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

Immigration Litigation Bulletin

Vol. 11, No. 7 **VISIT US AT: https://oil.aspensys.com** *July 2007*

LITIGATION HIGHLIGHTS

Inside

Second Circuit holds that BIA lacks statutory authority to presume persecution of spouses of victims of forced abortion or forced sterilization

Concluding that "the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer," the Second Circuit held in ***Lin v. United States Department of Justice***, __F.3d__, 2007 WL 2032066 (2d Cir. July 16, 2007)(*en banc*), that "the BIA lacks authority to adopt a policy that presumes that every person whose spouse was subjected to a forced abortion or sterilization has himself experienced persecution based on political opinion." Accordingly, the court overruled *Matter of C-Y-Z-*, 21 I&N Dec. 951 (BIA 1997)(*en banc*), where the BIA had held that "past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse," so that spouses of individuals directly victimized by coercive family planning are *per se* eligible for asylum under INA § 101(a)(42).

"The statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer."

In this consolidated petition for review, three Chinese citizens sought asylum on the basis that they had been persecuted by China's coercive family planning policies. All three claimed that their girlfriends or fiancées had been forced to have an abortion, and therefore they were entitled to asylum under *Matter of C-Y-Z-*. The BIA refused to extend the *C-Y-Z-* to boyfriends, fiancées, and other unmarried partners and rejected their claim to asylum on that basis. Petitioners then challenged the BIA's decisions in the Second Circuit. In *Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005), the court remanded the petitions to the BIA to further explain its rationale in *C-Y-Z-* and to clarify the status of boyfriends and fiancées under the asylum statute. On remand, the BIA in *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006)(*en banc*), reaffirmed its core holding in *C-Y-Z*, that under INA § 101(a)(42) as amended by IIRIRA § 601(a), an applicant opposed to a spouse's abortion or sterilization could establish past persecution. However, the BIA declined to extend the holding to unmarried applicants based on a partner's abortion or sterilization. In the latter

(Continued on page 2)

13th Annual Immigration Law Seminar - Sept 17-21

The Office of Immigration Litigation will present its 13th Annual Immigration Law Seminar on September 17-21, 2007 in Washington, D.C. The seminar will be repeated on October 1-5.

This is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law. Among the topics that will be covered are: categories of admission, immigrants and non-immigrants; removal grounds, including security grounds of removal;

(Continued on page 21)

Second Circuit overrules C-Y-Z-

(Continued from page 1)

cases, an applicant would have to show if he or she qualifies under the terms of the "other resistance" clause in INA § 101(a)(42). Following the BIA's decision in *S-L-L-*, the Second Circuit ordered rehearing *en banc*. The government in its brief argued principally that the court owed *Chevron* deference to the BIA's interpretation.

The Second Circuit, in a fractured decision authored by Judge Parker, held that the plain language of the statute dictates that only applicants who can show that they themselves have suffered persecution or must suffer persecution are eligible for asylum. The statute, said the court, "does not provide that a spouse – and *a fortiori*, a boyfriend or fiancé – of someone who has been forced to undergo, or is threatened with, an abortion or sterilization is automatically eligible for 'refugee' status." Consequently, because the intent of Congress is clear, that is the "end of the matter" under *Chevron,* said the court, and "we are required to refrain from deferring to an agency's contradictory interpretation."

The *en banc* majority acknowledged that "an individual whose spouse undergoes, or is threatened with a forced abortion or involuntary sterilization may suffer a profound emotional loss as a partner and a potential parent. But such a loss does not change the requirement that we must follow the "ordinary meaning" of the language chosen by Congress, according to which an individual does not automatically qualify for "refugee" status on account of a coercive procedure performed on someone else," explained the court. On the other hand, said the court, the phrase "'other resistance' under the amended refugee definition, "is ambiguous and leaves room for the BIA's reasonable interpretation where the applicant relies on something beyond his spouse's or partner's persecution." However, it added that whatever interpretation the BIA chooses to give to this phrase "it is clear that the fact that an individual's spouse has been forced to have an abortion or undergo an involuntary sterilization does not, on its own, constitute resistance to coercive family planning policies."

> ***"The majority has gone out of its way to create a circuit split were one exist, thereby frustrating the BIA's uniform enforcement of a national immigration policy."***

On the merits, the majority agreed with the BIA that none of the petitioners qualified for asylum "as a result of the treatment of their girlfriends or fiancées. Instead, each petitioner must demonstrate "other resistance to a coercive population control program" or "a well founded fear that he . . . will be . . . subject to persecution for such . . . resistance."

In an opinion concurring in the judgment, Judge Katzman, joined by three other judges, criticized the majority for reaching an issue not necessary to the disposition of the cases. He noted that every judge on the court agreed that the BIA's interpretation of the statute as applied to boyfriends and fiancés was reasonable and the case could have been resolved on that basis. "Instead, the majority has gone out of its way to create a circuit split were none exist, thereby frustrating the BIA's uniform enforcement of a national immigration policy." Judge Katzman would have deferred to the BIA's interpretation in *C-Y-Z-,* explaining that the majority focus on the IIRIRA amendment was misplaced and that it should have considered the entirety of INA § 101(a)(42) to determine whether the statute is ambiguous. "In enacting the INA," wrote Judge Katzman, "Congress established a framework for determining when asylum relief should be provided to such individuals, and in doing so, it delegated considerable authority to the BIA to fill in statutory gaps and define the broad language used in the INA. It is in situations such as these that we should be particularly mindful of the views of the agency charged by Congress with administering the statute, views that will reflect the agency's considerable experience and expertise."

In an opinion concurring in the judgment, Judge Sotomayor, joined by Judge Pooler, also criticized the majority opinion because in his view it "marks an extraordinary and unwarranted departure from our longstanding principles of deference and judicial restraint." Noting that he agreed with Judge Katzman, he said that he needed to "write separately" because "the majority's zeal in reaching a question not before us requires the unprecedented step of constricting the BIA's congressionally delegated powers-a decision whose ramifications we are ill-prepared, given the procedural posture of this case, to understand or appreciate fully."

Judge Calabresi wrote an opinion concurring in part and dissenting in part. He agreed with the majority that the refugee definition as amended by IIRIRA § 601, grants *per se* refugee status only to a person who has been forced to abort a pregnancy or undergo a forced sterilization. However, in his view the majority and the concurrences went further, albeit in different directions, and Judge Calabresi found that "inappropriate." Ultimately, he would have again remanded the case to the BIA to allow it to make a determination under INA § 101(a)(42)(A), and issue that it had not considered.

By Francesco Isgro, OIL

Contact: Patricia Buchanan, AUSA
☎ 212-637-2800

See the guidance issued by OIL in light of the *Lin* decision at p. 20.

The "state-created danger" claims in removal cases

As the availability of relief from removal has been narrowed for criminal aliens, creative counsel experiment with new types of claims for relief, often borrowing theories from other areas of law. One such last resort is to assert that the due process clause of the Fifth Amendment includes a substantive right to be free from government action that increases a person's risk of harm in a way or to an extent that is unconscionable. This "state-created danger" theory has now appeared in some form in at least thirty immigration cases in courts in eight different Federal circuits

Recognition of the State-Created Danger Exception

As a rule, the due process clause generally provides no constitutional right to government protection from third-party harm. Theories of exceptions from that general rule gained general acceptance in constitutional tort cases from Supreme Court dicta in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, state child protective services received complaints that a child was being abused by his father and took various steps to protect him, but did not remove the child from his father's custody. The father finally beat the child so severely that he suffered permanent brain injury. The mother obtained custody and sued the state for damages, alleging that the state failed to protect the child. In its decision, the Supreme Court held that *DeShaney* had not established a substantive due process right to state protection, but acknowledged the possibility that under some circumstances a "special relationship" between the state and a victim of violence might support the existence of such a right. The Court also noted that the state had taken no affirmative action that placed DeShaney in greater danger than he had been in before state involvement.

In *DeShaney* and the four subsequent decisions in which the Supreme Court addressed the issue, the Court has never found the existence of facts sufficient to establish any exception to the general rule that the due process clause does not require the government to protect individuals against third party harm. The Court has repeatedly expressed "reluctance to expand the doctrine of substantive due process," and counseled "against recognizing a new 'fundamental liberty interest[s]'." *Chavez v. Martinez*, 538 U.S. 760, 776 (2003).

Nonetheless, in constitutional torts cases, virtually all Federal courts have held that *DeShaney* recognized exceptions under two theories: a "special relationship" theory and a "state-created danger" theory. Every court of appeals has acknowledged the existence of these exceptions, although the Fifth Circuit has since expressed doubt. Nine circuits have found circumstances in which a plaintiff was permitted to reach trial to seek damages on a constitutional tort theory based on a constitutional due process right to government protection.

The Supreme Court has carefully limited judicial power to second-guess decisions on policy questions constitutionally entrusted exclusively to the political branches of government.

Application of State-Created Danger Theory to Immigration

The Supreme Court also has not addressed the possibility that the exceptions suggested by *DeShaney* could be used to affirmatively compel government protection or otherwise enjoin government conduct, preventing harm rather than compensating for it after the fact. Nonetheless, the government lost the first cases that asserted substantive due process rights based on *DeShaney* in immigration proceedings. *See Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996); *Builes v. Nye*, 239 F.Supp.2d 518 (M.D.Pa. 2003); *see also Rosciano v. Sonchik* (Civ-01-472), 2002 WL 32166630 (D. Ariz. Sep. 9, 2002) (although unpublished, *Rosciano* was cited in *Builes*, and has since been cited regularly in aliens' claims). Rosciano, Builes, and virtually all of the aliens asserting the theory since have been convicted aggravated felons who subsequently cooperated in criminal investigations.

Since 2003, the tide has turned in immigration cases raising *DeShaney* theories. First, the government learned to remand cases in which the record is deficient for consideration of withholding or protection from torture. Second, the government began to understand the limitations of the *DeShaney* theories and to ensure that the alien's claims did not remain uncontested in the record. *Cf. Momennia v. Estrada*, 268 F.Supp.2d 679 (N.D. Tex. 2003). Most important, the government stopped attempting to avoid the issue through jurisdictional devices, and instead challenged both the application of the theories to immigration cases and on the merits of the alien's claims. Challenges to the creation of a substantive due process right by the courts in immigration cases are based on two well-developed bodies of Supreme Court cases: First, the Supreme Court has repeatedly admonished courts to exercise caution in creating or expanding rights under the Due Process clause. *See, e.g., Chavez v. Martinez*, *supra*. Second, the Supreme Court has carefully limited judicial power to second-guess decisions on policy questions constitutionally entrusted exclusively to the political branches of government.

(Continued on page 4)

State-created danger

See, e.g., Fiallo v. Bell, 430 U.S. 787 (1977).

Success Against the Theory in Courts of Appeals

The breakthrough against the application of state-created danger in immigration litigation came in *Kamara v. DHS*, 420 F.3d 202 (3d Cir. 2005). Although the court remanded to the agency on an issue of torture protection, the court specifically held "that the state-created danger exception has no place in our immigration jurisprudence," citing *Fiallo*. 420 F.3d at 216-18. The decision vitiated the published holding in *Builes* and several other unpublished district court decisions in the circuit.

Meanwhile, slightly different state-created danger issues were raised in the Fourth and Seventh Circuits in *Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005), and *Wang v. Gonzales*, 445 F.3d 993 (7th Cir. 2006). The aliens in those cases did not assert an abstract, absolute right against being placed in danger, but rather, based on state-created danger theories, claimed that the asylum and torture statutes should be interpreted to provide relief to aliens who faced third-party danger due to their cooperation. Both courts rejected these claims, holding that such an interpretation would "interfere with the other branches' primacy in foreign relations." *Saldarriaga*, 402 F.3d at 467; *see also Wang v. Gonzales*, 445 F.3d at 999 ("we are not at liberty to rewrite the statute so as to include her claim").

In the First Circuit prior to the REAL ID Act, a district court held evidentiary hearings in a state-created danger case, receiving testimony from several witnesses who had testified before the immigration court. After the Act, the court published its transfer order, including extensive factual findings and a recommendation that the court of appeals should enjoin the alien's deportation based on a state-created danger theory. *Enwonwu v. Chertoff*, 376 F.Supp.2d 42 (D. Mass. 2005). The First Circuit remanded the case to the Board for clarification of a torture issue, but agreed with the Third Circuit in *Kamara* that courts should not entertain challenges to removal orders based on the state-created danger theory. *See Enwonwu v. Gonzales*, 438 F.3d 22, 30-31 (1st Cir. 2006).

The state-created danger issue was most recently addressed in the Ninth Circuit. In *Morgan v. Gonzales*, the alien drug smuggler had been convicted and cooperated in 1982. Morgan asserted that he had been given some assurance that he would be permitted to remain in the United States, and the INS had issued him employment authorization while he was cooperating. At the conclusion of his cooperation, the United States Attorney told Morgan to return home, but no one told the INS. In 2000, the INS recommenced deportation proceedings. No law enforcement agency would request on Morgan's behalf an "S" visa (a visa under 8 U.S.C. § 1101(a)(15)(S) for certain cooperating witnesses), partly because records of his cooperation no longer existed. The immigration court and the Board both held that they lacked jurisdiction to grant a "constructive S visa," or to grant relief from removal under theories of promissory or equitable estoppel, or state-created danger. Morgan petitioned for habeas corpus. Given experience with an inadequate record in *Rosciano*, the government obtained an affidavit from the retired United States Attorney indicating that Morgan's cooperation had been valuable, but that there had been no non-deportation agreement with Morgan.

After transfer to the court of appeals, Morgan moved for the appointment of a special master for additional fact-finding. The government successfully opposed the motion. In its decision on the merits of the case, the court held that exhaustion of the constitutional issue was not required, and remand to the district court for fact-finding under 28 U.S.C. § 2347(b)(3) was not needed because Morgan could identify no additional evidence to be adduced, and had not even "alleged a colorable claim upon which relief might be granted" based on estoppel or a state-created danger finding. *Morgan v. Gonzales*, — F.3d —, 2007 WL 2127707 (9th Cir. Jul. 26, 2007).

Regarding state-created danger, the court in *Morgan* noted that it had previously held in *Wang* that the theory could be applied to enjoin deportation. The theory therefore remains available in immigration cases in the Ninth Circuit. The court then distinguished Morgan's situation from that in *Wang* in several ways, describing the government conduct in *Wang* in extreme terms. The result appears to be very favorable to the government, making *Wang* easily distinguishable, and setting the standard for relief under a state-created danger theory far higher than mere increased danger to a cooperating witness.

The application of state-created danger theory to immigration has not been resolved in most circuits, and is still being raised in various circuits. An immigration case raising the state-created danger theory is currently pending before the Second Circuit, and the theory has been asserted in several cases still before the immigration courts. So long as government attorneys remain vigilant to recognize the issue, take the time to understand the theory, develop the record, remand deficient records and cases with extreme facts for additional development, and emphasize the well-established case law discouraging judicial intervention in immigration policy, the government should prevail against state-created danger claims.

By Andy MacLachlan, OIL
☎ 202-514-9718

ASYLUM LITIGATION UPDATE

Recent developments in social group litigation

2006 and 2007 Board Decisions Establishing At Least Four Requirements For A Social Group

As discussed in a prior article, in 2006 and January 2007 the Board of Immigration Appeals issued two new decisions refining the definition of the phrase "particular social group" within the meaning of United States law. *See Matter of C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006) (holding that "non-criminal informants working against the Cali drug cartel" in Colombia are not a particular social group); *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007) (holding that affluent Guatemalans are not a social group). The Board reaffirmed that the immutable/ fundamental characteristic approach established in *Matter of Acosta*, 23 I. & N. Dec. 211, 233 (BIA 1985), which defines a social group as "a group of persons all of whom share a common, immutable characteristic." "The group characteristic must be one which "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* Most circuits have adopted the Board's immutability test. *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003); *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Meguenine v. INS*, 139 F.3d 28 (1st Cir. 1998); *Sarafie v. INS*, 23 F.3d 636 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

But in addition to the immutable/fundamental test, the Board concluded there are at least three other requirements needed to establish a social group: (1) a social group must have "social visibility" and be "recognizable and discrete" as a group by others in the community; *C-A-,* 23 I. & N. Dec. 951, 956; *A-M-E-*, 24 I. & N. Dec. at 74; (2) a social group requires "particularity" and cannot be defined exclusively by broad characteristics like wealth, *A-M-E-*, 24 I. & N. Dec. at 74-75; and (3) a social group refers to "a group of persons who share a common characteristic other than their risk of being persecuted" and "cannot be defined exclusively by the fact that [the group] is targeted for persecution." *C-A-*, 23 I. & N. Dec. at 956, 960; *see also A-M-E-*, 24 I. & N. Dec. at 74-75. In other words, a particular social group cannot be based on a shared broad characteristic, must have a distinct and visible social identity within the country, and that identity "cannot be defined exclusively by the fact that its members have been subjected to harm." *A-M-E-*, 24 I & N Dec. at 75 C-A- 23 I & N Dec. at 960. The Board has thus made clear that "particular social group" does not mean a persecuted group. The group must exist and be socially visible separate and apart from the persecution.

The Board has thus made clear that "particular social group" does not mean a persecuted group. The group must exist and be socially visible separate and apart from the persecution.

These additional requirements incorporate approaches developed by the courts of appeals, and internationally. *Compare C-A- and A-M-E- with Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003); *Sarafie*, 25 F.3d at 640; *Fatin*, 12 F.3d at 1240-41 (a social group cannot be too large, diverse, or broadly defined); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Saleh v. INS*, 962 F.3d 234, 240 (2d Cir. 1992) (a social group requires group-perception or -visibility, and that possession of broadly based characteristics such as youth and gender do not establish a social group); *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003) (a social group must exist independently of the persecution and cannot be defined by it). *See also* United Nations High Commissioner of Refugees, *Guidelines on International Protection: "Membership of a particular social group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*," para. 11, U.N. Doc. HCRGIP/02/02 (May 7, 2002) *See* UNHCR Guidelines, para. 11 (a "particular social group" is "a[] group of persons who share a common characteristic other than their risk of being persecuted"); *A. v. Minister for Immigration and Ethnic Affairs and Another (Australia 1997) 142 A.L.R. 331, 358,* per McHugh J. (Australia) (a social group "must exist independently of, and not be defined by the persecution"); *Islam v. Sec'y of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Sec'y of State for the Home Department ex parte Shah* (House of Lords, 1997), 2 W.R. 1015 (1999) (Lord Craighead) (" To define the social group by reference to the fear of being persecuted would be to resort to circular reasoning").

Second, Eighth, And Ninth Circuit Decisions At Odds With US Law

In *Gao v. Atty. Gen*, 440 F.3d 62 (2d Cir. 2006), the Second Circuit held that women whose marriages are arranged can and do constitute a "particular social group" of "women sold into forced marriages." The government has filed a petition for certiorari, seeking *vacatur* of this decision on the ground that the Second Circuit violated *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and had no authority to decide this

(Continued on page 6)

Social group litigation update

(Continued from page 5)

question, because it was not decided by the Board in the first instance. In addition, the Solicitor General has argued to the Supreme Court that the "particular social group" adopted by the Second Circuit "is irreconcilable with the Board's expert construction of that term." Government's Reply Brief , *Gonzales v. Gao*, No. 06-1264, at 6-7 (S.Ct.), *citing INS v. Aguirre-Aguirre*, 526 U.S. 415, 425. "Unlike the Board, the [Second Circuit] defined its social group in terms of the alleged persecution – 'women who have been sold into marriage,' [citation omitted] – and then held that the marriage into which the women have been 'sold' is 'persecu [tion],' *ibid*., and (to complete its circular reasoning) that the marriage is persecution 'on account of' membership in that group." *Id*. "Indeed, the Board has noted the conflict between its test for identifying a 'particular social group' and the Second Circuit's decision in this case." *Id., citing A-M-E-*, 24 I & N Dec. at 75. n. 7. In other words, the Second Circuit treated "particular social group" as meaning a persecuted group – which is not our law. This type of definition would have the effect of making all persecution, for whatever reason, a basis for asylum, and render the other grounds of persecution under the statute superfluous.

The Second Circuit's decision also conflicts with the Third Circuit's decision in *Lukwago*, 329 F.3d at 171, which has held that a "particular social group" cannot be defined by the persecution and must exist independently of it. If you are an AUSA and have an arranged marriage asylum case or a social group claim relying on *Gao* – in the Second or any other circuit – contact Margaret Perry (margaret.perry @ usdoj.gov). If you are an OIL attorney alert the Asylum Working Group member on your team and also contact Margaret Perry.

In *Hassan v. Gonzales* , 484 F.3d 513, 518 (8th Cir. 2007), the Eighth Circuit concluded that a woman who experienced past FGM was persecuted on account of her membership in a social group, "Somali females." The government has filed for panel rehearing on the ground that the Eighth Circuit violated *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), and had no authority to decide the social group question because it was not decided by the Board in the first instance. In addition, like the *Gao* decision, the Eighth Circuit's social group in *Hassan* is at odds with the Board's construction of that term. The Board requires particularity. *Matter of A-M-*, 24 I & N Dec. at 74-76*; Matter of C-A-*, 23 I & N Dec. at 957. This precludes an expansive social group of all women in a country like the one created by the Eighth Circuit in Hassan – which is a group defined exclusively by the broad characteristic of gender. While the Board has construed that FGM may be a basis for asylum, it has done so on theory that FGM can be persecution on account of membership in a narrow and particularized social group defined by tribal membership, gender, and opposition to the practice. *Matter of Kasinga*, 21 I & N Dec. 357 (BIA 1996). Again, if you are an AUSA or OIL Attorney and have a social group claim of all women in a country, or that relies on the *Hassan* decision, contact Margaret Perry and the Asylum Working Group member on your team.

The Second Circuit treated "particular social group" as meaning a persecuted group – which is not our law.

In *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005) (which the Eighth Circuit cited with approval in *Hassan*), the Ninth Circuit suggested, in the context of a plausibility analysis of an ineffective assistance of counsel claim, that a woman who experienced past FGM as a child is eligible for asylum on a theory that FGM is persecution on account of membership in a social group of all women in the country. However, *Mohammed* is not binding precedent even in the circuit that issued it. The Ninth Circuit did not – and could not – finally decide the merits of the social group question, because the court was deciding an ineffective assistance claim and merely addressing whether the female alien had a plausible claim for asylum. *See generally Zhang v. Gonzales*, 408 F.3d 1239, 1245-46 (9th Cir. 2005) (determination that a claim was plausible for ineffective assistance of counsel claim is not a binding construction of the statute). Furthermore, to the extent that the Ninth Circuit endorsed an expansive social group defined exclusively to be female gender, this is at odds with the Board's construction of the term. Again, contact Margaret Perry and your Asylum Working Group member if you have a social group case relying on *Mohammed*.

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court held that a federal court must accept an agency's reasonable construction of ambiguous statutory terms. The meaning of the phrase "particular social group" is ambiguous. *See, e.g., Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005); *Lukwago* 329 F.3d at 170-71 (3d Cir. 2003). Therefore, under *National Cable,* it appears that the Board has authority to construe that its decisions in *C-A-* and *A-M-E-* are the law for all circuits, and that any prior circuit case law like that above, which is inconsistent with these decisions, is unsound.

By Margaret Perry, OIL
☎ 202-616-9310

If you have an unusual asylum issue you would like to see discussed, you may contact Margaret Perry at:
202-6161-9310 or
margaret.perry@usdoj.gov

FURTHER REVIEW PENDING: Update on Cases & Issues

Asylum – Particular Social Group

The Solicitor General has filed a petition for certiorari in ***Gao v. Gonzales***, 440 F.3d 62 (2d Cir. 2006). The question presented is:

> Whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that women whose marriages are arranged can and do constitute a "particular social group" of "women sold into forced marriages," and that the alien would suffer "persecution" "on account of" that status.

Contact: Margaret Perry, OIL
☎ 202-616-9310

Asylum – Particular Social Group

On July 20, 2007, the Government filed a petition for panel rehearing in **Hassan v. Gonzales**, 484 F.3d 513 (8th Cir. 2007). The court's decision could be construed as deciding, in the first instance and without prior resolution of the question by the Attorney General, that all Somali women constitute a "particular social group" and that the alien, who underwent female genital mutilation in Somalia as a child, suffered persecution "on account of" that status so as to qualify for asylum.

Contact: Jennifer Paisner, OIL
☎ 202-616-8268

Asylum—Adverse Credibility

On June 18, 2007, the Ninth Circuit en banc heard oral arguments in ***Suntharalinkam v. Gonzales,*** 458 F.3d 1634 (9th Cir. 2006). The question presented is whether numerous minor discrepancies cumulatively add up to support an adverse credibility determination, and were those discrepancies central to the asylum claim of a Sri Lankan alien suspected as being a Tamil Tiger terrorist.

Contact: Frank Fraser, OIL
☎ 202-305-0193

Asylum—Disfavored Group

On May 11, 2007. the Solicitor General filed an opposition to a petition for certiorari in ***Sanusi v. Gonzales***, 188 Fed. Appx. 510 (7th Cir. July 24, 2006). The question presented is whether an alien who has demonstrated membership in a disfavored group must also show individual singling out for persecution to establish it is more likely than not that life or freedom would be threatened.

Contact: Frank Fraser, OIL
☎ 202-305-0193

REAL ID Act — Jurisdiction To Review Untimely Filed Asylum Application

In ***Ramadan v. Gonzales***, 479 F.3d 647 (9th Cir. 2007), the Ninth Circuit held that the REAL ID Act permits review of the application of law to undisputed facts, and that the court has jurisdiction to review a decision not to consider an untimely filed asylum application.

The 9th Circuit has *sua sponte* requested the parties to file supplemental briefs on whether the case should be heard *en banc*. The revised decision upon panel rehearing had stated that no further petitions for rehearing or rehearing en banc will be entertained. The government supplemental brief was filed on June 5, 2007.

Contact: Bryan Beier, OIL
☎ 202-514-4115

Jurisdiction — Sua Sponte Reopening

In ***Tamenut v. Gonzales***, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case.

On July 19, 2007, the court ordered that the case be submitted to the en banc court without oral argument.

Contact: Jennifer Paisner, OIL
☎ 202-616-8268

Constitution — Denial of 212(c) Relief Violates Equal Protection Clause

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection because the INS made "212(c) relief available to permanent residents who retroactively became aggravated felons, but who had committed deportable offenses at the time of their conviction, and not to those permanent residents who retroactively became aggravated felons, but who had not committed deportable offenses at the time of their convictions."

Contact: Alison R. Drucker, OIL
☎ 202-616-4867

BIA—Power to Issue Removal Order

On April 30, 2007, the Solicitor General filed an opposition to a petition for certiorari in ***Lazo v. Gonzales***, 462 F.3d 53 (2d Cir. 2006). The question presented is whether an IJ finding of removability is an "order of removal."

Contact: Frank Fraser, OIL
☎ 202-305-0193

Crime Involving Moral Turpitude

The question presented to the *en banc* court in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), is whether a conviction for accessory after the fact is a crime involving moral turpitude. The case was argued on December 13, 2006.

Contact: Frank Fraser, OIL
☎ 202-305-0193

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That There Is No Pattern Or Practice Of Persecution Of Christians In Indonesia

In ***Sipayung v. Gonzales***, __F.3d__, 2007 WL 1829370 (1st Cir. June 27, 2007) (Torruella, *Lynch*, Fuste), the court affirmed the denial of petitioner's request for withholding of removal to Indonesia and held that there is no pattern or practice of persecution against Christians there.

Petitioner claimed that as a practicing Christian, he would suffer religious persecution if returned to Indonesia. He claimed that in Indonesia he had been subject to "name calling at school and to 'weird looks' when he carried his Bible in public, and people once threw stones at the door of the home of a fellow church member while he was there to worship." An IJ denied asylum, holding that petitioner failed to file within one year of entry in the U.S. and because he had not met his burden of proof. The BIA affirmed.

The court upheld the BIA's decision. First, the court held that it had no jurisdiction to review the IJ's determination that the asylum claim was untimely. Then, turning to the withholding claim, held that "[t]hese sporadic incidents, over the course of several years, do not amount to persecution, even considered cumulatively." The court also noted that petitioner's parents continued to practice Christianity in Indonesia unharmed and that country conditions have improved. Finally, the court rejected petitioner's argument that a pattern or practice of persecution against Christians existed in Indonesia. The court found that while there is continuing violence against Christians, the government of Indonesia is making efforts to curtail the violence.

Contact: Kate Moore, OIL
☎ 202-305-7099

SECOND CIRCUIT

■ Second Circuit Remands Case For Findings As To Whether Ex-KGB Agents Are Members Of A Particular Social Group

In ***Koudriachova v. Gonzales***, __F.3d__, 2007 WL 1815576 (2d Cir. June 26, 2007) (*Cardamone*, Walker, Raggi), the court remanded petitioner's asylum claim with instructions for the BIA to determine whether defected KGB intelligence agents constitute a particular social group and, if so, whether petitioner had a well-founded fear of persecution in Russia.

> "It is clear that a shared past experience, such as prior military leadership, can be the type of immutable characteristic that will characterize a particular social group."

Petitioner, a native and citizen of Russia, claimed that his status as a former KGB agent who then defected to the U.S. would result in his persecution by government authorities. An IJ denied his claim, finding that petitioner was not credible. The BIA affirmed, holding that even assuming petitioner was credible, he failed to establish persecution on account of membership in a particular social group or because of political opinion. The BIA reasoned that defected KGB agents do not constitute a particular social group because defected KGB agents do not maintain "'any associational relationship' or share 'any recognizable characteristic.'" Petitioner then filed a motion to reopen offering new evidence, which the BIA also denied. Petitioner filed a petition for review of both decisions.

The Second Circuit held that the BIA had misapplied its own precedent to determine that defected KGB agents did not constitute a particular social group. The court explained that under *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), neither a voluntary associational relationship nor an element of cohesiveness or homogeneity among group members is needed to constitute a particular social group. Rather, the court said, the definition of a particular social group is "a broad definition [] that encompasses groups united by a shared past experience" and the BIA erred by failing "to explain why the shared past experience of having served in and defected from the KGB does not constitute such a characteristic. Under *Acosta* and *In re C-A-* [23 I&N Dec. 951 (BIA 2006)], it is clear that a shared past experience, such as prior military leadership, can be the type of immutable characteristic that will characterize a particular social group." The court also found that there was no evidence that petitioner was persecuted on account of his political opinion, then remanded to the BIA to determine whether defected KGB agents constitute a particular social group.

Contact: Norman Cairns, AUSA
☎ 505-346-7274

■ Second Circuit Holds That Equitable Exceptions To Untimely Appeals To The BIA Survive The Supreme Court's Decision in *Bowles v. Russell*

In ***Khan v. Gonzales***, __F.3d__, 2007 WL 1976151 (2d Cir. July 10, 2007) (*Cabranes,* Raggi, Berman), the court held that its equitable exceptions excusing an untimely appeal survive the Supreme Court's recent decision in *Bowles v. Russell*, __U.S.__, 127 S. Ct. 2360 (2007). The court then remanded petitioner's case because the BIA failed to sufficiently discuss the equitable exceptions.

Petitioner, a native and citizen of Pakistan, fraudulently obtained LPR status. When placed in removal proceedings, petitioner failed to show up and was removed in absentia. Petitioner then filed an untimely notice of appeal to the BIA. The BIA dismissed the appeal for lack of jurisdiction due

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

to untimeliness. Petitioner filed a motion to reconsider arguing that FedEx had erred by delivering his notice of appeal one day late. The BIA denied the motion, finding that FedEx had not erred, but in fact had told petitioner when he shipped the package that it would not arrive until one day after the filing deadline due to a long holiday weekend. Petitioner filed a petition for review claiming that the BIA failed to consider whether he had presented exceptional circumstances excusing the late appeal.

Before addressing petitioner's argument, the government argued that the court could no longer consider whether exceptional circumstances excused a late appeal as the Supreme Court had recently held in *Bowles v. Russell*, __U.S.__, 127 S. Ct. 2360 (2007), that courts cannot create equitable exceptions to untimely appeals. The court, however, found that *Bowles* only applied to statutory time limits. Thus, because the time limit for appeals to the BIA arises out of a regulation, the court found that *Bowles* did not apply and the court's equitable exceptions were still relevant.

The court rejected the government's claim that a statutory time limit could be found in 8 U.S.C. § 1158(d)(1) as that statute only applied a time limit to administrative appeals concerning asylum applications. The court then found that because the BIA failed to discuss the equitable exceptions and instead used jurisdictional language implying there were no exceptions, a remand was necessary.

Contact: E. Bryan Wilson, AUSA
☎ 850-942-8430

The court applied *Chevron* and held that because the statute did not explicitly define what a "son" encompassed, it would defer to the BIA's interpretation.

■ **BIA Reasonably Refused To Adopt A Functional Reading Of The Word "Son" Under 8 U.S.C. § 1182(d)(11).**

In ***Batista v. Gonzales***, __F.3d__, 2007 WL 1976151 (2d Cir. July 10, 2007) (Miner, Sack, Hall) (*per curiam*), the court held that the BIA reasonably interpreted INA § 212(d)(11), 8 U.S.C. § 1182(d)(11), to find that the smuggling waiver applied only to biological children. Accordingly, the court upheld the BIA's denial of waiver to an LPR who smuggled in her nephew.

Petitioner, an LPR, attempted to smuggle her nephew into the U.S. under a false passport and birth certificate. When immigration inspectors caught her at the airport, she was placed in removal proceedings. Petitioner then sought a waiver of inadmissibility under 8 U.S.C. § 1182(d)(11), claiming that her nephew was the "functional" equivalent of the statute's exception for smuggled sons and daughters because she raised him as her son. The IJ agreed, citing the statute's emphasis on family unity, and granted the waiver. The BIA reversed. The BIA stated that while the term "son or daughter" was not defined in 8 U.S.C. § 1182(d)(11), "elsewhere in the [INA], one's 'son' or 'daughter' must have once been the same person's 'child' and the term 'child' is not susceptible to a functional reading."

Before the court, petitioner reiterated her argument that her nephew was the "functional" equivalent of a son and further claimed that the waiver was in the statute's purpose of promoting family unity. The court disagreed. The court, applying *Chevron* deference, held that the BIA's interpretation of "son" was reasonable. The court explained that because the statute did not explicitly define what a "son" encompassed, it would defer to the BIA's interpretation. The court held that the BIA's refusal to adopt a functional equivalent of the word "son" was reasonable and that statute's stated purpose of family unity did not guide interpretation, but instead guided how and when to exercise discretion.

Contact: Beau Grimes, OIL
☎ 202-305-1537

THIRD CIRCUIT

■ **The BIA Properly Found That No New Period Of Continuous Physical Presence Can Be Established Following Application Of The Stop-Time Rule**

In *Briseno-Fores v. Gonzales*, __F.3d__, 2007 WL 1815477 (3d Cir. June 26, 2007) (Rendell, *Jordan,* Vanakiefn), the court affirmed an IJ's determination that petitioner's commission of petty theft interrupted his seven years of continuous physical presence disqualifying him for suspension of deportation. The court rejected petitioner's argument that he had established a subsequent seven years continuous presence after the petty theft conviction but before issuance of the OSC.

Petitioner had entered the U.S. without inspection in 1984. In 1985 and 1989, he was convicted of petty theft. When placed in deportation proceedings in 1996, petitioner sought suspension of deportation. An IJ found him ineligible for suspension of deportation for failure to establish the requisite seven years continuous physical presence. The IJ reasoned that petitioners petty theft convictions interrupted his continuous presence due to application of the "stop-time" provision of IIRIRA. The BIA ultimately affirmed.

Before the Third Circuit, petitioner first argued that the stop-time rule did not apply to suspension of deportation

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)
because IIRIRA repealed the stop-time provision. The court disagreed, holding that the stop-time rule was expressly made retroactive to applications filed before April 1, 1997, citing 8 U.S.C. 1229b(d). Petitioner next asserted that he established a second period of seven years continuous physical presence following his 1989 conviction and up to the OSC in 1996. The court rejected this argument as well. The court explained that applying *Chevron* deference to the BIA's decision in *In re Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000), commission of a crime is not simply an interruptive event that "resets the continuous physical presence clock, but is a terminating event."

Contact: Gjon Juncaj, OIL
☎ 202-307-8514

■ **Third Circuit Holds That A New York Conviction For Second-Degree Criminal Possession Of A Weapon Constituted A Crime Of Violence**

In ***Henry v. BICE***, __F.3d__, 2007 WL 1989360 (3d Cir. July 11, 2007) (Smith, Cowen, *Yohn*), the court upheld the BIA's determination that a conviction under New York law for second-degree criminal possession of a weapon constituted a crime of violence.

Petitioner, an LPR, was convicted of criminal possession of a weapon by the state of New York. Based on this conviction, he was placed in removal proceedings as an alien convicted of a crime of violence and charged with removability as an aggravated felon. While an IJ found that petitioner's conviction did not constitute an aggravated felony, the BIA reversed and held that because an element of the New York statute included "the intent to use the weapon unlawfully against another person," the crime involved a substantial risk that physical force would be used against another person and was thus a crime of violence.

The court affirmed the BIA. The court held that while "possession alone does not permit the inference that there is a substantial risk of the use of force, [] the New York statute under which [petitioner] was convicted requires proof not only of possession but also of intent to use a weapon unlawfully against another." The court rejected petitioner's argument that the risk of physical injury could occur only after completion of the crime, finding that it was the *intent* that caused the risk of harm. The court also rejected petitioner's argument that the court's caselaw using the pre-1989 Sentencing Guidelines interpreting "the intent to use" as a substantial risk of physical force had been superceded by *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The court stated that while *Leocal* specifically noted that a crime of violence under the Sentencing Guidelines is not the same as under 16(b), the term "crime of violence" had been defined by § 16 prior to the amendment of the Sentencing Guidelines in 1989 and remained relevant.

Contact: Ada Bosque, OIL
☎ 202-514-0179

FOURTH CIRCUIT

■ **Adverse Credibility Finding Affirmed Against Cameroonian Asylum Applicant**

In ***Dankam v. Gonzales***, __F.3d__, 2007 WL 2028170 (4th Cir. July 16, 2007) (Motz, Traxler, Shedd), the court affirmed an adverse credibility determination made against a Cameroonian asylum applicant where IJ offered clear and cogent reasons for his finding. The petitioner, a member of the Union of Cameroon Democratic Forces (UCDF), a political party opposed to the Cameroonian government, claimed that on three occasions she had been persecuted on account of her political views. She stated that, following her arrival in the U.S. in 2002, she continued her association with the UDCF by protesting in front of the Cameroonian embassies in Washington, DC and New York. The IJ found her credible regarding her activities in the U.S. but found that she lacked credibility with respect to her claim of past persecution. In particular, the IJ found discrepancies between petitioner's testimony and the corroborative evidence she offered. Accordingly, the IJ denied petitioner's request for asylum, withholding, and CAT protection. The BIA summarily affirmed without opinion.

Although some of the remaining inconsistencies "at first glance appear to be tangential and minor, they add to and create a cumulative effect that is sufficient to support a finding that [petitioner's] claims are not credible."

In upholding the adverse credibility finding, the Fourth Circuit found that the inconsistencies noted by the IJ were about the key events underlying her asylum claims. The court further noted that although some of the remaining inconsistencies "at first glance appear to be tangential and minor, they add to and create a cumulative effect that is sufficient to support a finding that [petitioner's] claims are not credible."

Contact: George M. Kelley III, AUSA
☎ 757-441-6331

■ **IJ Did Not Abuse Discretion By Denying Petitioner's Request To Continue Proceedings Until DHS Had Processed His I-140 Application Because The Possibility Of Adjustment Of Status Was Too Speculative**

In ***Lendo v. Gonzales***, __F.3d__, 2007 WL 1982038 (4th Cir. July 10, 2007) (Niemeyer, Michael, *Wilkins*), the court held that an IJ did not abuse his discretion by denying petitioner a continuance in order to adjust status

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)
based on an approved Labor Certification as petitioner had not even had his I-140 approved yet, much less an immediately available visa.

Petitioner, a native and citizen of Indonesia, was placed in removal proceedings after illegally entering the U.S. After removal proceedings began, petitioner requested a continuance so that DHS could process a previously filed I-140 visa petition based on an approved Labor Certification and ultimately adjust his status to that of a lawful permanent resident. The IJ denied the continuance, finding that petitioner's claim for adjustment of status was too speculative. The IJ explained that petitioner failed to meet the first prong of adjustment of status eligibility - that the I-140 had been approved - much less meet the other prong that a visa be immediately available. The BIA affirmed without opinion.

The court upheld the decision of the IJ. The court held that the IJ did not abuse his discretion in denying the continuance because when petitioner "sought the continuance, he met neither of the requirements [for adjustment of status]. Because [petitioner]'s wife's labor certification application had not yet been approved, neither she nor [petitioner] was eligible even to apply for an employment-based immigrant visa."

Contact: Kristin Edison, OIL
☎ 202-616-3057

FIFTH CIRCUIT

■ **A Previously Removed Alien Has No Vested Right To Adjustment Of Status When His Visa Was Not Immediately Available Prior To The Enactment Of IIRIRA**

In ***Silva Rosa v. Gonzales***, __F.3d__, 2007 WL 1806205 (5th Cir. June 25, 2007) (David, *Dennis,* Prado), the court held that petitioner's pre-IIRIRA marriage to an LPR and approved visa petition did not create either a vested right to adjustment of status nor impermissibly retroactive new consequences to his past illegal entry.

Petitioner had been previously removed from the U.S. in 1990. A month after his removal, petitioner returned to the U.S. and then married an LPR in 1993. His LPR spouse filed a visa petition on his behalf which was approved in 1994. Following the passage of IIRIRA, petitioner's visa petition became immediately available and he filed for adjustment of status. At this point, his prior removal came to the attention of ICE and they moved to reinstate the prior order of removal pursuant to IIRIRA's 8 U.S.C. § 1231 (a)(5).

Before the Fifth Circuit, petitioner argued that 8 U.S.C. 1231(a)(5) was impermissibly retroactive because his right to adjustment of status had vested before passage of IIRIRA and because IIRIRA's allowance of reinstatement of removal proceedings attached new consequences to his prior illegal entry. The court rejected both arguments. First, the court held that petitioner had no vested right in adjustment of status before the enactment date of IIRIRA because his visa petition was not immediately approvable at that point. Thus, the court stated, petitioner was not eligible to apply for adjustment of status before IIRIRA's effective date and therefore had no vested right. The court explained that filing a visa petition is just "the first of several steps" in adjusting one's status and further that "adjustment of status is discretionary and [petitioner] could not have any settled expectations on when relief would be forthcoming and under what legal conditions." Second, the court held that IIRIRA's reinstatement of removal provision does "not retroactively affect the past act of illegal reentry into this country, but rather focuses on the alien's continued illegal presence post-entry," citing the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*, __U.S.__, 126 S. Ct. 2422 (2006).

"Adjustment of status is discretionary and [petitioner] could not have any settled expectations on when relief would be forthcoming and under what legal conditions."

Contact: Cindy Ferrier, OIL
☎ 202-3537837

■ **Fifth Circuit Upholds Denial Of Withholding And CAT Protection To Claimed Victim Of Sex Trafficking.**

In ***Hongyok v. Gonzales***, __F.3d __, 2007 WL 1892310 (5th Cir. July 3, 2007) (Garwood, *Smith*, DeMoss), the Fifth Circuit upheld the BIA's denial of withholding of removal and protection under CAT to petitioner who claimed that she had been kidnaped in Thailand and sold into sex slavery in the United States. The court did not address the BIA's legal conclusion that "escaped sex slaves" are not a cognizable social group but held that the alien had not proven that she would more likely than not be persecuted or tortured if she were required to return to Thailand.

Petitioner, a native of Thailand, applied for withholding of removal and CAT protection. She was ineligible to apply for asylum because she could not establish that she sought asylum within one year of entering the United States. Petitioner contended that she would be subject to persecution and torture in Thailand as a member of the social group "victims of sex trafficking who have escaped." She claimed that the people that brought her into the United States took her passport and forced her to work as a prostitute to repay the debt she owed them. She also claimed that the traffickers would kill

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

her if she returned to Thailand, and that the Thai government cannot protect her because the Thai police have been corrupted by sex traffickers. The IJ granted relief. The BIA reversed, finding that she failed to prove that persecution upon her return to Thailand was "more likely than not." The BIA also declined to categorize escaped sex trafficking victims as a particular social group, and found that petitioner's fear of persecution was based on an outstanding debt.

The Fifth Circuit held that the BIA's factual conclusion that the petitioner failed to meet her burden to prove that she personally would more likely than not be subject to persecution in Thailand was supported by substantial evidence. Since a reasonable fact finder would not be compelled to conclude contrary to the BIA's factual conclusion, the court did not address the BIA's legal conclusion that escaped sex slaves are not a protected social group.

The court did not address the BIA's legal conclusion that escaped sex slaves are not a protected social group.

Contact: John C. Cunningham, OIL
☎ 202-307-0601

■ **Fifth Circuit Holds That An Alien Is Ineligible For Adjustment Of Status For Having Made A False Claim Of United States Citizenship**

In ***Theodros v. Gonzales***, __F.3d __, 2007 WL 1806341 (5th Cir. June 25, 2007) (*Garwood*, Barksdale, Garza), the Fifth Circuit held that an alien's testimony that he had falsely claimed United States citizenship to obtain employment, coupled with an employment document wherein the alien also falsely claimed citizenship, constituted substantial evidence in support of the BIA's determination that the alien was ineligible for adjustment of status. The court also deferred to the BIA's determination that a false claim of citizenship to obtain private sector, as opposed to public sector, employment still rendered the alien ineligible for adjustment of status.

Petitioner entered the United States in 1987 as a derivative E-2 visa holder benefitting from his father's E-1 status. His E-2 status was valid until 1993, when petitioner reached the age of eighteen. In 1993 and 1994, petitioner served prison sentences for three convictions of receiving stolen property, offenses that are categorized as involving moral turpitude. In 2003, after petitioner had completed his sentences, DHS issued an NTA, charging him with removability since he remained in the United States after the expiration of his visa. Because he would otherwise be found ineligible for adjustment of status under 8 U.S.C §1182(a)(2)(a) for committing crimes of moral turpitude, petitioner sought a waiver of inadmissibility alleging his removal would cause extreme hardship to his United States citizen wife. During his initial immigration hearing, petitioner testified that he falsely claimed United States citizenship to gain employment in 1999. Based on this admission and a supporting employment document, DHS charged petitioner with removability under 8 U.S.C §1127(a)(3)(D)(I) for falsely representing he was a United States citizen. Although the IJ ruled that he "would be inclined to grant the respondent adjustment and the hardship waiver," he denied petitioner's request due to his false claim to citizenship to gain employment. The BIA adopted and affirmed the IJ's decision.

Before the Fifth Circuit, petitioner argued that the IJ and BIA decisions rested on insufficient evidence supporting his false representation of citizenship. He also argued that even if he falsely claimed citizenship to gain employment, seeking private-sector employment does not make one inadmissible under 8 U.S.C §1227(a)(3)(D). First, the court found that petitioner's oral testimony and documentary evidence clearly supported the IJ's finding that petitioner falsely represented to employers that he was a United States citizen. Second, the court applied *Chevron* deference and found that the BIA's decision was a permissible construction of 8 U.S.C §1227(a)(3)(D) since the statute imposes no requirement that the "purposes or benefit" obtained through the false citizenship representation be obtained through a federal or state agency and no published authority supported the finding that private employment is not a benefit or purpose under the INA.

Contact: Mike Truman, OIL
☎ 202-616-9345

■ **Fifth Circuit Holds That It Retains Authority, Following The Enactment Of IIRIRA, To Toll The Period Of Voluntary Departure**

In ***Vidal v. Gonzales***, __F.3d __, 2007 WL 1830739 (5th Cir. June 27, 2007) (King, *Higginbotham*, Garza), the court held that it retained authority, following the enactment of IIRIRA, to suspend the period for voluntary departure and, thus, to toll running of that period. The court, however, denied the aliens' request to stay voluntary departure after applying the general criteria provided for injunctions pending appeal.

Petitioners filed a motion for stay of a voluntary departure order pending the outcome of their petition for review of BIA order denying asylum. In rejecting the government's argument that Congress restricted the court's jurisdiction to stay or extend voluntary departures under IIRIRA, and vested this authority in the Attorney General, the court interpreted the

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

section 8 U.S.C. §1229c as a limit only to the court's jurisdiction to review the executive branch's substantive judgment about whether an alien met the statutory qualifications for a voluntary departure, and not as a limit to the court's power to toll the period of voluntary departure. The court defended its jurisdiction, stating "we are emboldened in this conclusion not only by the light of seven sister circuits, but also by the pull of twin canons of statutory construction, one requiring narrow construction in favor of aliens, and the other requiring the clearest command for jurisdiction stripping." The court declined to use its authority to stay the executive order in petitioner's case because petitioner failed to show a likelihood of success on the merits, finding that the IJ's adverse credibility determination was supported by substantial evidence.

Contact: Luis E. Perez, OIL
☎ 202-353-8806

SIXTH CIRCUIT

■ Sixth Circuit Holds That An IJ Has Jurisdiction To Determine Portability Of An I-140 Petition

In ***Matovski v. Gonzales***, __F.3d__, 2007 WL 1713306 (6th Cir. June 15, 2007) (Merritt, Batchelder, *Gwin*), the court reversed the BIA's holding that an IJ lacks jurisdiction to determine whether an alien's I-140 petition is portable under 8 U.S.C. § 1154(j) for purposes of adjustment of status eligibility. However, the court rejected petitioners' argument that their due process rights were violated because the IJ based his inadmissibility finding on a material misrepresentation that was not charged in the NTA.

Petitioners, natives and citizens of Macedonia, entered the U.S. on visitor visas. Petitioners sought numerous extensions of their visitor visas. Meanwhile, the husband sought adjustment of status based on an offer of employment from a U.S. company. The company eventually filed an I-140 visa petition, which was approved by the INS, and petitioner applied for adjustment of status. While the application was pending, petitioner changed jobs and began working for a different U.S. company. Subsequently, the INS denied adjustment of status based on the fact that petitioner had misused his visitor visa in order to search for employment and revoked the I-140 visa. In removal proceedings, petitioner again sought adjustment of status. An IJ denied the relief, finding that petitioner did not have a visa immediately available and was not admissible to the U.S. On the former ground, the IJ found that petitioner had changed jobs and that a visa was not immediately available for the new job. The IJ rejected petitioners' argument that an immigration visa was immediately available under INA § 204 (j), 8 U.S.C. § 1154(j), allowing an alien to change jobs and retain the visa priority of his original I-140 if the application for adjustment of status has been pending for more than 180 days and as long as the new job is similar to the old job for which the I-140 was filed. The IJ found that he lacked jurisdiction to make the determination of whether the jobs are similar; that jurisdiction for that determination resided with USCIS because the Attorney General had not created regulations specifically giving that authority to an IJ. The IJ also found that petitioners were inadmissible for having misused their visitor visas. Finally, in addition to finding that petitioners were statutorily ineligible for adjustment of status, the IJ denied relief as a matter of discretion. The BIA affirmed that IJ's findings that petitioners were statutorily ineligible for adjustment without reaching the IJ's discretionary denial.

The court rejected petitioners' argument that their due process rights were violated because the IJ based his inadmissibility finding on a material misrepresentation that was not charged in the NTA.

Before the Sixth Circuit, petitioners argued that the IJ erred in finding he had no jurisdiction over the portability of the I-140 petition and that the IJ deprived them of due process by finding them inadmissible for willful misrepresentation in the visitor visas when misrepresentation was not charged in the NTA. The court agreed with the former, but not the latter. The court held that an IJ has jurisdiction to consider the application of INA § 204 (j). First, the court noted that an IJ has jurisdiction over adjustment of status applications under 8 C.F.R. § 245(a)(5)(ii) and thus no formal regulations applying INA § 204(j) were needed as Congress never distinguished between aliens filing an initial I-140 application with DHS and those aliens renewing their applications in removal proceedings. Second, the court found that precluding an IJ from making a determination under INA § 204(j) would contradict Congress' express intent to provide protection for long delayed applicants for adjustment of status. The court also noted that petitioners had complied with the informal guidance that DHS had issued to district directors when determining whether or not to apply INA § 204(j).

Turning to the latter claim, the court held that the NTA did not need to state the alleged material misrepresentation in the visitor visas because this was not a charged ground of removability. Rather, the court said, petitioners' misrepresentation was a defense to petitioners' request for discretionary relief. The court did not reach the IJ's denial of relief as a matter of discretion because the BIA failed to discuss it.

In a dissenting opinion, Judge Batchelder would not have found jurisdiction for the IJ to determine portability.

Contact: Gjon Juncaj, OIL
☎ 202-307-8514

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

Sixth Circuit Holds That Whistleblowing Against Government Corruption May Constitute Political Opinion

In ***Bu v. Gonzales***, 490 F.3d 424 (6th Cir. 2007) (*Daughtrey*, Martin, Schwarzer), the Sixth Circuit remanded the case for reconsideration and further proceedings. The BIA had summarily affirmed the IJ's denial of asylum, but the court concluded that the IJ misapprehended the nature of petitioner's claim.

Petitioner applied for asylum based on persecution by the Chinese government for organizing and participating in a workers' strike that protested management corruption in a state-sponsored factory. Petitioner was arrested for his involvement in the strike and jailed when he refused to cooperate with the police's interrogation. The police instructed the other inmates to beat and abuse petitioner until his family bailed him out of jail. Petitioner testified that if he returned to China, he would be "arrested and subjected to further persecution" based on outstanding warrants there. The IJ found that petitioner failed to establish that he was persecuted for a political opinion, and found instead that "he was roughed up and jailed for violating a law of general application and not on account of one of the five protected grounds."

In rejecting the IJ's decision, the Sixth Circuit relied on *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000), where the Ninth Circuit held that whistle blowing against corrupt government officials may constitute political activity sufficient to form the bases of persecution on account of political opinion. The court found that petitioner presented credible evidence that he acted upon his political opinion about government corruption and that his detention and abuse were motivated by this activity. It further found that, contrary to the government's contention, petitioner had raised the claim that his protest of government corruption caused the persecution that he suffered both at his immigration hearing and in his appeal to the BIA.

Contact: Laura Clemmens, AUSA
☎ 937-225-2910

SEVENTH CIRCUIT

■ **BIA Abused Its Discretion By Failing To Adequately Explain Why It Rejected Pro Se Petitioner's Motion To File A Late Brief**

In *Gutierrez-Almazan v. Gonzales*, __F.3d__, 2007 WL 1774027 (7th Cir. June 21, 2007) (*Flaum,* Manion, Rovner), the court held that the BIA abused its discretion by denying petitioner's motion to file a late brief without offering an adequate explanation.

"The BIA has given this Court no indication that it took account of petitioner]'s pro se status, education, language skills, or any other factors that might be relevant to the merits of his motion."

Petitioner was found removable due to a conviction for an aggravated felony. Subsequently, his application for § 212(c) relief was reconsidered in light of *St. Cyr*. The IJ denied § 212(c) relief, but noted that petitioner's counsel had performed poorly and submitted "woefully, woefully inadequate" documents. Thereafter, petitioner proceeded *pro se* and untimely appealed to the BIA claiming ineffective assistance of counsel. Petitioner asked the BIA to excuse the untimeliness claiming that he had lost the envelope from the BIA in a stack of old newspapers. The BIA, however, found petitioner's excuse unavailing and denied the brief as untimely and further for failure to meet the requirements for ineffective assistance of counsel. The order, in part, stated that "[w]e find the reason stated by the respondent insufficient for us to accept the untimely brief in our exercise of discretion." The BIA further found that petitioner failed to show prejudice in that he was still not eligible for 212(c) relief.

The court remanded petitioner's case and rejected the BIA's decision. The court found that the "sparse ruling [of the BIA] was [too] inadequate to enable us to perform any meaningful review." The court explained that "[t]he BIA has given this Court no indication that it took account of [petitioner]'s pro se status, education, language skills, or any other factors that might be relevant to the merits of his motion. Indeed, we cannot tell from the BIA's order whether it 'heard and thought' or 'merely reacted.'" The court also found it contradictory that the BIA had previously accepted a request for an extension of time in which to file petitioner's original appeal.

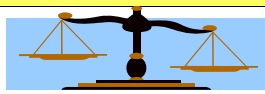
Contact: Jennifer Levings, OIL
☎ 202-616-9707

■ **Seventh Circuit Broadly Interprets Jurisdictional Bar And Dismisses Petition For Review Challenging Denial Of Cancellation Of Removal**

In ***Leguizamo-Medina v. Gonzales***, __F.3d__, 2007 WL 1827642 (7th Cir. June 27, 2007) (*Easterbrook*, Ripple, Evans), the Seventh Circuit broadly interpreted the jurisdictional bar set forth at INA § 242(a)(2)(b)(i), 8 U.S.C. § 1252(a)(2)(B)(i). The court decided that prior distinctions made under this provision between discretionary and non-discretionary decisions were not controlling, and instead looked to INA § 242(a)(2)(D), as amended by the REAL ID Act, concerning constitutional questions and questions of law, as the only exception to a bar that otherwise "forecloses *all* review of decisions denying requests for cancellation of removal."

The court also reiterated that questions of law did not include mixed questions of law and fact. Applying the jurisdictional bar, the court held that it could not review questions concerning factual findings or the denial

(Continued on page 15)



Summaries Of Recent Federal Court Decisions

(Continued from page 14)
of a continuance.

Petitioner, a native of Mexico, applied for adjustment of status as the spouse of a United States citizen. The IJ concluded that petitioner's marriage was fraudulent because her alleged husband submitted an affidavit that the marriage was a sham. The IJ noted that petitioner was living with and had a child by another man. He then found that petitioner did not qualify for cancellation of removal because she gave false testimony in order to obtain a benefit, barring her from meeting the statutory requirement of "good moral character." The BIA upheld the IJ's decision.

Applying the jurisdictional bar in INA § 242(a)(2)(b)(i), the court held that it could not review questions concerning factual findings or the denial of a continuance.

On appeal to the Seventh Circuit, petitioner argued that the IJ should have believed her testimony and that the IJ abused his discretion by declining to grant a continuance so that petitioner's sister could testify.

Petitioner relied on the Seventh Circuit's holding in *Morales-Morales v. Ashcroft*, 384 F.3d 418, 422 (7th Cir. 2004), to argue that the court had jurisdiction to review the decision because it involved findings of fact and questions of law regarding good moral character, and not discretionary issues. The court rejected petitioner's argument, emphasizing that *Morales-Morales* preceded the Real ID Act while petitioner's case was subject to the more comprehensive bar on the court's jurisdiction to review factual findings. The court dismissed the petition for review for want of jurisdiction.

Contact: Manning Evans, OIL
☎ 202-616-2186

EIGHTH CIRCUIT

■ **Eighth Circuit Upholds Adverse Credibility Determination Denying Ethiopian Petitioner Asylum**

In ***Gebresadik v. Gonzales***, __F.3d__, 2007 WL 1774662 (8th Cir. June 21, 2007) (*Wollman*, Gibson, Murphy), the court affirmed an IJ's determination that petitioner did not testify credibly as to her claim of political persecution in Ethiopia.

Petitioner, a native and citizen of Ethiopia, had claimed that she was persecuted due to her membership in the All Amhara People's Organization ("AAPO"). She claimed that on the day she joined the AAPO, she was asked to organize a rally. Then, because of participation in the rally, she claimed that she was thrown in jail where guards raped and beat her and accused her of being an Eritrean spy. An IJ found petitioner's account of persecution not credible. The IJ stated that it was implausible for the AAPO to have given her the authority to organize a 200-person rally on the very day she joined the AAPO. Further, the IJ questioned why the jail guards would accuse her of being an Eritrean spy when the country reports from that time period showed that the controlling governments of Ethiopia and Eritrea were in cooperation. Finally, the IJ found that petitioner had failed to provide a contemporaneous objective documentation regarding her claims. The BIA affirmed.

The court upheld the IJ's adverse credibility determination. The court found that petitioner's claim she organized a rally on the day of joining the AAPO was implausible. The court also found that it was implausible for the jail guards to call her an Eritrean spy after looking at the country reports from that time period. The court also found that petitioner had not presented any contemporaneous objective corroboration. The corroboration she had provided was of little value since one letter was written by someone who petitioner admitted had only met her once and the other did not mention petitioner's arrest or detention.

Contact: Susan Houser, OIL
☎ 202-616-9320

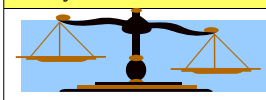
■ **Eighth Circuit Limits Sporting Exception To Destructive Devices With A Barrel Bore Diameter Greater Than One-Half Inch**

In ***Awad v. Gonzales***, __F.3d__, 2007 WL 2067857 (8th Cir. July 20, 2007) (Bye, Beam, *Smith*), the court affirmed the BIA's finding that petitioner's misdemeanor conviction under Minnesota state law for transportation of a loaded firearm rendered him removable as an alien convicted of a firearms offense under INA § 237(a)(2)(c) and did not meet the sporting exception for destructive devises under 18 U.S.C. § 921(a)(4).

Petitioner, an LPR, was lawfully sport hunting when he received a misdemeanor citation for carrying a loaded firearm. Subsequently, petitioner was placed in removal proceedings under INA § 237(a)(2)(c). The IJ found petitioner removable as charged and the BIA affirmed. In so holding, the BIA rejected petitioner's argument that his conviction fell within the destructive devices sporting exception contained within the definition of firearm in 18 U.S.C. § 921(a)(4). The BIA concluded that the sporting exception was limited to destructive devices and that it did not apply to firearms.

The court affirmed the BIA and agreed that petitioner's conviction did not fall within the sporting exception. The court stated that petitioner's rifle was a "firearm" and not a "destructive

(Continued on page 16)



Summaries Of Recent Federal Court Decisions

(Continued from page 15)

device." The court explained that while "all destructive devices are firearms . . . not all firearms are destructive devices . . . For a firearm to be a destructive device, the firearm's barrel must have a bore diameter greater than one-half inch. 18 U.S.C. § 921 (a)(4)(B)." Therefore, because petitioner's rifle had a diameter less than one-half inch, his rifle was not a destructive device but instead a firearm.

Contact: Dimitri Rocha, OIL
☎ 202-616-4358

■ **Eighth Circuit Holds That Threats And Beatings Constituted Past Persecution, Shifting Burden To Government To Disprove Fear Of Future Persecution**

In ***Sholla v. Gonzales***, __F.3d__, 2007 WL 1932253 (8th Cir. July 5, 2007) (*Melloy*, Smith, Benton), the Eighth Circuit held that petitioner's credible claims of politically motivated threats and beatings would compel any reasonable fact finder to conclude he had suffered past persecution, giving rise to a presumption of future persecution. Based on this presumption, the court further held that the IJ imposed an improper burden of proof on the alien.

Petitioner, a native of Albania, sought asylum, withholding of removal, and CAT protection based on his claim of persecution by Albanian police for anti-Communist political activities. He testified that in 1980, Communist authorities placed petitioner and his family in a hard-labor internment camp for two years. After he was released, petitioner served as the chairman of the Democratic party commission in his electoral zone. He campaigned and attended rallies and meetings for the Democratic party. Albanian police officers beat petitioner multiple times, threatening to "make him disappear" if he did not withdraw from the Democratic party. After the Socialists won the 1997 election and petitioner continued his work for the Democratic Party, masked men sprayed gunfire into petitioner's home and wounded petitioner's youngest son. When petitioner reported the attack to the authorities, they took no action.

> "This country's asylum statute would be quite hollow indeed if our definition of persecution required petitioner to wait for his persecutor to finally carry out their death threats before petitioner could seek refuge here."

Although the IJ found petitioner's testimony credible, he denied the requested relief because he found that the conditions in Albania had improved sufficiently since petitioner left that country to eliminate his fear of future persecution. He also found that that the "isolated occasions" of police brutality did not constitute past persecution under the INA. The BIA adopted the IJ's decision without comment.

The Eighth Circuit found that petitioner established past persecution, entitling him to the presumption of a well-founded fear of future persecution. In deciding that any reasonable fact finder would conclude that petitioner suffered past persecution, the court stated that "this country's asylum statute would be quite hollow indeed if our definition of persecution required petitioner to wait for his persecutor to finally carry out their death threats before petitioner could seek refuge here." The court found that the IJ erred in emphasizing that the burden of proof was upon petitioner, even when discussing changed country conditions, and remanded the case to the Board with the burden of proof upon the government to prove that petitioner's fear of future persecution is no longer well-founded because of recent, fundamental changes in Albania or because he could safely and reasonably relocate to a different region of Albania. The court remanded for the government to prove that the alien's presumed fear of future persecution is no longer well-founded because of recent, fundamental changes in Albania, or because the alien could safely and reasonably relocate within Albania

Contact: John O'Quinn, DAAG
☎ 202-514-9500

NINTH CIRCUIT

■ **Ninth Circuit Upholds *Matter of Blake* And Affirms That The Crime Of Sexual Abuse Of A Minor Lacks A Statutory Counterpart Which Would Qualify Petitioner For § 212(c) Relief**

In ***Abebe v. Gonzales***, __F.3d__, 2007 WL 1965165 (9th Cir. July 9, 2007) (*Nelson,* Cowen, Berzon), the court held that § 212(c) relief was not available to petitioner because the crime for which he was placed in removal proceedings, sexual abuse of a minor, lacked a statutory counterpart ground of inadmissibility. The court rejected petitioner's claims that the denial of § 212(c) relief conflicted with the INA, agency regulations, and case-law and because it would violate equal protection.

Petitioner, an LPR, pled guilty to sexual abuse of minor in 1992. In 2005, petitioner was placed in removal proceedings as an alien convicted of an aggravated felony. Petitioner sought a § 212(c) waiver but was ultimately denied by the BIA because the crime he was placed in removal proceedings for lacked a statutory counterpart under § 212(a)'s grounds of inadmissibility, pursuant to *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005).

Before the Ninth Circuit, petitioner first argued that *Matter of Blake* was inconsistent with the statutory text of IMMACT 90, the regulation implementing IMMACT 90 - 8 C.F.R. § 1212.3(f) - and the BIA's prior interpretation of the statutory counterpart rule. The court rejected all these claims. First, the court held that IM-

(Continued on page 17)

Summaries Of Recent Federal Court Decisions

(Continued from page 16)

MACT "clearly intended to *further limit* § 212(c) relief rather than to expand its availability" to the crime of sexual abuse of a minor as nothing in the statute prevented application of the statutory counterpart rule.

The court rejected petitioner's claim that by barring § 212(c) relief to a subset of aggravated felons, IMMACT expressed Congress' intent to render all other aggravated felons eligible for § 212(c). Second, the court held that 8 C.F.R. § 1212.3(f) was promulgated to ensure that an alien who pleaded guilty during the time frames specified in the regulation was not stripped of § 212(c) relief as long as he had served less than five years in prison. The court rejected petitioner's argument that an alien who pled guilty within the regulation's time frame is eligible for relief *as long as* he has served less than five years in prison. Third, the court held that the BIA has consistently applied the statutory counterpart rule to comparable *grounds* of inadmissibility, not conduct as petitioner suggested.

Finally, the court also rejected petitioner's argument that *Matter Of Blake* violated equal protection. Equal protection, the court said, in this context only requires that "the government give the same benefit (the waiver of a particular ground of inadmissibility) to aliens whether or not they depart the United States." Because aliens who would have sought a waiver of inadmissibility could not have sought a waiver of sexual abuse of minor, neither could petitioner and there was no equal protection violation. Judge Berzon filed a concurring opinion.

Contact: John C. Cunningham, OIL
☎ 202-307-0601

ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That Colombian Petitioner Suffered Past Persecution On Account Of His Political Opinion**

In ***Jimenez v. U.S. Attorney General,*** __F.3d__, 2007 WL 2034955 (11th Cir. July 17, 2007) (Anderson, *Marcus*, Cox), the Eleventh Circuit considered whether the FARC's attempt to murder petitioner by shooting at his moving vehicle qualified as persecution when he escaped unharmed and the gunmen only succeeded in damaging his car.

> "The FARC financial interest in petitioner [did not] undermine the conclusion, compelled by the record, that they also targeted him because of his political opinion."

The petitioner was a politically active member of the Colombian conservative party who helped mobilize voters to elect the party's candidates. In 1999, the FARC contacted him at home, made monetary demands, and told him to leave the party and back the FARC. In another incident, two armed men on motorcycles began following him as he drove home alone. He evaded the motorcycles and when he arrived home, he discovered several bullet holes in his car. He fled Colombia and applied for asylum in the United States. The IJ denied him relief reasoning that mere threats generally do not rise to the level of persecution and that the shooting incident was not persecution because petitioner escaped unharmed. The IJ also noted that any alleged persecution would be on account of a monetary motive rather than political opinion.

The court disagreed concluding that, under the specific facts of the case, petitioner suffered past persecution when the FARC gunmen followed him on motorcycles and intentionally shot at him in his moving car. The court noted that the shooting incident qualified as persecution because the "gunmen's poor marksmanship did not detract from the nature of their act as sufficiently extreme to rise to the level of persecution." The court found that the record compelled the conclusion that the persecution was on account of petitioner's political opinion because "the FARC financial interest in petitioner [did not] undermine the conclusion, compelled by the record, that they also targeted him because of his political opinion." The court concluded that because petitioner showed past persecution, the burden shifted to the government to show, by preponderance of the evidence, that conditions in Colombia have changed or that he could avoid future persecution by relocating within Colombia.

Contact: Stuart Nickum, OIL
☎ 202-616-8779

■ **Case Remanded To Determine Whether The Threats And The Physical Attack On Colombian Petitioner Were Politically Motivated Instead Of A Random Criminal Act For Purposes Of Determining Whether She Suffered Past Persecution**

In *Lopez v. U.S. Attorney General*, __F.3d__, 2007 WL 1953603 (11th Cir. July 11, 2007) (*Carnes,* Wilson, Stagg), the Eleventh Circuit remanded the case to the IJ to determine whether the FARC's threats petitioner received in Colombia viewed together with a physical attack amounted to past persecution.

The petitioner joined the Colombian Liberal Party as a community coordinator providing humanitarian assistance to poor residents. She received phone calls from the FARC warning her to abandon her activities with the Liberal Party. She did not report the calls to the police. In 1999,

(Continued on page 18)

Summaries Of Recent Federal Court Decisions

(Continued from page 17)

FARC members attacked her and she suffered serious injuries that she did not report to the police. She left Colombia and applied for asylum in the United States. The IJ denied her asylum because she determined that petitioner's activities were community-based, not political in nature. The IJ reasoned that the harm alleged was an act of random violence instead of political persecution and that it should have been reported to the police. The court reversed holding that the record compelled the conclusion that the 1999 attack was politically motivated instead of a random criminal act.

The court remanded the case to the IJ to determine, in the first instance, whether the threats petitioner received and the 1999 physical attack taken all together, amounted to past persecution. The court also noted that if wasn't clear if the BIA had ruled that failure to seek protection without more was enough to defeat an asylum claim. It pointed out that the BIA had previously held that failure to report would be excused where a petitioner convincingly demonstrates that those authorities would have been unable or unwilling to protect her and for that reason she could not rely on them. This issue should also be addressed by the BIA on remand, said the court.

Contact: Tony Payne, OIL
☎ 202-616-3264

■ **Substantial Evidence Supported Determination That An Asylum Applicant From Togo Did Not Suffer Past Persecution On Account Of Political Opinion**

In ***Djonda v. U.S. Attorney General,*** __F.3d__, 2007 WL 2100917 (11th Cir. July 24, 2007) (Black, *Pryor*, Limbaugh), the Eleventh Circuit held that petitioner was not entitled to asylum because he did not establish past persecution on account of a political opinion where the evidence showed he suffered a brief detention and beating after he participated in a political rally. The court also held that the record did not compel a finding that petitioner was likely to suffer persecution upon his return to Togo going beyond a brief detention and minor physical abuse.

The issues in this appeal were whether substantial evidence supported the BIA finding that petitioner's minor beating and brief detention while in Togo amounted to past persecution and, whether he was likely to face more severe treatment upon his return. Petitioner was a member of a student opposition Union in Togo. He suffered scratches and bruises when the police detained him for 36 hours and beat him. He later received summons to appear before the police but did not appear for fear of detention and mistreatment. Instead, he fled to the United States and applied for asylum. On these facts, the BIA concluded that petitioner had not suffered past persecution because his detention was brief and he only suffered minor scratches and bruises. With respect to his fear of future persecution, the BIA relied on the 2003 Country Report to conclude that Union members, like petitioner, were frequently arrested and released within days without physical abuse. Petitioner therefore did not establish that, even if he faced arrest or detention upon his return to Togo, his treatment would likely rise to the level of persecution.

The court found that the BIA's interpretation was reasonable because legal marriages reflect "a sanctity and long-term commitments that other forms of cohabitation don't."

The court affirmed the BIA's decision reasoning that the record did not compel the conclusion that petitioner suffered past persecution in Togo or that he had a well-founded fear of future persecution should he be returned to Togo. In particular, the court affirmed the BIA's conclusion, based on the 2003 State Department report on Togo, that, although Union members are frequently arrested, they are typically not subject to harsh treatment and nothing in the evidence presented suggested otherwise.

Contact: Russ Verby, OIL
☎ 202-616-4892

■ **Eleventh Circuit Holds That For Male Petitioner To Be Entitled To Asylum Protection Based On A Woman's Forced Abortion, He Had To Be Legally Married**

In ***Yang v. U.S. Attorney General***, __F.3d__, 2007 WL 2000044 (11th Cir. July 12, 2007) (Black, Carnes, Marcus) (*per curiam*), the Eleventh Circuit held that it was reasonable for the BIA to limit asylum protection based on forced abortion only to legally married persons and not to extend the protection to the woman's unmarried partner.

The petitioner claimed that he entered into a "traditional marriage" in China because he could not formally marry his partner since, under Chinese law, they were both underage. When his partner became pregnant, petitioner claimed that family planning officials forcibly took her to have an abortion. He tried to save her life, fought with the officials, but escaped unharmed while she was forced to abort the baby. He fled to the United States where he claimed refugee status because he allegedly suffered persecution when his partner was forced to undergo an abortion. He based his asylum claim on *Matter of C-Y-Z,* 21 I&N Dec. 915 (BIA 1997), where the BIA held that "an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion as a refugee within the definition of that word under Section 101(a)(42) of the INA."

The IJ disagreed finding that peti-

(Continued on page 19)

Summaries Of Recent Federal Court Decisions

(Continued from page 18)

tioner was not entitled to asylum because under *C-Y-Z-* he had failed to "establish a spousal relationship between him and the person he described as his wife." The BIA affirmed holding that "an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution and may thereby be eligible for asylum but the protection does not extend to unmarried applications claiming persecution based on a partner's abortion or sterilization." The BIA explained, that "in the absence of a legal marriage, evaluating the existence of the requisite nexus is problematic both as to whether the applicant was, in fact, the father of the child and whether local officials considered him responsible or were even aware of his involvement."

On appeal, the court noted that because Congress had "not spoken unambiguously on the issue of whether husbands are permitted to step into their wives shoes for the purpose of family planning refugee status", the BIA's interpretation in *Matter of C-Y-Z and Matter of S-L-L, 24 I&N Dec. 1 (BIA 2006),* was entitled to great deference. In *S-L-L-,* the BIA declined to extend the holding in *C-Y-Z* to unmarried applicants claiming persecution based on a partner's abortion or sterilization. The court found that the BIA's interpretation was reasonable because legal marriages reflect "a sanctity and long-term commitments that other forms of cohabitation don't. A legal husband, at least in the eyes of the government has significantly more responsibility in determining with his wife whether to bear a child in the face of societal pressure and government incentives," and "determining paternity of the aborted baby is considerably more difficult yet essential for asylum based on family planning refugee status."

Accordingly, the court held that for a male to claim refugee status pursuant to INA § 1101(a)(42), he must be legally married to the mother of his aborted baby under the laws of his native country. Because petitioner's traditional marriage was not recognized he could not claim refugee status.

Contact: John C. Cunningham, OIL
☎ 202-307-0601

■ **Denial Of Motion To Change Venue Not A Due Process Violation**

In ***Frech v. U.S. Attorney General***, __F.3d__, 2007 WL 1879987 (11th Circ. July 2, 2007) (*Barkett*, Kravitch, Trager), the Eleventh Circuit held that petitioner was not denied due process when the IJ denied his motion to change venue because he did not suffer substantial prejudice as a result of the denial.

"While deprivation of the right to counsel or the ability to present evidence on one's behalf in a removal proceeding would, under certain circumstances, constitute a due process violation, [petitioner] has not shown that he was substantially prejudiced by any due process violation in this case."

The petitioner and his wife, two Nicaraguan nationals, applied for adjustment of status under NACARA. Petitioner's wife was granted relief and adjusted her status to that of a lawful permanent resident. The IJ denied relief to petitioner on the ground that he lacked good moral character based on false statements he made on his asylum application. On appeal, the BIA remanded the case to the IJ holding that there was no good moral character requirement under NACARA. Again, the IJ denied adjustment of status holding that, because of his criminal record, in order to obtain adjustment, petitioner would have to apply for a waiver of inadmissibility under INA § 212(i) showing that denying him admission would result in extreme hardship to his lawful resident spouse.

At his evidentiary hearing, petitioner asked for a change of venue from Miami to Houston where he was living, and where all his witnesses and his attorney were located. The IJ denied the motion because the arrest and conviction evidence were in Miami. The IJ also denied him relief after concluding that the hardship to petitioner and his wife did not rise to the level of extreme hardship required to overcome the serious nature of his criminal history.

In his petition for review, petitioner claimed that he was denied due process as a result of the denial of change in venue and that the IJ failed to apply the correct legal standard in adjudicating the application for waiver of inadmissibility. The court disagreed holding that although it lacked jurisdiction to review whether an applicant's status should be adjusted under NACARA, it retained jurisdiction to review constitutional claims arising from the denial of relief and any constitutional claim of due process arising from the denial of waivers of inadmissibility.

The court then found that "while deprivation of the right to counsel or the ability to present evidence on one's behalf in a removal proceeding would, under certain circumstances, constitute a due process violation, [petitioner] has not shown that he was substantially prejudiced by any due process violation in this case." The court noted that petitioner had discharged his Texas attorney and that there was no indication that the absence of an attorney was related to the location of the hearing or that additional witnesses would have offered evidence related to the "extreme hardship" inquiry. The court further noted that the IJ correctly denied the waiver of inadmissibility and applied the correct legal standard in evaluating that waiver because he considered the hardship to both petitioner and to his wife.

CHINESE ASYLUM LITIGATION UPDATE IN LIGHT OF *LIN*

In ***Lin v. US DOJ***, __F.3d__, 2007 WL 2032066 (2d Cir. 2007) (en banc), the Second Circuit recently reversed the BIA's construction in *Matter of S-L-L-*, 24 I & N Dec. 1 (BIA 2006), that an alien may qualify for asylum based on the forced abortion or sterilization of his her spouse or partner.

OIL has issued written guidance on how to proceed in a spousal Chinese asylum case in the Second Circuit in light of *Lin*. This advice applies to all Second Circuit cases awaiting a decision. It applies only to cases in the Second Circuit. And it applies regardless of whether the asylum applicant was legally married to the victim of forced abortion or sterilization, had a traditional (unregistered) marriage, or had a non-marriage relationship (such as a boyfriend).

(1) If the case has been held in abeyance pending a decision in *Lin*, do nothing.

(2) If the case is active and the government's brief has already been filed, file an appropriate 28(j) letter (see OIL guidance for the wording of the letter).

(3) If the case is active but neither side has briefed the case, and the spouse/partner claim is the sole issue, file a motion for summary disposition.

(4) If the case is active and the alien has filed a brief (although the government has not), or the case presents multiple issues, file a brief.

(5) Regardless of whether you file a motion for summary disposition or a brief, ask for denial of the review petition, issuance of the mandate, and dissolution of any stay of removal in place.

The full written guidance has been circulated to all OIL attorneys. If you have questions contact Alison Drucker, alison.drucker@ usdoj.gov, or in her absence Blair O'Connor.

SECTION 601 IIRIRA

Section 601 of IIRIRA amended INA § 101(A)(42) to provide as follows:

"[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well founded fear of persecution on account of political opinion."

FUJIAN STERILIZATION REMAND PROGRAM (2D CIR) IS ENDED

Last winter, OIL distributed guidance to its attorneys and to USAO's establishing a special Fujian Sterilization Remand program. Two sets of guidance set forth criteria and special procedures for the remand from the Second Circuit of certain cases bringing Fujian 2-baby sterilization asylum claims. The purpose of this program was to minimize the number of Second Circuit decisions in which the court would remand cases to the BIA for extra-record evidence (documents which are now under consideration by the BIA on remand of *Shou Yung Guo* by the Second Circuit).

The likelihood of wholesale remands for the extra-record *Shou Yung Guo* documents appears to be over. On July 12, 2007, the Second Circuit decided *Ni v. Gonzales*, __ F.3d__, 2007 WL 2012395 (2d Cir. 2007). That decision answered in the negative the question of whether the court should exercise any inherent power to remand when the BIA had not had the opportunity to consider reopening proceedings (because the alien had failed to file a motion to reopen with it). 2007 WL 2012395 at *9. Moreover, pursuant to the Second Circuit's remand in *Guo*, the BIA issued a precedent decision on August 2, 2007 addressing the documents of concern in *Guo*. *See* ***Matter of S-Y-G-***, 24 I&N Dec. 247 (BIA 2007) ("In her motion to reopen proceedings to pursue her asylum claim, the applicant did not meet the heavy burden to show that her proffered evidence is material and reflects 'changed circumstances arising in the country of nationality' to support the motion where the documents submitted reflect general birth planning policies in her home province that do not specifically show a likelihood that she or similarly situated Chinese nationals will be persecuted as a result of the birth of a second child in the United States").

Representatives of the agencies involved in this program have unanimously agreed that its usefulness is over. The program is therefore terminated, effective immediately, cases raising sterilization issues in the Second Circuit should henceforward be handled on a case-by-case basis, under the normal remand procedures of the respective offices.

August 2, 2007

Contact: Alison R. Drucker, OIL
☎ 202-616-4867

Inside OIL

(Continued from page 22)
Sept. 2006 and worked as a contract attorney until starting this job.

Deitz Lefort graduated from the University of Notre Dame and Loyola University School of Law. Prior to joining OIL, Deitz practiced as a commercial litigator with a law firm in New Orleans.

Charles Canter received a B.A. in mathematics from Amherst College and a J.D. from Vanderbilt University. He clerked for Judge Arthur Harris of the U.S. Bankruptcy Court for the Northern District of Ohio. He is currently on detail in Cleveland, Ohio.

Gary Newkirk graduated from the University of Florida and received his J.D. from American University Washington College of Law. Prior to joining OIL, Gary was a law clerk to Judge Alan Lance of the U.S. Court of Appeals for Veterans Claims.

Oil Summer Interns

SEATED L TO R: Sarah Schroeder, Karla Campbell, Bridget Tomlinson, Jennifer Khouri, Allison Hoffman, Yamilet Hurtdao
SECOND ROW: Amelia Hoffman, Jeanne Cook Janette Allen, Yanfei Shen, Andrew Kawel, Eric Kasenetz, Parisa Ghazi, Thomas York
THIRD ROW: Andrew Creighton, Edwin Childs, Jared Feiger, Ben Moss, Luis Diaz, Mark Herman

INDEX TO CASES SUMMARIZED IN THIS ISSUE

13th Annual Immigration Law Seminar

(Continued from page 1)
aggravated felonies and definition of conviction; removal proceedings under § 240 and alternative forms of removal; BIA appeals and streamlining update; immigration reliefs, including cancellation, waivers, and adjustment; asylum, withholding of removal, and Convention Against Torture; due process issues in immigration proceedings; immigration enforcement, REAL ID Act, judicial review of removal orders, and mandamus.

There is no charge for attendance at the seminar, although attendees are expected to cover their travel expenses. Subject to approval by OLE, CLE credits will be available. The preliminary agenda for the seminar has been posted on the OIL web site.

For additional information contact Francesco Isgro at francesco.isgro@usdoj.gov or Karen Drummond at 202-616-8126.

INSIDE OIL

Congratulations to the following OIL attorneys who have been promoted to Senior Litigation Counsel: **Quynh Bain, Josh Braunstein, Dave Dauenheimer, Shelley Goad, Dan Goldman, John Hogan, Susan Houser, Lyle Jentzer, Kurt Larson, Jennifer Lightbody, Anh Mai, Stacy Paddack, Jennifer Paisner, Betty Stevens,** and **Russ Verby.**

Welcome on board to the following attorneys who joined OIL in July:

Katharine Clark is a graduate of Brown University and Georgetown University Law Center. During law school, she earned a Certificate in Refugees and Humanitarian Emergencies from Georgetown's Institute for the Study of International Migration and participated in the Center for Applied Legal Studies, Georgetown's asylum law clinic. Prior to joining OIL, Katharine served as a Judicial Law Clerk with the Executive Office for Immigration Review at the Boston Immigration Court.

Samia Naseem is a graduate of Simmons College and the George Washington University Law School, where she was a Thurgood Marshall Scholar. She studied International Human Rights Law at Oxford University and was the President of GWU's International Legal Fraternity, Phi Delta Phi. She served as a Law Clerk for the Honorable Judith N. Macaluso of the D.C. Superior Court.

Justin Markel received his B.A. from the University of Alabama in 2000. He then graduated from Notre Dame Law School in 2005. After graduating from law school and taking the bar, Justin moved back home to New Orleans approximately three weeks before Hurricane Katrina made landfall. His family's home and business (a lumberyard) were destroyed during the storm. Justin spent the next year helping to get the business back on its feet and his family settled into a new home. Justin moved here to D.C. in

(Continued on page 21)

L to R: Justin Markel, Deitz Lefort, Samia Naseem, Katharine Clark, Gary Newkirk

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended 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.

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.

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.

Office of Immigration Litigation

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

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

Contributors:
Tim Ramnitz, Micheline Hershey, Jeanne Cook (intern)