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Immigration Litigation Bulletin

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SUPREME COURT HOLDS THAT A THEFT OFFENSE INDER INA § 101(a)(43) INCLUDES "AIDING AND ABETTING" A THEFT OFFENSE

In a 9-0 decision, the Supreme Court held in *Gonzales v. Duenas-Alvarez*, __U.S.__, 2007 WL 98723 (U.S. Jan. 17, 2007), that the "theft offense" under INA § 101(a)(43)(G), 8 U. S. C. §1101(a)(43)(G), includes the crimes of "aiding and abetting" a theft offense.

The criminal activities of aiders and abettors of a generic theft offense fall within the scope of the term "theft" in the federal statute.

The respondent, a Peruvian citizen and a permanent resident alien, was convicted of violating Cal. Veh. Code Ann. §10851(a), under which "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner. . . or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense." DHS then instituted removal proceedings against the respondent on the basis that he had been convicted of an aggravated felony, namely a "theft offense" under INA § 101(a)(43)(G) for which the term of imprisonment was at least one year.

An IJ and subsequently the BIA applied the categorical approach under *Taylor v. United States*, 495 U. S. 575 (1990), and found respondent removable as charged. In *Taylor*, the Court considered whether a prior conviction for violating a state statute criminalizing certain burglary-like behavior fell within the term "burglary" for sentence-enhancement purposes under 18 U. S. C. § 924(e). The Court held that Congress meant that term to refer to "burglary" in "the generic sense in which the term is now used in the criminal codes of most States." Under *Taylor*, a sentencing court seeking to determine whether a particular prior conviction was for generic burglary should normally look to the state statute defining the crime of conviction, not to the facts of the particular prior case. However, where state law defines burglary broadly to include crimes falling outside generic "burglary," the Court said that the sentencer should "go beyond the mere fact of conviction" and examine, e.g.,

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REVOCATION OF APPROVED I-130 PETITION NOT SUBJECT TO REVIEW

In *Hanif v. Department of Homeland Security*, __F. Supp.2d__, 2007 WL 151908 (E.D. Mich. January 16, 2007) (*Lawson*), the district court held that it lacked jurisdiction to review the revocation of a previously-approved I-130 visa petition.

The court was persuaded by the reasoning of the Third Circuit in *Jilin Pharmaceutical USA, Inc, v. Chertoff*, 447 F.3d 196 (3rd Cir. 2006), which held that courts do not have the authority to review "any decision or action the Attorney General or the Secretary of Homeland Security the authority for which is specified . . . in the discretion of the Attorney General or the Secretary of Homeland Security." INA § 242 (a)(2)(B)(ii).

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PRESIDENT REAFFIRMS COMMITMENT TO COMPREHENSIVE IMMIGRATION REFORM

President Bush reaffirmed his commitment to comprehensive immigration reform during his State of the Union Address on January 23, and called on Congress to pass comprehensive immigration reform that will secure our borders, enhance interior and worksite enforcement, create a temporary worker program, and resolve the status of illegal immigrants.

The President stated as follows:

"Extending hope and opportunity in our country requires an immigration system worthy of America - with laws that are fair and borders that are secure. When laws and borders are routinely violated, this harms the interests of our country. To secure our border, we're dou-

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Highlights Inside

THEFT OFFENSE INCLUDES "AIDING AND ABETTING"

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the charging document and jury instructions to determine whether the earlier "jury was actually required to find all the elements of generic burglary."

The Ninth Circuit summarily remanded respondent's case in light of its earlier decision in *Penuliar v. Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (2006). In *Penuliar*, the Ninth Circuit held that § 10851(a) of the Cal. Veh. Code, sweeps more broadly than generic theft. In particular, the court said that generic theft has as an element the taking or control of others' property. But, the court added, the California statutory phrase "'[who] is a party or an accessory . . . or an accomplice'" would permit conviction "for aiding and abetting a theft." And the court believed that one might "aid" or "abet" a theft without taking or controlling property. Hence, in *Penuliar* the court found that the provision must cover some generically defined "theft" crimes and also some other crimes (aiding and abetting crimes) that, because they are not generically defined "theft" crimes, fall outside the scope of the term "theft" in the immigration statute.

The Supreme Court preliminarily noted that the lower courts and the BIA have accepted as a generic definition of theft, the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." Then, the sole question said the Court is "whether one who aids and abets a theft, falls like the principal, within the scope of the generic definition." The Court explained that under common law there was a distinction among the participants to felony. Today, however, every jurisdiction has abrogated the distinction between principals and aiders and abettors. The record showed that state and federal criminal law now uniformly treats principals and aiders and abettors alike, "the generic sense in which" the term "theft" "is now used in the criminal codes of most States." Thus, *Taylor*, said the Court covers such "aiders and abettors" as well as principals. Therefore, the criminal activities of these aiders and abettors of a generic theft fall within the scope of the term "theft" in the federal statute.

Taylor covers such "aiders and abettors" as well as principals. Thus, the criminal activities of these aiders and abettors of a generic theft fall within the scope of the term "theft" in the federal statute.

The Court rejected respondent's argument that Cal. Veh. Code §10851, through the California courts' application of a "natural and probable consequences" doctrine, creates a subspecies of the crime falling outside the generic "theft" definition. The fact that, under California law, an aider and abettor is criminally responsible not only for the crime he intends, but also for any crime that naturally and probably results from his intended crime, said the Court, does not in itself show that the state statute covers a nongeneric theft crime. In a concurring opinion Justice Stevens would not have addressed these "issues of California law until after they have been addressed by the Court of Appeals in the first instance."

Finally, the Court declined to address respondent's additional claims—that §10851 (1) holds liable accessories after the fact, who need not be shown to have committed a theft, and (2) applies to joyriding, which falls outside the generic "theft" definition— because they did not fall within the terms of the question presented to the Court and they had not been addressed below.

By Francesco Isgro, OIL

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I-130 REVOCATION NOT SUBJECT TO REVIEW

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Plaintiff had married a U.S. citizen who filed an I-130 visa petition on his behalf. The petition was originally approved, but the approval was subsequently revoked when USCIS discovered that plaintiff and his wife lived in separate apartments and kept most of the assets separate. Plaintiff and his wife then filed two other I-130 petitions which were also both denied by USCIS. Plaintiff then appealed the denial to the BIA and also filed a writ of habeas corpus. The district court transferred the case to the Sixth Circuit pursuant to the REAL ID Act where it was dismissed for lack of prosecution. The plaintiff again filed an action in the district court claiming that the denial of his I-130 was in violation of the APA and due process.

In addition to finding that it lacked jurisdiction to review the revocation of the visa petition, the court rejected plaintiff's argument that INA § 254 gave the Attorney General and not the Secretary of DHS, the authority to approve visa petitions. the spousal petition is not a final agency action because the plaintiffs appealed the decision." "The authority to approve or deny petitions appears to have been delegated to the Department of Homeland Security" under 8 C.F.R. §103.1,said the court.

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OIL GUIDANCE FOLLOWING SUPREME COURT'S DECISION IN DUENAS-ALVAREZ

On January 17, the Supreme Court decided *Gonzales v. Duenas-Alvarez*, 2007 WL 98723, which involved whether aiding and abetting liability is included in the generic definition of a "theft offense" in 8 U.S.C. § 1101(a)(43)(G). This notice includes guidance to ensure that cases affected by the decision are handled consistently. As soon as possible, you should review your cases involving the application of 8 U.S.C. § 1101(a)(43)(G), and take the steps requested herein. If you have any questions, please contact Donald Keener and Jennifer Paisner by e-mail.

> If you have a case that is being held in abeyance pending *Duenas*, or in which *Duenas* is otherwise applicable, you should file a Rule 28(j) letter apprising the reviewing court of the decision.

I. The Supreme Court's decision

Duenas holds that the term "theft offense" in 8 U.S.C. § 1101(a)(43)(G) includes the crime of "aiding and abetting" a theft offense. The Court noted that state and federal criminal law now uniformly treats principals and aiders and abettors alike, and therefore the criminal activities of these aiders and abettors of a generic theft thus fall within the scope of the term "theft offense" in 8 U.S.C. § 1101(a)(43)(G). The Court specifically rejected Duenas' claim that California Vehicle Code § 10851(a) (the California statute under which the alien was convicted), through the California courts' application of a "natural and probable consequences" doctrine, creates a subspecies of the crime falling outside the generic "theft" definition. The Court concluded that the fact that, under California law, an aider and abettor is criminally responsible not only for the crime he intends, but also for any crime that naturally and probably results from his intended crime, does not in itself show that the state statute covers a non-generic theft crime. The Court declined to decide two additional claims raised by Duenas -- whether California Vehicle Code § 10851(a) includes liability for accessories after the fact, and whether it includes liability for joyriding as well as auto theft.

II. Determining Applicability

As soon as possible, all attorneys should review their pending cases to determine the applicability of the decision in *Duenas*. *Duenas* is applicable to all cases that were being held in abeyance pending the Supreme Court's decision. In addition, *Duenas* should be considered applicable to all cases, regardless of circuit, which: 1) involve the issue of whether the alien was convicted of a theft offense under 8 U.S.C. § 1101(a)(43)(G); and 2) in which the time for seeking rehearing has not yet expired. This includes those cases: 1) still in the briefing stage, or pending oral argument; 2) in which briefing and/or oral argument have been completed, but the court of appeals has not yet entered a decision; 3) in which a petition for rehearing – panel or en banc – has been filed; and 4) in which the time for seeking rehearing has not yet expired. If the mandate has already issued, the case is considered final, and no further steps should be taken.

III. Steps to take

If you have a case that is being held in abeyance pending *Duenas*, or in which *Duenas* is otherwise applicable as discussed in Section II *supra*, you should file a Rule 28(j) letter apprising the reviewing court of the decision, and urging the court to take appropriate action. This may include asking the court to affirm the decision of the Board on the basis of *Duenas*, or asking the court to grant a petition for rehearing on the basis of *Duenas*. If appropriate, the letter should include a request for a summary disposition. If additional briefing is necessary, you should request a briefing schedule.

OIL is not aware of any cases pending before the Ninth Circuit where the Board concluded that the term "theft offense" in 8 U.S.C. § 1101(a)(43)(G) *does not* include the crime of "aiding and abetting" a theft offense. However, if you have such a case, you should request that the case be remanded to the Board for further consideration in the light of *Duenas*.

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PRESIDENT SPEAKS ON IMMIGRATION REFORM

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bling the size of the Border Patrol, and funding new infrastructure and technology. Yet even with all these steps, we cannot fully secure the border unless we take pressure off the border - and that requires a temporary worker program.

We should establish a legal and orderly path for foreign workers to enter our country to work on a temporary basis. As a result, they won't have to try to sneak in, and that will leave Border Agents free to chase down drug smugglers and criminals and terrorists. We'll enforce our immigration laws at the work site and give employers the tools to verify the legal status of their workers, so there's no excuse left for violating the law.

We need to uphold the great tradition of the melting pot that welcomes and assimilates new arrivals. We need to resolve the status of the illegal immigrants who are already in our country without animosity and without amnesty. Convictions run deep in this Capitol when it comes to immigration. Let us have a serious, civil, and conclusive debate, so that you can pass, and I can sign, comprehensive immigration reform into law."

TOLLING OF VD BY THE FILING OF A MOTION TO REOPEN

Over the past two years the courts of appeals have addressed the question of whether a timely filed motion to reopen before the Board of Immigration Appeals (Board) tolls the running of an alien's voluntary departure period. The Board has never issued a precedent decision on the issue, and the courts of appeals disagree on the answer, which has resulted in a clear circuit conflict. To date, six courts have ruled on the question. The government has prevailed in two of the cases and lost in the other four. Thus, there is currently a two to four circuit split ripe for Supreme Court intervention. The issue has obvious importance for thousands of aliens under voluntary departure orders who may seek to reopen their removal proceedings for discretionary forms of relief. There is currently a petition for writ of certiorari pending before the Supreme Court that *may* be a suitable vehicle to resolve the conflict on this important question.

Statutory Background

The Immigration and Nationality Act (INA) provides that, at the conclusion of removal proceedings, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense . . . in lieu of removal" provided that the alien satisfies certain requirements. 8 U.S.C. § 1229c(b); 8 C.F.R. § 1240.26(c). "Permission to depart voluntarily . . . shall not be valid for a period exceeding 60 days." 8 U.S.C. § 1229c(b)(2); 8 C.F.R. § 1240.26 (e). There are also provisions that allow for pre-conclusion voluntary departure for a period of 120 days. 8 U.S.C. § 1229c(a); 8 C.F.R. § 1240.26(b). However, the vast majority of voluntary departure grants will be at the conclusion of removal proceedings. Extensions of the time to voluntarily depart granted by an immigration judge or the Board "is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs." 8 C.F.R. § 1240.26(f). "In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in [8 U.S.C. § 1229(c)]." *Ibid*. Any breach of the agreement "if an alien is permitted to depart voluntarily" can result in monetary penalties and an alien who fails to depart "shall be ineligible for a period of 10 years, to receive [various forms of relief, including cancellation of removal and adjustment of status]. . . ." 8 U.S.C. § 1229c(d)(1) (A) & (B).

The INA also provides an alien the opportunity to file a motion to reopen. 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2 (regulations governing motions to reopen before the Board). "An alien may file one motion to reopen proceedings" which "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(7)(A) & (C)(i); 8 C.F.R. § 1003.2(c)(2) . However, 8 C.F.R. § 1003.2(d), provides that "[a] ny departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

The issue has obvious importance for thousands of aliens under voluntary departure orders who may seek to reopen their removal proceedings for discretionary forms of relief.

Thus, the INA provides *both* that an alien is barred from applying for certain forms of relief for a period of ten years if he does not voluntarily depart; and that when an alien departs the United States, he forfeits the right to reopen his proceedings.

Circuit Case Law

Four Circuits, the Third, Eighth, Ninth and Eleventh, have held that the filing of a timely motion to reopen tolls the running of voluntary departure until such time as the Board rules on the alien's motion to reopen. *See Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. U.S. Attorney General*, 453 F.3d 1325 (11th Cir. 2006). The *Azarte* Court, the first to decide the issue, reasoned that this result is required in order "[t]o avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the purposes of the two statutory provisions." 394 F.3d at 1289. The three other circuits came to the same conclusion relying heavily on the reasoning in *Azarte*. The government's position is that these courts' rulings eviscerate § 1229c(d) and overlook an alien's express choice to forfeit his eligibility for relief (notwithstanding the opportunity to seek reopening) in exchange for significant benefits gained by voluntarily departing.

Two Circuits, the Fifth and Fourth, have held that the filing of a motion to reopen does not toll the voluntary departure period. *See Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006). These courts emphasized that voluntary departure under 8 U.S.C. § 1229c is an agreed upon exchange of benefits between the alien and the government, and that the breach of the agreement by the alien has consequences. Specifically, an alien who fails to depart "shall be ineligible for a period of 10

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years, to receive [various forms of relief]. . . ." 8 U.S.C. § 1229c(d)(1)(B). Additionally, these courts reasoned that to allow tolling upon the filing of a motion to reopen was in tension with the provisions specifically limiting the length of and authority to extend voluntary departure. *See Dekoladenu*, 459 F.3d at 504 ("both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits.").

A Suitable Supreme Court Vehicle

The *Banda-Ortiz* case appeared to be a good vehicle for the Supreme Court to resolve the tension between the voluntary departure and motion to reopen provisions. That, however, proved not to be the case. While the government was preparing its response to petitioner's certiorari petition, it was discovered that Banda-Ortiz did not post his voluntary departure bond which caused the voluntary departure order to vacate and be replaced by the alternative order of removal. *See* 8 C.F.R. § 1240.26(c)(3) ("If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternative order of removal will take effect on the following day.").

Thereafter, on November 15, 2006, the Board issue a precedent decision in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). In *Diaz-Ruacho*, the Board held that an alien who fails to post the voluntary departure bond required by 8 U.S.C. § 1229c(b)(3), is not subject to the penalties in 8 U.S.C. § 1229c(d) for failure to depart within the time period specified for voluntary departure. Under the reasoning of *Diaz-Ruacho*, Banda-Ortiz could not be viewed as "an alien [] permitted to depart voluntarily" for purposes of 8 U.S.C. § 1229c(d)(1)'s bar to relief, because he failed to post the requisite bond. By extension, his motion to reopen should not have been denied under § 1229c(d) based solely on his failure to voluntarily depart.

Based on *Diaz-Ruacho* and pursuant to a joint-motion, Banda-Ortiz's removal proceedings were reopened. Consequently, his case become moot thereby rendering it an unsuitable vehicle for the Supreme Court to resolve the issue. Given the *Diaz-Ruacho* decision, attorneys should be mindful of cases in which the Board denied an alien's motion to reopen under § 1229c(d)'s relief bar because of the alien's failure to voluntarily depart. If the alien did not pay his voluntary departure bond (check with ICE), then the Board's application of § 1229c(d)'s bar to relief would be legally incorrect.

In the meantime, the Fifth Circuit decided an unpublished decision, *Moorani v. Gonzales*, 182 Fed.Appx. 352, 2006 WL 151993 (5th Cir. 2006), which relied on its precedent decision in *Banda-Ortiz*. Moorani filed a certiorari petition. Moorani posted his voluntary departure bond and therefore does not present a *Diaz-Ruacho* problem. *If* the Solicitor General decided to acquiesce to this petition (a decision which has *not* yet been made), then it would become the vehicle for the Supreme Court to finally resolve this important issue.

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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 Francesco Isgro at:

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REGULATORY UPDATE

USCIS PROPOSES INCREASE TO APPLICATION FEES

On February 1, 2007, DHS published a proposal to increase the immigration and naturalization benefit application and petition fees from a weighted average of $264 to $438. 72 *Fed. Reg.* 4888 (Feb. 1, 2007). The proposed rule would also merge the fees for certain applications so applicants will pay a single fee rather than paying several fees for related services. The proposal eliminate fees for interim benefits, duplicate filings, and premium processing by consolidating and reallocating costs among the various fees.

The rule proposes to exempt applicants for T nonimmigrant status, or for status under the Violence Against Women Act from paying certain fees. This rule also proposes generally to allocate costs for surcharges and routine processing activities evenly across all form types for which fees are charged, and to vary fees in proportion to the amount of adjudication decision-making and interview time typically required.

The cost of applying for naturalization, for example, would rise from $330 to $595, and a required fingerprint check would go from $70 to $80.

"As a fee-based agency, we must be able to recover the costs necessary to administer an efficient and secure immigration system that ultimately improves service delivery, prevents future backlogs, closes security gaps, and furthers our modernization efforts," said USCIS Director Emilio Gonzalez. "We're confident that this fee adjustment will enable the type of exceptional immigration service our nation expects and deserves."

ASYLUM LITIGATION UPDATE: LATEST DEVELOPMENTS IN CHINESE POPULATION CONTROL CASES

To qualify for asylum an alien must come within the definition of a "refugee," 8 USC 1158(b), which is defined as someone who experienced "[past] persecution or [has] a well-founded fear of [future] persecution on account of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). In 1996 Congress amended this definition to treat forced sterilization or abortion, or persecution for other opposition to a coercive birth control policy in China, as per se persecution on account of "political opinion." *See* 8 U.S.C. § 1101(a)(42) (A) (stating that a "person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . or who has been persecuted for . . . other resistance to a coercive population control program is deemed to have been persecuted on account of political opinion"). As a result an alien may qualify for asylum based on past or a well-founded fear of forced abortion or sterilization in China – or past or future persecution for opposition to a coercive birth control policy – without actually having to prove this was on account of a political opinion on the alien's part.

The government is currently litigating several questions in Chinese population-control cases. Some of these questions may require remand (see below). These questions are: (1) whether a husband, boyfriend, or other relatives automatically qualify for asylum based on the forced abortion or sterilization of their spouse, girlfriend, or other family member; (2) whether there is a risk of future forced sterilization or abortion for an alien with two children born in the United States; (3) whether the birth of children in the United States constitutes "changed country conditions" for purposes of the exception to the 90-day time limit for reopening; and (4) whether there is a conflict between the motion to reopen statute and regulations (permitting reopening only if there are "changed country conditions") and the successive-asylum application statute and regulations (permitting a new asylum application if there are changed circumstances including "activities the [alien] becomes involved in . . . that place [him] at risk").

Claims For Asylum By A Husband, Boyfriend, Child, Or Other Relative Due To Sterilization Of Someone Else

In *Matter of C-Y-Z-*, 21 I& N Dec. 915 (BIA 1997), the Board ruled that a husband of a woman who was sterilized or subject to forced abortion can automatically get asylum, but not a boyfriend or fiancé. The courts of appeals upheld this construction on the theory that a husband in effect stands in the shoes of the wife as the husband, too, lost a child or the opportunity to have one. The courts have generally refused to extend *C-Y-Z* to unmarried boyfriends or other relatives. *See Chen v. Ashcroft*, 381 F.3d 221, 226-27, 229 (3d Cir. 2004) (no extension of *C-Y-Z* to unmarried partners of woman forcibly sterilized); *Zhang v. Ashcroft, 395* F.3d 531 (5th Cir. 2004) (no extension of *C-Y-Z-* to a boyfriend of woman forcibly sterilized); *Yuan v. USDOJ*, 416 F.3d 192 (2d Cir. 2005) (no extension of *C-Y-Z* to in-laws of person forcibly sterilized); *Wang v. Gonzales*, 405 F.3d 134, 143 (3d Cir. 2005) (no extension of *C-Y-Z-* to child of parents who were sterilized). *But see Zhang v. Gonzales,* 408 F.3d 1239 (9th Cir. 2005) (no extension of *C-Y-Z* to daughter of man who was sterilized, but daughter may qualify in her own right based on imputed political opinion, due to problems she herself experienced as result of her father's violation of family planning laws).

The government is currently litigating several questions in Chinese population-control cases. Some of these questions may require remand.

In 2005, the Second Circuit remanded a case to the Board to explain the reasoning behind *C-Y-Z-* and asylum for husbands, but not boyfriends. *See Shi Liang Lin v. DOJ*, 416 F.3d 184, 192 (2d Cir. 2005). In response the BIA issued *Matter of S-L-L-*, 24 I & N Dec. 1 (BIA 2006), in which the Board modified *C-Y-Z-* and ruled that a husband will not automatically qualify for asylum, and must prove that he was married at the time of his spouse's forced abortion or sterilization, and opposed it. In explaining its reasons for concluding that asylum should be available to the husband of a woman who has been sterilized or subject to abortion, the Board relied on the particular facts of China's laws, which sanction both partners in a marriage if one violates birth control policy. The Board also relied on the effect of marriage, reasoning that a spouse experiences the same loss as the person who underwent forcible abortion or sterilization, i.e., loss of a child or the ability to have children. The Board ruled that boyfriends and fiancés do not come within this marriage rationale, but may be able to qualify for asylum in their own right based on "other resistance" to a coercive population program. The Board construed "other resistance" to refer to some type of forceful opposition, but this basis for asylum will have to be fleshed out in future cases. *Matter of S-L-L-* is now back before the Second Circuit, has been briefed, and is awaiting oral argument.

Claim For Asylum Based On Birth Of Two Or More Children In The United States

There are two kinds of cases we are litigating involving the birth of children in the United States: (1) cases where the alien raises the birth of children in the United States as the basis for asylum before an IJ, and is found ineligible by the IJ and the Board on this basis; and (2) cases where the alien files a late motion to reopen based on the birth of children in the United States, which is denied

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CHINESE POPULATION CONTROL CASES

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as untimely because this is a change in personal circumstances, not changed country conditions excusing the late filing of a motion to reopen.

On the first question – as of 2006, both the Second Circuit and the Board determined that a parent who returns to China with more than one child born in the United States does not risk sterilization and experiences only economic sanctions or penalties. *Wang v. BIA*, 437 F.3d 270 (2d Cir. 2006); *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006). *See also Zheng v. U.S. Dept of Justice*, 416 F.3d 129, 130 (2d Cir. 2005); *Guan v. BIA*, 345 F.3d 47, 49 (2d Cir. 2003). This is consistent with the views of other European countries about conditions in China. *See Matter of C-C-, supra*. However, in September 2006, in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), the Second Circuit remanded an asylum case to the Board to consider the effect of two unauthenticated reports regarding Fujian province in 1989 and 1993, which in the court's view indicated that parents returning from abroad with more than one child might risk sterilization in that province. Since then, the Second Circuit has been taking judicial notice of the unauthenticated documents in *Guo* to remand other cases involving the denial of asylum based on the birth of two or more children in the United States. *See Chen v. U.S. Dep't of Justice*, __F.3d__, 2006 WL 3190313 (2d Cir. 2006*); Tian Ming Lin v. U.S. Dep't. of Justice*, __F.3d__, 2006 WL 3050101 (2d Cir. 2006). In light of this practice, we are currently stipulating to remand in these cases in the Second Circuit – i.e, remanding asylum cases from Fujian province, where there was a full-blown asylum hearing and denial of asylum based on a claim of birth of children in the United States. For Instructions about whether, or how, to remand contact Alison Drucker or Margaret Perry at OIL. However, we oppose any efforts to extend *Gao* outside the Second Circuit. Courts have no authority to consider matters that are outside the administrative record in the case under review. *See* 8 U.S.C. 1252(b)(2). The Board has made a thorough assessment of country conditions for people returning to China with children born abroad in *Matter of C-C-*, which is consistent with the assessments of other countries. And unauthenticated reports in a case in the Second Circuit do not trump the BIA's decision in *Matter of C-C-*, or the evidence in the case before the court.

Courts have no authority to consider matters that are outside the administrative record in the case under review. *See* 8 U.S.C. 1252(b)(2).

An untimely motion to reopen based on the birth of children in the United States does not come within OIL's current remand instructions, and we are briefing these cases. This is because the agency is acting soundly within its discretion in denying such motions. As the Second Circuit has recognized: "The law is clear that a[n alien] must show *changed country conditions* in order to exceed the 90-day filing requirement [for reopening]." *Wang,* 437 F.3d at 274 (emphasis added). "A self-induced change in personal circumstances cannot suffice." *Id*. (holding the Board did not abuse its discretion in denying a motion to reopen as untimely, because "[t]he [Board] correctly held that the birth of petitioner's two children in the United States is evidence of his changed personal circumstances, as opposed to changed conditions in China"); *Zheng,* 416 F.3d at 130 (affirming that the birth of a child in the United States is a change in personal circumstances that does not come within the changed circumstances exception to the 90 day time limit for motions to reopen). *Cf. Guan*, 345 F.3d at 49 (noting that the birth of two children in the United States following an order of deportation does not constitute changed country conditions). "[I]t would be ironic indeed, if [aliens] . . . who have remained in the United States illegally following an order of deportation, were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities. This apparent gaming of the system in an effort to avoid deportation is not tolerated by the existing regulatory scheme." *Wang*, 437 F.3d at 274. If you have a case in which you are defending the denial of an untimely motion to reopen based on the birth of children in the United States, contact Margaret Perry who has a sample brief on this question.

Cases involving an untimely motion to reopen based on the birth of children in the US may raise another, more complex issue. Aliens are beginning to challenge the Board's denial of reopening of such motions by arguing that there is a conflict between the reopening statutes and regulations (8 U.S.C. 1229a(c)(7)) and 8 C.F.R. 1003.2(c), 1003.23) – which require an alien to show "changed country conditions" – and the successive asylum statutes and regulations (8 U.S.C. 1158(a)(C), (D) 8 C.F.R. 1208.(a)(4)(i)(B)) – which permit an alien to show either changed circumstances in his country, or changed individual circumstances ("changes in the applicant's circumstances . . . including . . . activities the applicant becomes involved in outside the country"). Since this is a question about the meaning of the statutes and Attorney General's regulations, and there is no published Board decision on this question, OIL has remanded several cases involving this issue. Whether to brief or remand depends on the type of proceeding at issue (exclusion, deportation, or removal) and the actual decision you are defending. Contact Margaret Perry to assess whether such a case should be remanded or defended.

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IMMIGRATION REFORM

The White House released the following statement in conjunction with the President's State of the Union Address:

President Bush's Plan For Comprehensive Immigration Reform

1. The United States Must Secure Its Borders

Border Security Is The Basic Responsibility Of A Sovereign Nation And An Urgent Requirement Of Our National Security. We have more than doubled border security funding from $4.6 billion in FY 2001 to $10.4 billion in FY 2007. We will have also increased the number of Border Patrol agents by 63 percent – from just over 9,000 agents at the beginning of this Administration to nearly 15,000 at the end of 2007. We are also on track to increase this number to approximately 18,000 by the end of 2008, doubling the size of the Border Patrol during the President's time in office.

■**To Supplement The Border Patrol As Its Numbers Increase, Approximately 6,000 National Guard Members Have Been Sent To Our Southern Border In Coordination With Governors**. National Guard units are assisting the Border Patrol by operating surveillance systems, analyzing intelligence, installing fences and vehicle barriers, and building patrol roads. The National Guard is increasing the operational capacity of the Border Patrol to gain control of our Southern border.

■**The President's Secure Border Initiative (SBI) Is The Most Technologically Advanced Border Enforcement Initiative In American History.** Last year, we initiated a multi-year plan to secure our borders and reduce illegal immigration through comprehensive upgrading of technology used in controlling the border, including improved communications assets, expanded use of manned and unmanned aerial vehicles, and state-of-the-art detection technology.

■**The Administration Is Increasing Infrastructure Investment At The Border**. We are expanding detention capacity and developing rapidly deployable fencing technology that will be rolled out this year. In addition, the President is committed to building hundreds of miles of integrated, tactical infrastructure along the Southern border, which includes vehicle barriers, checkpoints, and lighting to help detect, deter, and prevent people from entering our country illegally.

■**The Administration Has Effectively Ended "Catch And Release" For Illegal Aliens Apprehended At The Borders.** In FY06 and FY07 the Administration funded 6,700 new detention beds, for a total of 27,500 detention beds this fiscal year.

■**The Administration Expanded The Use Of "Expedited Removal," Which Allows Us To Send Illegal Immigrants Home More Quickly.** The President is also working with Congress to mitigate court-imposed requirements that the Federal government release dangerous criminal aliens if their home countries do not take them back within a certain period of time.

■**The Administration Is Working Closely With State And Local Law Enforcement To Stop Illegal Immigration. Immigration and Customs Enforcement (ICE) has the resources to train 1,500 State and local law enforcement officers under the 287(g) program in 2006 and 2007.** DHS will work with its State and local partners to expand these programs, and received $50 million in 2006 supplemental funding for this effort. In addition, DHS is expanding to State and local law enforcement agencies the Criminal Alien Program (CAP) previously in place with the Federal Bureau of Prisons to identify illegal aliens who are incarcerated in Federal, State, and local jails.

2. We Must Hold Employers Accountable For The Workers They Hire

In A Sharp Break From The Past, The Administration Is Addressing The Illegal Employment Of Undocumented Workers With A Tough Combination Of Criminal Prosecution And Forfeitures. Previously, worksite enforcement relied on a combination of administrative hearings and fines. The fines were so modest that some employers treated them as merely a cost of doing business, and employment of undocumented workers continued unabated.

■**The Number Of Arrests In Worksite Enforcement Cases Has Increased Dramatically During The President's Time In Office.** There were more than 4,300 arrests in worksite enforcement cases for 2006, more than seven times the arrests in 2002. In addition, the two largest worksite enforcement actions in U.S. history were conducted last year by ICE.

■**In Fall 2005, The President Signed A Bill Doubling Federal Resources For Worksite Enforcement.** In addition, the Administration has launched law enforcement task forces in 11 major cities to dismantle criminal rings that produce fake documents.

■**DHS Has Issued A Proposed "No-Match" Regulation To Assist Employers In Ensuring A Legal Workplace And To Help The Government Identify And Crack Down On Employers Who Knowingly Hire Illegal Workers.** In cases in which an employer has ten or more employees with inaccurate information, the Social Security Administration (SSA) sends the employer a "No-Match" letter. DHS's proposed "No-Match" regulation clarifies that employers may be held civilly and criminally liable when a letter is sent and employers ignore the discrepancies between SSA databases and the information provided about their employees.

■**Comprehensive Immigration Reform Must Include The Creation Of A New, Tamper-Proof Identification Card For Every Legal Foreign Worker So Businesses Can Verify The Legal Status Of Their Employ-**

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FIRST CIRCUIT

■ IJ Improperly Excluded Petitioner's Corroborating Evidence As Unauthentic "Official Documents" But Properly Denied Asylum Claim For Failure to Meet Burden Of Proof

In ***Jiang v. Gonzales***, __F.3d__, 2007 WL 152631 (1st Cir. January 23, 2007) (Torruella, *Selya*, Howard), the First Circuit upheld an IJ's denial of asylum, withholding of removal, and CAT protection, but found improper the exclusion of corroborating documents submitted pursuant to 8 C.F.R. § 287.6(b). Furthermore, because the IJ had improperly excluded petitioner's corroborating documents, it declined to discuss whether or not the IJ's adverse credibility finding was in error, but instead upheld the denial of asylum based on petitioner's failure to meet his burden of proof.

Petitioner, a native and citizen of China, claimed that he feared persecution by the Chinese authorities on account of his Catholic faith. In his initial asylum interview, petitioner described how he had attended a Catholic gathering which the local police interrupted and attempted to arrest the Catholic priest in attendance. He further described how he helped the priest escape and went into hiding and, as a result, feared the police would arrest and beat him. He later heard that the police had visited his parents and had told them that they would shoot the petitioner if they found him. At his immigration hearing, petitioner submitted two documents to corroborate his testimony: an affidavit signed by his father and a declaration signed by his parish priest in China. Petitioner also claimed for the first time, that the police arrested and interrogated his parents. Ultimately, the IJ found the cited inconsistencies and omissions sufficient to make an adverse credibility finding. The IJ also excluded the corroborating documents petitioner submitted because they were improperly authenticated under 8 C.F.R. § 287.6(b). The BIA upheld the adverse credibility determination and found that even if petitioner were found credible he failed to meet his burden of proof.

The First Circuit found that the IJ erroneously excluded petitioner's corroborating documents. The regulation relied upon by the IJ to exclude the documents applied only to the authentication of "official records". Because neither an affidavit by a parent nor a priest's declaration could be considered official foreign records, the court found that the IJ erred in relying on 8 C.F.R. § 287.6(b) to exclude the documents. Moreover, because these were documents offered as corroborative evidence, their erroneous exclusion had an impact on the IJ's adverse credibility determination. Thus, the court declined to make an explicit ruling upholding the adverse credibility determination and instead upheld the BIA's determination that even if credible, petitioner failed to meet his burden of proof. Specifically, the court found that petitioner's claims that the police were still looking for him was speculative. The court also noted that petitioner's parents continued to practice Catholicism in China without harassment from government officials.

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■ First Circuit Affirms That Petitioner's Voluntary Departure From The U.S. While His Motion To Reopen Was Pending Constituted A Withdrawal Of That Motion

In ***Aguilar v. Gonzales***, __F.3d__, 2007 WL 121996 (1st Cir. January 19, 2007) (*Lynch*, Selya, Howard), the First Circuit affirmed the BIA's determination that petitioner had abandoned his motion to reopen by voluntarily departing the U.S. while the motion was still pending. The court did not reach the merits of the motion because petitioner failed to argue the merits before the BIA.

Petitioner had been granted conditional LPR status based on his marriage to a U.S. citizen. When he filed a joint form I-751 to remove the condition on his residence, it was denied because he forged his wife's signature on the form. The forgery led to the institution of deportation proceedings. An IJ ordered that petitioner be deported but granted voluntary departure. Subsequently, petitioner's wife unexpectedly died. Petitioner then filed a motion to reopen requesting a waiver of the joint filing requirement due to extreme hardship. Before the motion had been ruled on, petitioner voluntarily returned to his country of origin. Subsequently, the IJ denied the motion to reopen because petitioner had to first seek a hardship waiver from a DHS District Director. However, the IJ granted petitioner leave to amend the motion should the District Director deny the waiver in order to seek review of the denial. When a District Director denied the waiver, petitioner failed to amend his motion to reopen. Five years later, petitioner reentered the U.S. and filed a second motion to reopen seeking an extreme hardship waiver. An IJ denied this motion as well, stating that petitioner had abandoned the hardship argument. The BIA affirmed.

The court held that under 8 C.F.R. § 1003.23(b)(1), petitioner's departure from the U.S. constituted a withdrawal of his first motion to reopen.

The court held that under 8 C.F.R. § 1003.23(b)(1), petitioner's departure from the U.S. constituted a withdrawal of his first motion to reopen, and thus the second motion to reopen had "nothing to amend." Thus, the court held that the IJ did not commit any error of law or abuse of discretion in finding petitioner's argument aban-

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doned. While petitioner had also argued that the IJ erred in pretermitting his waiver application and for finding him ineligible for a second grant of voluntary departure, he had failed to raise this issues before the BIA and thus the court dismissed those claims for failure to exhaust.

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SECOND CIRCUIT

■ Second Circuit Holds That BIA Engaged In An Improper De Novo Review Of IJ's Credibility Determination

In ***Chen v. CIS***, 470 F.3d 509 (2d Cir. 2006) (Miner, *Pooler*, Rakoff (District Judge)), the Second Circuit reversed a denial of asylum because the BIA had conducted an improper *de novo* review of the IJ's credibility determination when 8 C.F.R. § 1003.1(d)(3)(i) requires a clearly erroneous standard of review.

The petitioner had previously filed for asylum based on China's coercive birth control policy, but withdrew the application in removal proceedings. Subsequently, he sought to reopen his asylum claim based on changes in the immigration laws following the passage of IIRIRA. The original asylum application, however, and the one presented in his motion to reopen had inconsistencies. Petitioner explained these inconsistencies by stating that the applications had been prepared by non-attorneys who simply instructed the petitioner to sign the application without knowledge of their contents. An IJ believed this explanation, finding petitioner credible and granting asylum. Following DHS' appeal, the BIA reversed the credibility finding because of the inconsistencies.

The Second Circuit held that despite using the phrase "clearly erroneous" in its opinion, the BIA had disregarded 8 C.F.R. § 1003.1(d)(3)(i) and engaged in an improper *de novo* review of the facts. The court found that instead of giving deference to the weight the IJ placed on petitioner's explanation of the discrepancies between the two asylum applications, the BIA simply chose to reject the explanation and substitute its own judgment. "In reviewing the IJ's decision, the BIA did not point to any misstatements of fact, errors in analysis, flawed reasoning, or improper applications of law. Instead, the BIA started anew, conducting its own credibility analysis . . . without giving any deference to the IJ."

The court suggested that it had an inherent equitable power to grant a remand for consideration of new evidence under "sufficiently compelling circumstances."

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■ Second Circuit Grants Government's Panel Rehearing Petition Objecting To The Court's Previous Grant Of Petitioner's Motion To Remand For Extra-Record Evidence

In ***Tian Ming Lin v. Gonzales***, __F.3d__, 2007 WL 63767 (2d Cir. January 5, 2007) (Pooler, Sotomayor, Katzmann) (*per curiam*), the Second Circuit held that it lacked statutory authority to grant petitioner's request for a remand to consider new evidence. However, the court, in dicta, suggested that it may have the inherent equitable power to remand cases to the BIA to consider new evidence where there were "compelling circumstances" or, in the alternative, where it could take judicial notice of facts identified in other decisions.

Petitioner claimed persecution due to China's coercive birth contol policy. When his claim was denied, petitioner filed a motion to reopen proffering new, material evidence. The new evidence included a number of exhibits, including the John Shields Aird affidavit stating that parents with two or more children are forcibly sterilized in China. Having previously held, in *In re C-C-*, 23 I & N Dec. 899 (BIA 2006), that a Chinese parent of two children could not establish prima facie eligibility for asylum on the basis of the Aird affidavit, the BIA denied the motion to reopen. Petitioner sought review of the BIA's order in the Second Circuit, asking it to remand the case pursuant to *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), where it found that Shou Yung Guo had submitted certain documents possibly showing an official policy of forced sterilization in Changle City or the Fujian Province generally. Initially, the court granted petitioner's request for a remand citing the *Shou Yung Guo* documents as "too important to ignore." However, the government petitioned for a rehearing of that decision, claiming that pursuant to 28 U.S.C. § 2347(c) the court lacked the authority to order a remand, but nevertheless concurring that a remand was necessary until the BIA ruled on the *Shou Yung Guo* documents.

The court ultimately granted the remand. It explained, "[b]ecause both parties ask us to remand, we need not decide whether we may remand simply because the government requests. Nor need we decide whether we could remand in the exercise of our inherent equitable powers if the government did not concur in our decision to do so." But while the court agreed that 28 U.S.C. § 2347(c) limited its authority to remand cases to the BIA to hear additional evidence, it went on to state that if it were so inclined, the court would have an inherent equitable power to grant a remand for consideration of new evidence under "sufficiently compelling circumstances." Moreover, the court stated that it could take judicial notice of evi-

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dence cited in the decisions of other panels, even though the evidence was outside the administrative record.

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■ **Second Circuit Orders Remand To Determine Whether The Time An Alien Is Seeking Asylum Can Constitute Part Of His Requisite Seven Years of Continuous Presence For Purposes Of A 212(h) Waiver**

In ***Rotimi v. Gonzales***, __F.3d__ , 2007 WL 10771 (2d Cir. January 3, 2007) (Feinberg, Meskill, Katzmann) (*per curiam*), the Second Circuit held that whether INA § 212(h)'s requirement that an alien lawfully and continuously reside in the United States for seven years prior to the initiation of removal proceedings could include the time when an alien was seeking asylum was a unique question of law that required remand.

Petitioner had entered the United States in 1995 on a visitor's visa and affirmatively sought asylum. Following an interview with an asylum officer, petitioner was referred to removal proceedings. Shortly thereafter, petitioner became an LPR based on his marriage to a U.S. citizen. Subsequently, in 1997 petitioner withdrew his asylum application before an IJ could rule on it. In 2002, petitioner committed a crime of moral turpitude. A year later, he was stopped at the border and charged as an inadmissible alien. At his removal hearing, petitioner sought a § 212(h) waiver based on the extreme hardship his removal would cause his U.S. citizen wife.

An IJ denied the waiver because petitioner did not meet the requisite seven years of lawful continuos presence. On appeal to the BIA, the petitioner argued that he was eligible for § 212(h) relief because between 1996 and 2003 he had been lawfully in the U.S as either a visitor, asylum seeker, adjustment applicant, or LPR. In a nonprecedential decision by a single member, the BIA affirmed the IJ, defining a period of lawful residence as "one in which the alien has affirmatively been accorded the right or privilege of residing here and abides by the rules associated with that right or privilege," and holding that submission of an asylum application did not make petitioner's presence lawful.

On appeal, the Second Circuit found that a remand was appropriate in order for the BIA to address the novel issue in a precedential decision. The court said that normally it would have given *Chevron* deference to the BIA's definition, but because the BIA's unpublished decision was not binding on third parties, it was not "'promulgated' under [the BIA's] authority 'to make rules carrying the force of law'" such that deference to the BIA's legal interpretation was warranted under *Chevron*. Thus, the court remanded the case to permit the BIA an opportunity to address the legal question presented – i.e., what is precisely meant by the term "lawfully resided continuously" in section INA § 212(h).

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■ **Aliens Who Return To The United States Under Advance Parole Are "Arriving Aliens"**

In ***Ibragimov v. Gonzales***, __F.3d__, 2007 WL 184661 (2d Cir. January 25, 2007) (Feinberg, *Cabranes*, Sack), the court held that an alien who previously overstayed his visa and returned to the U.S. based on advance parole was properly deemed an "arriving alien" and an "applicant for admission." The court reasoned that the plain language of 8 C.F.R. § 245.2 (a)(4)(B) manifested the agency's intent to treat as "arriving aliens" and "applicants for admission" those advance parolees who are denied adjustment of status and then placed in removal proceedings.

An alien granted advance parole is properly treated as an arriving alien once his adjustment of status application is denied.

Petitioner had entered the U.S. in 1992 on a B-2 visa. He overstayed his visa, but married a U.S. citizen and filed for adjustment of status. While his application for adjustment was pending, he sought, and was granted, advance parole. Subsequently, he left and returned to the U.S. numerous times. However, when petitioner's adjustment application was denied, the INS revoked his advance parole and began removal proceedings against him. Petitioner sought to terminate the proceedings contending that he was not an arriving alien seeking admission. Rather, because he had been given advance parole he claimed that he was an alien lawfully admitted into the U.S. An IJ rejected the argument and the BIA affirmed without opinion.

On appeal, the Second Circuit looked to the plain and unambiguous language of INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) and 8 C.F.R. § 145.2(a)(4)(B) to hold that an alien granted advance parole is properly treated as an arriving alien once his adjustment of status application is denied. The court found that INA § 212(d)(5)(A) explicitly states that parole does not constitute admission and 8 C.F.R. § 145.2(a)(4)(B) explicitly states that if an adjustment of status application is denied, the applicant will be treated as an applicant for admission.

The court noted that a grant of advance parole merely constitutes an agreement to allow for an alien's temporary return to the U.S. and to pre-

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vent the abandonment of an adjustment of status application and that those purposes were served here. That is, the court held that "parole is a means by which the government allows aliens who have arrived at a port-of-entry to temporarily remain in the United States pending the review and adjudication of their immigration status. Although paroled aliens physically enter the United States for a temporary period, they nevertheless remain constructively detained at the border, i.e. legally unadmitted, while their status is being resolved . . ."

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■ **Second Circuit Upholds BIA's Denial Of Motion To Reopen In Absentia Removal For Lack Of Notice**

In ***Bhanot v. Gonzales***, __F.3d__, 2007 WL 148654 (2d Cir. January 22, 2007) (Cabranes, Wesley, Korman) (*per curiam*), the court upheld the BIA's denial of petitioner's motion to reopen his in absentia removal proceedings for lack of notice. Petitioner had argued that he did not receive notice of a postponement of his removal proceedings. However, the record showed that the government sent notice to petitioner's most recent address giving rise to a presumption of receipt. Petitioner failed to rebut this presumption as two of the three affidavits he submitted to show non-receipt were never presented to the IJ and the third was uncorroborated and contained a substantial misstatement of material fact.

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THIRD CIRCUIT

■ **Third Circuit Adopts Willful Blindness Standard For Torture Convention Protection**

In *Silva-Rengifo v. Attorney Gen. of the United States*, __F.3d__, 2007 WL 45856 (3rd Cir. January 9, 2007) (*McKee*, Ambro, Restani (sitting by designation)), the Third Circuit held that to qualify for CAT protection an applicant need not prove that the government approves of torture or consents to it. Rather, the court adopted the Ninth Circuit's approach in *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), to hold that an alien can satisfy the burden for CAT protection by producing sufficient evidence that the foreign government is willfully blind to such activities. In so doing, the court rejected the BIA's decision in *Matter of S-V-*, 22 I & N Dec. 1306 (BIA 2000).

An alien can satisfy the burden for CAT protection by producing sufficient evidence that the foreign government is willfully blind to such activities.

Petitioner was an LPR and native and citizen of Columbia. In 1991, he was convicted of possession of cocaine with intent to distribute. When the INS initiated removal proceedings against him, petitioner applied for 212(c) relief. The request was denied and a final order of removal entered against him. Seven years after the final order of removal, petitioner received a "bag-and-baggage" letter. When he was arrested a year later for failure to appear for deportation, he asked the BIA to reopen and reconsider his case for CAT protection due to changed circumstances in Colombia. Specifically, petitioner claimed that now he faced torture in the form of "extrajudicial killings carried out by the government, kidnapings by paramilitary and guerilla forces, and cooperation or collusion between such groups and the government." An *en banc* BIA found changed circumstances, but held that nothing proved the Colombian government consented or actually acquiesced to torture and denied petitioner's CAT claim.

On appeal, the Third Circuit vacated the BIA's *en banc* decision. Specifically, the court held that when the executive branch ratified the CAT, it included written understandings of the Senate that a government's willful blindness to tortuous activity was encompassed by the definition of "acquiesce." Thus, said the court, "the Convention and its accompanying regulations must be read in conjunction with the understandings prescribed by the Senate, which make clear that the definition of 'acquiescence' includes *both* actual knowledge *and* 'willful blindness.'"

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FOURTH CIRCUIT

■ **Fourth Circuit Reverses Immigration Judge On Likelihood Of FGM In Niger**

In ***Haoua v. Gonzales***, __ F.3d__, 2007 WL 29463 (4th Cir. January 5, 2007) (*King*, Gregory, Shedd), the Fourth Circuit reversed a denial of asylum and withholding of removal because substantial evidence did not support the IJ's determination that petitioner would not face FGM if returned to Niger. The court, however, upheld the IJ's denial of CAT protection because the Nigerian government does not acquiesce to FGM.

Petitioner testified that while she was in the U.S. her parents in Niger had married her off to a tribal chieftain that insisted on performing FGM. She further testified that because her parents had already accepted a dowry from the tribal chieftain, they would

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force her to undergo FGM in accordance with her husband's wishes. However, using the 2005 State Department Report on Niger that stated only one in five Nigerian women is forced to undergo FGM, the IJ reasoned that the petitioner faced only a 10% likelihood of FGM. Further, the IJ found that petitioner could reasonably relocate in Niger to avoid FGM and thus denied petitioner's claims. The BIA affirmed without opinion.

In oral argument before the Fourth Circuit, the government conceded that the IJ's 10% calculation was not supported by substantial evidence, and stated that petitioner's likelihood of suffering FGM would probably approach 100%. However, the government asked the court to uphold the finding that petitioner could reasonably relocate within Niger. The court found the "Attorney General's concession . . . [] admirable, and [] entirely consistent with the evidence - including [petitioner]'s testimony . . . that her family had, in effect, sold her to her chieftain husband, and that the transaction would, upon her return to Niger, force her to undergo FGM and assume her place as his wife." Thus, the court found the IJ's 10% calculation of future persecution to be pure "speculation and conjecture". Additionally, because the IJ used the 10% finding as his basis to deny withholding and to find that petitioner could reasonably relocate within Niger, the court found that the denial was not supported by substantial evidence.

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FIFTH CIRCUIT

■ Challenge To The Retroactive Application Of An Immigration Law Does Not Invoke A Due Process Analysis And Thus Requires Exhaustion At The Administrative Level

In ***Falek v. Gonzales***, __F.3d__, 2007 WL 38915(5th Cir. January 8, 2007) (*Jolly*, Barksdale, Dennis), the Fifth Circuit dismissed the petition for review for lack of jurisdiction because the petitioner failed to exhaust his administrative remedies with respect to his claim that INA § 103(a)(13), 8 U.S.C. § 1103(a)(13), could not be retroactively applied to him. The court stated that when Congress expressly makes a statute retroactive, "undefined constitutional concerns" are raised and administrative exhaustion is not required. But when there is no clear statement from Congress, as was the case here, retroactivity is a matter of statutory interpretation and thus requires exhaustion.

The court stated that when Congress expressly makes a statute retroactive, "undefined constitutional concerns" are raised and administrative exhaustion is not required.

Petitioner, an LPR, had been convicted of sexual assault against his stepdaughter, for which he served four years in prison. Several years after his release, the petitioner was returning from a nine-day trip to Brazil when the INS arrested him and charged him as an inadmissible alien convicted of a crime of moral turpitude. In 2001, an IJ denied § 212(c) relief because petitioner's conviction qualified as an aggravated felony. After the *St. Cyr* decision, petitioner asked the BIA to reconsider his eligibility for § 212(c). The BIA granted a remand, and an IJ ultimately granted § 212(c) relief. The government appealed. On appeal, the BIA found that the IJ had improperly balanced the equities and reversed the grant of § 212(c) relief.

In 2002, petitioner filed for habeas relief, challenging for the first time the INS's charge that he was an inadmissible alien. This petition was dismissed by a district court for lack of jurisdiction and for failure to raise any issue of material fact. Undaunted, petitioner filed another habeas petition in 2004 alleging that his due process rights had been violated by: (1) the BIA's retroactive application of INA § 103(a)(13) to define petitioner as an alien seeking admission; (2) the BIA's discretionary denial of 212(c) relief; and (3) the BIA's entry of an order of removal in the first instance in the absence of an earlier order by the IJ. The petition was transferred to the Fifth Circuit pursuant to the REAL ID Act.

The Fifth Circuit quickly dismissed the second and third arguments for lack of jurisdiction and foreclosure by recent precedent, respectively. Turning to the first argument, the court held that the petitioner could not couch his claim that § 103(a)(13) was impermissibly retroactive in due process language, as *St. Cyr* and its predecessor, *Landgraf*, did not base their holdings concerning retroactive application of statutes on constitutional grounds. Rather, those decisions based their holdings on rules of statutory interpretation. Thus, because the issue was one of statutory interpretation and not due process, the court held that petitioner had an obligation to exhaust this argument on the administrative level. Because petitioner did not raise the issue before the BIA, the court dismissed the petition for lack of jurisdiction.

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■ Fifth Circuit Holds That An Alien Need Only Provide Clear And Convincing Evidence That Her Asylum Application Was Mailed Within One Year Of Her Arrival In Order For The Application To Be Considered Timely

In ***Nakimbugwe v. Gonzales***, __F.3d__, 2007 WL 29807(5th Cir.

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January 5, 2007) (King, Benavides, Clement) (*per curiam*), the Fifth Circuit held that the plain language of 8 C.F.R. § 208.4(a)(2)(ii) does not distinguish between asylum applications that are never received and those that are received late. Therefore, the court held that as long as an alien provides clear and convincing evidence that he/she mailed the asylum application within one year of arrival in the United States, the application is timely.

Petitioner had arrived in the United States on May 30, 2001. She mailed her asylum application on May 29, 2002, within one year of her arrival. The application was received by the government on June 3, 2002. According to 8 C.F.R. § 208.4(a)(2)(ii), if an alien provides clear and convincing evidence that her asylum application was mailed within one year of her arrival, then the mailing date shall be considered the filing date and the application timely. However, in removal proceedings, an IJ ruled that this regulation only applied to applications that are *never* received by the government, and not applications received late. Therefore, the IJ dismissed the asylum application as untimely because it was *received* more than one year after the petitioner's arrival.

> "[W]e find the language of the regulation to be clear and unambiguous. When an application 'has not been received by the Service within 1 year,' the mailing date 'shall' be considered the filing date ."

On appeal, the Fifth Circuit read the regulation differently. "[W]e find the language of the regulation to be clear and unambiguous. When an application 'has not been received by the Service within 1 year,' the mailing date 'shall' be considered the filing date if the application provides clear and convincing evidenced that it was mailed before the deadline expired." The court remanded the case to the BIA with instructions to consider the merits of the asylum claim.

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■ **Fifth Circuit Rules That Criminal Aliens Who Wait To File § 212(c) Applications In Reliance On Availability Of Relief Remain Eligible For § 212(c) Relief**

In ***Carranza-de Salinas v. Gonzales***, __F.3d__, 2007 WL 155195 (5th Cir. January 23, 2007) (*Jolly*, Higginbotham, Denis), the Fifth Circuit held that denying § 212(c) relief to an alien who had actually relied on the availability of § 212(c) would constitute an impermissible retrospective application of the repeal, even though the alien did not immediately seek such relief affirmatively from the district director, but waited until immigration proceedings commenced so that favorable equities could accrue. The court acknowledged that aliens could not show reliance on § 212(c) relief based on a decision to go trial rather than plead guilty.

Petitioner, an LPR since 1985, after a trial by jury was convicted in 1993 of possession of marijuana with intent to distribute. In 1997 she was served with an NTA and placed in removal proceedings based upon that conviction. Petitioner argued that she was eligible for § 212(c) relief despite its repeal in 1996 by IIRIRA because of the Supreme Court's holding in *St. Cyr*. An IJ and the BIA denied the requested relief.

The government argued that petitioner was not eligible for § 212(c) relief because she had declined a plea agreement and elected trial by jury. Therefore, her situation was not analogous to aliens like the one in *St. Cyr* as she had not shown an intent to rely on the continued availability of § 212(c). Thus, the government argued that an alien who has participated in a plea agreement and foregone a trial by jury has a much greater expectation of relief because the alien has exchanged going to trial for better relief. However, the court disagreed with the government, citing the Second Circuit's decision *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). In *Restrepo*, the court held that an alien who forgoes seeking § 212(c) relief in the hopes that she can build a better case for relief has the same expectation of the continued availability of § 212(c) as the alien in *St. Cyr*. The court remanded to permit petitioner to establish whether she decided to postpone seeking § 212(c) relief in order to build a better application. .

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SIXTH CIRCUIT

■ **A State Court Vacatur Of A Conviction Was Ineffective For Immigration Purposes Because It Was Done Solely To Ameliorate Immigration Consequences**

In ***Sanusi v. Gonzales***, __F.3d__, 2007 WL 148760 (6th Cir. January 23, 2007) (Siler, McKeague, *Griffin*), the Sixth Circuit affirmed the BIA's decision that a state court's vacation of petitioner's criminal conviction solely to ameliorate the conviction's immigration consequences did not prevent petitioner's removal based upon that conviction.

Petitioner was convicted of property theft and ordered to pay a $500 criminal fine in lieu of a court appearance. Petitioner paid the fine, but was subsequently charged as an alien removable for having been convicted of a crime involving moral turpitude. Prior to his immigration hearing, the

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petitioner asked a state court to vacate his criminal conviction so that he could avoid deportation. The state court granted his request. Petitioner then filed a motion to terminate removal proceedings for lack of a final conviction. However, citing the BIA's precedent decision in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), an IJ held that the vacation of petitioner's conviction was issued by the state court solely to ameliorate the immigration consequences to petitioner and was thus ineffective in preventing deportation. The BIA affirmed and then denied a subsequent motion to reconsider.

> "A conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, while one vacated because of procedural or substantive infirmities does not."

The Sixth Circuit affirmed the reasoning of the BIA, quoting its prior decision in *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) holding that "[a] conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, while one vacated because of procedural or substantive infirmities does not." Indeed, the court said, "[o]n this record[] the only reasonable inference that can be drawn is that the conviction was vacated for the sole purpose of relieving [petitioner] from deportation." The court noted that, unlike Pickering, petitioner did not raise or argue any colorable legal basis for the vacation of his conviction.

While petitioner argued that due process required that he have notice of the immigration consequences of this guilty plea - which occurred when he paid the fine - the court stated that "it is well settled that there is no obligation to advise a criminal defendant of the collateral immigration consequences of entering a guilty plea."

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SEVENTH CIRCUIT

Seventh Circuit Criticizes Government's Overreliance On State Department Reports

In ***Gomes v. Gonzales,*** __ F.3d__, 2007 WL 63973 (7th Cir. January 11, 2007) (Cudahy, Posner, *Wood*), the Seventh Circuit remanded petitioners' asylum claim for further proceedings in light of omissions and shortcomings in the IJ's decision. The court rejected the IJ's finding that the petitioners' mistreatment by Muslim fundamentalists in Bangladesh did not amount to past persecution, and did not accept the IJ's statement that the evidence failed to establish that the petitioner and his family were targeted because of their religious beliefs.

In support of their claim that Muslim fundamentalists persecuted them for their Christian beliefs, the petitioners had submitted numerous documents detailing attacks on Christians by Muslims in Bangladesh. Specifically, the petitioners submitted newspaper articles, letters from eyewitnesses, and testified that men in Muslim garb beat the husband with a pipe or hockey stick, ransacked their family home and threatened them to convert to Islam or die. An IJ found their testimony credible, but denied their application, finding that none of the described events rose to the level of persecution and that it did not appear that the petitioners were targeted because of their Christian religion. The BIA affirmed without opinion. Subsequently, the petitioners filed a motion to reopen and reconsider, including more evidence that Christians were generally persecuted in Bangladesh. The BIA denied the motion, finding the evidence cumulative and simply a rehash of old arguments.

On appeal to the Seventh Circuit, the court found that the IJ erred in his determination of persecution. Previously, in *Bucar v. INS*, 109 F.3d 399, 405 (7th Cir. 1997), the court had stated that "a credible threat that causes a person to abandon lawful political or religious associations or beliefs is persecution." The court invoked this definition of persecution to reverse the IJ's finding, stating that "there can be no doubt that [the husband] described far more than general harassment, which he endured because he was a Catholic." The court also found that "a great deal of evidence" supported the fact that the petitioners were targeted because of their religious beliefs. Moreover, the court once again criticized an IJ for placing too much emphasis on State Department Reports in light of highly adverse evidence presented by the petitioner. In short, "[t]he omissions and shortcomings in the IJ's decision . . . leave no choice but to remand for further proceedings."

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■ **Seventh Circuit Holds That Despite A IJ's Prior Grant Of 212(c) Relief, The BIA Can Issue A Final Order Of Removal If An IJ Has Previously Found The Alien Removable**

In ***Guevara v. Gonzales,*** __F.3d__, 2007 WL 38412 (7th Cir. January 8, 2007) (Rovner, Evans, *Sykes*), the Seventh Circuit explicitly disagreed with the Ninth Circuit's decision in *Molina-Camacho v. Ashcroft,* 393 F.3d 937 (9th Cir. 2004), and held that the BIA may issue a final order of removal without remanding to the IJ when the IJ has previously found the alien removable. The court also affirmed the BIA's discretionary reversal of the IJ's grant of § 212(c) relief as being within the BIA's authority under 8 C.F.R. § 1003.1(d)(3).

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Petitioner, an LPR, was placed in removal proceedings because he had been convicted of a crime of moral turpitude. Petitioner conceded removability and requested § 212(c) relief. An IJ granted § 212(c) relief and the government appealed. The BIA reweighed the facts of the case and found that the petitioner did not warrant discretionary § 212(c) relief. On appeal to the Seventh Circuit, petitioner argued (1) that the BIA had improperly applied a de novo standard of review to the IJ's weighing of facts; and (2) that the BIA lacked authority to enter the final order of removal in the first instance. The court rejected both arguments. First, the court stated that "[t]he relative weight of [petitioner]'s rehabilitation in the balancing process is not 'factfinding' subject to the clearly erroneous standard of review; it is a matter of discretion . . . subject to de novo review by the BIA." Second, the court held that the BIA was not issuing an order of removal in the first instance because the IJ had already found petitioner removable for having committed a crime of moral turpitude. Thus, the BIA was merely upholding the IJ's original finding of removability while rejecting the § 212(c) waiver determination.

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■ Seventh Circuit Holds That An Immigration Judge's Questioning Did Not Deny Petitioners' Due Process

In ***Boci v. Gonzales***, __F.3d__, 2007 WL 79696 (7th Cir. January 12, 2007) (*Flaum,* Manion, Williams), the Seventh Circuit affirmed the BIA's denial of asylum to an Albanian couple who claimed persecution on account of their support for the Democratic Party. The court also rejected a due process claim that the IJ's confrontational attitude, routine interruptions, and incessant questioning prejudiced the proceedings.

In the mid-1990s, the Socialist Party gained control of Albania and began persecuting supporters of the previous ruling party, the Democratic Party. Petitioners claimed that as supporters of the Democratic Party, they suffered such persecution. Specifically, the husband claimed he was threatened by socialists after recording some election irregularities and that his uncle was killed by an unknown person. Moreover, petitioner's wife claimed her family's house was blown up by socialists and she was threatened on her walks to school. An IJ denied all relief, finding that the petitioners had not demonstrated physical harm or abuse and that all claims the Socialist Party were behind the threats and bombing were speculative. The BIA affirmed.

"An IJ's large docket makes his time a limited resource, so he must strive to provide fair procedures while efficiently managing his docket . . . Unlike an Article III judge, an immigration judge is not merely the fact-finder and adjudicator; he also has an obligation to establish the record."

The Seventh Circuit upheld the denial of the petitioners' asylum application as supported by substantial evidence. As for the alleged due process violation, the court stated "[a] n IJ's large docket makes his time a limited resource, so he must strive to provide fair procedures while efficiently managing his docket . . . Unlike an Article III judge, an immigration judge is not merely the fact-finder and adjudicator; he also has an obligation to establish the record." Therefore, the court found no violation of due process and, moreover, no prejudice.

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■ Seventh Circuit Holds That *Matter of Blake* And 8 C.F.R. § 1212.3(f)(5) Did Not Have An Impermissibly Retroactive Effect Or Violate Petitioner's Equal Protection Rights

In ***Valere v. Gonzales,*** __F.3d__, 2007 WL 63975 (7th Cir. January 11, 2007) (Rovner, Evans, *Sykes*), the Seventh Circuit held that *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and 8 C.F.R. § 1212.3(f)(5) did not have impermissibly retroactive effects on the petitioner or violate his equal protection rights.

In 1994, petitioner, an LPR, pleaded guilty to a charge of indecent assault to a minor. In 1998, the INS initiated removal proceedings against him as an alien convicted of an aggravated felony. An IJ granted petitioner's request for § 212(c) relief. On appeal, the BIA reversed the IJ's decision in light of *Matter of Blake*, which held that an alien deportable due to a conviction for sexual abuse of a minor is not eligible for § 212(c) relief because of the "statutory counterpart rule" (codified as 8 C.F.R. § 1212.3(f)(5)). That is, because there is no statutory counterpart allowing waiver of that particular offense in the enumerated grounds for inadmissibility waivers under the current § 212(a), petitioner's conviction was likewise not waivable under the repealed § 212(c). The BIA rejected petitioner's argument that his crime for sexual abuse of a minor had a counterpoint in § 212(a)'s broad "crime of moral turpitude" provision.

On appeal to the Seventh Circuit, petitioner argued that the statutory counterpart rule had an impermissibly retroactive effect and violated equal protection. The court rejected both arguments. First, the court held that because the statutory counterpart rule existed before petitioner pleaded guilty to his crime, he did not have the requisite reliance on receiving § 212 (c) relief that was encompassed by the holding in *St. Cyr.* It noted that 8 C.F.R. § 1212.3(f)(5) "is simply the

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agency's codification of this preexisting judicially created rule." Second, the court rejected petitioner's equal protection argument because equal protection does not require the statutory counterpart rule to apply to all aliens in deportation, but only those similarly situated.

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■ **Seventh Circuit Feels Compelled To Conclude That Alien Was Persecuted In Egypt Based On His Religion**

In ***Boctor v. Gonzales,*** __ F.3d__, 2007 WL 162839 (7th Cir. January 24, 2007) (Ripple, Manion, *Sykes*), the Seventh Circuit reversed an IJ's denial of asylum and withholding of removal and found that the petitioner had been persecuted for his Christian faith in Egypt by Muslim extremists. The court remanded the case to the BIA for further proceedings.

Petitioner testified that he had been violently attacked by Muslim extremists because he refused to disclose the whereabouts of an interfaith couple that the extremists wanted to kill. As a result, he claimed that he was subject to violent retribution. Specifically, the Muslim extremists called him an "infidel," ripped a crucifix from his neck, and assaulted him. An IJ, while admitting that the acts qualified as persecution, denied petitioner's asylum claim because he found that the persecution had occurred not because his Christian faith, but because the petitioner was protecting an interfaith couple. The BIA affirmed.

The Seventh Circuit reversed the denial of asylum. The court found that the "insults were obviously aimed at [petitioner]'s Christian faith - or at least his lack of adherence to Islam - and plainly established that these were religiously motivated attacks."

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■ **Seventh Circuit Holds That The BIA Abused Its Discretion By Failing To Discuss Any Of The Evidence Petitioner Submitted To Show Changed Country Conditions**

In ***Kebe v. Gonzales,*** __ F.3d__, 2007 WL 120796 (7th Cir. January 19, 2007) (Posner, *Manion*, Evans), the Seventh Circuit reversed the BIA's denial of a motion to reopen to consider new evidence of changed country conditions in Ethiopia. The court reversed the BIA because it failed to discuss any of the evidence submitted with the motion and simply put forth a conclusory and generic statement denying the motion.

"The BIA's denial of [petitioner]'s Motion . . . did not discuss or analyze any of [petitioner]'s evidence" and "the absence of any articulated reasons in the BIA's decision constitutes an abuse of discretion and requires a remand."

Petitioner, a native and citizen of Ethiopia, claimed to fear persecution by the Ethiopian government because of his membership in the Oromo Liberation Front and his Oromo ethnicity. An IJ denied petitioner asylum because she found that the political situation in Ethiopia had improved and that the events described by petitioner did not equate to persecution. The BIA affirmed without opinion. Petitioner then filed a motion to reopen, attaching numerous human rights reports and news articles citing the Ethiopian government's violent suppression of opposing political parties. The BIA denied the motion with the simple statement that petitioner "'failed to show materially changed conditions in Ethiopia.'"

The Seventh Circuit found that the BIA abused its discretion in denying the motion to reopen. "In this case, the BIA's denial of [petitioner]'s motion . . . did not discuss or analyze any of [petitioner]'s evidence" and "the absence of any articulated reasons in the BIA's decision constitutes an abuse of discretion and requires a remand," said the court. The court also found it most significant that petitioner credibly testified about beatings and imprisonment he suffered as a result of his political opposition.

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EIGHTH CIRCUIT

■ **Eighth Circuit Affirms Denial Of Convention Against Torture Protection To Gambian Petitioner**

In ***Jallow v. Gonzales***, 472 F.3d 569 (8th Cir. 2007) (*Smith*, Bowman, Colloton), the Eighth Circuit upheld the denial of CAT protection. The petitioner sought protection based on his affiliation with the United Democratic Party, which opposed the governing party in Gambia. The court held that the petitioner failed to prove he had been tortured or was likely to be tortured upon his return to Gambia. The court also held it lacked jurisdiction to review the agency ruling that no extraordinary circumstances justified the filing of an untimely asylum application.

The petitioner, a native and citizen of the Gambia, was placed in removal proceedings after the expiration of his temporary visa. He conceded removability and applied for asylum and CAT protection. He claimed persecution on account of his political opinion because of his membership in the United Democratic Party, Gambia's main opposition political party. He also claimed that twice he had been confronted by members of that party but was not injured in either incident.

The IJ denied petitioner asylum

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because the application had not been timely filed. The IJ also denied the request for protection under CAT because he found that petitioner did not present credible evidence that he would be tortured if returned to Gambia. In particular, the IJ found that petitioner's membership card in the United Democratic Party was obtained solely for the purpose of supporting his asylum petition. The IJ stated that the card purported to be issued in 1997 but had no place to record membership dues for 1997, 1998, 1999, or 2000. The IJ also noted that the card was not authenticated and found similar defects in other documentary evidence.

> The court affirmed the denial of asylum because petitioner could not link any of the cited incidents to groups the Peruvian government was unwilling to control.

The Eight Circuit held that it lacked jurisdiction to review the finding that there were no extraordinary circumstances to justify the untimely filing of the asylum application. The court also held that the IJ's credibility findings was supported by sufficient record evidence. The court further held that even if petitioner were to conclusively establish that he was a member of the United Democratic Party, his petition for relief under CAT would still fail. The court noted that petitioner had conceded that he was never physically injured in either of the two encounters that he recounted to the IJ. He also admitted that he could live in a different area of Gambia without incident.

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■ Denial Of Asylum Affirmed For Failure To Prove Harassment Was On Account Of Political Beliefs

In ***Flores-Calderon v. Gonzales***, __F.3d__, 2007 WL 37936 (8th Cir. January 8, 2007) (Melloy, Beam, *Benton*), the Eighth Circuit upheld an IJ's denial of petitioner's asylum application. The petitioner was a former member of the Peruvian Navy. As part of his duties, he had fought subversives and narcotraffickers. One day in 2000, while he was driving home, the petitioner was abducted by unknown assailants, hit with handguns, and robbed of his car and military ID. A year later, he received threatening telephone calls and letters which caused he and his wife to move around the city and take alternate routes to work. The threats stopped after petitioner's retirement from the Navy.

An IJ denied asylum, withholding of removal, and CAT protection, finding that none of the described incidents were perpetrated by persons the Peruvian government was unwilling to control. On appeal, the Eighth Circuit agreed, holding that the IJ had reasonably concluded that petitioner could not link any of the cited incidents to groups the Peruvian government was unwilling to control. Further, because the petitioner had not been threatened subsequent to his retirement from the Navy, the IJ reasonably found no fear of future persecution.

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NINTH CIRCUIT

■ Ninth Circuit Holds That 8 C.F.R. § 1003.23(b)(1) Does Not Preclude An Alien Who Illegally Reenters The U.S. From Moving To Reopen Prior Proceedings

In ***Zi-Xing Lin v. Gonzales***, __F.3d__, 2007 WL 29242 (9th Cir. January 5, 2007) (Nelson, Paez, *Smith*), the court held that 8 C.F.R.§ 1003.23(b)(1) does not preclude an alien who has been removed from the U.S. from filing a motion to reopen those proceedings. Further, the court found that INA § 241(a)(5) does not work to automatically reinstate a prior order of removal upon an alien's illegal reentry. Rather, reinstatement of the prior order requires adherence to § 241(a)(5)'s implementing regulation, 8 C.F.R. § 241.8.

Petitioner, a citizen of China, had previously been removed from the U.S. after an IJ denied his application for asylum. He then illegally returned and filed a second application for asylum. The second asylum application was also denied. Petitioner filed a motion to reopen due to changed circumstances. The BIA found that it lacked jurisdiction over the motion because INA § 241(a)(5) requires an alien who has illegally reentered the U.S. to have his prior removal order reinstated against him.

On appeal to the Ninth Circuit, the government argued that under 8 C.F.R. § 1003.23(b)(1), a motion to reopen cannot be filed by an alien who was in removal proceedings after the alien's departure from the U.S. The court disagreed. Applying the canon of statutory construction that all ambiguities must be resolved in favor of the petitioner, the court found that the regulation was phrased in the present tense and thus only applied to an alien who departed the U.S. *during* removal proceedings and "*is* the subject of removal . . . proceedings." Because the petitioner's removal proceedings were already completed by the time of his removal to China, he was no longer the subject of removal proceedings after that time. Finally, because the record did not show that DHS had complied with the requirements of 8 C.F.R. § 241.8, the prior removal proceedings could not be reinstated until those requirements were met. The court remanded the case for a determination of timeliness of the motion to reopen.

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■ **Ninth Circuit Holds That Petitioner Was Not Entitled To Equitable Tolling Of The Time Limitations For Filing A Motion To Reopen**

In ***Valeriano v. Gonzales,*** __F.3d__, 2007 WL 150476 (9th Cir. January 23, 2007) (*Kleinfeld*, Fisher, Shadur), the Ninth Circuit upheld the BIA's denial of petitioner's untimely motion to reopen for ineffective assistance of counsel because the petitioner failed to show due diligence. The court also upheld the BIA's denial of a motion to reconsider the motion to reopen.

An IJ had found petitioner deportable in 1999. The petitioner attempted to appeal the decision to the BIA, but filed the appeal six days late, resulting in the appeal's dismissal. The petitioner filed a motion to reconsider the dismissal of his appeal, but this, too, was denied. However, the notice of the denial of petitioner's motion to reconsider did not reach the petitioner because his lawyer had not notified the BIA of a change in petitioner's address. Consequently, the petitioner hired new counsel to file a motion to reopen based on ineffective assistance of counsel.

Petitioner's new counsel complied with all the *Lozada* requirements, but decided to hold off on filing the motion to reopen in the hopes that the DHS District Counsel would join in the motion. After eight months had elapsed, the District Counsel finally responded but refused to join. Immediately after receiving notice of the District Counsel's decision, petitioner's new counsel filed the motion. The BIA denied the motion for lack of diligence, reasoning that although the ninety day deadline for motions to reopen could be equitably tolled until the client learned of his previous attorney's fraud, the petitioner did not file his motion for eight months after learning of his previous counsel's fraud.

The Ninth Circuit affirmed the BIA's finding that petitioner lacked due diligence. The court explained, "[f]or equitable tolling to apply, it is necessary that 'despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim. . . however, diligence in attempting to obtain nonvital information or acquiescence is not 'diligence' within the meaning of our equitable tolling jurisprudence." The court found that the District Counsel's agreement to join the motion to reopen was not vital information and denied the petition for review.

> "The government is not entitled to a second bite at the apple; it may not use this conviction again as a predicate removal offense."

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■ **An Alien Previously Found Removable For A Conviction But Granted Cancellation Cannot Have That Same Conviction Used Against Him In Subsequent Removal Proceedings**

In ***Ruiz-Vidal v. Gonzales,*** __F.3d__, 2007 WL 113940 (9th Cir. January 18, 2007) (Beezer, *O'Scannlain,* Trott), the Ninth Circuit held that a *Ventura* remand was not necessary where the BIA had already twice ruled on the issue at bar and no new evidence would be introduced on remand. The court also held that a conviction previously the subject of removal proceedings that resulted in cancellation of removal could not be used again as a predicate removal offense.

Petitioner, an LPR, had been convicted of two controlled substance violations under California law. The first conviction for criminal possession of methamphetamine in 1998 resulted in petitioner's first removal proceeding. In those proceedings, an IJ granted cancellation of removal under INA § 240A. In 2003, petitioner was charged with his second conviction for possession and transportation of methamphetamine. DHS again, commenced removal proceeding against petitioner for possession of a controlled substance. However, this time the IJ concluded that because all crimes under California's Health & Safety Code 11377(a) were within the federal CSA, petitioner was removable for possession of a controlled substance. The BIA affirmed without opinion and denied a subsequent motion to reconsider.

On appeal, petitioner first argued that his 1998 conviction could not serve as a predicate for removal because he was granted cancellation of removal for that conviction. The court agreed, stating that "the government is not entitled to a second bite at the apple; it may not use this conviction again as a predicate removal offense." Petitioner also argued that DHS had not sufficiently proven that he was removable for possession of a controlled substance under the CSA based on his 2003 conviction because the judgment of conviction contained in the record did not adequately explain what he had pled guilty to. The court found that the record did not unequivocally show that petitioner's controlled substance conviction fell under the CSA. The court explained, because "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA . . . We must, therefore, conclude that the IJ was in error . . ." Further, "the administrative record contains no plea agreement, plea colloquy, or any other document that would reveal the factual basis for [petitioner's] 2003 conviction." The government did not counter petitioner's argument, but

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instead asked that, pursuant to *Ventura*, the court remand the case in order for the BIA to have an opportunity to decide the issue in the first instance. The court denied the remand, finding "*Ventura* inapplicable because the record is clear that the disputed issue in this case was raised not once, but twice before the Board, which deemed the evidence in favor of removability to be sufficient" and "the record on remand would consist only of those documents already in the record."

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■ NTA's Lack Of A Legible Name And Title Of Issuing Officer Does Not Deprive Immigration Court Of Jurisdiction

In ***Kohli v. Gonzales,*** __F.3d__, 2007 WL 102982 (9th Cir. January 17, 2007) (Nelson, Gould, *Callahan*), the court held that an IJ properly had jurisdiction over petitioner's removal proceedings despite an illegible signature on the NTA. The court also upheld the denial of petitioner's claims for withholding and CAT protection for failure to provide credible testimony and proof of persecution.

Petitioner had entered the U.S. in 1997 and attended school until 1999. In 2001, she filed for asylum based on alleged political persecution in India. The asylum application was not granted and petitioner was served with an NTA charging her with removal for overstay of her visa. Ultimately, an IJ found petitioner incredible and denied relief. Petitioner moved to terminate the proceedings because the signature and title of the issuing officer on the NTA were illegible. The IJ denied the motion because (1) no statute or regulation required that the title of the issuing officer be included on the NTA, (2) the argument was waived by petitioner's admission to the allegations in the NTA and concession to removability, (3) petitioner could not show prejudice, and (4) nothing indicated the NTA was improperly issued. The BIA agreed.

On appeal, petitioner claimed that the IJ lacked jurisdiction over her removal proceedings because the NTA was defective. The court disagreed, finding that the NTA contained all the information required by statute or regulation and that a legible signature was not required. The court also found that the petitioner failed to rebut the presumption of regularity that arises with agency action, as petitioner admitted to proper service and did not show that the signing officer lacked authority to do so. Moreover, said the court, the petitioner did not show that the alleged defect "obscured the charges against her or obstructed her ability to respond to the charges and present her asylum [claim]"; that the petitioner did not show prejudice. Finally, the court upheld the IJ's adverse credibility determination as supported by substantial evidence.

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TENTH CIRCUIT

■ Limiting Its Review To Solely The Inconsistencies Cited By The BIA, The Tenth Circuit Reverses An Adverse Credibility Determination

In ***Sarr v. Gonzales,*** __F.3d__, 2007 WL 140953 (10th Cir. January 22, 2007) (Lucero, *McConnell,* Holmes), the Tenth Circuit reversed the BIA's affirmance of an IJ's adverse credibility determination. Significantly, the court declined the government's request to look to both the decision of the BIA *and* the IJ when ruling on the adverse credibility determination because the BIA's decision did not expressly or implicitly incorporate the reasoning of the IJ.

Petitioner claimed asylum on the basis that as a "Black African" in Mauritania, he was persecuted by the majority "Moor" population. In his asylum application and at his hearing, petitioner testified that soldiers came to his family's farm in Mauritania, destroyed all evidence of his family's identity, murdered his father, and beat him. An IJ doubted his story - and his identity - for multiple reasons, but specifically because petitioner was able to produce a birth certificate from Mauritania despite his testimony that soldiers destroyed all documents relating to his family's identity. Moreover, the petitioner had given two different dates for his mother's death. Thus, the IJ found petitioner incredible and denied asylum. The BIA, in single member review, upheld the adverse credibility determination but cited only the facts that petitioner did not consistently explain the production of the birth certificate and made contradictory statements concerning his mother's death.

The Tenth Circuit found that the adverse credibility determination was not supported by substantial evidence. First, the court stated that the petitioner had provided a consistent explanation of why he was able to produce the birth certificate. Specifically, that "[a]lthough [petitioner]'s later statements contain language about 'all' the paperwork and 'everybody else's paperwork' being destroyed, these statement were made though a translator and in the shadow of the very specific explanation given at the outset of the questioning on this topic." Further, the petitioner had explained at the outset that his mother was able to retain the birth certificate and prevent its destruction with the rest of the papers. Second, the court found that while "[petitioner] did, momentarily, contradict himself as to the date of his mother's death . . . that contradiction was a minor discrepancy that [petitioner] quickly corrected . . . [and] made no difference to the strength or plausibility of his story." The court declined to review the IJ's rationale because 8 C.F.R. § 100 3.1(e)(5) prohibits review of both decisions unless the BIA expressly or implicitly incorporates the IJ's reasoning, something which the court found lacking here.

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INSIDE OIL

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Georgetown University and the Catholic University, Columbus School of Law. While in school she was an intern at the Chief Counsel's Office at DHS for one semester.

Edward Wiggers served in the Army on active duty as a judge advocate with assignments at Fort Bliss, Texas and Arlington, Virginia, serving primarily in criminal law positions at the trial and appellate levels. He graduated from Georgia State University with his JD and a Master's degree in Public Administration in 1999, and is originally from Atlanta, Georgia.

Melissa Leibman is a graduate of Cornell University and the George Washington University Law School. Prior to joining OIL, she clerked for the Honorable John M. Campbell of the D.C. Superior Court.

Lindsay Williams received her B.A. in English Literature/French from the University of Arkansas at Fayetteville, and her J.D. from the University of California Hastings College of the Law. After law school she clerked for former Chief Judge Lawrence Baskir at the U.S. Court of Federal Claims.

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Tracie Jones received her B.A. from University of Maryland, College Park in 2003 and her J.D. from Syracuse University College of Law in 2006. She has worked at OIL as a student clerk while pursing her undergraduate studies, and during law school, she returned as a law clerk.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

PRESIDENT'S PLAN FOR IMMIGRATION REFORM

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ees. A tamper-proof card would help us enforce the law and leave employers with no excuse for violating it. We will also work with Congress to expand "Basic Pilot" – an electronic employment eligibility verification system – and mandate that all employers use this system.

3. To Secure Our Border, We Must Create A Temporary Worker Program America's Immigration Problem Will Not Be Solved With Security Measures Alone. There are many people on the other side of our borders who will do anything to come to America to work and build a better life. This dynamic creates tremendous pressure on our border that walls and patrols alone cannot stop.

As We Tighten Controls At The Border, We Must Also Address The Needs Of America's Growing Economy. The rule of law cannot permit unlawful employment of millions of undocumented workers in the United States. Many American businesses, however, depend on hiring willing foreign workers for jobs that Americans are not doing.

To Provide A Lawful Channel For Employment That Will Benefit Both The United States And Individual Immigrants, The President Has Called For The Creation Of A Temporary Worker Program. Such a program will serve the needs of our economy by providing a lawful and fair way to match willing employers with willing foreign workers to fill jobs that Americans have not taken. The program will also serve our law enforcement and national security objectives by taking pressure off the border and freeing our hard-working Border Patrol to focus on terrorists, human traffickers, violent criminals, drug runners, and gangs.

The Temporary Worker Program Should Be Grounded In The Following Principles:

■American Workers Must Be Given Priority Over Guest Workers. Employers should be allowed to hire guest workers only for jobs that Americans have not taken.

■The Program Must Be Truly Temporary. Participation should be for a limited period of time, and the guest workers must return home after their authorized period of stay. Those who fail to return home in accordance with the law should become permanently ineligible for a green card and for citizenship.

Parts 4-5 of the President's proposal will be continued in the next issue.

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MARK YOUR CALENDAR

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

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

Contact Francesco Isgro at OIL for additional information.

INSIDE OIL

OIL welcomes the following new attorneys:

Pete Matson is a graduate of Washington College of Law, American University, Old Dominion and Roger Williams Universities. Prior to joining OIL he was in private practice in Alexandria and assigned to the Joint Staff (J2) at the Pentagon.

Hannah Baublitz is a graduate of the University of North Carolina at Chapel Hill and Wake Forest University School of Law. Prior to joining OIL she worked at a civil litigation firm in Raleigh, NC.

Wendy Benner-Leon is a graduate of Lock Haven Univ., Penn State, and Boston University School of Law. Prior to joining OIL, she worked in the Office of the Florida Attorney General.

Shahrzad Baghai is a graduate of

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From L to R: Pete Matson, Melissa Leibman, Sheri Baghai, Leah Durant, Lindsay Williams, Hannah Baublitz, Tracie Jones, Wendy Benner-Leon

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

Office of Immigration Litigation

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

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

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