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SEVENTH CIRCUIT SUGGESTS IMPROVEMENTS TO ASYLUM ADJUDICATIONS

In a decision involving the asylum claim of a Liberian citizen who claimed persecution under the former regime of Charles Taylor, the Seventh Circuit criticized the procedures for handling recurring asylum disputes and suggested that the "immigration bureaucracy has much to learn from the experience of other federal agencies that handle large numbers of comparable claims with individual variations." ***Banks v. Gonzales,*** __F.3d__, 2006 WL 1816015 (7th Cir. July 5, 2006) (Posner, *Easterbrook*, Rovner).

> The "immigration bureaucracy has much to learn from the experience of other federal agencies that handle large numbers of comparable claims with individual variations."

The petitioner, a member of the Krahn tribe, sought asylum on the ground that she had been persecuted by the Liberian government on account of her ethnicity and her support of the Unity Party. When petitioner filed her application, Charles Taylor was the President of Liberia, and it was undisputed that "he had it in for both the Krahns and the Unity Party." Before petitioner's asylum claim was heard by the immigration judge, Taylor fled the country after losing a long and bloody civil war.

Petitioner's asylum claim rested on two episodes. One occurred in September 18, 1998, when Taylor's forces attacked a settlement populated mostly by ethnic Krahns and political opponents of his government. Residents were subject to atrocities and homes were ransacked and destroyed. Petitioner was not at home when this raid occurred but her house was destroyed. The occurrence of this raid was conceded. The second episode was a series of incidents in 2001, during which, petitioner maintained, she was beaten and raped by Taylor's forces. An expert in Liberian politics testified that petitioner's account was entirely plausible and that the Taylor regime persecuted ethnic Krahns who had withdrawn from politics. In March 2004, seven months after Taylor's departure, the IJ denied asylum.

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NINTH CIRCUIT FINDS ABUSE OF DISCRETION FOR FAILURE TO EVALUATE HARDSHIP FACTORS

Without addressing the threshold jurisdictional question, the Ninth Circuit held in ***Franco-Resendo v. Gonzales***, __F.3d __, 2006 WL 1984595 (9th Cir. July 18, 2006) (*Reinhardt*, Trott, Wardlaw), that the BIA abused its discretion when it denied as a matter of discretion petitioner's motion to reopen to present additional evidence of hardship for purpose of a previously denied application for cancellation of removal. The court held that the BIA had to "consider and address in its entirety the evidence submitted by petitioners" and was required to weigh "both favorable and unfavorable factors by evaluating all of them, assign weight or importance to each one separately and then to all of them cumulatively."

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ATTORNEY GENERAL GONZALES SPEAKS ON COMPREHENSIVE IMMIGRATION REFORM

Attorney General Gonzales recently spoke on the need for a comprehensive immigration reform and called for "better identification system . . . to restore integrity to the nation's immigration system."

In his prepared remarks delivered to the Commonwealth Club of Silicon Valley on July 21, 2006, the Attorney General said that when it comes to immigration "there are no easy answers." Illegal immigration is a "complicated, emotional and alarming issue," he said, and "government action must be fair, just and realistic." "I am ever mindful that we are a nation of laws and that the enforcement of those laws is critical to our country's health and the preservation of its freedoms. And I know that illegal im-

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Highlights Inside

SEVENTH CIRCUIT CALLS FOR SYSTEMIC DECISIONS AND DETAILED ASYLUM REGULATIONS

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The IJ concluded that petitioner had not been persecuted in the 1998 raid and that her story regarding the series of incidents in 2001 was not credible. In particular, the IJ opined that because petitioner had not been politically active in 2001, it was unlikely that Taylor's forces, stretched thin by civil war, would tarry over someone who was not an immediate threat. The IJ also determined that a letter from the Unity Party describing petitioner's political activities appeared fake because it placed Monrovia, the capital of Liberia, in the wrong county. The IJ's decision only mentioned in passing Taylor's departure. The BIA, in affirming the IJ's decision did not mention the change in government, focusing instead on the fabrication of the letter from the Unity Party.

The Seventh Circuit first held that the IJ was bound by the regulation at 8 C.F.R. § 1208.113(b)(2)(iii), to analyze petitioner's claims without regard to whether she personally had a well-founded fear of future persecution. The rule provides, *inter alia*, that in evaluating whether an asylum applicant has met her burden of proof, "an immigration judge shall not require the applicant to provide evidence . . . that she would be singled out for persecution . . . if the applicant establishes that there is a pattern or practice . . . of persecution of a group of persons similarly situated to the applicant." Instead, said the court, the IJ "did what this regulation says that an IJ 'shall not' do: he required petitioner to show that she had been singled out" during the 1998 raid even though it was conceded that ethnic Krahns were unsafe in Liberia while Taylor was in charge. The application of this regulation to petitioner's claim was not raised by the parties nor addressed by the IJ or the BIA. Nonetheless, the court interpreted the rule as governing not only the proofs at the hearing "but also an IJ's process of reasoning, and it must be followed whether or not an alien draws it to the agency's attention."

"Why do immigration officials so often stand silent at asylum hearings and leave the IJ to play the role of country specialists, a role for which an overworked lawyer who spends his life in the Midwest is so poorly suited?"

Second, the court held that the IJ's adverse credibility determination regarding the 2001 incidents was not "remotely" supported by substantial evidence. The court agreed that petitioner's documentation was suspect that doubts about her veracity "cannot be labeled as irrational." However, the court was critical of the IJ's principal reason for disbelieving petitioner, namely "his confidence that Taylor's forces would not have singled out someone who was by then no longer politically active." The court said that how Taylor's forces behaved was a question of fact and petitioner's expert had testified that her account was entirely plausible. "The agency did not offer any evidence to the contrary," noted the court, and the Department of State reports were silent on this issue. "An IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are not substitute for evidence – a point that we have made repeatedly, but which has yet to sink in."

Finally, the court criticized the current immigration system's consideration of asylum claims, observing that the "immigration bureaucracy" should establish a system of subject matter experts on each country to relieve immigration judges of the double duty of having to be country experts on top of being neutral arbiters and fact-finders. "Why do immigration officials so often stand silent at asylum hearings and leave the IJ to play the role of country specialists, a role for which an overworked lawyer who spends his life in the Midwest is so poorly suited," asked the court. The court also suggested that many asylum disputes are recurring and could be resolved by "systemic decisions' or by "detailed regulations" much like what the Social Security Administration has done over the years. The court noted for example, that while Taylor ruled Liberia all ethnic Krahns should have been treated the same way. Similarly, "adherents of the Ahmad sect either are or are not persecuted in Pakistan." Accordingly, the court remanded the case to the BIA.

By Francesco Isgro, OIL

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ASYLUM REPORT ISSUED

In a report issued on July 31, 2006, the Transactional Records Access Clearinghouse (TRAC) found "wide disparities in the rate at which judges grant asylum to people seeking haven in the United States." The report "examined 297,240 immigration cases from fiscal year 1994 through the first few months of fiscal year 2005. The study found wide variations in how different nationalities were treated. It reported that more than 80 percent of asylum seekers from Haiti and El Salvador were denied asylum for the period beginning in 2000, while fewer than 30 percent of asylum seekers from Afghanistan or Myanmar, formerly Burma, were denied."

The TRAC study also examined the asylum decisions by individual immigration judges. The study found that even within similarly situated asylum seekers, such as Chinese applicants, there was a significant variation on the denial rates by immigration judges.

The TRAC report is available at: http://trac.syr.edu/immigration/reports/160/

ATTORNEY GENERAL SPEAKS ON IMMIGRATION REFORM

migration degrades the rule of law," he said.

The following are excerpts of the prepared remarks delivered by the Attorney General on July 21, 2006, to the Commonwealth Club of Silicon Valley in Santa Clara, California.

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As you might imagine, the topic of immigration is close to my heart for a number of reasons. We all have our own perspective on the issue because of our heritage, our profession, our proximity to the border and so on.

That said, I believe we can all agree on at least one fact and one answer when it comes to immigration. The fact is that the federal government needs to take action.

And the answer – is that there are no easy answers. And that's all right. I'm proud to support the President's proposal for immigration reform in part because it isn't an easy answer. It's a broad set of reforms that address the problem of illegal immigration from every relevant angle: security at the border, a temporary worker program, effective identification systems that will ease employer accountability, and a course of action for the millions of illegal immigrants who are already here.

I believe that it is a comprehensive set of reforms that will work together to address a considerable, and growing, problem. And I hope that by the end of our time together you'll agree. But since my own background and profession lend me a unique perspective on immigration and immigration reform, I'd like to share them briefly with you; I think it will provide a good starting point for our discussion.

* * *

Immigrants – illegal and legal – have provided a critical supply of labor, particularly for California's agricultural and tech industries. Both legal and illegal immigrants have contributed to your tax base. But illegal immigrants also represent an enormous cost to your state in the form of social services – education, medical care and so on.

Then, to the decades-long California concern over immigration, a new red flag appeared five years ago: terrorism. A porous border is now an opportunity for the enemies of this country to enter, blend in, and develop their murderous plots on American soil.

So for California – and now for the rest of the nation – reform can't come soon enough.

> "I am ever mindful that we are a nation of laws, and that the enforcement of those laws is critical to our country's health and the preservation of its freedoms. And I know that illegal immigration degrades the rule of law."

For this complicated, emotional and alarming issue, government action must be fair, just and realistic.

Let's start with the value of fairness. Two weeks ago, just after the fourth of July, I participated in a naturalization ceremony for new American citizens in New York City. I don't know how many of you have seen friends or family members naturalized; it is quite moving. I reassured these proud new citizens that the President is committed to fairness in his reform agenda. The President and I believe that, morally, those of us in government owe it to them – the people who followed the rules to become citizens – to enact smart reform that acknowledges the difference between those who followed the rules and those who did not. It is only fair.

That includes going to the back of the line for citizenship if you are here illegally. It includes paying substantial fines, paying back income taxes and paying back-Social Security taxes.

Most illegal immigrants who have been living and working here a long time have been productive and otherwise law-abiding members of our society. Allowing them a chance at citizenship is fair, but it must be earned, and the price of breaking the law must be paid.

Like anything that is earned, citizenship will be especially cherished by those who work for it. For those who came here illegally, immigration reform will make the road to citizenship harder and longer, but not out of reach. Again, this is a fair and practical solution to the challenge facing all Americans, including those who seek or have already achieved citizenship legally.

Reform must also be just, and renew faith in the rule of law.

Giving honest immigrants a lawful way to provide for their families will bring the rule of law back to an underground sector of the labor market.

Willing workers would be matched with willing employers. All applicants would need to pass criminal background checks. And temporary workers would be required to return to their home countries at the end of their work contract.

We believe that a well-designed and well-run temporary worker program will be good for state and local governments because temporary workers would be taxpayers, contributing to the funding of social services, education, and health care.

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AG GONZALES ON IMMIGRATION REFORM

Part of what will make a temporary worker program function well is a better identification system. Employer accountability is essential in our efforts to restore integrity to the nation's immigration system. And while knowingly hiring illegal immigrants is flouting the law, we must recognize that it can be difficult for employers to verify their workers' status.

Document fraud is widespread and it is extremely sophisticated. It is an international crime business that is on par with the structure and scope of major drug cartels. So a well-forged document is not easily identified by an untrained eye. And, of course, for most employers their area of expertise is not document verification – it's farming or manufacturing or whatever their business is. Every day, employers are presented with false Social Security cards, birth certificates, drivers licenses, resident-alien cards, etc. Some of these would-be workers have fully stolen the identity of an American citizen.

Again, employers are not document detectives, and they are not required to be, under law. In fact, they risk law suits if they reject a potential employee whose documents reasonably appear to be valid. Small firms, in particular, lack the resources to verify documentation. In other words, they don't have a human resources department to look into those matters.

The Department of Homeland Security is moving forward on a number of fronts to give employers the tools they need to develop a secure, legal workforce.

But to help employers out and crack down on this problem over the long-term, we should eventually create a new identification card for every legal foreign worker. We have the technology for this, and we must use it. Digital fingerprints, for example, could make an i.d. card tamper-proof. This would help enforce the law and leave employers with no excuse for violating it.

Easily enforced laws also have the power to modify incentives. If foreign workers know that they can only work here under legitimate circumstances with official identification, there will be less incentive for them to cross the border illegally.

Finally, reforms must be based in reality.

For example, we cannot, realistically, deport en mass the 12 million people who are here illegally today. A strictly-defined path to citizenship, involving the required payment of fees and back-taxes as I described a moment ago, flatly makes more sense.

"To help employers out and crack down on this problem over the long-term, we should eventually create a new identification card for every legal foreign worker. We have the technology for this, and we must use it."

The President has said that illegal immigrants who have roots in our country and want to stay should have to pay a "meaningful penalty for breaking the law." He wants them to pay their taxes and learn English. He thinks they should wait in line behind those who played by the rules and followed the law.

I know that there is concern about amnesty – but I want to reassure you that the President's plan is a way for those who have broken the law to pay their debt to society and then have a chance to demonstrate their character and their commitment to achieving legal citizenship. This is not amnesty.

Those who have come here illegally in order to engage in illegal or illicit activities, including terrorist plots, are in another category. And they have the Department of Justice, the FBI, the Department of Homeland Security and state and local law enforcement officials to deal with. We are working together to discover, dismantle and disrupt their conspiracies every single day. As I told the Senate Judiciary committee earlier this week: when it comes to a passion for disrupting homegrown terrorist plots, for the employees of the department of Justice every day is like September 12th. Their dedication is 100 percent, every day.

This leads me to my next point about reality: We cannot ignore the reality that the level of ease with which foreigners can enter our country illegally is a security threat. We can still take pride in being an open country and a nation of immigrants, while also protecting our country from those who seek to harm us – whether through taking advantage of our social services without contributing to the tax base, through selling illegal drugs that destroy families and communities, or through plotting and carrying out acts of terror.

Successfully securing our borders will take manpower, the implementation of technology, the end of the practice of "catch and release," and a dedication at all levels of government – local, state and federal – to keeping the criminals out, period.

The President does not want to militarize the borders, but he has called on Congress to provide funding for dramatic improvements. By the end of 2008, he hopes to increase the number of Border Patrol officers by 6,000. This will mean that the size of the Border Patrol will have more than doubled during his Presidency. As you know, the President has also deployed the National

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Guard to help out until permanent Border Patrol officers can be hired and trained. I think you'll agree that these actions demonstrate a solid commitment to increased border security.

While manpower is being deployed, the most technologically advanced border security initiative in our history must also be launched. This includes high-tech fences in urban corridors and new patrol roads and barriers in rural areas. We have the technology and we must use it to enhance the efforts of our Border Patrol officers: motion sensors, infrared cameras and unmanned aerial vehicles will all help them do their jobs, and ultimately help prevent illegal crossings.

This is another area where government action must be in partnership. State and local law enforcement needs our support, and under the President's proposal they will get it. That means increased federal funding for state and local authorities who are assisting the Border Patrol on targeted enforcement missions. It also means providing specialized training so they can help federal officers apprehend and detain illegal immigrants.

I mentioned ending the practice of "catch and release." This is important in terms of both justice and reality. When we catch illegal immigrants crossing the border, they've got to be returned to their home countries. This has been logistically easier with illegal immigrants from Mexico, but those from other countries presented us with physical and legal challenges.

Unfortunately, for many years, we did not have enough space in detention facilities to hold these people while the legal process took its course. They were therefore released into society and asked to return for a court date. I don't think it will come as a surprise to hear that the vast majority have not shown up for their court dates.

This practice is simply unacceptable, and at worst it mocks the efforts of our Border Patrol officers who apprehend the illegal border-crossers in the first place. The end of "catch and release" will be the beginning of an overall more effective border security program.

Steps are already underway in this area. We are adding beds in detention facilities and have expedited the legal process to cut the average deportation time. And we're letting foreign governments know, in no uncertain terms, that they must accept back their citizens who violate U.S. immigration laws.

> "The goal of immigration reform, as with all good legislation, is to protect what we value most while keeping pace with changing times, circumstances and challenges."

The President is asking Congress for additional funding and legal authority to end "catch and release" at the southern border once and for all. We believe that this will provide another change in incentives – when people know that they will be caught and sent home if they enter our country illegally, they will be less likely to try to sneak in.

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The reality of the times calls for fast, no-nonsense action. And the values we hold dear as a nation call for justice and fairness at all times.

I believe the President's plan strikes a very good balance of these objectives.

The freedom and opportunity offered by the United States has always attracted, and will always attract, hopeful souls 'yearning to breathe free.' This is a good thing, and it must continue. A nation of immigrants is something we should preserve because we know immigration enriches our country enormously.

We are also a nation of laws, and that helps make our country strong as well. The goal of immigration reform, as with all good legislation, is to protect what we value most while keeping pace with changing times, circumstances and challenges.

I believe this can be done through the President's proposed reforms. As leaders in your state and your communities, I encourage you to voice your opinion and give input on this issue. All aspects of the debate deserve attention because reform that is anything short of comprehensive will not be good enough.

So, please, stay engaged.

This President's plan is big. It is not simple, because there are no simple answers to a challenge of this magnitude. But I assure you that a comprehensive bill will mean comprehensive victory for state and local governments, for taxpayers, and for both the economic and homeland security of the American people.

When he talks about this issue, the President reminds those of us in government that "real lives will be affected by our debates and decisions." As a member of his cabinet, I can speak to the fact that his policies are smart and well-thought-out. But as his friend, I can speak to his dedication to human dignity – and I can tell you that is something that has helped shape his immigration reform proposals.

The President appreciates that people are willing to risk everything for the dream of freedom – and he appreciates the vital need to protect Americans from those who will do anything to take our freedoms away. I believe his reform proposals are an excellent, multi-faceted approach to this intricate issue.

ASYLUM LITIGATION UPDATE: SEVEN "HOT" ISSUES

The following are 7 "hot" or developing issues in asylum litigation which warrant special attention.

1. Third Party Persecution Claims: Seeking Asylum Or Withholding Based On Persecution Of Someone Else – Not The Applicant

Our asylum and withholding law is applicant specific – asylum and withholding of removal are for persecution of the applicant, not someone else. Regulations require the asylum or withholding applicant (the person who files the application) to prove that "he" or "she" suffered past persecution or "he" or "she" has a well-founded fear (asylum) or clear probability (withholding of removal) of future persecution. 8 C.F.R. 1208.13(a), 1208.13(b), 1208.13(b)(2)(i)(A) and (B) (asylum); 8 C.F.R. 1208.16(b), 1208.16(b)(1) and (2) (withholding). If an alien is granted asylum, he or she may give his asylum status to a spouse and minor children. This is called "derivative" asylum. *See* 8 U.S.C. 1158(b)(3).

Our asylum and withholding law is applicant specific – asylum and withholding of removal are for persecution of the applicant, not someone else.

This means that the spouse and child need not file their own applications for asylum, or prove persecution in their own right. Their claims are dependent on the principal applicant proving persecution of himself or herself. 8 C.F.R. 1208.21. Notwithstanding our law requiring the asylum or withholding applicant to prove persecution of himself or herself, we have begun to see cases where aliens are claiming asylum based on persecution of someone else (a derivative child, another spouse, a parent or other relative). The most common situations where these claims are being raised are asylum applications by parents trying to get asylum based on a claim future persecution (usually FGM) of their child, or a Chinese child or other relative trying to get asylum based on forced sterilization of a relative.

If you have a case where the asylum applicant/s is/are applying for asylum based on a claim of persecution of someone else, contact OIL. This type of third party persecution claim will need to be assessed to determine if it should be defended or remanded for further analysis.

Cases raising these issues: *Tchoukhrova v. Gonzales,* 404 F.3d 1181 (9th Cir. 2005) (holding that parent is eligible for asylum based solely on harm to a derivative child without establishing any persecution of the parent in her own right), *petition for certiorari filed* May 4, 2006. *Khup v. Ahscroft*, 376 F.3d 893 (9th Cir. July 2004) (finding killing of one priest in a city constituted "persecution" of entirely different priest in a different city). *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003) (mother cannot qualify for asylum based on claim of future persecution (FGM) of US citizen daughter), and *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) (en banc) (remanding to BIA to determine if parents can qualify for asylum based on future FGM of US citizen daughter). *But see Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (mother can qualify for asylum based on claim of future FGM of alien daughter). *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (Chinese child cannot qualify for asylum based on claim of past persecution (sterilization) of parent); *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005) (same); *Huang v. USINS* , 421 F.3d 125 (2d Cir. 2005) (aliens not eligible for asylum based on claim of past persecution (forced sterilization) of son or daughter in law).

2. What Constitutes A "Particular Social Group" / What Tests Are Used To Decide If There Is A Social Group/ Is "Family" A Social Group

"Membership in a particular social group" is the least understood ground of persecution. If you have a social group case, contact OIL (Margaret Perry) to discuss how to defend it, or whether it requires remand for further analysis. This is a developing area of the law, and proceeding to briefing without sufficient analysis could lead to adverse precedent with far reaching effects. The question whether "family" constitutes a "particular social group" is unresolved by the BIA, and raises sensitive issues. Discussion with OIL is needed about how to defend a social group case, because the question involves policy issues.

There are several different legal standards for what constitutes a "particular social group": (1) an immutable/fundamental characteristic approach, *see Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985); *Castillo-Arias v. U.S. Atty. General*, 446 F.3d 1190 (11th Cir. 2006); (2) a prohibition against circularly defining the group by the alleged persecution, *see Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003); (3) a voluntary associational relationship approach, *see Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 and n.6 (9th Cir. 2000); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); and (4) a group-perception or social visibility approach. *See Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006) (Interim Dec. 3535), *affirmed sub nom. Castillo-Arias v. U.S. Atty. General*, 446 F.3d 1190 (11th Cir. 2006) (holding that "former noncriminal drug informants working against the Cali drug cartel" does not have requisite social visibility to constitute a "particular social group"); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

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ASYLUM LITIGATION UPDATE: SEVEN HOT ISSUES

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3 "Well Founded Fear"/"Disfavored Group" Test

To qualify for asylum, an applicant ordinarily must show a "well-founded fear" of future persecution. In *Lolong v. Gonzales*, 400 F.3d 1215 (9th Cir. 2005), the Ninth Circuit added a new "disfavored group" test to regulations defining how an alien must prove a "well-founded fear" of future persecution for purposes of asylum. The Ninth Circuit's new "disfavored group" test dilutes the requirements for what is required to establish a well-founded fear. The Ninth Circuit recently granted the Government's petition for rehearing *en banc* challenging this new "disfavored group" test for "well-founded fear." *Lolong v. Gonzales*, _F3d_, 206 WL 1703741 (9th Cir. June 19, 2006). The Third Circuit has rejected Lolong's "disfavored group" test for well-founded fear. *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005). If you have a case involving a this issue in the Ninth Circuit, consider staying briefing pending rehearing *en banc* in *Lolong*. If you have this issue in another circuit with an alien arguing that the court should adopt the *Lolong* approach, contact OIL attorneys, or Frank Fraser at OIL who is handling the *Lolong* case, for sample briefs opposing adoption of this test.

4. What Constitutes A Political Opinion

An alien can qualify for asylum or withholding by showing persecution on account of "political opinion." The question what constitutes a "political opinion" is a developing issue. *See Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. May 2005) (risk of future persecution by Colombian drug cartel for choosing to cooperate with US DEA drug investigation and being informant is not on account of "political opinion"). Women seeking asylum can often raise a novel "political opinion" claim, seeking asylum based on personal violence or rape, claiming that the incident was based on their "political opinion" opposing violence against women. If you have a novel political opinion claim (actual or imputed), contact OIL (Margaret Perry) to discuss how to defend.

5. Meaning Of "Government Unable Or Unwilling To Control"

To establish both past and future "persecution" and qualify for asylum or withholding, an alien must show that the conduct he experienced in the past or fears in the future is by the government or persons the government is unable or unwilling to control. There is a developing issue about what is required to prove this element. *Contrast Menjivar v. Gonzales* 416 F.3d 918 (9th Cir. 2005) (alien claiming persecution by private actor must show more than govt's difficulty in controlling private behavior; must show govt condones or is unwilling to control) (correct) *with Fiadjoe v. AG*, 411 F.3d 135 (3d Cir. 2005) (reversing denial of asylum and holding that govt was unable and unwilling to control persecution on account of social group membership of which govt was never made aware or notified); *id*. (holding that alien proved persecution by father that govt was unable or unwilling to control persecution on account of membership in a particular social group (women in particular tribe in Ghana subject to practice of Trokosi fetish sexual abuse), notwithstanding that national govt had national policy against abuse, and no govt official was ever notified or even made aware of the alleged persecution (sexual abuse) or membership in the alleged particular social group) (clearly wrong).

6. "Firm Resettlement" Bar Against Asylum

The asylum statute makes an alien ineligible for asylum if he or she is "firmly resettled in another country prior to arriving in the United States." 8 U.S.C. 1158(b)(2)(A)(vi). A regulation states that an alien is firmly resettled if he or she has an "offer of permanent residence" or some other type of permanent resettlement, but also contains a catch-all provision calling for assessment of various factors such as availability of housing, conditions under which alien lived, whether employment was available, and rights to education, and other conditions in the country where alien previously settled. 8 C.F.R. 1208.15. This regulation has led to litigation about what kind of evidence is sufficient evidence to show firm resettlement barring asylum.

The Circuits are split. The Third, Seventh, and Ninth Circuits apply an "offer-based" test for "firm resettlement," which requires DHS to prove an actual offer of permanent residence in order establish that an alien was firmly resettled in another country and is not eligible for asylum. *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (holding that the primary and most important inquiry in any analysis of firm resettlement is whether or not the stopover country has made some type of "offer" of permanent resettlement); *Diallo v. Ashcroft,* 381 F.3d 687, 693-94 (7th Cir.2004) (same); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001) (same).

By contrast, the Second, Fourth, and Eighth Circuits apply a "totality of the circumstances" approach which favors DHS, does not require an actual "offer" of resettlement, and considers a variety of factors such as length of residence in another country, availability of jobs, education, etc. *See Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006) (collecting cases); *Farbakhsh v. INS*, 20 F.3d 877, 881 (8th Cir. 1994); *Mussie v. USINS*, 172 F.3d 329 , 331-32 (4th Cir. 1999).

If you have a "firm resettlement" issue, knowing the law of the circuit will be important. If the question is not resolved, you will need to argue in favor of the totality of circumstances approach. The dissent by Judge O'Scannlain in *Maharaj v. Gonzales, supra,* contains an excellent argument for this approach.

7. What Decisions Will Be Given *Chevron* Deference By The Courts And Implications For Your Case

Ordinarily an IJ's or BIA's statutory

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ASYLUM LITIGATION

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interpretation of the meaning of our asylum and withholding statutes or regulations would be entitled to *Chevron* deference and should be binding on the courts. But there is a developing trend in which the courts of appeals are refusing to give *Chevron* deference to anything other than a published, precedential BIA decision. This means that if you have a case involving a novel question of statutory or regulatory construction in the area of asylum or withholding (or any other issue under the immigration laws), and the IJ or the BIA decided the question in an unpublished decision, you may want to assess whether to remand for further analysis, given these new rules that are developing about *Chevron* deference. If the court does not give *Chevron* deference to your agency decision, and the question is one with far reaching implications, then litigating the case without a precedential decision by the agency could result in the courts, not the Attorney General, deciding what the statute means.

Here are the recent cases showing this trend among the courts. *Ang v. Gonzales*, 430 F.3d 50, 58 (1st Cir. 2005) (unpublished opinion issued by AG has no precedential force and not entitled to Chevron deference); *Adjin v. Bureau of Citizenship and Immigration Services*, 437 F.3d 261, 264-65 (2d Cir. 2006) (per curiam) (unpublished BIA decisions have no precedential value); *Cruz v. AG of US*, _F.3d_, 2006 WL 1687393 (3d Cir. 2006) (unpublished BIA decisions are not precedential and not entitled to *Chevron* deference); *Garcia-Quintero v Gonzales,* _F.3d_ 2006 WL 2042896 (9th Cir. 2006) (same).

If you have an asylum issue you would like to see discussed, you may contact Margaret Perry at: 202-616-9310 margaret.perry@usdoj.gov

DHS PROPOSES EXPANSION OF VISITORS ENROLLED IN US-VISIT

On July 27, 2006, DHS published a Notice of Proposed Rulemaking (NPRM) proposing to expand processing in the US-VISIT program to an additional number of non-U.S. citizens. 71 Fed. Reg. 42605 (July 27, 2006).

The United States Visitor and Immigrant Status Technology (US-VISIT) records biometric and biographic information to verify the identities of foreign visitors to the United States. Most visitors experience US-VISIT biometric collection procedures – digital, inkless finger scans and digital photograph – upon entry to the United States and at visa-issuing posts around the world. Specifically included would be:

- Lawful permanent residents of the United States (LPRs).
- Individuals entering the United States who seek admission on immigrant visas.
- Individuals entering the United States who seek admission as refugees and asylees.
- Certain Canadian citizens entering the United States for specific business or employment reasons (i.e., Form I-94 holders). This excludes most Canadian citizens entering the United States for purposes of shopping, visiting friends and family, vacation or short business trips.
- Individuals paroled into the United States.
- Individuals applying for admission to Guam under the Guam Visa Waiver Program.

According to DHS, expanding the population processed through US-VISIT is the next step in a comprehensive plan to further improve public safety and national security, as well as ensure the integrity of the immigration process. It is consistent with a number of initiatives that strengthen the integrity of travel documents issued to foreign visitors seeking entry into the United States, as it verifies the travel documents' holder by their biometrics.

US-VISIT currently applies to all foreign visitors (with limited exemptions) entering the United States, regardless of country of origin or whether they are traveling on a visa or by air, sea, or land. This includes foreign visitors traveling under the Visa Waiver Program. Foreign visitors under age 14 and over age 79 are exempt from US-VISIT procedures.

REAL ID ACT ON JTN

On August 8, 2006, at 3:00-4:00 pm EST, Papu Sandhu and Linda Wendtland will be on Justice Television Network to give a presentation on: The Scope and Constitutionality of the Jurisdictional Provisions of the REAL ID Act.

Section 106 of the Act effects significant changes to the jurisdictional rules for judicial review of orders of removal under the INA. The jurisdictional amendments were effective immediately, and were designed to overturn existing case law enabling aliens found removable for having been convicted of crimes in the United States to challenge their removal orders in district court habeas corpus proceedings. *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001).

The 1-hour presentation has been approved for CLE credits. Papu Sandhu and Linda Wendtland will be available to answer questions.

The presentation will be replayed on August 15 (2:00 pm), and August 24 (12:00 pm).

SUMMARIES OF RECENT BIA DECISIONS

■ **Group Consisting Of Noncriminal Informants Does Not Constitute A "Particular Social Group"**

In ***Matter of C-A-***, 23 I&N Dec. 951 (BIA 2006), the Board concluded that the alien failed to demonstrate that he would experience harm on account of a protected ground if he returned to Colombia. The alien sought asylum, claiming fear of persecution on account of imputed political opinion and membership in a particular social group as a result of his past acts of passing along information concerning the Cali drug cartel to the Colombian government.

The Board initially affirmed the IJ's denial of asylum, determining that the people who threatened the alien did so out of personal motives and not due to any political opinion imputed to him. The Board did not separately address the claim based on membership in a particular social group, but stated that it agreed with the Immigration Judge that the record contained insufficient evidence that there was any motivation behind the actions of the cartel members against the alien, other than revenge for the aid he provided to the government. On appeal to the Eleventh Circuit, the Court held that the Board erred by so concluding, and remanded the case for it to consider in the first instance whether noncriminal informants constitute a "particular social group" within the meaning of the INA. *Castillo-Arias v. U.S. Att'y Gen*., No. 02-12125 (11th Cir. Aug. 25, 2003).

On remand, the Board reaffirmed that members of a particular social group must share a common, immutable characteristic, which may be an innate one, such as sex, color, or kinship ties, or a shared past experience, such as former military leadership or land ownership, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences.

The Board also held that social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group" for the purpose of determining whether a person qualifies as a refugee. Because the record evidence demonstrated that the Cali drug cartel directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises, the Board held that the group of "former noncriminal drug informants working against the Cali drug cartel" lacked the requisite social visibility to constitute a "particular social group."

> **The Board also held that social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group."**

The Board's holding in this case was subsequently affirmed in *Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006).

■ **A "Totality Of The Circumstances" Test Does Not Apply In Determining Whether An Organization Is Engaged In Terrorist Activity, And An Alien's Intent In Making A Contribution To Such A Group Is Not Considered In Assessing Whether "Material Support" Was Provided**

In ***Matter of S-K-***, 23 I&N Dec. 936 (BIA 2006), the Board sustained in part and dismissed in part an IJ's decision that the alien was statutorily barred from asylum, withholding of removal, and CAT protection. The alien claimed that she fled Burma because the government of that country knew that she had donated money and goods to the Chin National Front ("CNF"), an organization engaged in armed conflict with the Burmese government. Although the IJ found that the alien had established a well-founded fear of persecution to qualify for asylum, he denied her application because she had engaged in terrorist activity by providing material support to an organization that she knew, or had reason to know, used firearms and explosives to endanger the safety of others or to cause substantial property damage. The alien argued that the CNF's use of justifiable force against an illegitimate regime and its purpose of supporting the right of people to self-determination rendered its actions to fall outside the definition of terrorist activity.

The Board rejected that argument, holding that the statutory language of the relevant provision does not allow consideration of factors such as an organization's purposes or goals and the nature of the regime that the organization opposes in determining whether that organization is engaged in terrorist activity. Further, the Board concluded that neither the alien's intent in making a donation to a terrorist organization nor the intended use of the donations by the recipient is considered in assessing whether she provided "material support" to a terrorist organization.

The Board declined to address the issue of whether the meaning of "material support" excludes trivial or unsubstantial amounts of assistance, ruling that the alien's monetary contribution in this case was sufficiently substantial to constitute material support to a terrorist organization, and therefore barred her from asylum and withholding of removal. However, in light of the government's concession during oral argument that the alien was eligible for deferral of removal under CAT, the Board vacated the IJ's decision with respect to that issue and remanded the case for the appropriate background checks to be updated.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Motion To Reopen To Apply For Adjustment Of Status Properly Denied Where Petitioner Was Not Eligible For Adjustment Because He Had Filed A Frivolous Asylum Application

In *Tchuinga v. Gonzales*, __F.3d__, 2006 WL 1868488 (1st Cir. July 7, 2006) (Boudin, Stahl, Lipez), the First Circuit held that the BIA did not abuse its discretion in denying petitioner's motion to reopen to apply for adjustment of status because at the time he applied for adjustment, he was barred from such relief under INA § 208(d)(6), for having submitted a frivolous asylum application.

The petitioner, a native and citizen of Cameroon, entered the United States in 1997 and applied for asylum, withholding of removal, and CAT relief. At his asylum hearing, he claimed he had suffered persecution in Cameroon as a member of a militant political party, the Social Democratic Front ("SDF"). Examining the documents that petitioner produced at the hearing, the IJ found that he "ha[d] knowingly provided to this Court false documentation in an attempt to secure asylum" and thus had knowingly filed a frivolous application for asylum. Specifically, the IJ found that petitioner had knowingly presented false documents indicating that he was an appointed official of the SDF party so that he could exaggerate the nature of his membership and the extent to which he was persecuted on account of his role with the party. The IJ denied the asylum claim and found that petitioner was barred from applying for any other benefits under INA § 208(d)(6) because he had submitted a frivolous application.

Subsequently, petitioner filed a motion to reopen his case with the IJ, arguing that he had not knowingly provided false evidence. The IJ denied the motion and petitioner appealed to the BIA. The BIA remanded the case to the IJ to consider new evidence. Petitioner then married an American citizen, who filed an I-130 visa application, allowing him to apply for adjustment of status. By the time the asylum hearing resumed with the IJ, the I-130 application had been approved. However, The IJ stated that, in light of her previous determination that petitioner was subject to a permanent bar under INA § 208(d)(6), she would not consider an application for adjustment of status. The IJ also noted that a regulation stated that "[a]n arriving alien who is in removal proceedings" is ineligible to apply for adjustment of status. *See* 8 C.F.R. § 245.1(c)(8). The BIA affirmed that decision.

Petitioner then filed a motion to reopen with the BIA to apply for adjustment of status, based on *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005) (holding that arriving aliens are eligible to adjust their status). The BIA denied reopening concluding that notwithstanding *Succar*, petitioner was statutorily barred from adjusting his status.

The First Circuit held that it lacked jurisdiction to review the "frivolous asylum application" finding because petitioner's motion to reopen only raised the *Succar* issue. Accordigly, the court also held that the BIA did not abuse its discretion in denying his motion to reopen.

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■ First Circuit Upholds Ineligibility For Waiver Of Inadmissibility Under INA § 212(i)

In *Coelho v. Gonzales*, __F.3d__, 2006 WL 186894 (1st Cir. July 6, 2006) (Torruella, Lynch, *Lipez*), the First Circuit held that petitioner had abandoned review of the BIA's determination that he was inadmissible for adjustment of status under INA § 212 (a)(6)(C)(i), and that he was further ineligible for a waiver of inadmissibility under INA § 212(a). Nonetheless, "to avoid any suggestions that the outcome of this appeal depends solely on omitted arguments," the court addressed the merits of the BIA's ruling.

The court held that substantial evidence supported the BIA's conclusion that petitioner was inadmissible because in 1995 he had been involved in a fraudulent scheme to obtain immigration benefits in conjunction with his application for adjustment of status based on a fraudulent marriage. The court further held that petitioner was ineligible for a waiver of inadmissibility under INA § 212(i) because he could not show that he had a qualifying relative.

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SECOND CIRCUIT

■ Second Circuit Rejects Adverse Credibility Finding Based On Flawed Reasoning, Factual Error, And An Unreasonable Corroboration Demand

In *Li Zu Guan v. Gonzales*, __F.3d__, 2006 WL 1776717 (2d Cir. June 29, 2006) (*Calabresi*, Pooler, Parker), the court reversed the denial of asylum to an applicant who claimed that he and his wife had been persecuted for violating the family planning policies of the PRC by having more than one child. The IJ did not find petitioner credible because he had produced a number of questionable documents, his testimony was inconsistent, and his behavior and demeanor during the hearing led the IJ to conclude that he was fabricating his testimony. On appeal, the BIA adopted the IJ's decision.

The Second Circuit found that the IJ's adverse credibility determination rested in large part on several errors. The court noted for example that the assessment that a photograph in the marriage certificate was a fake was rooted in "flawed reasoning." The court also found that the IJ's analysis of petitioner's demeanor

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was compromised by a factual error - namely that the IJ had stated that petitioner took two water breaks when confronted by inconsistencies and the record showed that one of those breaks was taken after petitioner was excused from the stand. Although the court also found that the record provided valid reasons for doubting the petitioner's credibility, it nonetheless remanded the case because it could not conclude with confidence that the agency would reach the same result in the absence of the IJ's errors.

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■ "Extreme Hardship" Under 8 U.S.C. § 1182(i) Is A Non-Reviewable, Discretionary Determination

In ***Zhang v. Gonzales***, __F.3d__, 2006 WL 1901014 (2d Cir. July 12, 2006) (Walker, *Cabranes*, Calabresi), the Second Circuit, in an issue of first impression, held that the it lacked jurisdiction to review the BIA's determination that an alien does not satisfy the "extreme hardship" standard under INA 212(i)(1), 8 U.S.C 1182(i)(1). The IJ and subsequently the BIA, had denied petitioner's waiver of inadmissibility for purpose of seeking adjustment, because he had failed to establish "extreme hardship" to a qualifying relative as required under § 212(i).

The court held that the "extreme hardship" determination was a discretionary judgment similar to the hardship factors evaluated in cancellation of removal cases and therefore unreviewable under INA §242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). The court further held that in challenging the extreme-hardship determination petitioner failed to raise a "constitutional claim or a question of law," and consequently it could not consider the issue under the REAL ID Act.

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■ Second Circuit Remands For Updating Of Stale Record

The Second Circuit, in an issue of first impression, held that the it lacked jurisdiction to review the BIA's determination that an alien does not satisfy the "extreme hardship" standard under INA § 212(i)(1).

In ***Serafimovich v. Ashcroft***, __F.3d__, 2006 WL 1980173 (2d Cir. July 17, 2006) (Jacobs, Parker, *Oberdorfer*), the Second Circuit held that both the IJ and the BIA overlooked the record evidence showing that conditions in Belarus had significantly worsened in light of the government's efforts to lead Belarus back to Soviet-era authoritarian practices.

The petitioner entered the United States in 1995 on a three-month student visa and did not depart when the visa expired. Petitioner subsequently married and had a U.S. born child. Petitioner claimed that she feared persecution in Belarus because of her criticism of the government when she was a university student in Belarus and for her political activism in the United States. The IJ pretermitted petitioner's asylum claim finding that it was untimely and denied her application for withholding and CAT relief. The BIA adopted the IJ's decision.

The court held that the BIA erred in its conclusion that petitioner did not face a clear probability of past persecution because she had not been persecuted while in Belarus, and that the President of that country was no more authoritarian in 2000 than he was in 1995 when petitioner entered the United States. The court found that the BIA's finding was not supported by substantial evidence, noting that the reports from the Department of State indicated a deteriorating civil rights climate. The court also found that the IJ had erred when he found no evidence that the Belarus government had stopped petitioner from engaging in political activity. Petitioner's testimony, said the court, "provides ample evidence from which a reasonable fact finder could determine" that petitioner had been prevented from engaging in certain political activities. Accordingly, the court remanded to allow the parties the opportunity to update the record given the passage of nearly five years since the asylum application was denied.

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■ Second Circuit Rejects Adverse Credibility Determination As Flawed And Requests Assignment To A Different Immigration Judge On Remand

In ***Huang v. Gonzales***, __F.3d__, 2006 WL 1777897 (2d Cir. June 29, 2006) (Feinberg, *Newman*, Katzmann), the Second Circuit reversed the denial of asylum and withholding of removal. The petitioner, a Chinese citizen sought to enter the United States through the Visa Waiver Program by using a fraudulent Japanese passport. When detained, at Tampa International Airport, he claimed a fear of persecution on account that the Chinese government had forced his wife to have an abortion. Accordingly, he was given a "credible fear" interview by a Asylum Officer, and subsequently had an asylum hearing before an IJ. The IJ denied the asylum claim finding that petitioner lacked credibility and that a document he submitted was fraudulent. The IJ also commented on the fact that petitioner had committed a "a very sexist act" when he gave up his first child for adoption because she was a girl. The BIA dismissed the appeal finding that petitioner had submitted a fraudulent document and that he had made certain false statements.

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On appeal, the court reviewed both the credibility findings of the IJ and the BIA. The court reviewed each of the adverse credibility findings and determined that only one – the dubious authenticity of a document – would support the adverse finding. "The errors permeating the adverse credibility finding require a remand," said the court, particularly because a reasonable fact-finder could find that the dubious document was indeed authentic. The court also found that this was one of "the rare case where remand is required because of the IJ's apparent bias and hostility toward" the petitioner. The court then identified several instances of questioning by the IJ that were "at least inappropriate and at worst indicative of bias against Chinese witnesses." The court ordered that the case be reassigned to a different IJ for any further proceedings.

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■ Second Circuit Affirms Adverse Credibility Finding But Remands For Further Proceedings On Finding Of Frivolousness

In ***Liu v. U.S. Dept. of Justice***, __F.3d__, 2006 WL 1901018 (2d Cir. July 11, 2006) (*Calabresi*, Wesley, Hall), the Second Circuit upheld the adverse credibility finding but reversed the finding that petitioner's asylum application was frivolous. The petitioner, a citizen of the PRC, entered the United States in August 2002, leaving behind his wife and three children. In his original application he claimed fear of persecution on account of his practice of Falun Gong. However, when he filed an amended asylum application, petitioner claimed persecution on account of the PRC family planning policies. The IJ determined that petitioner was not credible principally because he had omitted his wife's IUD and coerced abortion in his original asylum application. The IJ also deemed the asylum application frivolous. The BIA affirmed without opinion.

The court upheld the adverse credibility finding given the glaring discrepancy between the two asylum applications even though it identified a number of errors in the IJ's decision. The court then held that absent clear standards from the BIA, it would not affirm the IJ's finding that a "garden variety" adverse credibility determination could be "parlayed" into a finding of frivolousness. The court noted that remand would allow the BIA to set clear standards for frivolousness. "There is a real opportunity for the BIA to take the lead in the establishment of uniform standards for deciding when a finding of frivolousness is appropriate," said the court.

"There is a real opportunity for the BIA to take the lead in the establishment of uniform standards for deciding when a finding of frivolousness is appropriate."

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■ Conviction For A False Statement On A U.S. Passport Application Constitutes A Crime Involving Moral Turpitude

In ***Rodriguez v. Gonzales***, 451 F.3d 60 (2d Cir. 2006) (Newman, Straub, Brieant) (*per curiam*), the Second Circuit held that petitioner's conviction under 18 U.S.C. § 1542 for willfully and knowingly making a false statement in a United States passport application constitutes a CIMT. The petitioner, a Dominican national, entered the United States in 1986, and shortly thereafter purchased a American passport. In 1990, while visiting the Dominican Republic, he obtained a new passport from the United States embassy in Santo Domingo. In 1992, petitioner returned to the U.S. with his family. Ten years later, when his passport was about to expire, petitioner sent in a renewal application and included his passport and a birth certificate indicating that he was born in New York City. Petitioner's fraud was discovered and he was indicted and later pled guilty for making a false statement in an application for a passport.

Preliminarily, the court held that it had jurisdiction to review the nondiscretionary judgments that petitioner was statutorily ineligible for cancellation and that he was inadmissible. The court then found that the BIA was due *Chevron* deference in its construction of the term "moral turpitude," but that it would review *de novo* whether a particular crime of conviction qualifies as a CIMT. The court found that 18 U.S.C. § 1542 "certainly involves deceit and an intent to impair the efficiency and lawful functioning of the government," and that this "alone is sufficient to categorize [it as] a CIMT." Accordingly, the court agreed with the IJ's finding that petitioner was ineligible for cancellation of removal and adjustment of status.

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■ Second Circuit Considers Level Of Diligence Required By Petitioner To Merit "Equitable Tolling" Of Regulatory Requirements

In ***Zhao v. Gonzales***, 452 F.3d 154 (2d Cir. 2006) (Cabranes, Straub and Hall), in a *per curiam* decision, the Second Circuit reversed the BIA's denial of a motion to reopen removal proceedings. Although the Court held that the BIA properly denied the petitioner's first untimely motion to reopen for failing to demonstrate due diligence, it concluded that the BIA erred when it declined to apply equitable tolling and dismissed Zhao's second motion to reopen as both time-barred and number-barred. The court remanded to the BIA for consideration on the merits of Zhao's claim that ineffective assistance of counsel caused both the initial rejection of Zhao's application and the BIA's dismissal of Zhao's first motion to reopen.

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■ **Second Circuit Remands Asylum Claim For Explanation Why Wife Was Denied Asylum While Husband Had Been Previously Granted Asylum Based On Same Facts**

In ***Zhang v. Gonzales,*** *452* F.3d 167 (2nd Cir. 2006) (*Raggi,* Hall, Korman), the Second Circuit affirmed the denial of asylum based on past political persecution but remanded for the BIA to explain why it had denied asylum based on fear of future persecution on account of forced sterilization where it had granted asylum to petitioner's husband based on the same facts.

The petitioner, a PRC national, illegally entered the United States in June 1999, and a year later filed an affirmative asylum application claiming persecution on account of her union activities in her former place of employment. That application was not granted and her case was referred for a removal hearing. She then amended her application to include a claim of a fear of sterilization if returned to China. At the outset of the IJ hearing, some concerns were raised whether petitioner's case should have been heard together with that of her husband who had a pending motion to reopen his previously denied asylum case. Petitioner's husband did not testify. However, the parties stipulated that his testimony concerning the PRC planning policies would be consistent with that offered by petitioner. At the conclusion of the hearing the IJ determined that petitioner had not suffered any past persecution due to her union activities. The IJ also determined that petitioner had not demonstrated that her fear of future persecution was objectively reasonable and that at most she would be fined for having had two children in the United States. Petitioner appealed to the BIA and while the appeal was pending notified the BIA that her husband had been granted asylum and withholding based on the same family planning claims. The BIA summarily affirmed the IJ's decision without mentioning petitioner's husband's case.

The court agreed with the IJ's finding that petitioner had been laid off her job for economic and not political reasons. And the incidents during a factory protest were personal in nature. However, on the claimed fear of future persecution, the court was concerned about the inconsistent treatment "of the couple's seemingly identical future persecution claims." While recognizing that IJ's are required to give asylum cases individualized scrutiny, said the court, "it is a fundamental principle of justice that similarly situated individuals be treated similarly." Accordingly, the court remanded the case to the BIA for an explanation of the "seemingly inconsistent treatment" between the two asylum claims.

The court held, without determining whether an adverse credibility determination "might acquire a constitutional dimension," that petitioner was given a full and fair opportunity to present her claim.

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■ **Second Circuit Rejects Constitutional Challenge To Untimely Filed Application But Reverses Adverse Credibility Finding For Withholding**

In ***Lin v U.S. Dept. of Justice,*** __F.3d__, 2006 WL 1755289 (2d Cir. June 28, 2006) (*Calabresi*, Cabranes, Pooler), the Second Circuit reversed a denial of withholding because the IJ's adverse credibility finding was based on speculation. The IJ cited eight specific instances where the petitioner was not credible and concluded that she appeared to be testifying from an account that she had not fully memorized yet, rather than from actual experience. The IJ also rejected her claim that she had been subjected to a forcible abortion as her hands and feet were tied down because the procedure could not physically have been performed as she struggled.

Preliminarily, the court rejected petitioner's contention that her due process rights were violated by the IJ's finding that her asylum application was untimely. The IJ had based that finding on an adverse credibility determination. The court noted that although it had no jurisdiction to review the untimeliness finding, under the REAL ID Act it could review petitioner's constitutional challenge. The court held, without determining whether an adverse credibility determination "might acquire a constitutional dimension," that petitioner was given a full and fair opportunity to present her claim.

Turning to the withholding claim, the court summarized its jurisprudence on the standard of review that it applies to IJ's factual findings, including adverse credibility determinations. That standard, under INA § 242(b)(4)(B), 8 U.S.C 1252(b)(4(B), has been interpreted by the Second Circuit "to mean that the factual findings of an IJ merit deference so long as they are supported by substantial evidence in the record." However, said the court, under *Chenery* when those findings rely upon legal errors "the appropriate remedy is generally to vacate those findings and remand to the BIA for reconsideration of an applicant's claim." "Our Court's asylum and withholding jurisprudence, then, remains on a continuing course of reconciliation between the twin commands neither to disturb substantially supported factual determinations nor to let stand determinations that rely, in whole or in part, on legal error," said the court. In the asylum context, the Second Circuit has explicitly held that not every error

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requires a remand. *See Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391 (2d Cir. 2005), and *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006). On "those occasions on which a reviewing panel may 'confidently predict' that the agency would reach the same conclusion absent the identified errors," a remand would be futile, said the court.

In this case, the court acknowledged that the IJ "pointed to several legitimate grounds for skepticism" about the petitioner's account, but ruled that the IJ's conclusion about the abortion procedure that petitioner underwent was "speculation upon speculation." Because the IJ called petitioner's account of the sterilization procedure the most critical issue in the case, "we cannot be confident that the agency would reach the same result on remand absent this error," concluded the court. Finally, the court observed "the ineluctable fact that these cases, simply put, are hard. They do not easily submit to catch-all formulae or general rules; each case is fact - specific, and so it is with this one." Accordingly, the court remanded the case for further proceedings.

"The ineluctable fact [is] that these [asylum] cases, simply put, are hard. They do not easily submit to catch-all formulae or general rules; each case is fact - specific, and so it is with this one."

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■ Second Circuit Reverses Denial of Motion To Reopen To Apply For Asylum Based On Changed Circumstances In Iran

In ***Norani v. Gonzales,*** 451 F.3d 212 (2d Cir. 2006) (Straub, Sotomayor, Hall) (*per curiam*), the Second Circuit reversed the BIA's denial of a motion to reopen to apply for asylum based on changed circumstances in Iran. The court held that the BIA abused its discretion in finding that the evidence presented was not previously available, and that the BIA's decision was conclusory, devoid of reasoning, and failed to account for the substantial record evidence of worsened country conditions in Iran.

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THIRD CIRCUIT

■ Third Circuit Holds That Petitioner Who Had Already Been Removed From The Country Did Not Satisfy The "In custody" Requirement For Habeas Jurisdiction

In ***Kumarasamy v. Att'y General,*** __F.3d__, 2006 WL 1716733 (3d Cir. June 26, 2006) *(Barry,* Smith, Tashima), the Third Circuit dismissed the petitioner's appeal of the denial of his writ of habeas corpus for lack of jurisdiction. The petitioner, a native of Sri Lanka and citizen of Canada, was granted withholding of removal to Sri Lanka, but was later removed to Canada. The court held that since the petitioner was already removed from the United States at the time he filed his habeas petition, he was not "in custody" for habeas purposes, as he was "subject to no greater restraint than any other non-citizen living outside American borders."

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■ Third Circuit Determines That New Jersey Child Endangering Statute Is Not Sexual Abuse Of A Minor

In ***Stubbs v. Gonzales,*** 452 F.3d 251 (3d Cir. 2006) (Barry, *Ambro,* Pollak), the Third Circuit held that a New Jersey conviction for "endangering welfare of children" did not constitute the aggravated felony of sexual abuse of a minor. The court held that because the record contained no information as to the underlying facts of the offense and because the New Jersey statute was written in the disjunctive, the BIA properly departed from the formal categorical approach and reviewed the charging document to determine under which portion of the statute the petitioner was convicted. The court ruled, however, that the BIA erred in concluding that the petitioner had engaged in sexual conduct with a child under the age of 16 because neither the record of conviction nor the indictment alleged that the petitioner had engaged in sexual conduct with a minor. The court also determined that while the BIA's definition of sexual abuse of a minor required that a past act with a child actually occurred, the statute of conviction did not necessarily require that an act with a child took place.

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Third Circuit Remands To BIA To Explain Its Reasoning For Refusing To Exercise Its Discretion To *Sua Sponte* Reopen Where Petitioner's State Law Conviction Was Vacated Subsequent To His Removal Proceedings

In ***Cruz v. Gonzales,*** 452 F.3d 240 (3d Cir. 2006) (*Rendell*, Ambro, Shapiro), the Third Circuit remanded the BIA's denial of Cruz's untimely motion to reopen. The court asked the BIA to address the issues of (1) whether he remained removable where his conviction had been vacated subsequent to the removal proceeding, and (2) whether the BIA decided not to *sua sponte* reopen the removal proceedings in an exercise of its unfettered discretion, which would not be reviewable, or based on a conclusion that Cruz failed to demonstrate a prima facie case for *sua sponte* relief, which would be reviewable.

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FIFTH CIRCUIT

■ Fifth Circuit Holds That U.S. Citizenship Is Not Automatically Obtained By Virtue Of Adoption By A U.S. Citizen

In ***Marquez-Marquez v. Gonzales,*** __F.3d__, 2006 WL 1851244 (5th Cir. July 6, 2006) (*Garwood*, Davis, Garza), the Fifth Circuit held that the petitioner did not automatically obtain U.S. citizenship pursuant to INA § 301(g), 8 U.S.C. § 1401(g), by virtue of her adoption by a U.S. citizen, because adoption does not establish the "blood relationship" required for obtaining citizenship at birth. Because petitioner was removable by reason of having committed a criminal offense, the court then held that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(C), to review her challenge to the rulings of the IJ and the BIA denying her relief under former section 212(c).

The Fifth Circuit held that a determination whether an applicant for "special rule" cancellation had been subjected to "extreme cruelty" was discretionary, and therefore removed from judicial review.

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■ Fifth Circuit Joins Tenth Circuit In Finding No Jurisdiction To Review "Extreme Cruelty" Determination In Special-Rule Cancellation Case

In ***Wilmore v. Gonzales,*** __F.3d__, 2006 WL 1828644 (5th Cir. July 5, 2006) (DeMoss, *Benavides*, Prado), the Fifth Circuit ruled that a determination whether an applicant for "special rule" cancellation of removal under INA § 240A(b)(2) had been subjected to "extreme cruelty" by his or her spouse was discretionary, similar to determinations regarding "extreme hardship," and therefore removed from judicial review by INA § 242(a)(2)(B)(i). The court expressly agreed with the Tenth Circuit's similar conclusion in *Perales-Cumpean v. Gonzales* and disagreed with the Ninth Circuit's earlier assertion of jurisdiction in *Hernandez v. Ashcroft.* The court also ruled that the REAL ID Act did not confer jurisdiction to review "extreme cruelty" determinations.

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SIXTH CIRCUIT

■ Sixth Circuit Upholds BIA's Rule On Criminal Conviction *Vacatur* But Reverses BIA's Application Of Rule

In ***Pickering v. Gonzales,*** __F.3d__, 2006 WL 1976043 (6th Cir. July 17, 2006) (Daughtrey, Gilman, *Rice*), the Sixth Circuit held that the BIA correctly interpreted the law by holding that a conviction remains valid for immigration purposes if a court vacates an petitioner's conviction for reasons solely related to rehabilitation or to avoid immigration hardships. The court, however, reversed the finding of deportability against the petitioner because the record was incomplete regarding whether the Canadian court vacated his conviction solely for immigration purposes.

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■ Sixth Circuit Finds Unreasonable BIA's Interpretation To Impute Parents' Intent To Commit Immigration Fraud

In ***Singh v. Gonzales***, 451 F.3d 400 (6th Cir. 2006) (Daughtrey, *Gilman*, Russell), the Sixth Circuit rejected the BIA's decision imputing the fraudulent conduct of her parents to petitioner, a minor. Petitioner's father fraudulently assumed the identity of his deceased cousin, secured a visa, and fraudulently procured admission to the United States for his wife and daughter. The court found that the BIA's history of imputing parents' knowledge of their ineligibility for admission or their intent to abandon immigration status to their minor children does not establish a reasonable basis for imputing fraudulent conduct to those children and remanded the case to the BIA for a determination of whether petitioner is otherwise removable.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds That War Veteran Who Served During Time of Hostilities Is Not Exempt From Establishing Good Moral Character For Purposes Of Naturalization Under 8 U.S.C. § 1440

In ***O'Sullivan v. U.S. Citizenship and Immigration Services***, __F.3d__, 2006 WL 1841768 (7th Cir. July 6, 2006) (*Flaum*, Posner, Kanne), the Seventh Circuit affirmed the district court's decision denying a petitioner wartime veteran's petition for naturalization which had been filed while removal proceedings were pending, even though the petitioner qualified for treatment as a veteran who served during a period of designated military hostilities (Vietnam War) pursuant to 8 U.S.C. § 1440. Petitioner's distribution of cocaine conviction was an aggravated felony and prevented him from establishing the "good moral character" element in his naturalization petition, and the aggravated felony bar in 8 U.S.C. § 1101(f)(8) applies to wartime veterans seeking the benefit of citizenship through naturalization.

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■ **Seventh Circuit Denies Alien's Collateral Attack On The Underlying Removal Proceedings Because He Failed to Meet The Requirements of 8 U.S.C. § 1326(d)**

In *United States v. Santiago-Ochoa*, 447 F.3d 1015 (7th Cir. 2006) (*Kanne*, Posner, Williams), the court held that the petitioner was not entitled to collaterally attack his underlying removal proceedings because he failed to meet the requirements of 8 U.S.C. § 1326(d).

The petitioner had established a consistent pattern of illegally entering the U.S. to either abuse his girlfriend or sell drugs. While serving a state sentence for delivery of a controlled substance, the federal government indicted the petitioner for criminal reentry. Petitioner wanted to dismiss the indictment and in order to do so had to meet the requirements of 8 U.S.C. § 1326(d). That is, the petitioner had to show that (1) he exhausted all available administrative remedies, (2) the removal proceedings deprived him of the opportunity for judicial review, and (3) the removal order was fundamentally unfair. The court held that the petitioner could not show any of the above. First, the petitioner had previously waived his right to contest removal in a signed notice receipt. Consequently, he never appeared before an Immigration Judge and thus had not exhausted his administrative remedies. Second, the petitioner had recourse to a petition for habeas review, so judicial review was still available to him.

Finally, the court held that petitioner had no "constitutional right to be informed of eligibility for – or be considered for – discretionary relief." Furthermore, said the court, even if there had been a due process violation, petitioner would still be unable to prove prejudice because "he is an aggravated felon, which means he is conclusively presumed to be subject to removal and is ineligible for cancellation of removal, voluntary departure, and registration as a permanent resident."

The court held that petitioner had no "constitutional right to be informed of eligibility for – or be considered for – discretionary relief."

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EIGHTH CIRCUIT

■ **Eighth Circuit Rules That Indonesian Chinese Christian Did Not Demonstrate Past Persecution Or A Pattern And Practice Of Persecution**

In *Tolego v. Gonzales*, 452 F.3d 763 (8th Cir. 2006) (*Murphy*, Melloy, Colloton), the Eighth Circuit reaffirmed that it lacked jurisdiction to review the determination of whether the petitioner's asylum application was timely filed. The court held that the petitioner failed to establish either past persecution or a pattern or practice of persecution against Chinese Christians in Indonesia, and that the petitioner failed to demonstrate that the record evidence was so compelling that a reasonable factfinder must have concluded that he was entitled to CAT relief.

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■ **Eighth Circuit Dismisses Criminal Petitioner's Torture Claim**

In *Hanan v. Gonzales*, 449 F.3d 834 (8th Cir. 2006) (Beam, *Murphy*, Benton), petitioner, a member of the Pashtun ethnic group and citizen of Afghanistan, filed a habeas petition after the BIA denied his claim seeking CAT relief. The case was transferred to the Court of Appeals with the passage of the REAL ID Act. The court noted that under the REAL ID Act, it had jurisdiction to consider only constitutional questions or questions of law, and that the merits of the CAT claim presented neither a statutory nor a constitutional question. The court reasoned that "inasmuch as the claim came down to challenges to the Immigration Judge's factual determination that it was not likely the current government in Aftghanistan would seek to torture petitioner if he was returned, it did not depend upon any constitutional issue or question of law," and dismissed the petition.

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NINTH CIRCUIT

■ **Ninth Circuit Grants En Banc Rehearing In Court's Disfavored Group Case**

In *LoLong v. Gonzales*, __F.3d__, 2006 WL 1703741 (9th Cir. June 19, 2006), the Ninth Circuit, ordered that *Lolong* will be reheard *en banc*. The government's June 27, 2005, petition for rehearing en banc challenged the court's judicially created "disfavored group" alternative test for establishing a well-founded fear of persecution because it failed to accord controlling weight to the agency's legislative regulation, created sharp tension with controlling precedent from the Ninth Circuit, and created a direct conflict with decisions of the Third and Seventh Circuits. On November 29, 2005, the parties simultaneously filed supplemental briefs in *Lolong* addressing three questions raised by the court pertaining to the impact of the court's ruling in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), on its jurisdiction in *Lolong*. The government urged the court to rehear Molina-Camacho en banc as well. The court's June 19, 2006, or-

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der did not address Molina-Camacho.

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■ Ninth Circuit Upholds Agency Reporting Requirements For National Interest Waivers But Determines Calculation Of Service Requirements To Be *Ultra Vires*

In ***Schneider v. Chertoff***, 450 F.3d 944 (9th Cir. 2006) (*Pregerson*, Noonan, Thomas), the Ninth Circuit affirmed in part and reversed in part the decision of the district court. Appellants were four physicians seeking national interest waivers under the Nursing Relief Act, which exempts physicians from the labor certification process and permits adjustment of status after three or five years of medical service in an underserved area. The court upheld the agency reporting requirements, determining that the agency demand of multiple submissions to indicate work was reasonable given the 5 year required qualifying service. However, the court held that the interim rule requirements regarding the calculation of qualifying service time was *ultra vires* to the plain language of the statute.

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■ Ninth Circuit Determines That California Forgery Conviction Is An Aggravated Felony

In ***Morales-Alegria v. Gonzales***, 449 F.3d 1051 (9th Cir. 2006) (Noonan, *Berzon*, Kleinfeld), the court upheld the BIA's finding that petitioner was removable because his forgery conviction under California Penal Code section 476 qualifies as an "aggravated felony." The court rejected the petitioner's argument that his conviction was not aggravated felony because the statute section under which he was convicted was amended in 1998 to remove the knowledge requirement, determining that the amendment removed "superfluous" language and that the knowledge element was implied within the intent element. The court held that "the offense of forgery under California Penal Code section 476 requires knowledge of the fictitious nature of the instrument, and therefore, is not broader than the federal definition of "offense relating to . . . forgery" for purposes of qualifying as an "aggravated felony"."

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■ Ninth Circuit Holds That California Sec. 242 Battery Is Not Categorically A Crime Of Violence

In ***Ortega-Mendez v. Gonzales***, 450 F.3d 1010 (9th Cir. 2006) (Thompson, *Berzon*, Callahan), petitioner, a Mexican citizen, challenged the IJ's denial of his application for cancellation of removal. The IJ determined that petitioner's 1998 conviction for battery under California Penal Code section 242 was a "crime of domestic violence" within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i) and as a result, he was ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1) as an alien who has "been convicted of an offense under section . . . 1227(a)(2)." 8 U.S.C. § 1229b(b)(1)(C). The BIA affirmed finding a conviction under California Sec. 242 battery to be a conviction for a "crime of domestic violence," which rendered petitioner ineligible for cancellation. The court held that petitioner's 1998 offense was not a "crime of violence" within the meaning of 18 U.S.C. § 16 and so it was not a "crime of domestic violence" within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i).

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The majority held that only the conviction record could be examined under the modified categorical approach to determine the nature of the crime.

■ Ninth Circuit Holds Battery Conviction For Beating Wife Was Not Crime Of Domestic Violence

In ***Cisneros-Perez v. Gonzales***, __F.3d__, 2006 WL 1728068 (9th Cir. June 26, 2006) (Thompson, *Berzon;* Callahan dissenting), the Ninth Circuit remanded the case to the BIA to determine if the petitioner was eligible for cancellation and merited a favorable exercise of discretion. The petitioner had been convicted under California's Sec. 242 battery statute and had admitted in his cancellation application that the victim was his wife. The BIA found that he had been convicted for a "crime of domestic violence," which rendered him ineligible for cancellation. The majority, relying on language in *Tokatly v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004), held that only the conviction record could be examined under the modified categorical approach to determine the nature of the crime, that the record did not state that the victim was his wife, and therefore the BIA erred in classifying the crime as "domestic."

Judge Callahan in a dissenting opinion would have found that the crime was one of domestic violence. Petitioner's "request for relief asserted that Megali Garcia was, and is, petitioner's] wife. If we do not recognize such an exception, we drift toward creating legal determinations that are divorced from reality. Therefore, I do not agree with the majority's holding that because the transcript from the plea proceeding does not specifically name the victim of [petitioner's] battery, the BIA cannot find that the victim was his wife."

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■ Ninth Circuit Finds That Statutory Rape Is Not A Crime Of Violence

In *United States v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006) (Fletcher, Graber (dissenting), *Nelson*) the court held that statutory rape did not qualify as a crime of violence under the USSG. The petitioner, a Mexican national, had been indicted for illegal reentry after deportation. He admitted to reentry charge but reserved his right to appeal the statutory enhancement based on a statutory rape conviction in Tennessee. Preliminarily, the court held that the application of the amended USSG which included statutory rape in the definition of a "crime of violence," violated the *ex post facto clause*.

The court then determined, after applying the categorical approach, that under Tennesee law, consensual sex with a minor does not necessarily mean that abuse and psychological damage resulted, as is the case with other sexual crimes. Therefore, the crime was not a "crime of violence." The court further held that it was not bound by *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006), where it had determined that "sexual abuse of a minor" under the INA encompassed a conviction for the statutory rape of a minor. In *Afridi* the court gave *Chevron* deference to the BIA's permissible construction of the INA. Here, however, no deference was owed, and the court applied *de novo* review.

In a dissenting opinion, Judge Graber would have found that the clarifying amendment to the USSG created no new law and therefore its application was not an *ex post facto* violation. He would also have found that petitioner had been convicted of a crime of violence.

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TENTH CIRCUIT

■ Tenth Circuit Grants Rehearing In Part And Amends Prior Opinion

In *Padilla-Caldera v. Gonzales*, __F.3d__, 2006 WL 1670289 (10th Cir. June 19, 2006) (Henry, *Lucero*, Brack), the Tenth Circuit, on rehearing, held that Padilla, who departed and illegally reentered the United States after accruing more than one year of illegal presence, is admissible for permanent residence under the Legal Immigration Family Equity (LIFE) Act. The Court found that the LIFE Act was intended to provide an exception to the general rule that illegal entrants are ineligible for adjustment of status. Using standard tools of statutory construction to reconcile a seeming conflict between 8 U.S.C. §§ 1182(a)(9)(C)(i)(I) and 1255(i), the court concluded that the circumstances surrounding the LIFE Act's passage indicated that it applies to status-violators who have accrued more than one year of illegal presence.

> The court explained that the text and legislative history of the Visa Waiver Program statute barred any challenge to petitioner's removal order on any ground other than asylum.

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■ Tenth Circuit Finds Contributing To Delinquency Of A Minor Is An Aggravated Felony

In *Vargas v. Gonzales,* __ F.3d__, 2006 WL 1689293 (10th Cir. June 21, 2006) (*Hartz*, Ebel, Tymkovitch), the Tenth Circuit affirmed the BIA's finding that a conviction for Contributing to the Delinquency of a Minor by inducing the minor to engage in unlawful sexual contact under Colorado Revised Statute § 18-6-701 constituted "sexual abuse of a minor" and therefore is an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). The court held that the agency may look to the charging document to determine whether the petitioner's conviction constituted an aggravated felony.

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■ Tenth Circuit Holds That Petitioner Who Entered Under Visa Waiver Program May Not Challenge Removal By Seeking To Adjust Status

In *Schmitt v. Maurer,* __ F.3d__, 2006 WL 1681326 (10th Cir. June 20, 2006) (Lucero, Baldock, *McConnell*), the Tenth Circuit denied a challenge to a removal order by a German citizen who entered under the Visa Waiver Program, overstayed, and applied for adjustment of status. The court explained that the text and legislative history of the Visa Waiver Program statute barred any challenge to his removal order on any ground other than asylum, and also noted that petitioner had not sought adjustment until after the date when he was required to depart from the United States.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds That The Filing Of A Motion For Reopening Tolls The Running Of A Voluntary Departure Period

In *Ugokwe v. U.S. Atty. General*, __F.3d__, 2006 WL 1752339 (11th Cir. June 29, 2006) (Anderson, *Barkett*, Bowman), the Eleventh Circuit joined the Third, Eighth, and Ninth Circuits in holding that 8 U.S.C. § 1229c(d), which renders a petitioner

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ineligible for nearly all forms of relief if the petitioner fails to depart the United States in accordance with the terms of a grant of voluntary departure, may not be used to bar a timely motion for reopening filed during the voluntary departure period. The court held that when such a motion has been filed, the voluntary departure period is tolled until such time as the BIA rules on the request for additional proceedings.

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■ **Eleventh Circuit Holds Involvement With Falun Gong Does Not By Itself Entitle Petitioner To Asylum**

In ***Yi Feng Zheng v. Gonzales***, 451 F.3d 1253 (11th Cir. 2006) (Edmondson, Hill, Kravitch) (*per curiam*), the Eleventh Circuit affirmed the denial of the petitioner's petition for asylum. The court held that the petitioner's mere loss of employment, absent proof that the petitioner could not secure any alternative employment, and detention for five (5) days, at which time the petitioner was required to watch anti–Falun Gong videos and stand in the sun for two (2) hours until he agreed to watch those videos, did not constitute persecution or establish a well-founded fear of future persecution. The opinion concluded that involvement with Falun Gong does not by itself entitle a petitioner to asylum.

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■ **Eleventh Circuit Holds That *Buckhannon's* Rejection Of The Catalyst Theory For Purposes Of Determining "Prevailing Party" Status In Fee-Shifting Cases Applies To EAJA**

In ***Morillo-Cedron v. District Director***, __F.3d__, 2006 WL 1688185 (11th Cir. June 21, 2006) (*Dubina*, Kravitch, Gibson), the Eleventh Circuit reversed an award of attorneys' fees under the Equal Access to Justice Act (EAJA). Plaintiffs filed a complaint for mandamus, seeking to compel the United States Citizenship and Immigration Service to act on their applications for adjustment of status. After receiving the complaint, the Service voluntarily processed the applications. The district court dismissed the case as moot, but awarded plaintiffs fees on the theory that their lawsuit acted as a catalyst in their achieving the relief they sought. The Eleventh Circuit reversed, holding that the Supreme Court's decision in *Buckhannon* applies to EAJA and bars awards of attorneys' fees under these circumstances.

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NINTH CIRCUIT FINDS BIA ABUSED ITS DISCRETION

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The principal petitioner and his wife are Mexican citizens who illegally entered the United States in 1990. They have four U.S. citizen children. In December 2001, the former INS instituted removal proceedings against them and they in turn applied for cancellation of removal under INA § 240A(b).

The IJ and subsequently the BIA, on April 24, 2004, denied their application finding that they had not demonstrate that their U.S. citizen children would suffer "exceptional and extremely unusual hardship," as required under INA § 240A(b)(1)(D). To be sure, the IJ had also found that petitioners lacked good moral character because of fraud in their federal tax returns and because they could not demonstrate ten years of continuous physical presence. The IJ had also denied voluntary departure. The BIA however, at petitioner's request granted voluntary departure.

The petitioners however, did not depart and did not seek judicial review of the BIA's decision. Instead they obtained the service of a new attorney who filed a motion to reopen with the BIA seeking to introduce new and additional evidence of hardship. On September 24, 2004, the BIA denied the motion finding that even if petitioner's argument regarding their eligibility for cancellation were correct, in balancing the factors in the case, including their violation of the voluntary departure order, "the proceedings would not be reopened in the exercise of our discretion."

The Ninth Circuit found that the BIA's decision to deny reopening was "inadequate" because it made no mention "of the factors favoring petitioner's motion or the effect of these factors on their United States citizen children." The court faulted the BIA for not giving any indication that it had considered the documentary evidence provided with the motion and that it had not taken into account any "humane considerations." Finally, the court held that "the BIA's failure to identify and evaluate the favorable factors was an abuse of discretion." Lastly, the court noted, in response to the government's argument that petitioner's motion went to the merits of the underlying decision, that even if this were a "disguised attempt to relitigate the merits," the BIA would not be excused from explaining its reasoning.

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DIGEST OF REAL ID ACT DECISIONS

Conversion of Habeas Appeals to Petitions for Review

Schmitt v. Maurer, __ F.3d __, 2006 WL 1681326 (10th Cir. June 20, 2006) (converting pending habeas appeal to petition for review); *Delgado-Reynua v. Gonzales*, 450 F.3d 596, 599 (5th Cir. 2006) ("habeas petitions on appeal as of May 11, 2005, - are properly converted into petitions for review"); *Francois v. GonzaleS*, 448 F.3d 645, 648 (3d Cir. 2006) (the appropriate way to treat a pending appeal from the district court's habeas petition is to "vacate and disregard the [d]istrict [c]ourt's opinion and address the claims raised in [the] habeas petition as if they were presented before us in the first instance as a petition for review"); *Tostado v. Carlson*, 437 F.3d 706, 708 (8th Cir. 2006); *Rosales v. Bureau of Immigration & Customs Enforcement*, 436 F.3d 733, 736 (5th Cir. 2005) (per curiam); *Gittens v. Menifee*, 428 F.3d 382 (2d Cir. 2005); *Bonhometre v. Gonzales*, 414 F.3d 442 (3d Cir. 2005); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005); *see also Ishak v. Gonzales*, 422 F.3d 22 (1st Cir. 2005) (treating habeas appeal as "still 'pending' in the district court within the meaning of the Real ID Act" and transferring petition to court of appeals to be treated as a petition for review); *cf. Kumarasamy v. Attorney General of U.S.*, __ F.3d __ 2006 WL 1716733, *2 (3d Cir. June 23, 2006) (refusing to convert pending habeas appeal into petition for review because Appellant's habeas petition was not challenging a removal order).

Scope of Review of Removal Orders in Courts of Appeals Under REAL ID Act:

1st Circuit

Silva v. Gonzales, __F.3d__, 2006 WL 1954969 at *1 (1st Cir. July 14, 2006) ("Here, the petitioner argues that the IJ erred in characterizing his state-court conviction as one for an aggravated felony. Because this argument poses an abstract legal question, we have jurisdiction to entertain it."); *Kaweesa v. Gonzales*, 450 F.3d 62, 67-68 (1st Cir. 2006); *Boakai v. Gonzales*, 447 F.3d 1 (1st Cir. 2006) (no review of equitable tolling issue in criminal alien's petition for review under REAL ID Act because issue presented only a factual question); *Chahid Hayek v. Gonzales*, 445 F.3d 501, 507 (1st Cir. 2006) (BIA's finding that asylum application was untimely filed is a factual determination not subject to judicial review); *Mehilli v. Gonzales*, 433 F.3d 86, 93-94 (1st Cir. 2005).

The is no review of equitable tolling issue in criminal alien's petition for review under REAL ID Act because issue presented only a factual question.

2nd Circuit

Zhang v. Gonzales, __ F.3d __, 2006 WL 1901014, at **1-2 (2d Cir. June 12 2006) (finding no jurisdiction to review the BIA's determination that alien did not satisfy the extreme-hardship standard of § 1182(i)(1), where alien raised no question of law or constitutional claim); *Lin v. U.S. Dept. of Justice*, __ F.3d __, 2006 WL 1755289, at *3 (2d Cir. June 26, 2006); *Vargas-Sarmiento v. U.S. Dept. of Justice*, 448 F.3d 159, 164 (2d Cir. 2006) (what constitutes an aggravated felony is a reviewable question of law); *Avendano-Espejo v. Department of Homeland Security*, 448 F.3d 503, 505 (2d Cir. 2006) (no jurisdiction to review an IJ's discretionary denial of a section 212(c) waiver of removal); *Canada v. Gonzales*, 448 F.3d 560, 563-64 (2d Cir. 2006) (what constitutes a "crime of violence" is a reviewable question of law); *Guyadin v. Gonzales*, 449 F.3d 465, 468 (2d Cir. 2006) (IJ's balancing of factors is discretionary and not a question of law subject to review); *id.* at *3 ("An assertion that an IJ or the BIA misread, misunderstood, or misapplied the law in weighing factors relevant to the grant or denial of discretionary relief does not convert what is essentially an argument that the IJ and BIA abused their discretion into a legal question. Such legal alchemy would defeat the intent and the language of the INA."); *Bugayong v. INS*, 442 F.3d 67, 71 (2d Cir. 2006) (rejecting claim that purported legal errors made by IJ denying adjustment of status sought on the basis of "extreme hardship" provided this Court with jurisdiction to review the IJ's exercise of discretion); *Saloum v. U.S. Citizenship & Immigration Services,* 437 F.3d 238, 243 (2d Cir. 2006); *Meraz De La Vega v. Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 180 (2d Cir. 2006); *Chen v. U.S. Dept. of Justice*, 434 F.3d 144, 152-55 (2d Cir. 2006).

3rd Circuit

Romanishyn v. Attorney General of U.S., __ F.3d __, 2006 WL 2041028, *3 (3d Cir. July 20, 2006) (finding that "[w]hether the IJ violated the requirements of due process when he limited the number of witnesses that Mr. Romanishyn could call at the immigration hearing, is a constitutional claim" that the court may review); *Alaka v. Atty. Gen. of U.S.*, __ F.3d __, 2006 WL 1994500, *10 (3d Cir. July 18, 2006) (finding no jurisdiction to review criminal alien's challenge to BIA's finding of abandonment of LPR status because challenge raised "fact-based inquiry," but finding jurisdiction over issue of whether alien's crime was "particularly serious" for purposes of qualifying for withholding of removal where she raised a question of law by asserting that the IJ made a legal error in determining that her crime was an aggravated felony); *Francois v. Gonzales*, 448 F.3d 645, 647 (3d Cir. 2006) (stating that under REAL ID Act, "we are limited to pure questions of law, and to issues of ap-

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DIGEST OF REAL ID ACT DECISIONS

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plication of law to fact, where the facts are undisputed and not the subject of challenge," but then appearing to review criminal alien's factual claims concerning CAT); *Jilin Pharmaceutical USA, Inc. v. Chertoff*, 447 F.3d 196, 206 n.16 (3d Cir. 2006) (finding no district court jurisdiction over constitutional challenge to visa revocation because claim not raised in a petition for review and Section 242(a)(2)(D) does not apply to district court action brought pursuant to 28 U.S.C. §§ 1331, 2201); *Sukwanputra v. Gonzales*, 434 F.3d 627, 634-35 (3d Cir. 2006); *Kamara v. US Attorney General*, 420 F.3d 202, 210-11 (3d Cir. 2005); *see also Bakhtriger v. Elwood*, 360 F.3d 414, 425 (3d Cir. 2004) (pre-REAL ID case which has helpful language distinguishing between legal and factual claims).

After the REAL ID Act, the only claims that survive the jurisdictional bar to review of the BIA's finding that an asylum application is untimely are "constitutional claims or matters of statutory construction."

4th Circuit

Jean v. Gonzales, 435 F.3d 475, 480-81 (4th Cir. 2006); *Higuit v. Gonzales*, 433 F.3d 417, 420 (4th Cir. 2006).

5th Circuit

Okafor v. Gonzales, __F.3d__, 2006 WL 1991412 at *2 (5th Cir. July 18, 2006) (whether or not signing of an oath satisfied the public ceremony requirement for naturalization was a reviewable question of law; "this petition presents a question of law rather than a question of fact because both sides agree about the underlying factual sequence and disagree only about the *legal significance* of those facts") (emphasis in original); *Marquez-Marquez v. Gonzales*, __ F.3d __, 2006 WL 1851244, *8 (5th Cir. July 6, 2006) ("a challenge to a determination that in the exercise of discretion favorable relief under section 212(c) is not merited does *not* present a question of law or a constitutional claim") (emphasis in original); *Wilmore v. Gonzales*, __ F.3d __, 2006 WL 1828644, **3-4 (5th Cir. July 5, 2006) (stating that "the Real ID Act does not provide this court with jurisdiction to review" the BIA's determination with respect to "'extreme cruelty'" as that is a discretionary determination); *Jean v. Gonzales*, __ F.3d __, 2006 WL 1577914, at *5 (5th Cir. June 9, 2006); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 319 (5th Cir. 2005);

6th Circuit

Almuhtaseb v. Gonzales, __ F.3d __, 2006 WL 1971645, *4 (6th Cir. July 14, 2006) (holding that, after the REAL ID Act, the only claims that survive the jurisdictional bar to review of the BIA's finding that an asylum application is untimely are "constitutional claims or matters of statutory construction"; thus there is not review over a finding of no extraordinary circumstances because that is a "predominantly factual determination"); *Elia v. Gonzales*, 431 F.3d 268, 276 (6th Cir. 2005) (noting that, to the extent criminal alien raised a factual question regarding the issue of equitable estoppel, the Court lacked jurisdiction over such question).

7th Circuit

Rosales-Pineda v. Gonzales, __F.3d__, 2006 WL 1667695 (7th Cir. June 19, 2006) (question of whether the IJ's reliance on the "rap sheet" was contrary to statute was a question of law subject to review); *Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006); *Sokolov v. Gonzales*, 442 F.3d 566, 569 (7th Cir. 2006); *Mabasa v. Gonzalez*, 440 F.3d 902, 906 (7th Cir. 2006); *Vasile v. Gonzales,* 417 F.3d 766, 768-69 (7th Cir. 2005); *Hamid v. Gonzales,* 417 F.3d 642, 647-48 (7th Cir. 2005) (where alien's contention "comes down to whether the IJ correctly considered, interpreted, and weighed the evidence presented" in determining whether torture was likely, the contention is "factual" in nature).

8th Circuit

Hanan v. Gonzales, 449 F.3d 834, 837 (8th Cir. 2006) (no judicial review over claim that alien was improperly denied CAT because "[t]hese are challenges to factual determinations by the IJ"); *Suvorov v. Gonzales,* 441 F.3d 618, 621 (8th Cir. 2006) (determination of whether or not a marriage was entered into in good faith is a "discretionary factual determination" that is not reviewable because it does not raise a question of law); *Reyes v. Gonzales*, 436 F.3d 842, 843 (8th Cir. 2006); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Grass v. Gonzales*, 418 F.3d 876, 878 (8th Cir. 2005).

9th Circuit

Morales-Alegria v. Gonzales, __F.3d __, 2006 WL 1529033 at *1 (9th Cir. 2006) (what constitutes an aggravated felony is a reviewable question of law); *Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 982 (9th Cir. 2006) (alien's claim that his conviction for being under the influence of a controlled substance is not a conviction for immigration purposes is a reviewable question of law); *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006) (stating that court lacks jurisdiction to reweigh the evidence when reviewing the merits of the agency's decision denying relief to a criminal alien, but then appearing to review factual aspects of the BIA's determination that alien committed particularly serious crime); *Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006) (finding that section 242(a)(2)(B) did not preclude court's jurisdiction to review BIA's interpretation of statute defining "immediate relative" because it was a purely legal claim); *Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005)("Should there be any doubt about the meaning of the term 'questions of law' in

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the REAL ID Act, the legislative history makes it abundantly clear this term refers to a narrow category of issues regarding statutory construction."), *petition for panel reh'g granted* July 3, 20066, *oral argument heard* July 25, 2006; *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 929-30 (9th Cir. 2005).

"REAL ID Act does not violate the Suspension Clause of the Constitution because it provides, through review by a federal court of appeals, an adequate and effective remedy to test the legality of an alien's detention."

10th Circuit

Vargas v. Department Of Homeland Security, __ F.3d __, 2006 WL 1689293, *2 (10th Cir. 2006) ("Because Mr. Vargas's challenge to the characterization of his conviction [as an aggravated felony] raises such a question of law, we have jurisdiction to review it."); *Ballesteros v. Ashcroft*, __ F.3d __, 2006 WL 1633739, **4-6 (10th Cir. June 14, 2006); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. May 12, 2006) (reviewable questions of law are "those issues that were historically reviewable on habeas - constitutional and statutory-construction questions, not discretionary or factual questions."); *id.* at *6 (BIA's construction of statutory requirement for filing asylum applications within one-year of arrival into United States is reviewable question of law); *Schroeck v. Gonzales*, 429 F.3d 947, 951 (10th Cir. 2005).

11th Circuit

Martinez v. U.S. Atty. Gen., 446 F.3d 1219, 1221 (11th Cir. 2006) (BIA discretionary determination of "exceptional hardship" is not reviewable because it is neither a question of law nor a constitutional claim); *Savoury v. U.S. Atty. Gen*, 449 F.3d 1307 (11th Cir. 2006) (BIA's determination of what constitutes an alien "lawfully admitted for permanent residence" is a reviewable question of law); *Chacon-Botero v. U.S. Atty. Gen.*, 427 F.3d 954, 957 (11th Cir. 2005); *Balogun v. U.S. Atty. Gen.*, 425 F.3d 1356, 1359-1360 (11th Cir. 2005).

REAL ID Act is Constitutional:

Alexandre v U.S. Attorney General, __ F.3d __, 2006 WL 1678202, at *1 (11th Cir. Apr. 12. 2006) ("REAL ID Act does not violate the Suspension Clause of the Constitution because it provides, through review by a federal court of appeals, an adequate and effective remedy to test the legality of an alien's detention"); *Enwonwu v. Gonzales,* 438 F.3d 22, 33 (1st Cir. 2006) (rejecting argument that REAL ID Act's transfer provision is unconstitutional under the Suspension Clause because the petition-for-review process did not provide alien with sufficient fact-finding opportunities; and reasoning that "[t]his case presents only pure questions of law, and so the Act encompasses at least the same review and the same relief as to Enwonwu as were available under prior habeas law"); *Maiwand v. Ashcroft*, No. 04-3185, 2006 WL 2340466, at *8 (Sept. 26, 2005) ("A petition for review filed with the appropriate court of appeals provides an adequate forum for testing the legality of removal orders.") (appeal pending); *Iasu v. Chertoff*, 426 F. Supp. 2d 1124, 1128-29 (S.D. Cal. 2006) ("The Suspension Clause is not violated here because the REAL ID Act provides an adequate and effective substitute for habeas corpus through direct review in the courts of appeals. Since Petitioner had an opportunity to pursue review of the order of removal . . . , he had available to him an avenue of independent judicial review. The Constitution requires no more."); *Saavedra De Barreto v. INS*, 427 F. Supp. 2d 51, 58-62 (D. Conn. March 10, 2006) (rejecting Suspension Clause challenge to REAL ID Act and explaining that aliens have opportunities to develop a factual record in immigration proceedings prior to judicial review in the courts of appeals); *see also Brempong v. Chertoff*, No. 05-733, 2006 WL 618106, at *9-10 (D. Conn. Mar 10, 2006) (same) (unpublished).

REAL ID Act's Jurisdictional Amendments Apply Retroactively:

Ballesteros v. Ashcroft, __ F.3d __, 2006 WL 1633739, *2 (10th Cir. June 14, 2006) ("Congress expressly intended this new provision to apply retroactively to all final deportation orders."); *Savoury v. U.S. Atty. Gen*, 449 F.3d 1307, 1311 (11th Cir. 2006) (REAL ID applies retroactively "to all pending proceedings regardless of the date of the final administrative order"); *Vargas-Sarmiento v. U.S. Dept. of Justice*, 448 F.3d 159, 164 (2d Cir. 2006); *Ali v. US Attorney General,* 443 F.3d 804, 809 (11th Cir. 2006); *Hamdan v. Gonzales*, 425 F.3d 1051, 1057 (7th Cir. 2005) ("Furthermore, in the REAL ID Act, Congress explicitly mandated that the amendment restoring our jurisdiction be retroactive"); *Jordon v. Attorney General of U.S.*, 424 F.3d 320, 327 (3d Cir. 2005) ("We have also acknowledged that Congress left no doubt that the REAL ID Act's changes to § 1252(a)(2)(D) would be retroactive"); *Tovar-Alvarez v. U.S. Attorney General*, 427 F.3d 1350, 1352 (7th Cir. 2005) (same); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 319 (5th Cir. 2005) (same); *Ishak v. Gonzales*, 422 F.3d 22, 29-30 (1st Cir. 2005) (same); *Kamara v. US Attorney General*, 420 F.3d 202, 210 (3d Cir. 2005) (same); *Lopez v. Gonzales*, 417 F.3d 934, 936 (8th Cir. 2005) (same).

Under REAL ID Act, There is No Habeas Jurisdiction to Review Removal Orders:

Almaghzar v. Gonzales, 450 F.3d 415, 418 (9th Cir. 2006) ("The REAL ID Act eliminates habeas jurisdiction under 28 U.S.C. § 2241 over final orders of deportation, exclusion, and

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removal."); *Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006) ("Congress has eliminated habeas review as to most types of immigration claims."); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 512 (5th Cir. 2006) ("The REAL ID Act thus supplies, in this context, the 'clear statement of congressional intent to repeal habeas jurisdiction' that the *St. Cyr* Court found lacking."); *Gittens v. Menifee*, 428 F.3d 382, 383 (2d. Cir. 2005) ("The REAL ID Act "eliminates habeas corpus review of orders of removal."); *Ishak v. Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005) ("The plain language of these amendments, in effect, strips the district court of habeas jurisdiction over final orders of removal, including orders issued prior to the enactment of the REAL ID Act . . . Congress now has definitely eliminated any provision for jurisdiction"); *cf. Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006) ("in cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241").

Cases Previously Governed by the Transitional Rules for Judicial Review are Now Governed by 8 U.S.C, § 1252(a) Pursuant to REAL ID § 106(d):

Onikoyi v. Gonzales, __F.3d__, 2006 WL 1652527, *2 (1st Cir. 2006) ("Thus, under the REAL ID Act, transitional rules cases are now subject to the jurisdictional rules currently codified in 8 U.S.C. § 1252"); *Masnauskas v. Gonzales*, 432 F.3d 1067, 1069 (9th Cir. 2005); *Elia v. Gonzales,* 431 F.3d 268, 272-73 (6th Cir. 2005), *cert. denied* __ U.S. __, 126 S. Ct. 2019 (2006); *Tovar-Alvarez v. U.S. Attorney General*, 427 F.3d 1350, 1351 (11th Cir. 2005) ("The Act made the permanent rules applicable to all petitions for review"); *Paripovic v. Gonzales*, 418 F.3d 240, 241 (3d Cir. 2005).

Cases Improperly Transferred Under REAL ID Act § 106(c):

Chen v. Gonzales, 435 F.3d 788, 789 (7th Cir. 2006) (improperly transferred because habeas petition filed after REAL ID Act's enactment).

REAL ID Act §§ 101(e) and 101(g) Apply to Pending Cases:

Rodriguez-Galicia v. Gonzales, 422 F.3d 529, 536 n.6 (7th Cir. 2005) (REAL ID Act § 101(e)'s modification of the standards by which this Court reviews the agency's determination concerning the availability of corroborating evidence applies to pending cases); *Chen v. Gonz*ales, 434 F.3d 212, 218 (3d Cir. 2005) (Section 101 (e) applies to pending cases); *Lin v. U.S. Dept. of Justice*, 416 F.3d 184, 188 (2d Cir. 2005) ("We note that the 1,000 person-per-year cap has been lifted by § 101(g) of the recently enacted REAL ID Act.").

REAL ID Act's Asylum Amendments:

Chen v. U.S. Atty. Gen., __ F.3d __, 2006 WL 1867470, *3 (2d Cir. June 23, 2006) (noting in dicta that Congress' asylum amendments in the REAL ID Act "would seem to overrule certain holdings of *Secaida-Rosales* and other decisions of this Court").

By Papu Sandhu, OIL
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INDEX TO CASES SUMMARIZED IN THIS ISSUE

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Arbor. She joined the Antitrust Division of the U.S. Department of Justice through the Honors Program in October 1999, where she worked until October 2005. She then served as Assistant Chief Counsel in ICE's Arlington Office.

Colette Winston is a graduate of Georgetown University, University of Maryland School of Law, and the Universite Catholique de Louvain. Ms. Winston worked as a Trial Attorney in the Torts Branch of the Civil Division for 22 years (with a 7-month detail to OIL) and prior to joining OIL was an Administrative Judge on the Department of Interior Board of Indian Appeals.

NOTED — OIL attorney **Joan Smiley** appeared in a photo in the July 22, Sports Section of the Washington Post where it was noted that she was enjoying the food fair at a Nationals' game.

INDEX TO FEDERAL COURTS*

*See p. 23 for the Cases Index

HUMAN TRAFFICKING REPORT

The Department of State has issued its 2006 Report on Trafficking in Persons. "Trafficking in persons is a form of modern-day slavery, and we strive for its total abolition. Future generations will not excuse those who turn a blind eye to it," said Secretary of State Condoleezza Rice. Human traffickers prey on the most vulnerable and turn a commercial profit at the expense of innocent lives.

The report can viewed or downloaded from the State Department's web site at:

http://www.state.gov/g/tip/rls/tiprpt/2006/

INSIDE OIL

Congratulations to OIL attorneys **Anthony Payne** and **Patricia Smith** who have been promoted to Senior Litigation Counsel.

A warm welcome to the following new OIL attorneys:

Richard Zanfardino is a graduate of North Carolina State University, and Catholic University Law School. After graduation from law school, he was an attorney with the Board of Immigration Appeals, where he has worked for the past 10 years prior to joining OIL.

Jeffery Leist is a graduate of Illinois Wesleyan University and American University, Washington College of law. Mr. Leist has been with OIL for the last two years as a law clerk.

Mona Maria Yousif received her undergraduate degree and law degree from the University of Michigan in Ann

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Pictured from L to R: Jeff Leist, Mona Yusif, Richard Zanfardino, Colette Winston

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.

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