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SUPREME COURT REJECTS CHALLENGE TO RETROACTIVITY OF REINSTATEMENT

In *Fernandez-Vargas v. Gonzales*, __S. Ct.__, 2006 WL 1698970 (June 22, 2006), the Supreme Court held that INA § 241(a)(5), the reinstatement of removal provision, applies to aliens who reentered the United States before April 1, 1997, the effective date of IIRIRA, and does not retroactively affect any right of, or impose any burden on, aliens who chose to remain illegally here after that date.

> It is "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime."

The petitioner, a Mexican citizen, first entered the United States in the 1970's only to be deported several times for immigration violations. He last reentered illegally in 1982 and remained undetected for 20 years in Utah where he started a trucking business, fathered a son (a United States citizen), and in 2001 married his son's mother, a United States citizen. Based on that marriage, petitioner subsequently filed an application for adjustment of status which alerted HDS to his past immigration violations. In November 2003, DHS reinstated a 1981 deportation order against the petitioner thus making him ineligible for the discretionary relief of adjustment of status. Petitioner was subsequently removed to Mexico in 2004.

Petitioner sought review in the Tenth Circuit, arguing that it would be impermissibly retroactive to apply the reinstatement provision as amended by IIRIRA. He contended that the prior reinstatement version should have applied to him, which would have made him eligible to apply for adjustment of status. The Tenth Circuit held that under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the new law did not have an impermissible retroactive effect in petitioner's case. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005). The Supreme Court then granted certiorari to resolve a split in the circuits. For example, in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), the Ninth Circuit had held that the reinstatement provision does not

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EN BANC NINTH CIRCUIT REVERSES FIRM RESETTLEMENT DETERMINATION

In *Maharaj v. Gonzales*,__ F.3d__, 2006 WL 1579870 (9th Cir. June 9, 2006) (Schroeder, Pregerson, O'Scannlain, *Rymer*, Kleinfeld, Thomas, Graber, W. Fletcher, Fisher, Gould, Paez, Rawlinson, Clifton, Bybee, Callahan), the *en banc* Ninth Circuit reversed a denial of asylum based on the firm resettlement bar under 8 C.F.R. § 208.13(c)(2)(i)(B) (2000). The court held that "under the plain language" of the definition of "firm resettlement" under 8 C.F.R. § 208.15, "DHS bears the initial burden of showing that the government of the third country issued to the alien a formal offer of some type of official status permitting the alien to reside in that country indefinitely."

Here, the court found that there

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ASSISTANT ATTORNEY GENERAL PETER KEISLER NOMINATED TO D.C. CIRCUIT COURT OF APPEALS

On June 29, 2006, President Bush sent to the Senate the nomination of Assistant Attorney General Peter D. Keisler, to be United States Circuit Judge for the District of Columbia Circuit, to fill the vacancy left by now Chief Justice John G. Roberts, Jr.

Mr. Keisler was sworn in as the Civil Division's Assistant Attorney General on July 1, 2003. Prior to that, he served as Principal Deputy Associate Attorney General and Acting Associate Attorney General. He joined the Department on June 24, 2002.

Prior to joining the Department of Justice, Mr. Keisler was a partner in the Washington, D.C. office of Sidley Austin Brown & Wood. A graduate of

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CHALLENGE TO REINSTATEMENT REJECTED

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apply at all to aliens who reentered before the provision's effective date, while most circuits had held otherwise.

The Supreme Court affirmed the Tenth Circuit ruling in an 8-1 decision by Justice Souter. The Court first reviewed the history of the reinstatement provision, noting that since 1950 Congress has provided that deportation orders issued against some aliens who later reentered illegally could be reinstated. Under former INA § 242(f), only a limited class of aliens entrants were subject to reinstatement and those affected were permitted to seek discretionary relief. IIRIRA displaced that provision with § 241(a)(5), a "reinstatement provision []that toed a harder line." "Unlike its predecessor, § 241(a)(5) applies to all illegal reentrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order," observed the Court.

The Court then applied its retroactivity principles as set forth in *Landgraf* and other decisions. The rule of general application, said the Court, is that "a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Landgraf* held that retroactive application of statutes is disfavored when such application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."

When an objection is made to applying a statute said to affect a vested right or impose a new burden, the Court considers the following sequence of analysis. First, the Court looks to "whether Congress has expressly prescribed the statute's proper [temporal] reach." If not, the Court inquires under *Landgraf* "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" If so, "the presumption against retroactivity" controls, the Court stated.

> "The statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country."

Applying these principles to this case, the Court found that the IIRIRA contains no "clause dealing with individuals who illegally reentered the country before" its effective date. The Court then held that two features of the IIRIRA showed that its application to petitioner was not retroactive. First, the IIRIRA applies to him "today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective." Thus, "the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country." Distinguishing its holding in *St. Cyr*, the Court said that in this situation it is "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." In *St. Cyr*, the plea agreements were based on the possibility of §212 (c) relief were entirely past and could not be undone, said the Court.

Second, the provision setting IIRIRA's effective date shows that petitioner "had an ample warning of the coming change in the law, but chose to remain until the old regime expired and 241(a)(5) took its place." The Court noted that the IIRIRA did not become effective for six months after it was enacted. The Court recognized that ending the continuing violation "would have come at a high personal price," for petitioner, but it stated that "the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law."

Petitioner, concluded the Court "claims a right to continue illegal conduct indefinitely under the terms on which it began, an entitlement of legal stasis for those whose lawbreaking is continuous. But 'if every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified.'"

In a dissenting opinion Justice Stevens would have held that, "the natural reading of [IIRIRA] provision, the one most consistent with the 'deeply rooted' traditional presumption against retroactivity . . . is that it would apply to deportations that occurred before the provision's enactment but not to preenactment reentries."

By Francesco Isgro, OIL

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KEISLER NOMINATION

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the Yale Law Shool, Mr. Keisler served as a law clerk to Justice Anthony M. Kennedy of the United States Supreme Court, and Judge Robert H. Bork of the United States Court of Appeals for the District of Columbia Circuit.

In other recent nomination news, Associate Attorney General Robert D. McCallum, and former Assistant Attorney General for the Civil Division, was nominated and subsequently confirmed to be the United States Ambassador to Australia.

Aggravated Felonies Involving Financial Losses

Three provisions of the aggravated felony definition require a showing that the alien's offense involves a loss to the victim or the government of more than $10,000. A crime involving fraud or deceit in which the loss to the victim or victims exceeds $10,000 is an aggravated felony offense. 8 U.S.C. § 1101(a)(43)(M)(i). Less common in immigration litigation are offenses relating to money laundering (18 U.S.C. § 1956) or engaging in monetary transactions in property derived from specific unlawful activity (18 U.S.C. § 1957), and offenses relating to tax evasion (28 U.S.C. § 7201), in which the revenue loss to the government exceeds $10,000. 8 U.S.C. §§ 1101(a)(43)(D), (M)(ii). Because the aggravated felony definition applies in criminal as well as immigration cases, its interpretation often occurs outside the context in which deference to the administrative agency would otherwise be appropriate.

In determining whether an offense is an aggravated felony, the courts normally first resort to the "categorical approach," in which the court looks at the statute under which the alien was convicted and compares its elements to the statutory aggravated felony definition. Under this categorical approach, an offense qualifies as an aggravated felony "'only if the 'full range of conduct' covered by [the criminal statute] falls within the meaning of that term.'" *Chang v. INS,* 307 F.3d 1185, 1189 (9th Cir. 2002), quoting *United States v. Baron-Medina,* 187 F.3d 1144, 1146 (9th Cir. 1999). Fraud statutes, however, normally do not have a $10,000 cutoff, so the categorical approach usually is not useful. *See Singh v. Ashcroft,* 383 F.3d 144, 161 (3d Cir. 2004). If the criminal statute covers conduct that does and does not fit within the aggravated felony definition, then the issue is analyzed under the "modified categorical approach" under which judicially cognizable conviction documents are examined to determine if the evidence is sufficient to conclude that the defendant was convicted of the elements of the generic definition of the offense. *See Taylor v. United States,* 495 U.S. 575, 602 (1990). Under that approach, the courts may look at the indictment or information, plea agreement, the judgment of conviction, jury instructions, or the transcript from the plea proceedings. *See* 8 U.S.C. § 1229a(c)(3)(B); 8 C.F.R. § 1003.41(a); *Canada v. Gonzales,* 448 F.3d 560, 566 (2d Cir. 2006).

> The conviction records submitted at the removal proceedings are sometimes insufficient to satisfy the courts as to the amount of the loss.

The conviction records submitted at the removal proceedings are sometimes insufficient to satisfy the courts as to the amount of the loss, and it is important that the immigration judge and the courts be provided with as much cognizable information from the criminal proceeding as possible in order to assure a supportable determination regarding the amount of loss. It must be recognized, however, that obtaining conviction records, particularly for convictions in state courts, may be a burdensome task.

If the defendant is convicted after trial or pleads guilty to a count alleging fraud and a loss in excess of $10,000, then the offense is an aggravated felony. Difficulties arise, however, when the charging document or other cognizable documents are not so specific.

The amount of restitution ordered in the criminal case may or may not establish the monetary loss to the victim. For example, the Third Circuit has held that where the restitution amount on the count of conviction is contradicted by the amount of loss to the victim specified in the plea agreement or indictment, and the specified loss to the victim is less than $10,000, the offense is not an aggravated felony, even if restitution of more that $10,000 is ordered. *Chang,* 307 F.3d at 1190-1191. A restitution order will not trump the plea agreement or the indictment. The Ninth Circuit has held, however, that where the plea agreement or complaint does not specify the amount of the loss, a restitution order may establish the amount of loss. *See Ferreira v. Ashcroft,* 390 F.3d 1091, 1098-1110 (9th Cir. 2004). If the restitution amount is not based on the amount of the victim's loss, but is intended solely to affect the alien's immigration status, the amount of restitution is not controlling. *Munroe v. Ashcroft,* 353 F.3d 225, 227 (3d Cir. 2003).

In general, the loss to the victim must stem from the convicted offense. *Knutsen v. Gonzales,* 429 F.3d 733, 736-737 (7th Cir. 2005). Thus, to the extent that a restitution order or agreement is based on unconvicted offenses, it normally will not be considered in determining whether the loss to the victim is $10,000. However, state statutes may provide that restitution be based on the amount of loss to the victim. *See, e.g.,* Cal Penal Code § 1202.4(f).

It is therefore important to determine the precise parameters of the offense of conviction and the basis for any restitution order. If the charge which forms the basis of the conviction alleges a scheme to defraud, then losses resulting from the entire scheme may be considered. If, however, the charge alleges only a discrete action, such as kiting one bad check, or a separate scheme, then usually only the amount of the loss from that transaction or scheme

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Aggravated Felonies Involving Financial Losses

may be considered.

A fraud offense need not be specifically charged for the monetary loss limit to come into play. In *Nugent,* the alien was convicted in Pennsylvania of theft by deceit. *Nugent v. Ashcroft,* 367 F.3d 162 (3d Cir. 2004). The Third Circuit concluded that the theft by deceit offense was a hybrid that constituted both a theft offense and a fraud offense. Consequently, the court concluded that in order for the offense to constitute an aggravated felony, it had to meet the requirements under both the theft definition (imprisonment for one year) and the fraud definition (loss to victim exceeding $10,000). *Nugent,* 367 F.3d at 176-179.

A conviction for conspiracy or attempt to commit one of the identified crimes also constitutes an aggravated felony offense. 8 U.S.C. § 1101(a)(43)(U). A conviction for conspiracy to commit fraud need not involve an actual loss for the conviction to constitute an aggravated felony. *See Kamagate v. Ashcroft,* 385 F.3d 144, 153 (2d Cir. 2004). The co-conspirators only must have contemplated acts that would cause a loss in excess of $10,000. All that is required is an object of the conspiracy or attempt involve $10,000. *See id.* at 153 and n.12. In addition, a co-conspirator is liable for the substantive offenses committed in furtherance of a conspiracy. Thus, if the conspiracy defrauded a victim or victims of more than $10,000, the alien's offense is an aggravated felony even if he or she did not commit the fraudulent acts. *See Iysheh v. Gonzales,* 437 F.3d 613 (7th Cir. 2006). Where the charge on which the alien was convicted alleges a fraudulent scheme, the "loss to the victim or victims" includes all amounts lost as a result of the scheme, even if the count of conviction alleges only one discrete fraudulent transaction that resulted in a loss of less than $10,000. *See Khalayleh v. INS,* 287 F.3d 978, 980 (10th Cir. 2002). The loss resulting from the scheme is the proper measurement. *Id.*

An aggravated felony may be found based on an attempt to commit a fraud if the object of the attempt is to defraud in an amount of more than $10,000, even if the attempt was unsuccessful. *Li v. Ashcroft,* 389 F.3d 892, 896 (9th Cir. 2004); *In re Onyido,* 22 I. & N. Dec. 552 (BIA 1999). It is not necessary that attempt be specifically charged, for example, by a state, for the offense to be deemed an attempt under 8 C.F.R. § 1101(a)(43)(U), so long as the offense charged meets the generic definition of attempt. *Sui v. Gonzales,* 250 F.3d 105, 114-115 (2d Cir. 2001).

> An aggravated felony may be found based on an attempt to commit a fraud if the object of the attempt is to defraud in an amount of more than $10,000, even if the attempt was unsuccessful.

The aggravated felony provision relating to money laundering differs from the fraud provision in that an offense is an aggravated felony "if the amount of the funds exceeded $10,000." 8 U.S.C. § 1101(a)(43)(D). The Ninth Circuit has rejected the argument that the money laundering provision turns on the "loss to the victim," ruling instead that the "amount of the funds" refers to the amount of funds laundered. *Chowdhury v. v. INS,* 249 F.3d 970 (9th Cir. 2001). In such cases, even if restitution is ordered, it may be deemed insufficient to establish the amount of funds laundered.

As to the aggravated felony tax provision, the amount of the loss is likely less difficult to establish through conviction records. But all tax offenses, even those involving fraud and the requisite monetary loss, may not be found to be aggravated felonies. Immediately following the aggravated felony fraud provision, 8 U.S.C. § 1101(a)(43)(M)(ii) provides that an offense "described in § 7201 of the Internal Revenue Code of 1986 (related to tax evasion) in which the revenue loss to the Government exceeds $10,000," also is an aggravated felony. The Third Circuit has ruled that Congress did not intend to include tax offenses other than tax evasion under section 7201 within the aggravated felony definition, even though those tax offenses involve fraud and the requisite monetary loss. *See Lee v. Ashcroft,* 368 F.3d 218, 224 (3d Cir. 2004). In light of the broad aggravated felony fraud provision, it seems unlikely that Congress intended to exempt tax fraud (other than violations of section 7201 of the Tax Code) from the aggravated felon definition. In courts that have not decided the issue, it may be argued that tax fraud involving the requisite monetary loss is an aggravated felony under the fraud provision even if it did not arise under the general tax evasion statute. *See Abreu-Reyes v. INS,* 292 F.3d 1029, 1034 (9th Cir. 2002), *withdrawn on other grounds,* 350 F.3d 966 (9th Cir. 2003).

The analysis applied by the courts in determining whether a financial crime falls within the aggravated felony definition is often rigorous. A thorough analysis of the offense and the relevant documentary evidence is prudent in addressing these issues.

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ATTENTION READERS!

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

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CORROBORATION OF ASYLUM CLAIMS: EFFECT OF FAILURE TO CORROBORATE AND FAVORABLE CASE LAW REQUIRING FOREIGN CORROBORATION

Lack Of Corroboration As Basis For Finding Alien Not Credible

The alien has the burden of proof to establish his eligibility for asylum and withholding of removal *See, e.g.*, *Berroteran-Melendez v. INS*, 955 F.2d 1252, 1256 (9th Cir. 1992); *Aguilera-Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999); 8 C.F.R. 1208.13(a); 1208.16(b). The Board has held that this means that the alien has the burden of proof *and* persuasion to prove eligibility for asylum and withholding. *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). As a matter of black letter law, the party who has the burden of proof and persuasion must convince the factfinder of the truth of the party's claims and bears the "risk of nonpersuasion," i.e., the risk that if the factfinder is in doubt, or does not know what to believe, he may decide against the applicant. *See* 2 McCormick on Evidence, Section 337 (Strong 3d. 1992); 9 Wigmore on Evidence, Section 2485 (Chadbourne ed. 1970). Therefore, just like any other party in an adversarial proceeding, an alien seeking asylum in a removal proceeding runs the risk that if he does not reasonably corroborate his claims, he may be found not credible. *See generally Mejia Paiz v. INS*, 111 F.3d 720, 722 (9th Cir. 1997). All of the Circuits are in agreement that an IJ can find an alien not credible if there are inconsistencies or other problems with the alien's testimony, and the alien failed to reasonably corroborate his claim.

Lack of Corroboration As Basis For Finding Credible Alien Failed To Meet Burden Of Proof

The more controversial issue is whether an IJ can require a credible alien to corroborate his testimony in order to meet his overall burden of proof. As shown above, regulations provide that the applicant bears the burden of proof. 8 C.F.R. 1208.13(a); 1208.16(b). These regulations also provide that the testimony of the applicant, if credible, persuasive, and specific "may" be sufficient to sustain that burden. *Id*. However, the Board of Immigration Appeals has interpreted the regulations to mean that as a general rule testimony alone will not be enough, and an Immigration Judge may require an alien to corroborate specific facts or experiences that are central to the alien's claim when it is reasonable to do so. *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). This requirement that an applicant must corroborate credible testimony is called the "Corroboration Rule." This rule permits an Immigration Judge to find that a credible alien nonetheless failed to meet his of proof when he fails to reasonably corroborate his testimony and does not have a reasonable explanation for the lack of corroboration. *Id.*

> All of the Circuits are in agreement that an IJ can find an alien not credible if there are inconsistencies or other problems with the alien's testimony, and the alien failed to reasonably corroborate his claim.

The Circuits are in disagreement about whether the Board's "Corroboration Rule" is a permissible interpretation of the regulations.

The Second and Third Circuits have affirmed the Corroboration Rule, although they require an express statement by the Immigration Judge explaining why corroboration is necessary and the alien's failure to provide the corroboration was unreasonable. *See Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000). The Seventh Circuit requires an Immigration Judge to make an explicit credibility finding, explain why the alien's explanation for lack of corroboration was inadequate, and explain why it was reasonable to expect corroboration. *See Iallo v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005). The Ninth Circuit has refused altogether to enforce the Corroboration Rule - meaning that it will not permit an Immigration Judge to require corroboration from a credible alien, but will permit an Immigration Judge to rely on lack of corroboration as one reason for finding an alien not credible. *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000).

The REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), will change this law. It adds amendments to the asylum and withholding statutes (and statutes governing all other applications for relief as well) that permit lack of corroboration to be a basis for finding an alien failed to meet his burden of proof. *Id*. But these amendments only apply to "applications made on or after [May 11, 2005, the REAL ID Act's enactment date]." REAL ID Act Section 103(h). Therefore, the change made by the REAL ID Act is not yet in effect in most cases currently being litigated, and pre-REAL ID Act case law applies.

Foreign Corroboration Can Be Required

Apart from the relevance of the failure to corroborate -- i.e., whether it is relevant to finding an alien not credible, or relevant to finding a credible alien failed to meet his burden of proof -- there is a separate question about what kind of corroboration reasonably can be required. The Ninth Circuit has suggested that it is almost never appropriate to require an alien to corroborate his testimony with foreign evidence from abroad. *Sidhu v. INS*, 220 F.3d 1085, 1091-92 (9th Cir. 2000) (stating that it is "inappropriate" to require corroborating evidence from relatives or acquaintances living outside the United States, because "such corroboration is almost never easily obtainable."). However, this was dictum and does not accurately reflect the law of the Ninth Circuit. There is Ninth Circuit case law affirming the agency's finding of lack of corroboration for failure to produce evidence from

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ASYLUM LITIGATION

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abroad. *See Mejia-Paiz*, 111 F.3d at 722 (affirming finding of lack of corroboration where alien failed to produce foreign church records to corroborate claim of membership in Johovah's Witnesses); *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (affirming finding of lack of reasonable corroboration where alien failed to produce corroboration from wife abroad and foreign medical records).

Other Circuits have also affirmed a finding of lack of reasonable corroboration for failure to produce foreign corroboration. *See Nigussie v. Ashcroft*, 383 F.3d 531, 538 (7th Cir. 2004) (lack of reasonable corroboration for failure to produce foreign evidence confirming ethnic background and baptism as Jeohvah's Witness); *Nyama v. Ashcroft*, 357 F.3d 812 (8th Cir. 2004) (lack of reasonable corroboration for failure to provide foreign corroboration of father's or brother's involvement in political organization); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 598-99 (3d Cir. 2003) (lack of reasonable corroboration for failure to provide foreign documents showing membership in student union); *Loulou v. Ahscroft*, 354 F.3d 706 (8th Cir. 2003) (lack of reasonable corroboration for failure to provide easily obtainable foreign police reports or medical corroboration); *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003) (lack of reasonable corroboration for failure to provide foreign documents showing membership in Nigerian political/ethnic movement); *Propenko v. Ashcroft*, 372 F.3d 941 (8th Cir. 2004) ("It was [the alien's] responsibility, not that of the IJ or the INS, to gather evidence in support of his asylum claim" and his "failure to provide the requested [medical] documents to corroborate the sources of scars provided further reason to doubt [his claim].").

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

SPOTTING REAL ID JURISDICTIONAL ISSUES

The REAL ID Act of 2005 amended the Immigration and Nationality Act's judicial review scheme to ensure that in some (not all) instances, the courts will have jurisdiction to decide "questions of law and constitutional claims" despite one or more statutory limitations on judicial review. It is very important when briefing an immigration petition for review to educate the court about the effect of the REAL ID Act amendments, and most importantly, to ensure that the courts do not find jurisdiction where the REAL ID Act has not authorized review. How can you tell if your case presents issues regarding the proper scope of jurisdiction in the light of the REAL ID Act amendments, and how it should be briefed? Here's a handy guide:

> It is very important when briefing an immigration petition for review to educate the court about the effect of the REAL ID Act amendments.

1. *Evaluate immigration consequences of any criminal convictions.* If your alien was ordered removed based on a conviction, determine whether the conviction is within the scope of 8 U.S.C. § 1252(a)(2)(C). If it is, then the court does not have jurisdiction over any issues other than questions of law or constitutional claims. (See #3.)

2. *Evaluate whether any discretionary relief was denied in the exercise of discretion.* If your alien wishes to challenge a finding of statutory ineligibility for relief from removal where the underlying relief was also denied in the exercise of discretion, the court should not consider the eligibility issue because it cannot grant relief in any event. *See* 8 U.S.C. § 1252(a)(2)(B).

3. *Evaluate whether some other jurisdictional limitation applies, and whether it is subject to the REAL ID Act rule of construction for questions of law and constitutional claims.* Determine whether some other jurisdictional limitation applies and, if so, whether it is within 8 U.S.C. § 1252. If the only limitation applicable to a given challenge is outside 8 U.S.C. § 1252, the alien's arguments must be analyzed to determine whether they present a "question of law," or a "constitutional claim." The court has jurisdiction only to that extent. If, however, a limitation within 8 U.S.C. § 1252 other than those in steps 1 and 2 above applies (such as exhaustion), then the court does not have jurisdiction.

4. *Evaluate whether, and to what extent, a question of law or constitutional claim is presented.* The meaning of "question of law" is under consideration in several courts now. See cases identified by Papu Sandhu for guidance. Be aware that the REAL ID Act prevents courts from reviewing factual components of some questions of law and constitutional claims.

5. *Communicate with Papu Sandhu (202-616-9357) or with any of the contacts below if you have any questions.*

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FIRM RESETTLEMENT

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was insufficient evidence indicating that the petitioner was entitled to permanent resettlement when he departed Canada prior to the completion of his asylum process in that country.

The case involved a family from Fiji who claimed persecution on account of their Indo-Fijian ethnicity and on account of political opinion because the principal petitioner had been associated with an opposition party. In 1987, the family traveled to Canada where petitioner's sister lived and settled in Edmonton where they then applied for asylum and refugee status. While their applications were pending, they were granted work authorizations and health insurance from the Canadian government. The adult petitioners worked, rented an apartment, and sent their children to public school. After living in Canada for four years, petitioners decided to move to the United States because, as the Ninth Circuit explained, "they believed the grass was greener on the other side of the border." Following their entry into the United States as visitors in March 1991, petitioners never departed and remained here illegally. When eventually placed in proceedings in September 1996, petitioners applied for asylum and withholding. The IJ denied their application for asylum finding that petitioners had been offered settlement in Canada but chose not to wait for the outcome of their refugee application. Accordingly, the IJ applied the rebuttable presumption of firm resettlement based upon *Cheo v. INS*, 162 F.3d 127 (9th Cir. 1998). Because petitioners provided no evidence in rebuttal that they were not firmly resettled, the IJ found that petitioners were statutorily ineligible for asylum. The IJ denied the request withholding on the basis of changed country conditions and petitioners' renewal of their Fijian passports. The BIA affirmed, adopting the IJ's opinion. In the alternative, the BIA also found that petitioners' asylum claim failed because of changed circumstances in Fiji. Subsequently, the Ninth Circuit denied petitioner's appeal in *Maharaji v. Gonzales*, 416 F.3d 1088 (9th Cir. 2005). That decision was then vacated when the Ninth Circuit reheard the case *en banc*.

> The firm resettlement rule requires evidence that an offer was received before the burden shifts to the alien.

The Ninth Circuit preliminarily determined that a finding of "firm resettlement" is a factual determination to be reviewed under the *Elias-Zacarias* standard that such finding will be reversed "only if a reasonable fact finder would have been compelled to reach a different result."

On the merits, the court noted that as of October 1, 1990, the regulations prohibit the granting of asylum to an alien who has been firmly resettled. *See* 8 C.F.R. § 208.13(c)(2)(i)(B). "Firm resettlement" is defined for purpose of the bar in 8 C.F.R. § 208.15. Until October 1, 1990, "firm resettlement" was only a factor considered by the adjudicators and the courts in evaluating an asylum claim as a matter of discretion. Based on the regulations, the court held, consistent with the consensus view among the circuits, that DHS bears the initial burden of showing "an offer of permanent resident status, citizenship, or some other type of permanent resettlement." Therefore, the rule requires evidence that an offer was received before the burden shifts to the alien. The court then agreed with the Third Circuit's interpretation in *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001), that the threshold showing that will cause the burden to shift is "the existence *vel non* of an offer of permanent resident status, citizenship, or some other type of permanent resettlement." If direct evidence is unobtainable, said the court, circumstantial "evidence must be of sufficient force to show that the alien's length of residence, intent, and ties in the third country indicate that the third country officially sanctions the alien's indefinite stay."

Here, the court found that there was no evidence to indicate that petitioner was entitled to permanent resettlement when he left Canada while his refugee application was pending. Thus, there was no basis "to find an offer of permanent resettlement" and shift the burden to petitioner. Likewise, the court found that the IJ erred in shifting the burden to petitioner based on his length of residence and work in Canada, because DHS had not made a showing that "offer-based evidence was unobtainable. Therefore, it had to adduce direct evidence of an offer of some type of permanent resettlement." Accordingly, the court remanded this issue for a determination whether evidence that petitioner had a right to work, receive benefits, and apply for refugee status, constituted "an offer of permanent residence, citizenship, or some other type of resettlement," under the court's analysis. The court also remanded the case on the issue of withholding, finding that the BIA had not made an individualized determination of changed country conditions.

Judge O'Scannlain, joined by judges Kleinfeld, Rawlinson, and Callahan filed an opinion concurring in part and dissenting in part. The minority agreed with the majority's remand to consider changed country conditions in Fiji for withholding of removal, but dissented with respect to the merits or petitioners' asylum applications. They would have held that the IJ had properly concluded that petitioners had firmly resettled in Canada. They criticized the majority's opinion because it "misconstrues the law of resettlement, opens our asylum process to an alien who is not fleeing from persecution, and invites abusive country-shopping."

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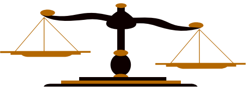

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Remand Of Petitioner's Case To Immigration Court Did Not "Retroactively Nullify" Her Previous Violation Of Voluntary Departure Order

In *DaCosta v. Gonzales*, __F.3d__, 2006 WL 1413058 (1st Cir. May 24, 2006) (Lipez, Cyr, *Howard*), after the BIA affirmed the IJ's decision denying petitioner asylum and granting her voluntary departure, she moved to reopen her case to apply for adjustment of status based on her marriage to a US citizen. In support of her motion, petitioner claimed that DHS led her to believe for nearly two years that her adjustment application was being processed before finally warning her that her application could not be considered because she was in removal proceedings. DHS did not oppose the motion to reopen. The BIA granted the motion and remanded the case to the IJ who subsequently granted adjustment of status. DHS then appealed the BIA's decision, arguing that petitioner was statutorily ineligible for adjustment of status because she had violated her order to voluntarily depart. Agreeing with DHS, the BIA vacated the order granting adjustment of status.

Petitioner appealed the BIA's decision to vacate arguing that (1) by failing to oppose her motion to reopen for consideration of her application for adjustment, DHS waived its right to contest the IJ's subsequent order granting her adjustment; (2) the BIA's order reopening her case tolled her voluntary departure period and gave the IJ the authority to consider afresh her adjustment of status; and (3) the DHS's conduct in mishandling her application violated her due process rights.

The court preliminarily found that it had jurisdiction to review the legal questions raised by petitioner, while noting that it would have lacked jurisdiction if it had been asked to review the discretionary denial of adjustment. The court held that although DHS did not oppose the motion to reopen, it did not waive its right to appeal the IJ's decision granting adjustment of status. "The filing of a motion to reopen with the BIA is not a vehicle for trying an issue, but is merely a request for an opportunity to try it," said the court. The court also found that the BIA's order granting petitioner's motion to reopen her removal proceedings had not canceled the terms of the voluntary departure order or wiped out the legal consequences of breaking that order.

> "The filing of a motion to reopen with the BIA is not a vehicle for trying an issue, but is merely a request for an opportunity to try it."

Finally, the court held that because adjustment of status was a discretionary form of relief, petitioner did not have a protected liberty or property interest in adjustment of status, as required to sustain her claim that the mishandling of her application for adjustment had violated her due process rights.

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■ Asylum Denied to Cambodian Applicants Who Had No Political Affiliations Of Their Own And Did Not Qualify For Relief As Members Of A Political Party

In *Sou v. Gonzales,* __F.3d__, 2006 WL 1545437 (1st Cir. June 7, 2006) (Selya, Lipez, *Saylor*, D. Mass.), the First Circuit affirmed the BIA's denial of asylum and withholding of removal to a married couple from Cambodia. Petitioners claimed that they had left Cambodia because a government worker warned them that the husband was believed to be a member of the Cambodian freedom fighters, a supporter of the Sam Rainsy opposition party, and "especially dangerous" as a previous soldier in the 1970s. The IJ and the BIA denied asylum finding that they had "no political affiliations of their own, they were allowed to leave Cambodia, and their three children remain in Cambodia at this time." On appeal they claimed that they would suffer future persecution on the basis of their political opinion upon repatriation and challenged the BIA's finding that they had "no political affiliation of their own."

The court affirmed the BIA's decision concluding that it was not "manifestly contrary to law or an abuse of discretion" for three reasons. First, the court noted that petitioners testified that they were not members of any organization and their involvement in political organizations was low-level to nonexistent which is "not sufficient, by itself, to establish that the political beliefs of those organizations would be imputed to them or that they would be targeted on the basis of those tangential connections." Second, the court stated that even though members of Sam Rainsy party suffered abuses in Cambodia, petitioners' support for that party was so limited that the BIA correctly concluded that petitioners "had not demonstrated that their fear of suffering the same abuses was well-founded."

Finally, the court noted that the husband's service in the military had ended 27 years before the events leading to their departure from Cambodia. The court found that "while petitioners were not entirely apolitical, the record [did] not compel the conclusion that they had political affiliations." The court also noted that petitioners left their country freely, and their three children live peacefully in Cambodia, which "undercut" their claim that "persecution awaits their return."

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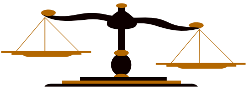

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■ **IJ Committed Error Of Law Because He Failed To Properly Evaluate The Exceptional Circumstances For The Alien's Failure To Appear**

In *Kaweesa v. Gonzales*, __F.3d__, 2006 WL 1575400 (1st Cir. June 9, 2006) (*Torruella*, Hill, Howard), the court held that the IJ abused his discretion in denying petitioner's motion to reopen an *in absentia* removal order without considering the totality of the circumstances that led to her failure to appear at her removal hearing.

The petitioner, a citizen of Uganda and a Christian minister, entered the United States in August 1994 to attend a religious conference. After her visa expired she applied for asylum in October 1997, claiming that she had suffered mistreatment at the hands of government security officers on account of her religious beliefs. The Asylum Officer did not grant her application and served her with a Notice to Appear. When she failed to appear at her May 13, 1999, scheduled hearing, the IJ entered an *in absentia* order of removal. She subsequently filed a first motion to reopen claiming that she got the dates of her hearing mixed up and thought that her hearing was on May 17. The IJ denied the motion based on a finding that petitioner had not demonstrated the requisite "exceptional circumstances" warranting reopening. After petitioner was taken into custody on June 17, 2003, she filed a second motion to reopen arguing that changed circumstances in Uganda and newly acquired evidence made her eligible for asylum and for relief under CAT. The BIA denied the second motion to reopen as numerically and time-barred. Undaunted, on April 15, 2004, petitioner, while still in custody, filed a third motion to reopen with the BIA based upon "newly discovered evidence and changed country conditions in Uganda." She also filed a habeas petition in the district court. She argued that the IJ committed "clear legal error" by failing to examine the totality of circumstances surrounding her first motion to reopen. She also argued that the BIA violated her due process rights by denying her first and second motions. The BIA denied the third motion to reopen again as numerically and time-barred and also noted the motion's "dilatory nature." The district court determined that it had habeas jurisdiction to review petitioner's first motion to reopen and transferred the case to the Court of Appeals under the REAL ID Act.

> "Because the IJ must consider the totality of circumstances and because it is plain that the IJ looked no further than the fact that petitioner mixed up the dates, the IJ committed an error of law."

The First Circuit first determined that under the REAL ID Act, it retained jurisdiction to review the denial of a motion to reopen to the extent that the denial constituted an error of law or a violation of a constitutional right. The court then found that the denial of the first motion to reopen was an error of law and that the IJ had abused its discretion in denying the motion. The court reasoned that an *in absentia* order of removal may be rescinded if petitioner demonstrates that the failure to appear was "because of exceptional circumstances." In deciding the validity of a claim of exceptional circumstances the totality of circumstances must be considered. Petitioner had conceded throughout the proceedings that she was removable, and that she had failed to attend her initial May 13 hearing because she inadvertently mistook the May 13 hearing date for May 17. The IJ concluded that this was not "incomprehensible" error but did not amount to exceptional circumstances. The court found that it "did not appear that her failure to appear was deliberate or due to a desire to delay proceedings," and that "the harm of returning petitioner to Uganda without a hearing could have potentially been great." The court determined that "because the IJ must consider the totality of circumstances and because it is plain that the IJ looked no further than the fact that petitioner mixed up the dates, the IJ committed an error of law" and concluded that she had demonstrated exceptional circumstances so that her motion to reopen should be granted.

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■ **First Circuit Holds That It Lacks Jurisdiction To Review Discretionary Denials of Adjustment And Waiver Of Inadmissibility**

In *Onikoyi v. Gonzales*, __F.3d__, 2006 WL 1652527 (1st Cir. June 16, 2006) (*Lipez*, Howard, Hug), the court held that it lacked jurisdiction to review the BIA's discretionary denials of adjustment and waiver of inadmissibility. The court also denied a motion for a stay of voluntary departure stating that it did not have authority to reinstate the voluntary departure period after it originally expired.

The petitioner, a native and citizen of Nigeria, reentered the United States illegally after he had been deported in 1986 under an alias. He then applied for adjustment of status under the 1986 IRCA amnesty program. He did not inform the government that he had been previously deported which would have made him ineligible for adjustment of status. In 1990, DHS adjusted his status to that of a lawful permanent resident. In 1993, petitioner was arrested for theft which alerted the former INS to the fact that he had been previously deported under an alias. Following his conviction for illegal reentry, the INS charged him with deportability based on the theft conviction and his illegal status. During his deportation hearing, petitioner applied for adjust-

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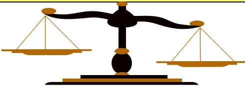

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ment of status based on his wife's US citizenship, a discretionary waiver of inadmissibility, and, in the alternative, voluntary departure. The IJ and later the BIA denied his applications for adjustment of status and waiver of inadmissiblity as a matter of discretion but granted voluntary departure. On appeal, petitioner challenged the denials of his applications for adjustment of status and waiver of inadmissibility and sought a stay of his voluntary departure period.

The court denied the petition holding that since the IJ "made clear for each form of discretionary relief she was denying, that her decision was based on her exercise of discretion" and since the BIA "adopted and affirmed the IJ's decision to deny his applications for relief "as a matter of discretion," the court did not "have jurisdiction to review the BIA's affirmance of the IJ's discretionary decision." Additionally, the court denied petitioner's motion to stay his expired voluntary departure period holding that under 8 U.S.C. § 1252(a)(2)(B)(i), it lacked jurisdiction to review voluntary departure determinations, and quoting from *Bocova v. Gonzales*, 412 F.3d 257, 266-68 (1st Cir. 2005), where it held that courts "no longer have the authority [. . .] either to fashion a new voluntary departure period or to reinstate an expired one."

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■ First Circuit Determines That The BIA Acted Within Its Discretion In Denying A Late Motion To Reopen

In *Joumaa v. Gonzales* 446 F.3d 244 (1st Cir. 2006) (Torruella, Lynch, Howard), the First Circuit held that the BIA acted within its discretion in denying petitioner's motion to reopen as untimely. The petitioner, a native and citizen of Lebanon, entered the United States on a transit visitor's visa. When he failed to depart, he ordered removed, and his applications for asylum, withholding, and CAT relief were denied based on an adverse credibility finding. The First Circuit had affirmed those findings. *See* 111 Fed.Appx. 15 (1st Cir. 2004) (unpublished decision). Subsequently, petitioner filed a belated motion to reopen to apply for adjustment of status. He based his motion to reopen on the court's decision in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), which was issued after his initial petition was denied and which invalidated one of the regulations that the IJ had invoked in finding him to be ineligible for adjustment of status. The BIA denied the motion, finding that, unlike the motion filed in *Succar*, petitioner had filed his motion long after the final order and following the court's denial of his appeal.

The court held that the motion to reopen was untimely regardless of any alleged change of law. "Congress has created particular exceptions to the ninety-day rule, none of which apply here," said the court. The court found that Congress had not provided an exception for a claim that is based on a new decision of law issued after the ninety-day period for filing a motion to reopen had expired. The court rejected for failure to exhaust, petitioner's contention that the BIA should have equitably tolled the ninety-day limit.

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SECOND CIRCUIT

■ Court Lacks Jurisdiction To Review BIA Denial Of *Sua Sponte* Reopening

In *Ali v. Gonzales*, __F.3d__, 2006 WL 1304939 (2d Cir. May 12, 2006) (Winter, Cabranes, Raggi) (*per curiam)*, the Second Circuit held, in an issue of first impression, that it lacked jurisdiction to review a BIA decision not to *sua sponte* reopen proceedings under 8 C.F.R. § 1003.2(a). The petitioner had filed his motion to reopen to apply for adjustment on July 30, 2004, more than eleven years after the BIA had dismissed his original appeal in 1992. The court noted that several circuits have concluded that a failure to *sua sponte* reopen a case cannot be reviewed in the courts of appeals. The court agreed with those circuits and held that the decision not to *sua sponte* reopen "is entirely discretionary and therefore beyond our review." The court also determined that the BIA did not abuse its discretion in denying petitioner's untimely motion to reopen based on the petitioner's failure to exercise due diligence during the seven-year time period for which he sought equitable tolling on account of the alleged ineffective assistance of his former counsel.

> The decision not to *sua sponte* reopen "is entirely discretionary and therefore beyond our review."

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■ Second Circuit Determines That Assaulting A Peace Officer In Violation Of Connecticut Law Is A Crime Of Violence

In *Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006) (Miner, Raggi, *Karas* (SDNY)), the Second Circuit held that it lacked jurisdiction to review the appeal following its determination that petitioner had been convicted of an aggravated felony. The petitioner, a citizen of the Philippines and an LPR, had entered a plea of nolo contendere to the crime of assaulting a peace officer in violation of Connecticut law. The court, applying the categorical approach, held that even though a conviction for assaulting a peace officer does not require proving any intent to cause physical injury, the crime, by its nature, involves a substantial risk that force may be used, and therefore, is a crime of violence.

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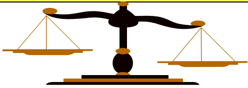

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■ **Second Circuit Remands Chinese Unmarried Father's Asylum Case For Further Adjudication**

In ***Pan v. Att'y General***, __ F.3d__, 2006 WL 1406360 (2d Cir. May 23, 2006) (Winter, Cabranes, Raggi), in a *per curiam* decision, the Second Circuit remanded petitioner's asylum case to the BIA to determine in the first instance, whether his status as a boyfriend and father of an out-of-wedlock child would allow him to qualify as a refugee. Petitioner claimed that his girlfriend was still hiding in China, and that he and she would be persecuted if returned to China. The IJ denied asylum finding no credible proof of a marriage and that, consequently, petitioner could not claim that there would be any consequences to him under the Chinese planning policy. the IJ also determined that petitioner had not met is burden to establish a well-founded fear of future persecution. The BIA summarily affirmed.

The court upheld the IJ's adverse credibility finding regarding the petitioner's claims of marital status, noting that even though there was ambiguity as to whether the IJ had considered the possibility of a non-traditional marriage, there was no compelling evidence "to reach a contrary conclusion." The court however, remanded for a definitive general credibility finding regarding the petitioner's testimony on other aspects of his past persecution claim because it found that the IJ had evaluated petitioner's "credibility only in so far as he found that [he] was not married."

Finally, the court also remanded to the BIA to determine whether petitioner had established a derivative claim of a well-founded fear of future persecution, for the reasons previously stated in *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005). In that case, the court had stated that it could not determine the eligibility of boyfriends and fiances under the amended refugee definition because the BIA had failed to articulate a "reasoned basis" for its decision in *Matter of C-Y-Z-*, 21 I&N Dec 915 (BIA 1997) (establishing spousal eligibility for asylum based on coercive family planning). The court noted that the BIA had yet to rule on its remand in *Shi Liang Lin* and ordered the BIA to inform the court when it would issue its opinion in that case.

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■ **Second Circuit Denies Petition For Review Predicated On Claim Of Ineffective Assistance Of Counsel**

In *Garcia-Martinez v. DHS,* 448 F.3d 511 (2d Cir. 2006) (Winter, Cabranes, Raggi) (*per curiam*), the court upheld the denial of cancellation of removal and declined to consider a claim of ineffective assistance of counsel because it had not been raised to the BIA in the first instance. Petitioner argued that he had substantially complied with *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), and asked the court to consider whether the *Lozada* requirements should apply in a direct appeal on the merits not involving a motion to reopen. The court found that petitioner failed to demonstrate substantial compliance with the requirements of *Lozada,* and that those requirements "are equally applicable in the context of a direct appeal."

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■ **Second Circuit Rules It Lacks Jurisdiction To Review The BIA's Decision To Affirm Without Opinion Rather Than Referring To A Three Member Panel**

In *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006) (Winter, Cabranes, Sack) (*per curiam*), the court affirmed the denial of the petitioner's asylum application and held that it lacked jurisdiction to review a single BIA member's decision to dispose of a case unilaterally and without opinion, rather than refer it to a three-member BIA panel. The petitioner, a citizen of Albania, claimed that as a result of his active membership in the Democratic Party he was persecuted and feared future persecution by Socialist Party operatives. The IJ determined that the mistreatment petitioner had suffered did not rise to the level of persecution and that he had failed to show he would be singled out for persecution if returned to Albania. The BIA affirmed without opinion pursuant to 8 C.F.R. § 1003.1 (e)(4).

> The drafters of the streamlining regulations "did not envisage review of the reasoning behind a BIA member's choice of unilateral affirmance."

The court held, after noting a circuit split on this issue, that it lacked jurisdiction to review petitioner's contention that his case should have been referred to a three-member BIA panel. The court reasoned that an alien has no constitutional right to an administrative appeal and that absent a provision to the contrary actions by an IJ or BIA may be subject to judicial review. The court also noted that a BIA member acting under §1003.1(e)(4), is precluded from making any record whatsoever of his reasoning, suggesting that the drafters of the regulations "did not envisage review of the reasoning behind a BIA member's choice of unilateral affirmance." The court also determined that the petitioner did not suffer past persecution, and did not have a well-founded fear of future persecution, given his single run-in with authorities and his successful ability to relocate in Albania.

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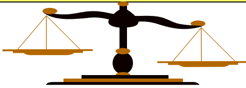

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■ Second Circuit Upholds Adverse Credibility Determinations Based On Omissions In Application

In *Wang v. Gonzales*, 449 F.3d 451 (2d Cir. 2006) (Miner, Wesley, Friedman) (*per curiam*) decision, the Second Circuit upheld the denial of asylum and withholding of removal to an applicant from China. The court concluded that the BIA had correctly based its adverse credibility determination on the petitioner's omission of a claim of persecution based on opposition to China's family planning program in a 1992 asylum application, even though at the time of the application, forced sterilization did not constitute persecution as a matter of law. The court found that petitioner's omission was "material to his claim for asylum irrespective of whether it predated the 1997 change in the definition of refugee."

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THIRD CIRCUIT

■ Third Circuit Holds It Has Jurisdiction To Review Immigration Judge's Denial Of Continuance

In *Khan v. Attorney General*, 448 F.3d 226 (3d Cir. 2006) (*Sloviter*, Smith, Van Antwerpen), the Third Circuit held, as a matter of first impression, that it had jurisdiction to review the IJ's denial of petitioner's request for a continuance. The court noted that there is a circuit split on the question of whether 8 U.S.C. § 1252 (a)(2)(B)(ii) precludes the review of a denial of a request for continuance. The Eighth and Tenth Circuit Courts of Appeals have interpreted § 1252(a)(2)(B)(ii) to mean that a court of appeals has no jurisdiction to review the denial of a motion for a continuance. *Yerkovich v. Ashcroft*, 381 F.3d 990, 995 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004). Other courts have held to the contrary concluding that discretionary authority to grant a continuance cannot be considered "specified under this subchapter" where the language that expressly provides for such authority appears only in a regulation. *See Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. Apr. 24, 2006); *Sanusi v. Gonzales*, 445 F.3d 193, 196 (2d Cir. 2006) (*per curiam*); *Zafar v. U.S. Att'y Gen.*, 426 F.3d 1330, 1335 (11th Cir. 2005). *See also Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006) (agreeing with the result, but not the reasoning, of *Zafar*); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir.2004) ("Because 8 U.S.C. § 1229a (c) neither grants nor limits the Attorney General's discretion to deny motions to reopen, [it] can perhaps be said to have left such authority to the Attorney General by default. But default authority does not constitute the specification required by § 1252(a)(2)(B)(ii)."). The court agreed with the majority of the circuits that have interpreted § 1252(a)(2)(B)(ii) to mean that the discretion giving rise to the jurisdictional bar must be 'specified' by statute. In other words, "the language of the statute in question must provide the discretionary authority before the bar can have any effect."

> The court interpreted § 1252(a)(2)(B)(ii) to mean that the discretion giving rise to the jurisdictional bar must be "specified" by statute. In other words, "the language of the statute in question must provide the discretionary authority before the bar can have any effect."

On the merits the court held that there was no abuse of discretion because the IJ had denied the continuance motion pending adjudication of the petitioner's labor certificate application. The court rejected petitioner's contention that government delay in processing his wife's labor certification constituted extraordinary circumstances that would warrant a continuance. The court noted that because petitioner is presently ineligible for an immigrant visa, any continuance would be indefinite.

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■ Third Circuit Holds That Equitable Tolling Does Not Apply To Permit Petitioner To File More Than One Motion To Reopen In Absentia Removal Order

In *Luntungan v. Att'y Gen. of U.S.*, __F.3d__, 2006 WL 1520241 (3d Cir. June 5, 2006) (Rendell, *Smith*, Becker), the Third Circuit affirmed the BIA's denial of the petitioner's third motion to reopen. The BIA denied the petitioner's motion, filed in an effort to cure the defects of his second motion, because it exceeded the numerical limitation for filing motions to reopen. The court held that even assuming, *arguendo*, the numerical limitation is subject to equitable tolling, tolling did not apply in this case because the petitioner failed to allege in his third motion to reopen that the counsel who filed his second motion to reopen was ineffective.

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FOURTH CIRCUIT

■ Fourth Circuit Holds That An Alien's Date Of Adjustment Of Status, Subsequent To A Prior Admission, Does Not Constitute "Date Of Admission" For Purposes Of Removability

In *Aremu v. DHS*, __F.3d__, 2006 WL 1668778 (4th Cir. June 19, 2006) (Wilkins, Motz, *King*), the Fourth Circuit reversed and vacated the BIA's published decision in *Matter of Shanu*, 23 I&N Dec. (2005). Petitioner primarily contended that the BIA had erroneously determined that the date on which he adjusted his status to become a permanent resident qualified as "the date of admission" within the

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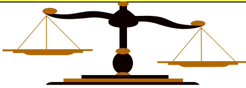

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meaning of 8 U.S.C. § 1227(a)(2)(A)(i). The court, deciding an issue of first impression, held that under petitioner's circumstances, the date of adjustment of status did not qualify as "the date of admission" under that provision.

The petitioner, a Nigerian citizen, entered the United States as a visitor in December 1989 and never departed. On December 20, 1996, petitioner obtained adjustment of status. On July 16, 1998, petitioner was convicted of various fraud offenses and on that basis was charged with removability under § 1227(a)(2)(A)(i), as an alien who had been convicted of a crime involving moral turpitude "committed within five years [] after the date of admission." The IJ and later the BIA held that the date of adjustment qualified as the "date of admission" and where there was more than one potential date of admission, any such date qualified as "the date of admission" under the statute.

The court found that 8 U.S.C. § 1101(a)(13)(A) defines the term "admission" as the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer" and that the definition does not include adjustment of status.

The court found that 8 U.S.C. § 1101(a)(13)(A) defines the term "admission" as the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer" and that the definition does not include adjustment of status. Consequently, said the court, the BIA's interpretation fails under step one of *Chevron*, namely Congress has directly spoken on the issue. Therefore, held the court, the BIA's interpretations and any conflicting regulations are invalid and impermissible. The court, however, expressed no opinion as to whether adjustment of status may properly be considered "the date of admission" where the alien sought to be removed has never been admitted within the meaning of § 1101(a)(13)(A).

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■ Fourth Circuit Holds That BIA Applied Incorrect Standards For Presumption Of Delivery Of Hearing Notice

In *Nibagwire v. Gonzales*, __F.3d__, 2006 WL 1604111 (4th Cir. June 13, 2006) (Luttig, *Michael*, Gregory), the court determined that the BIA incorrectly applied the strong presumption of delivery of certified mail set forth in *Matter of Grijalva* to petitioner who claimed that she had not received the notice of hearing sent to her by regular mail. The court noted that when *Grijalva* was decided, the statute required that notice be sent by certified mail. While *Grijalva*'s evidentiary standard for rebutting the presumption of delivery made perfect sense in connection with certified mail, noted the court, that standard would be impossible to meet with an assertion of nondelivery of regular mail. Accordingly, the court found that the BIA abused its discretion in applying the *Grijalva* standard and remanded the case for a determination whether petitioner's proffer of evidence was sufficient to rebut the presumption of delivery.

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FIFTH CIRCUIT

Fifth Circuit Denies *Molina-Camacho* Challenge To BIA's Order Of Removal

In *Delgado-Reynua v. Gonzales*,__F.3d__, 2006 WL 1390264 (5th Cir. May 23, 2006) (Reavley, Jolly, *DeMoss*), the Fifth Circuit vacated the district court's grant of habeas relief and converted the habeas petition into a petition for review under the REAL ID Act. The court held that it lacked jurisdiction to review the BIA's discretionary reversal of the IJ grant of a waiver of inadmissibility. The court determined that it had jurisdiction over the petitioner's challenge to the BIA's authority to order his removal, but rejected the Ninth Circuit's ruling in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), that the BIA lacks authority to order removal.

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■ Fifth Circuit Affirms Attorney General's Ruling The Aliens Who Engage In Violent Criminal Acts Should Not Be Granted A Discretionary Waiver

In *Jean v. Gonzales*, __F.3d__, 2006 WL 1577914 (5th Cir. June 9, 2006) (King, Smith, *Benavides*), the court rejected a challenge that the Attorney General's decision in *Matter of Jean,* 23 I&N Dec. 373, 374 (A.G. 2002) was *ultra vires*.

The petitioner, a native of Haiti, was convicted in New York state court in 1995 of manslaughter in the second degree in connection with the death of a child entrusted to her care and sentenced to a term of imprisonment of two to six years, then released in March 1999. At her removal hearing, the IJ ruled that her second-degree manslaughter conviction was a crime of violence and therefore constituted an "aggravated felony" which rendered her ineligible for all reliefs from removal. The BIA reversed the IJ stating that her manslaughter conviction was not a crime of violence. On remand the IJ denied again petitioner's requests for relief. The BIA again reversed the IJ. The Attorney General then took the case by certification and reversed the BIA. The Attorney General determined that "the interests of [petitioner's] family and the general public would be ill-served by granting her lawful permanent residency" and concluded that she was "not entitled

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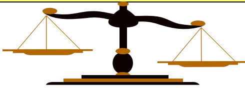

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to any alternative relief from removal." *Matter of Jean,* 23 I&N Dec. at 374. The Attorney General explained that the balance between "claims of hardship to the respondent's family against the gravity of her criminal offense . . . will nearly always require the denial of a request for discretionary relief from removal where an alien's criminal conduct is as serious as that of the respondent in this case." Petitioner then filed a habeas petition, which subsequently, was dismissed for lack of jurisdiction but on appeal was converted to a petition for review under the REAL ID Act.

Petitioner argued that the Attorney General's decision was *ultra vires* for two reasons. First, she contended that the Attorney General attached additional requirements never contemplated by Congress to requests for adjustment of status filed pursuant to 8 U.S.C. § 1159(c). Second, she argued that the Attorney General's decision effectively rewrote the "aggravated felony" asylum limits of 8 U.S.C. §1158, establishing a per se rule instead of Congress' guided discretion.

The Fifth Circuit found that the Attorney General imposed a heightened standard in petitioner's case by adding a new factor to be considered in making a waiver determination under § 1159(c). However, the court held that the Attorney General acted lawfully in so doing because he did not "impose the heightened standard on all aliens with aggravated felony convictions but only on those who 'engage in violent criminal acts.'" Additionally, he did not add a class of aliens who are ineligible for a waiver, nor did he instruct the BIA to ignore statutory considerations of family unity, humanitarian concerns, and public interest. "He left open the possibility that even the most dangerous and violent criminals can be granted relief in an appropriate case," said the court. Moreover, the court held that the Attorney General "acted within his broad discretion" in imposing the heightened standard. The court noted that the Attorney General has "broad discretionary authority to grant and deny a waiver" and may establish standards governing such discretion. Those standards, however, "should be rational and connected to the statutory scheme" said the court. Here, the court found that the standards utilized met that inquiry, and consequently the Attorney General did not exceed his statutory authority and therefore his action was not *ultra vires*.

> The court held that the Attorney General acted lawfully because he did not "impose the heightened standard on all aliens with aggravated felony convictions but only on those who 'engage in violent criminal acts.'"

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SIXTH CIRCUIT

■ Sixth Circuit Concludes That Retroactive Application Of Change In Law Permits Renewed Proceedings Against Petitioner

In *Tran v. Gonzales,* 447 F.3d 937 (6th Cir. 2006) (*Guy*, Daughtrey, Clay), the Sixth Circuit upheld the decision to place the petitioner in renewed proceedings, but remanded the case for consideration of the petitioner's claim for CAT under the correct standard of review. The petitioner, an ethnic Chinese from Vietnam, entered the United States with his family as a refugee in 1980, and later became an LPR. In 1987, petitioner was charged with aggravated murder and robbery, and in 1988 pleaded guilty after agreeing to serve a term of 20 years. At the plea hearing, petitioner's trial counsel advised the court that petitioner had been advised that the INS would not deport petitioner to Vietnam because there were no diplomatic relations between the two countries. The INS then charged petitioner with removability for having committed two crimes involving moral turpitude. However, the BIA terminated the proceedings because the evidence suggested that petitioner had committed only one crime involving moral turpitude.

Following the enactment of IIRIRA in 1996, which made the petitioner's conviction for murder an aggravated felony, the INS in December 2000, instituted new removal proceedings under 8 U.S.C. §1227(a)(2)(A)(iii) based on the same 1988 convictions. The IJ determined that petitioner was removable as charged but deferred removal under CAT. The BIA agreed with the IJ's finding that petitioner had been convicted of an aggravated felony but reversed the grant of CAT protection. Following a skirmish in district court and a direct appeal, the Sixth Circuit consolidated the actions under the REAL ID Act.

The court held that IIRIRA's changes to the aggravated felony provision applied on their face to petitioner's 1988 convictions. The court rejected petitioner's contention that because his case had been previously closed he should not be subject to the amended provision. The court noted that petitioner was subject to removal proceedings on an entirely different charge and that his policy argument could not prevail over the text of the statute.

The court found however, that it could not discern what standard of review the BIA had employed in reversing the IJ's grant of CAT protection. The court said that it could not determine whether the BIA had reviewed the IJ's findings of fact for "clear error," or whether it had reviewed them "de novo." "The standard of review is particularly significant in [petitioner's] case because the

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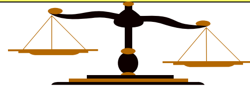

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IJ granted withholding of removal under the CAT, and [petitioner] presented unrebutted expert testimony as to his likely treatment in Vietnam," said the court. Accordingly, it remanded the case to the BIA for consideration of petitioner's claim under the correct standard of review and burden of proof.

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■ Sixth Circuit Concludes That Alleged Incompetence Is Not A Bar To Denaturalization Proceedings

In *United States v. Mandycz*, 447 F.3d 951 (6th Cir. 2006) (*Sutton*, Griffin, Oberdorfer (D.D.C.)) the Sixth Circuit affirmed a district court decision revoking the petitioner's naturalized citizenship on the basis that his service as a forced labor camp guard during World War II rendered him ineligible for a visa under the Displaced Persons Act of 1948. The court held that the petitioner's Alzheimer's disease and alleged mental incompetence was not a bar to the denaturalization proceeding, but, as a general rule, in such cases, the trial court should appoint a guardian pursuant to Fed. R. Civ. P. 17(c). The court left open the possibility that future cases might require exceptions to this rule. The court rejected the petitioner's argument that a defendant in a denaturalization proceeding could assert laches as a defense against the United States.

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SEVENTH CIRCUIT

■ Seventh Circuit Reverses Denial Of Asylum Because IJ Ignored Material Evidence Bearing On Petitioner's Persecution Claim

In *Boyanivskyy v. Gonzales*, 450 F.3d 286 (7th Cir. 2006) (Manion, Williams, *Sykes*), the Seventh Circuit held that petitioner's immigration hearing was statutorily insufficient because the IJ excluded critical material evidence bearing directly on his claim of persecution. The court found that the IJ reached the decision to deny asylum and withholding of removal based "on an underdeveloped record."

The petitioner, a Ukranian citizen, was placed in removal proceedings after his second attempt to illegally enter the United States from Mexico. He then sought asylum claiming persecution by the Ukranian police because of his marriage to a Jewish woman. At the asylum hearing, petitioner's counsel asked the IJ to continue the hearing to a date on which key witnesses could be available, but the judge insisted on resuming the hearing on January 8, 2004, a date when he knew all three witnesses were unavailable. When petitioner finished testifying on January 8, the IJ told him he would be resting his case because he was ready to render a decision. Counsel reported a "heated argument" ensued over whether a continuance was necessary for petitioner to present his corroborating witnesses. The transcript contained none of this "argument" but simply stated "OFF THE RECORD." Once back on the record, the IJ made the following remarks: "All right. It's my understanding the parties have rested. The respondent would like to call another witness. I am denying that request." The IJ then rendered a decision denying all relief. The BIA affirmed without opinion.

On appeal, petitioner argued that the IJ's refusal to continue his hearing to enable his three witnesses to testify prejudiced his claims for asylum and withholding of removal by excluding critical corroborating evidence in support of his persecution claim. The court first determined that a decision on a motion to continue an immigration hearing is discretionary and not subject to review, except where, as in this case, the denial of a continuance nullifies some statutory right. "Where the denial of a continuance operates to nullify some statutory right, or leads inescapably to a substantive adverse decision on the merits of an immigration claim, we retain jurisdiction despite §1252(a)(2)(B)'s restriction," said the court.

> "Where the denial of a continuance operates to nullify some statutory right, or leads inescapably to a substantive adverse decision on the merits of an immigration claim, we retain jurisdiction despite §1252(a)(2)(B)'s restriction."

On the merits, the court preliminarily refused to address petitioner's "understandable" challenge to the denial of a continuance as a " due process violation," explaining that "our cases have sometimes applied due process principles to evaluate claims that an immigration judge has denied an alien an adequate opportunity to present evidence in support of his claim." "We would reach the constitutional question only if [petitioner] complained that the procedures outlined in the statutes and regulations were constitutionally deficient," said the court. Here, the court found that by denying the request to continue the case to permit petitioner's witnesses to testify, the IJ had deprived petitioner of "his statutory and regulatory right to present material evidence essential to his persecution claim. The court "found no difficulty concluding that his case was harmed by the exclusion of his corroboration witnesses." Accordingly, the court remanded the case for further proceedings.

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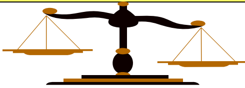

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■ Seventh Circuit Holds That FBI Identification Record Could Be Relied Upon By BIA As Proof Of Prior Drug Conviction To Deny Discretionary Relief

In *Rosales-Pineda v. Gonzales*, __F.3d__, 2006 WL 1667695 (7th Cir. Jun 19, 2006) (Easterbrook, Rovner, *Williams*), petitioner conceded that was deportable, but argued that the BIA erred in finding him ineligible for discretionary relief on the basis of a prior narcotics conviction that was reflected in the FBI Identification Record ("rap sheet"). The court concluded that the BIA was entitled to rely on the rap sheet and the related corroborating evidence to deny discretionary relief because it "reasonably indicated the existence of a criminal conviction" pursuant to 8 C.F.R. §1003.41(d). The court noted, however, that there could be circumstances where the use of a rap sheet, such as a rap sheet from a foreign jurisdiction, would necessarily be subject to more intense scrutiny than one with a domestic origin. Additionally, the court noted that in this case it did not need to determine whether the rap sheet constituted clear and convincing evidence of a criminal conviction for a drug offense.

> The court concluded that the BIA was entitled to rely on the rap sheet and the related corroborating evidence to deny discretionary relief because it "reasonably indicated the existence of a criminal conviction" pursuant to 8 C.F.R. § 1003.41(d).

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■ Seventh Circuit Holds That IJ's Refusal To Grant Continuance To Obtain New Counsel Denied Petitioner A Fundamentally Fair Hearing In Violation Of Due Process

In *Gjeci v. Gonzales*, __F.3d__, 2006 WL 1642627 (7th Cir. June 15, 2006) (*Cudahy*, Posner, Wood), the court held the IJ violated petitioner's due process rights because he should have continued the hearing to permit petitioner to obtain new counsel.

The petitioner, an ethnic Albanian citizen, illegally entered the United States in 1998. On July 9, 1999, the former INS instituted removal proceedings. The case was continued thirteen times, apparently mostly at the behest of the government, before going to a merits hearing. Four different lawyers represented petitioner following the institution of removal proceedings. Following a determination by the DHS Forensic Document Laboratory (FDL) that petitioner had submitted fraudulent documents, petitioner's counsel withdrew citing "irreconcilable difference." Petitioner then obtained a second counsel who later obtained the original documents that the FDL had found suspect. However, six months later, and days before a status conference scheduled for August 7, 2003, petitioner filed with the immigration court a pro se motion to change venue to Miami, Florida. On the morning of the scheduled conference, the IJ permitted petitioner's counsel to withdraw, noting that it was clear that petitioner was taking matters "into his own hands." That afternoon, the IJ after verifying that petitioner was aware of his counsel's withdrawal, denied the motion for change of venue and set the case for a merits hearing on August 26, 2003. The IJ asked petitioner if he understood these actions and petitioner replied that he did.

At the merits hearing, the IJ questioned petitioner through an Albanian interpreter and ultimately concluded that his story was not credible because it lacked details and he could not rebut the FDL report. Petitioner objected to the hearing because he had no lawyer with him and apparently had not understood that the hearing was on the merits and not another status conference.

Following the hearing, petitioner obtained a third attorney in Miami, who filed an appeal to the BIA claiming that the IJ had violated his due process rights by proceeding with the hearing. The BIA summarily affirmed and petitioner appealed. At some point petitioner obtained a fourth counsel who retrieved petitioner's original documents retained by petitioner's second counsel. After petitioner's forensic expert examined the document, petitioner then filed a motion to reopen seeking to introduce evidence that the FDL report of document tampering was contradicted by petitioner's expert. The BIA denied the motion explaning that the IJ had not wholly relied on the FDL report. Petitioner appealed that denial, too.

The court found that "the central due process error stems from the way in which [petitioner's second counsel] was permitted to withdraw." That withdrawal, coupled with counsel's retention of petitioner's documents and the IJ refusal to grant a continuance, deprived petitioner "of a fundamental fair proceedings," said the court. The court noted that while aliens do not have a Sixth Amendment right to counsel "they do enjoy a statutory right to retain counsel." While IJs had wide discretion to grant a motion to withdraw, IJs also had a duty to protect an alien's rights, said the court. Here, the court found that the IJ considered the motion to withdraw, he did not ascertain the status of petitioner's case, including the status of documents that were cental to the case. "We do not suggest, of course, that aliens can make colorable due process claims simply by asserting on the record that they were unaware of the procedure or that they were unprepared. The critical difference here is that the [IJ] permitted the alien's counsel to withdraw and retain

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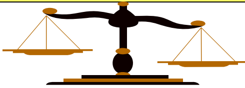

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the most important evidence in the case without ever ascertaining that the alien understood that he would need to prepare his case going forward." Accordingly the court remanded the case to give petitioner "a fair opportunity" to rebut the FDL report.

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> "Aliens who take the easy but dishonest path when a more honorable if more difficult one is open cannot insist on administrative lenity."

■ **Seventh Circuit Holds That IJ Did Not Abuse His Discretion In Denying Asylum Based On Petitioner's Use Of Deceit To Obtain Visitor's Visa**

In *Alsagladi v. Gonzales*, __F.3d__, 2006 WL 1598162 (7th Cir. June 13, 2006) (Coffey, *Easterbrook*, Manion), the court held that the IJ did not abuse its discretion in denying asylum based on petitioner's false representations to consular official in obtaining a tourist visa.

The applicant a citizen of Yemen, entered the United States on a tourist visa issued by Embassy of Saudi Arabia and did not depart when his visa expired. Instead he applied for asylum contending that Yemen had persecuted him for his socialist politics. The IJ disbelieved his story because petitioner had been a responsible public official in Yemen and Yemen recognizes the Socialist Part as legitimate. Moreover, petitioner conceded that he made false representations to the U.S. consular staff in Saudi Arabia regarding the purpose of obtaining a tourist visa. The IJ determined that, even if petitioner were credible, he would deny asylum as a matter of discretion because of his use of deceit to obtain the tourist visa. The BIA affirmed the denial without opinion.

The court preliminarily stated that "status as a victim of persecution makes an alien *eligible* for asylum but does not compel an exercise of discretion in his favor. An alien who enters the United States by fraud must show strong equities to merit a favorable exercise of that discretion," said the court."

The court noted that "someone who concedes willingness to lie in order to obtain residence in this nation (as [petitioner] does) may well be trying to pull the wool over the agency's eyes in support of his application for asylum as well as in his application for a visa."

In this case the court determined that since the IJ was entitled to deny relief as a matter of discretion, it was "unnecessary and often inappropriate to discuss the eligibility issue." The court relied upon *INS v. Bagamasbad,* 429 U.S. 24 (1976), where the Supreme Court held that IJs and the federal courts are entitled to pretermit comprehensive treatment of the merits if they have decided in any event to deny relief as a matter of discretion.

The court held that the IJ properly exercised his discretion to deny asylum because petitioner swore falsely about the purpose of his visit and his intentions after reaching the United States. Moreover, the IJ had noted that he would have excused this deceit if the Saudi government had been preparing to return petitioner to Yemen. "The visa fraud was worse, in the IJ's eyes, because it was gratuitous," said the court. "Aliens who take the easy but dishonest path when a more honorable if more difficult one is open cannot insist on administrative lenity," concluded the court.

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EIGHTH CIRCUIT

■ **Eighth Circuit Affirms Denial Of Asylum Application To Eritrean Petitioner**

In *Woldemichael v. Gonzales,* 448 F.3d 1000 (8th Cir. 2006) (*Loken*, Melloy, McMillian) the Eighth Circuit upheld the BIA's denial of asylum and withholding of removal to an applicant form Eritrea. The petitioner claimed that she would be persecuted as a Jehovah's Witness if returned to Eritrea. The court held that the record evidence established that the Eritrean government took adverse action only against Jehovah's Witnesses who were eligible for national service or who had engaged in certain political activities, and the petitioner had none of those characteristics. The court also determined the petitioner's connection to the Jehovah's Witness faith to be sporadic and tenuous, as opposed to an adherent who would suffer persecution.

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NINTH CIRCUIT

En Banc Ninth Circuit Rules That Petitioner Must Be Given Notice And Opportunity To Rebut Administrative Notice Of Controversial Facts.

In *Circu v. Gonzales,* __F.3d__, 2006 WL 1579888 (9th Cir. June 9, 2006) (Schroeder, Pregerson, Kleinfeld, Silverman, Thomas, McKeown, Rymer, Fisher, Berzon, Rawlins, *Callahan*), the *en banc* Ninth Circuit reversed the BIA's affirmance of an IJ's decision denying asylum and withholding of removal to a Romanian Pentecostal Christian petitioner. The court held the IJ violated procedural due process by taking administrative notice of changed conditions shown in a State Department report issued 19 months after the completion of the

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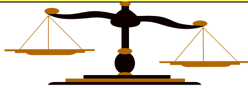

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asylum hearing, without affording the petitioner prior notice and an opportunity to respond.

At the asylum hearing, the IJ admitted into evidence the U.S. State Department's 1997 Country Report on Human Rights and the 1997 Profile of Asylum Claims and Country Conditions. Two years after the hearing, the IJ relied on a 1999 Country Report on Human Rights to deny the asylum application. Petitioner then appealed to the BIA contending that she had not received notice that the IJ intended to use the 1999 Report and that she was not afforded an opportunity to respond. The BIA summarily affirmed.

> Notice of intent to take administrative notice of events occurring after the hearing is all that is required where the extra-record facts and questions are legislative, indisputable, and general.

The Ninth Circuit held that notice of intent to take administrative notice of events occurring after the hearing is all that is required where the extra-record facts and questions are legislative, indisputable, and general. However, "more controversial or individualized facts require both notice to the alien that administrative notice will be taken and an opportunity to rebut the extra record facts or to show cause why administrative notice should not be taken of those facts."

Here, the court found that the extra-record facts were controversial because the IJ's assertion that "open worship is now possible in Romania" was based on the 1999 Country Report. Therefore, said the court, neither requirements for taking administrative notice were met in this case. Accordingly, the court held that the IJ had committed a procedural due process violation. The court also found that petitioner had established prejudice because the IJ had relied on the 1999 report to render his decision.

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■ **Simple Battery In Violation Of California Law Is Not A "Crime of Violence"**

In *Ortega-Mendez v. Gonzales*, __F.3d__, 2006 WL 1642755 (9th Cir. June 15, 2006) (Thompson, *Berzon*, and Callahan), the court held that simple battery in violation of California law was not a "crime of violence," within the meaning of 18 U.S.C. § 16 and therefore was not a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i).

The petitioner, a native of Mexico, was convicted in 1998 for battery under California Penal Code section 242. When placed in proceedings, petitioner applied for cancellation of removal. The IJ determined that petitioner's 1998 conviction was a "crime of domestic violence" and therefore he was statutorily ineligible for cancellation because he had been convicted of an offense under 8 U.S.C. § 1227 (a)(2). The BIA affirmed without opinion.

The court held that for an offense to be a "crime of domestic violence" under the INA, it must also be a "crime of violence" within the meaning of 18 U.S.C. § 16. The court held that battery under section 242 of the California Penal Code is not categorically a "crime of violence" because, as interpreted in judicial opinions, it prescribes conduct that may also involve offensive touching. Such conduct, said the court, does not rise to the level of a "crime of violence." The court did not address whether petitioner's prior conviction for simple battery in violation of California law qualified under the INA as a "crime of violence," under the modified categorical approach, where the government's sole argument for why the battery offense rendered alien ineligible for cancellation of removal was because it was categorically a crime of violence, and the documents of conviction, including the charging document and sentencing order, did not describe the underlying facts of the offense.

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TENTH CIRCUIT

■ **Tenth Circuit Holds That Removal Is A Civil, Not Criminal Proceeding, And The "Various Protections That Apply In The Context Of A Criminal Trial Do Not Apply In A Deportation Hearing"**

In *Ballesteros v. Ashcroft*, __F.3d__, 2006 WL 1633739 (10th Cir. June 14, 2006) (Henry, *McKay,* Tymkovich), the court held that Tenth Circuit law applied to determine whether petitioner's conviction for Idaho offense of felony possession of a controlled substance constituted an aggravated felony or controlled substance offense for purposes of removal proceedings, even though he had been arrested in Idaho before being transferred for detention in Colorado. Although the removal proceedings and detention were held within the jurisdiction of the Tenth Circuit, petitioner argued that because the allegations were based on convictions, his proceedings should be governed by the more generous immigration law of the Ninth Circuit where he had been convicted. The court noted that a alien has no legal right to have removal proceedings commenced in a particular place and that the Tenth Circuit routinely applies its law to determine whether a conviction from another jurisdiction constitutes an aggravated felony.

The court also rejected petitioner's contention that his due proc-

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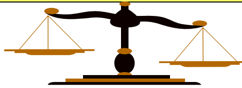

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ess rights were violated when DHS reorganized its detention boundaries without following a notice and comment procedure. The court found that "the DHS reorganization merely interpreted the grant of statutory authority, and that interpretation did not create or alter legal obligation . . . Because the DHS reorganization was an interpretive rule, it was exempt from the APA's notice and comment process and is therefore valid."

The court also held that, even after the REAL D Act, it lacked jurisdiction to review petitioner's claim that the BIA abused its discretion by denying his motion to change venue. The court noted that while in a criminal context venue is a right of constitutional dimension, petitioner's "venue arguments focus on matters of convenience and not constitutional violations."

Finally, the court held that it lacked jurisdiction under the REAL ID Act to consider petitioner's constitutional claim that he was arrested without a warrant, citing to 8 U.S.C. 1252 (a)(1) which limits review to "final orders of removal." Petitioner analogized his situation to that of a criminal defendant and sought to use alleged constitutional violations to overturn his removal. "But removal is a civil, not criminal, proceeding," said the court and the "various protections that apply in the context of a criminal trial do not apply in a deportation hearing." The court found that "no remedy for the alleged constitutional violations would affect the BIA's final order of removal . . . Any remedy available to [petitioner] would lie in a *Bivens* action."

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds That BIA Properly Found That Petitioner Was Not "Lawfully Admitted For Permanent Residence" Where Agency Had Erroneously Granted Him Adjustment Of Status

> "What is lawful depends on the law and not on administrative error."

In *Savoury v. U.S. Att'y General*, 449 F.3d 1307 (11th Cir. 2006) (*Carnes*, Wilson, Pryor), the Eleventh Circuit held that the BIA properly found that petitioner was ineligible for a waiver of inadmissibility where he had erroneously been granted adjustment of status. At the time petitioner's application was adjudicated, he was ineligible for adjustment due to a 1992 drug conviction. Petitioner was placed in removal proceedings when he attempted to reenter the United States following a brief trip abroad. He was charged with removability under INA § 212(a)(2)(A)(i)(II). The IJ denied petitioner's application for §212(c) relief and the BIA affirmed that decision. The BIA found that petitioner had not been "lawfully admitted for permanent residence" as required for the waiver.

The court determined that the BIA properly interpreted the word "lawfully" to require more than the absence of fraud but instead to require admission in accordance with the applicable immigration laws. "What is lawful depends on the law and not on administrative error," said the court. The court also rejected petitioner's assertions of a waiver, estoppel, and laches against the government.

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■ Eleventh Circuit Finds That Evidence Was Insufficient To Establish Past Persecution Because Of Petitioner's Membership In Falun Gong

In *Zheng v. U.S. Attorney General*, __F.3d__, 2006 WL 1629061 (11th Cir. June 14, 2006) (Edmondson, Hill, Kravitch) (*per curiam*), the court determined that petitioner's mere loss of employment, absent proof that he could not secure any alternative employment, and detention for five (5) days, at which time he was required to watch anti–Falun Gong videos and stand in the sun for two hours until he agreed to watch those videos, did not constitute persecution or establish a well-founded fear of future persecution. The court concluded that involvement with Falun Gong does not by itself entitle a petitioner to asylum.

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■ Eleventh Circuit Affirms That Lewd Acts With A Child Qualifies As A Crime Of Violence

In *United States v. Ortiz-Delgado*, __F.3d__, 2006 WL 1540261 (11th Cir. June 7, 2006) (Anderson, Birch, Marcus), the court held that a California conviction for lewd acts with a child qualified as a crime of violence under the United States sentencing statute, thus warranting a 16-level enhancement in the petitioner's sentence. The court explained that certain sexual activity with a minor qualified as a crime of violence because of the consequential psychological harm resulting in the victim. The court also noted that every other Circuit to have considered the issue of sexual acts on children for purposes of sentencing had held that such crimes qualified as a crime of violence.

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REGULATORY UPDATE

Proposed Rule To Amend 8 C.F.R. 274a – Making It More Difficult to Continue To Employ Unauthorized Workers

DHS recently proposed a rule to amend 8 C.F.R. § 274a.1 to make it more difficult for employers to continue to employ unauthorized aliens. 71 *Fed. Reg*. 34281 (June 14, 2006).

Each year, employers send the Social Security Administration ("SSA") millions of W-2 Forms in which the combination of employee name and social security number do not match. In some cases, the SSA sends a letter informing the employer of this fact. The letter is commonly called a "no-match" letter. The purpose of this proposed rule is to make it harder for employers in receipt of a no-match letter to continue to claim ignorance of their employee's immigration status. The rule attempts to accomplish this by including a specific definition of constructive knowledge. That is, an employer does not have to have actual knowledge that an employee is illegal, but can have that knowledge imputed to him/her if circumstances dictate. The rule also contains a "safe-harbor" provision laying out steps an employer can follow that will prevent a finding of constructive knowledge.

The purpose of this proposed rule is to make it harder for employers in receipt of a no-match letter to continue to claim ignorance of their employee's immigration status.

Constructive Knowledge

The rule provides two new examples of situations where an employer would have constructive knowledge that an employee is illegal.

(1) Written notice from the SSA that the combination of name and SSN submitted for an employee does not match SSA records;

(2) Written notice from the DHS that the immigration status document, or employment authorization document, presented or referenced by the employee in completing an I-9 Form was assigned to another person, or there is no record that the document was assigned to anyone.

Safe-Harbor

The proposed rule lays out steps an employer can take after receiving a no-match letter in order to protect against a finding of constructive knowledge. However, the steps are only guidelines. Totality of the circumstances will dictate if the employer acted reasonably. Specific examples of reasonable behavior include:

(1) Checking records to determine whether there was a typographical error in the records and, if so, informing the appropriate agency within 14 days of receipt of no-match letter requesting the employee to confirm his/her records are correct, and ask the employee to pursue the matter with the relevant agency within 14 days of receipt of no-match letter.

(2) The employer does not verify the employee's status within 60 days, but after the expiration of 60 days, takes reasonable steps within the following 3 days to verify employee's status. Verification includes completing a new I-9 form, except that no document containing the social security number or alien number used in the original no-match letter may be used as identification.

Final Rule for Affidavits of Support on Behalf of Immigrants

DHS and the DOJ recently issued a joint final rule requiring mandatory affidavits of support on behalf of immigrants. 71 *Fed. Reg*. 35732 (June 21, 2006). The rule is codified as 8 C.F.R. § 204, 205, 213a, 299, 1205, and 1204.

All prospective immigrants seeking lawful permanent resident status must prove that they will not become a public charge after admission. While several means used to exist to prove this, the new rule makes it mandatory that an immigrant must submit an Affidavit of Support showing the availability of financial support in the United States. The Affidavit of Support must be signed by a sponsor(s) demonstrating that the sponsor's or sponsors' income meets or exceeds 125 percent of the applicable poverty guideline for the sponsor's household size. Signing the Affidavit is binding on the sponsor, meaning that the sponsor can be held responsible for reimbursement of any Federally-funded, means-tested public benefits, and potentially some State-funded programs, paid to the sponsored immigrant.

Department of State Issues Final Rule Providing Guidance For The Review Of Nonimmigrant Visa Issuances and Refusals

The Department of State has published a final rule that expands the scope of review of nonimmigrant visa applications "to ensure that Department supervisors are reviewing both issuances and refusals to the greatest extent practicable, while balancing workload considerations at consular posts." 71 *Fed. Reg*. 37494 (June 30, 2006).

The rule notes that "in order to enhance U.S. border security" the Department of State will place "greater emphasis on reviewing issuances to ensure that visas are issued in compliance with law and procedures."

By Tim Ramnitz, OIL

INSIDE OIL

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poration (FDIC) and the Federal Reserve Board. He received his law degree from William and Mary, and his undergraduate degree from George Washington University.

John Blakeley joined OIL from the Office of General Counsel with the U.S. Commission on Civil Rights. Before joining the Commission, he had his own immigration practice in South Bend, Indiana. He received his BS from the U.S. Naval Academy and his JD and LLM from Notre Dame Law School.

Surrell Brady is a graduate of Cornell Law School and Pomona College. Just prior to joining OIL, Ms. Brady worked in the Office of General Counsel of the Justice Management Division. Ms. Brady has also served as an attorney in the Office of the Associate Attorney General, the Federal Programs Branch and Office of Consumer Litigation in the Civil Division, and the Civil Rights Division.

Molly DeBusschere is a graduate of the University of Washington in Seattle and Gonzaga University School of Law in Spokane. Before coming to OIL, she worked for over 20 years at the Antitrust Division, DOJ.

Angela Liang is a graduate of University of California at Berkeley and the University of Maryland School of Law. Prior to joining OIL she was an attorney in the DOJ's Civil Rights Division.

Manuel Palau is a graduate of the Catholic University Law School. Prior to completing a detail to OIL, he was an attorney with the Federal Deposit Insurance Corporation.

Dimitri Rocha received his B.A. from the University of Texas and his JD from the University of Virginia School of Law. Prior to joining OIL, he was an attorney in the Special Litigation Section of the Civil Rights Division.

Robert N. Markle is a graduate of the University of Connecticut and the University of Connecticut School of Law. Prior to joining OIL, he was partner in a New Orleans-based law firm. Previously, he had served as a Staff Counsel in the U.S. Court of Appeals for the Fifth Circuit.

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OIL ANNUAL INTERAGENCY PICNIC A SUCCESS

More than 100 employees from OIL, EOIR, USCIS, and ICE, attended the Annual Interagency Picnic held on June 15 at the RFK Stadium. While fun was had by all, the Nationals disappointed by losing to the Rockies.

Pics by Stacy Paddack

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NOTED

On June 25, the Department of Justice Robert F. Kennedy (Main Justice) Building experienced basement flooding and storm-related electrical outages.

INSIDE OIL

A warm welcome to the following new OIL Attorneys:

Alex Goring is a graduate of Central Missouri State University and Creighton University School of Law. He entered the Department under the AG Honors Program and was an Assistant Chief Counsel with DHS/ICE in Miami, Florida prior to joining OIL.

Lindsay Chichester is a graduate of Miami University, and Tulane Law School. She entered the Department through the AG Honors Program, serving as a judicial law clerk for the Boston and Hartford Immigration Courts. Prior to joining OIL, she served as the attorney advisor for the Office of the Chief Immigration Judge.

Daniel Lonergan joined OIL after practicing banking law for over 20 years in the federal government, most recently at the Federal Deposit Insurance Cor-

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Pictured from L to R: John Blakeley, Angela Liang, Molly DeBusschere, Surrell Brady, Alex Goring, Lindsay Chichester, Daniel Lonergan, and Robert Markle.

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

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

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