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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Review sought of Second Circuit ruling that women in arranged marriages are a "particular social group"

The Solicitor General has filed a petition for a writ of certiorari seeking review of the judgment in ***Gao v. Gonzales***, 440 F.3d 62 (2d Cir. 2006), *cert. filed*, No. 06-1264, 2007 WL 835007(U.S. March 16, 2007), where the Second Circuit held that "women who have been sold into marriages (whether or not that marriage has yet taken place) and who live in a part of China forced marriages are valid and enforceable" constitute a particular social group for purpose of asylum and withholding of removal.

The decision "defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts with this Court's decision[] in *Gonzales v. Thomas.*"

The question presented in the petition is "whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that women whose marriages are arranged can and do constitute a 'particular social group' of 'women sold into forced marriages,' and that the alien would suffer 'persecution' 'on account of' that status." The Solicitor General contends that the Second Circuit decision "defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts with this Court's decisions in *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*), and *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), which both summarily reversed court of appeals' decisions that similarly preempted the Board's consideration of important questions of asylum law."

The case involves Hong Yin Gao, a native of the People's Republic of China who attempted to enter the United States without proper documentation in 2001. When placed in removal proceedings, she applied for asylum and withholding of removal. She testified that her parents contracted with a "go-between in her local village" to arrange a marriage for her. A man interested in a marriage, Chen Zhi, paid the "go-between" 18,800 RMB (approximately $2200) to be matched with Gao when she turned 21. The go-between then provided Zhi's money to

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Second Circuit focuses on Suspension Clause

On May 11, 2005, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, which included, *inter alia*, several amendments to the INA eliminating district court habeas review of final removal orders issued by the Board of Immigration Appeals ("BIA").

Recently, and presumably in light of the REAL ID Act, the Second Circuit has been issuing orders to show cause directing the petitioner or the parties to explain whether there exists a Suspension Clause issue in two distinct types of cases:

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Petition for certiorari filed in *Gao*

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Gao's mother, who used the funds to pay family bills. Initially, Gao considered Zhi to be "a rather acceptable potential husband." She changed her mind, however, when she determined that he had a "bad temperament" and gambled. According to her testimony, the relationship soured when Zhi refused to pay back his debts, and he once slapped her and refused to cancel the engagement. At that point, Gao decided not to marry Zhi and moved to the City of Mawei, which is about an hour away by boat from her home. After her departure, Zhi occasionally harassed her family looking to have either his money returned or the marriage contract fulfilled. Once, when Gao was visiting her family, Zhi followed her to the boat when she departed and thus allegedly deduced the identity of the city to which she had moved.

In addition to her testimony, Gao submitted a State Department report that noted a problem in China of widespread domestic violence and "trafficking in brides and prostitutes." The report further explained that the central government was attempting to prevent such trafficking, but that it was impeded by official corruption and occasional resistance by local officials.

Following the hearing, an IJ concluded that Gao's "predicament did not arise from a protected ground such as membership in a particular social group, but was simply 'a dispute between two families.'" The IJ also found that the record did not establish that the government would not protect petitioner from the boyfriend and that since she "was able to relocate safely to another city," she did not need asylum in the United States. The BIA affirmed without opinion.

The Solicitor General contends principally that the Second Circuit erred when it "reached out to mint a new and controversial rule of immigration law that permits individuals to qualify for asylum and withholding of removal based on their involvement in an arranged marriage and the attendant familial or cultural pressure to participate in the marriage—or at least to choose between getting married or repaying the other party the money received in anticipation of the marriage." Such ruling, "usurps the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws, and its constitutionally assigned role in making the sensitive domestic and foreign-policy judgments that inhere in identifying which categories of individuals may receive refuge in the United States from persecution in their home land." The Solicitor General points out that the decision has far-reaching ramifications for immigration policy in light of the fact that approximately 60% of marriages worldwide are arranged and, that in some countries all marriages are arranged.

The Second Circuit erred when it "reached out to mint a new and controversial rule of immigration law that permits individuals to qualify for asylum and withholding of removal based on their involvement in an arranged marriage."

Accordingly, in light of the "sweeping implications of the court of appeals' decision and its potential effect on the proper administration of the immigration law and policy," the Solicitor General petitions the Court to grant the petition for certiorari, vacate the judgment below, and remand for consideration in light of *Thomas*.

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Regulatory Update

DHS proposes rule to enhance drivers licenses

On March 1, 2007, DHS issued a proposal to establish minimum standards for state-issued driver's licenses and identification cards in compliance with the REAL ID Act of 2005. 72 *Fed. Reg.* 10820 (March 1, 2007).

The proposed regulations set standards for states to meet the requirements of the REAL ID Act, including security features that must be incorporated into each card, verification of information provided by applicants to establish their identity and lawful status in the United States, and physical security standards for locations where licenses and identification cards are issued. As proposed, a REAL ID driver's license will be required to access a federal facility, board federally regulated commercial aircraft, and enter nuclear power plants. Because states may have difficulty complying before the May 11, 2008, deadline, DHS will grant an extension of the compliance deadline until December 31, 2009.

J-Visa rules amended

The Department of State has published a final rule amending the exchange visitor visa (J-1), to reflect changes made by Pub. Law 108-441, and other administrative and procedural changes that have occurred following the transfer of the 212(e) waiver authority from the USIA to the Bureau of Consular Affairs. 72 *Fed. Reg.* 10060 (March 7, 2007). The rule reconstitutes the Waiver Review Board, which, upon referral by the Chief, Waiver Review Division, of the Visa Office, will review cases that have compelling competing interests. Normally, an exchange visitor is required to live outside the U.S. for two years following the completion of the exchange program. However, that requirement may be waived under certain circumstances.

THE NORTH KOREAN HUMAN RIGHTS ACT

On October 18, 2004, President George W. Bush signed into law H.R. 4011, the North Korean Human Rights Act of 2004 ("NKHRA"). *See* P. L. 108-333, 118 Stat. 1287 (October 18, 2004); 22 U.S.C. § 7842. The Act is intended to help promote respect for and protection of human rights in the Democratic People's Republic of Korea. In particular, section 302 provides that North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship that they may enjoy under the Constitution of the Republic of Korea (South Korea). Section 302 of the NKHRA includes the following:

> Section 302. ELIGIBILITY FOR REFUGEE OR ASYLUM CONSIDERATION.
>
> (a) PURPOSE. The purpose of this section is to clarify that North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea [(South Korea)]. It is not intended in any way to prejudice whatever rights to citizenship North Koreans may enjoy under the Constitution of the Republic of Korea [(South Korea)], or to apply to former North Korean nationals who have availed themselves of those rights.
>
> (b) TREATMENT OF NATIONALS OF NORTH KOREA. For purposes of eligibility for refugee status under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157), or for asylum under section 208 of such Act (8 U.S.C. 1158), a national of the Democratic People's Republic of Korea [(North Korea)] shall not be considered a national of the Republic of Korea [(South Korea)].

According to the legislative history of the NKHRA, Congress was concerned that the South Korean Constitution could be read as rendering all North Koreans as nationals of South Korea. Therefore, section 302 of the NKHRA addresses North Korean nationals who had not found durable protection in South Korea and only had a "prospective claim to [South Korean] citizenship." H.R. Rep. No. 108-478, pt.1, at 22 (2004). Under section 302(a) of the NKHRA, to be considered a national of South Korea for purposes of refugee or asylum adjudications, a North Korean national must have availed himself or herself of the rights of South Korean citizenship.

The North Korean Human Rights Act does not provide for refugee status to all natives of North Korea as a matter of law.

In addition, section 302 of the NKRHA did not supercede the firm resettlement bar to asylum, even with respect to a North Korean national who had settled in South Korea or another third country. Specifically, to be eligible for asylum, an alien must demonstrate that he or she is a refugee (*i.e.*, suffered persecution or holds a well-founded fear of persecution on account of one of the protected grounds in the country or countries of the alien's nationality or, if stateless, the country or countries of last habitual residence) and is not subject to one of the mandatory bars to asylum. One mandatory bar to asylum eligibility is firm resettlement. *See* INA § 208(b)(2)(A)(vi) (providing that neither the Secretary of Homeland Security nor the Attorney General may grant asylum to an alien who "was firmly resettled in another country prior to arriving in the United States").

According to the firm resettlement regulations, an alien is considered to be firmly resettled if, prior to arrival in the United States, the alien "entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement," unless the alien can demonstrate that he or she is covered by at least one of the two exceptions described in the regulation. 8 C.F.R. § 1208.15; *see Sultani v. Gonzales*, 455 F.3d 878, 881-84 (8th Cir. 2006) (describing requirements of firm resettlement regulation); *Maharaj v. Gonzales*, 450 F.3d 961, 967-76 (9th Cir. 2006) (*en banc)* [*same*]; *Sall v. Gonzales*, 437 F.3d 229, 233-35 (2d Cir. 2006) (*same*); *Abdille v. Ashcroft*, 242 F.3d 477, 487 (3d Cir. 2001) (*same*). These exceptions are as follows:

1) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

2) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

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NKHRA

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Thus, for example, if an asylum applicant was considered to be firmly resettled, he or she would be ineligible for asylum unless the applicant could demonstrate that one of the above exceptions applies.

In most cases, a North Korean national, who enters South Korea prior to arriving in the United States, triggers the regulatory presumption of firm resettlement for having "received an offer of permanent resident status, citizenship, or some other type of permanent resettlement" in South Korea. 8 C.F.R. § 1208.15. At that point, the alien would bear the burden of establishing that he falls within one of the two exceptions described in the firm resettlement regulation. Congress recognized in the NKHRA that the "principal responsibility for North Korean refugee resettlement naturally falls to the Government of South Korea." NKHRA § 3 (24). Thus, section 302 of the NKHRA only was intended to clarify the difference between North Koreans who purposely availed themselves of rights to citizenship under the Constitution of South Korea and those who did not. The NKHRA does not otherwise affect the adjudication of refugee or asylum applications.

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FURTHER REVIEW PENDING
Update on Cases & Issues

Asylum – Particular Social Group

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

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

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Asylum — Population Control Policy

The Second Circuit *en banc* will hear arguments on March 3, 2007, in ***Lin,*** 02-4611, ***Dong,*** 02-4629, and ***Zou*** 03-40837, 416 F.3d 184 (2d Cir. 2005), consolidated cases. On of the question before the court is:

> Whether the BIA reasonably construed IIRIRA Section 601(a)'s definition of "refugee" to: (a) include a petitioner whose legally married spouse was subject to an involuntary abortion or sterilization, *see Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1977); and (b) not include a petitioner whose claim is derivatively based on any other relationship with a person who was subject to such a procedure, unless the petitioner has engaged in "other resistance" to a coercive population control program, *see Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006).

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Asylum – Disfavored Group

Lolong v. Gonzales, 400 F.3d 1215 (9th Cir. 2005) was argued *en banc* before the Ninth Circuit on October 5, 2006. The government also raised the further question of whether the BIA has statutory authority to issue order of removal.

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Asylum – Persecutor, *Ventura*

Oral argument has been scheduled for April 4, 2007, in ***Castaneda-Castillo v. Gonzales***, 464 F.3d 112 (1st Cir. 2007), where the government suggested that the panel's decision violated *Ventura* by (1) deciding that petitioner had not assisted in persecution where BIA did not decide this issue, and (2) affirmatively deciding that petitioner was credible after vacating the BIA's adverse credibility finding.

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Asylum—Adverse Credibility Determination

On December 14, 2006, the government filed a petition for rehearing en banc in ***Suntharalinkam v. Gonzales,*** 458 F.3d 1634 (9th Cir. 2006), The question presented is whether numerous minor discrepancies cumulatively add up to support an adverse credibility determination, and were those discrepancies central to the asylum claim of a Sri Lankan alien suspected as being Tamil Tiger terrorist.

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Asylum—Country Reports

On December 13, 2006, the government filed a petition for rehearing en banc in ***Ornelas-Chavez v. Gonzales***, 458 F.3d 1052 (9th Cir. 2006). The issue presented is whether country reports can be used to decide eligibility for asylum/withholding as well as credibility.

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SUMMARIES OF RECENT BIA DECISIONS

Section 244(b)(5) Of The INA Allows Aliens To Renew Their Application For Temporary Protection Status Before The Immigration Judge

In *Matter of Barrientos*, 24 I &N Dec. 100 (BIA 2007), the Board held that INA § 244(b)(5)(B), 8 U.S.C. § 1254(b)(5)(B), permits an alien to assert his right to Temporary Protection Status ("TPS") in removal proceedings, even if his application has previously been denied by the Administrative Appeals Unit ("AAU"). In this case, the alien was placed in removal proceedings following the denial of his application for TPS by the AAU for failing to present sufficient supporting information. In his removal hearings, the alien sought to reapply for TPS.

The Immigration Judge considered the regulations regarding the administrative procedure for the review of the denial of TPS benefits and found that if an alien had received a full administrative review of his TPS application, an immigration judge had no jurisdiction to conduct a de novo review of that application. The Board rejected that interpretation, finding that the plain language of section 244 (b)(5)(B) of the immigration statute provides, without qualification, that administrative procedures will not prevent an alien from asserting his right to TPS in removal proceedings. Therefore, the regulations must be read as providing de novo review of eligibility for TPS in removal proceedings, even if an appeal has previously been denied by the AAU.

Absent Affirmative Communication From DHS Regarding The Alien's Prima Facie Eligibility For Naturalization, Removal Proceedings May Not Be Terminated

In *Matter of Acosta Hidalgo*, 24 I &N Dec. 103 (BIA 2007), the Board, responding to questions posed by the Second Circuit on remand, determined that removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) where DHS has presented an affirmative communication attesting to an alien's prima facie eligibility for naturalization, noting that neither the Board nor the Immigration Judge has jurisdiction to adjudicate applications for naturalization. In so concluding, the Board reaffirmed its previous holding in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975) (considering 8 C.F.R. § 242.7 (1975), the predecessor to the current regulation, which is essentially identical in language). The Board further found that an adjudication by the DHS on the merits of an alien's naturalization application while removal proceedings are pending is not an affirmative communication of the alien's prima facie eligibility for naturalization that would permit termination of proceedings under 8 C.F.R. § 1239.2(f).

Since the "commercial advantage" component arose in the INA's aggravated felony provision – and not as an element of the underlying offense nor a basis for a sentence enhancement – the Board could properly look beyond the record of conviction.

Board Reaffirms That Alien's 2001 Conviction For Violating 18 U.S.C. § 2422(a) Is An Aggravated Felony Offense

In *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007), the Board considered, on remand from the Second Circuit, the following issues: 1) whether the categorical approach to determining whether a criminal offense satisfies a particular ground of removal applies to the inquiry as to whether a violation of 18 U.S.C. § 2422(a) meets the aggravated felony definition of section 101(a)(42)(K)(ii) of the INA; and 2) whether information beyond the record of conviction may be relied upon in determining whether the alien's violation of 18 U.S.C. § 2422(a) was for "commercial advantage." Relevant to this case, § 2422(a) prohibits knowingly persuading, inducing, enticing, or coercing "any individual to travel in interstate or foreign commerce or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense . . . ." The Board held that the categorical approach to determining whether a criminal offense satisfies a particular ground of removal does not apply to the inquiry whether a violation of 18 U.S.C. § 2422(a) was committed for "commercial advantage" because that factor was not an element of the offense. Since the "commercial advantage" component arose in the INA's aggravated felony provision – and not as an element of the underlying offense nor a basis for a sentence enhancement – the Board could properly look beyond the record of conviction to determine whether the alien's criminal offense was committed for "commercial advantage." As it was evident from the record of proceeding, including the alien's testimony, that he knew that his employment activity was designated to create a profit for the prostitution business for which he worked, the Board concluded that his offense was committed for "commercial advantage," and found him subject to removal as an aggravated felon.

Board Rejects Alien's Challenge To Immigration Judge's Decision That He Is Subject To Mandatory Detention

In *Matter of Kotliar*, 24 I &N Dec. 124 (BIA 2007), the alien appealed from an Immigration Judge's decision denying his request for a change in custody status, concluding that there was no jurisdiction to set a bond. Here, the alien admitted that he was convicted of the following offenses in violation of the California Penal Code: false identification to a police officer in June 2006; petty theft with a prior in November 2005; burglary in May 2004; and cable TV theft in November 2002. First, because section § 236 (c)(1) of the INA expressly states that an alien is subject to mandatory detention and shall be taken into cus-

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DHS declines to codify National Detention Standards

DHS Secretary Chertoff, in a recent letter to the American Bar Association, explained why DHS was not initiating rule-making to codify ICE's National Detention Standards (NDS). Excerpts from that letter follow:

An important priority for DHS is to ensure full NDS compliance by ICE officials and detention contract service providers. I will, therefore, consider the request that the NDS be formally codified. Of course, an NDS-related ruling would be a lengthy and resource-intensive process. Moreover, once implemented, updating the regulation would be equally laborious and protracted, thereby undermining agency flexibility to respond to changed circumstances or crises.

"I assure you that DHS is absolutely committed to providing safe, secure, and humane conditions of confinement to all aliens in our custody."

While there are a number of difficult considerations involved in formalizing the NDS into regulatory form, I assure you that DHS is absolutely committed to providing safe, secure, and humane conditions of confinement to all aliens in our custody. The ICE Office of Detention and Removal Operations (DRO) Detentions Standards Compliance Unit (DSCU) monitors conditions of confinement to ensure that facilities used for ICE detainees comply with NDS requirements and that facilities maintain conditions of confinement consistent with correctional industry standards and practices. DRO currently uses a combination of headquarters and field office staff to conduct annual standardized reviews of all facilities used to hold ICE detainees, The reviews are based on all 38 NDS. Facilities receiving a rating of "Deficient" or "At Risk" are inspected semi-annually. All facilities are required to complete a plan of action for correcting deficiencies identified during the review process. Further, ICE requires that its Service Processing Centers, Contract Detention Facilities, and Inter-Governmental Service Agreement facilities maintain accreditation by the American Correctional Association as a means of maintaining an independent verification of performance quality.

In addition, DHS has undertaken a number of positive steps recently to review the NDS and ensure NDS compliance. First, DRO is currently engaged in a major initiative to improve the delivery of care to detainees by converting the NDS to a performance-based model, consistent with the approach used by the American Correctional Association. The revised standards, expected practices, and outcome measures will enable ICE to qualitatively monitor activities and quantitatively measure outcomes over time.

DHS is undertaking other efforts as well. As ICE'S detention capacity increases, its detainee population increases in demographic complexity. Certain populations, such as alien children and families, present special considerations and raise unique challenges for DHS. ICE is, therefore, in the process of reviewing its secure and non-secure juvenile standards and developing family-specific detention standards. DHS is determined to ensure that the unique educational, recreational, nutritional, health care, relational, and custody consideration issues associated with these special populations are appropriately addressed. In addition to these ongoing initiatives to optimize the treatment: of ICE detainees, and to ensure independent internal management controls, ICE's Office of Professional Responsibility is creating a Detention Facilities Inspection Group (DFIG) within its Management Inspections Unit to independently validate detention compliance reviews conducted by DRO. The DFIG will provide quality assurance over the review process, ensuring consistency in application of the NDS, and verifying corrective action. To increase the transparency of its annual facility review process, ICE will also begin publishing an internal semi-annual report on reviews conducted during the previous six months. The report will identify facilities reviewed, deficiencies identified, and general trends in service provider performance and the detained population efforts we are already making to care for the ICE detainee population.

The Department of Homeland Security appreciates the ABA's past contributions to the successful promulgation of the current NDS and looks forward to working with the ABA in the future should we conclude that rule-

Summaries of recent Board decisions

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tody when the alien is released, without regard to whether he was released "on parole, supervised release, or probation," the Board found that the alien was subject to mandatory detention, even if he was not immediately taken into custody by immigration officials when released from incarceration. Second, although the Immigration Jude did not discuss when the alien came into custody, it was obvious from the record that he must have been detained at some time after his conviction in 2002, and therefore that he was release from criminal custody after October 8, 1998, the expiration date of the Transition period Custody Rules. Finally, the Board determined that the "is deportable" language in the current mandatory custody statue does not require that the alien be charged with or found deportable on the particular ground on which detention is based, and that in such circumstances, the Board will look at the record to determine whether it establishes that the alien has *committed* an offense and whether the offense would give rise to a charge of removability included in that provision.

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Summaries of Recent Federal Court Decisions

SECOND CIRCUIT

■ **Court Reverses BIA To Find That Petitioner Was Persecuted By The Sri Lankan Government On Account Of Her Tamil Ethnicity**

In *Uwais v. Gonzales*, __F.3d__, 2007 WL 603092 (2d Cir. February 28, 2007) (Calabresi, Wesley, *Oberdorfer*), the court reversed a BIA decision finding that petitioner had been sexually assaulted not on account of her Tamil ethnicity, but rather because of personal aggression of the assaulting police officer.

Petitioner, a native and citizen of Sri Lanka and ethnic Tamil, claimed that she had been arrested and sexually assaulted by the Sri Lankan police on account of her Tamil ethnicity. She testified that in 1995 the Sri Lankan police came to her house to search for evidence of Tamil Tiger activities. When the police found evidence of Tamil Tiger activity and weapons in the apartments of one of petitioner's tenants, they arrested the petitioner and detained her for three days. While she was detained, a police officer sexually assaulted her, telling her that if she told anybody about the assault no one would believe "a Tamil girl under suspicion." An IJ denied asylum, and the BIA affirmed. The BIA found that the sexual assault did not constitute persecution on the account of a protected ground. Further, the BIA found that the fact that petitioner had sent her young child to Sri Lanka to visit her grandparents and that petitioner's mother had come to the U.S. but subsequently moved back to Sri Lanka undermined her fear of future persecution.

The Second Circuit reversed the BIA, finding that because the sexual assault occurred "in the context of her arrest based on imputed political opinion [proved] that the assault occurring during the arrest was motivated, at least in part, by the same ground." The court stated that "[t]he Board should have been more sensitive to the 'obvious reality' that if [petitioner] had not been arrested and detained on account of her suspected involvement with the Tamil Tigers, there would have been no attempted sexual assault." The court also found that petitioner's fear of persecution was not undermined by her child's trip to Sri Lanka and her mother's return to Sri Lanka because those facts did not go to the heart of her claim and that the mother's decision was personal and not to be impugned to petitioner.

"The Board should have been more sensitive to the 'obvious reality' that if [petitioner] had not been arrested and detained on account of her suspected involvement with the Tamil Tigers, there would have been no attempted sexual assault."

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■ **District Court Improperly Transferred A Habeas Petition Pursuant To The REAL ID Act Because The Petition Challenged Only The Underlying Criminal Conviction**

In *Sandher v. Gonzales*, __F.3d__, 2007 WL 766106 (2d Cir. March 15, 2007) (Leval, Sotomayor, Amon) (per curiam), the court held that a habeas petition was improperly transferred from a district court to the Second Circuit under the REAL ID Act because the petition challenged only the underlying criminal conviction and not the grounds for removal.

Petitioner was placed in removal proceedings as an alien who committed an aggravated felony due to a conviction for murder. At the same time, petitioner filed a writ of habeas corpus in the Eastern District of New York challenging his conviction for murder. While the writ was still pending, an IJ ordered petitioner removed and the BIA affirmed. Subsequently, the district court transferred the habeas petition to the Second Circuit pursuant to the REAL ID Act. The Second Circuit dismissed the petition for lack of jurisdiction because it challenged only the criminal conviction and not the final administrative order of removal of the IJ and BIA.

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■ **Adverse Credibility Determination Upheld Because Petitioner Submitted Fraudulent Documents**

In *Siewe v. Gonzales*, __F.3d__, 2007 WL 744732 (2d Cir. March 13, 2007) (*Jacobs*, Walker, Raggi), the court upheld an IJ's adverse credibility determination because petitioner's submission of fraudulent documents undermined his whole claim.

Petitioner, a native and citizen of Cameroon, claimed that he was persecuted because of his membership in the political party, SDF. However, an IJ denied petitioner asylum, withholding of removal and CAT protection because he found that many documents petitioner submitted were not authentic and the petitioner's testimony was inconsistent. Specifically, an arrest warrant petitioner submitted incorrectly stated the number of children petitioner had and identified itself as having been issued by the "political police." Another document purported to be from the SDF describing petitioner's persecution was issued by someone besides the SDF Chairman, when SDF policy states that only the Chairman can issue such a letter.

The court upheld the adverse credibility determination. The court concluded that the IJ had substantial evidence to find that the arrest warrant and SDF documents were fraudulent and petitioner had provided no plausible rebuttable. Using the fraudulent arrest warrant, the court then applied the maxim "*falsus in*

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Summaries Of Recent Federal Court Decisions

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uno, falsus in omnibus [false in one thing, false in everything]" to hold that the IJ's finding that the warrant and SDF letter were fraudulent was grounds to reject petitioner's explanations for other apparent inconsistencies and debated facts in his testimony.

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THIRD CIRCUIT

■ Drug Trafficking Offense Was Not A "Particularly Serious Crime" And Claim That Petitioner's Status As An HIV Positive, Amputee, Pro-Aristide Supporter Made Him A Target For Torture Required A Remand

In ***Lavira v. Gonzales***, 478 F.3d 158 (3d Cir. 2007) (*Rendell*, Roth, Gibson), the court reversed the decision of an IJ finding that petitioner had committed a "particularly serious crime" making him ineligible for asylum and withholding of removal and denying CAT protection for failure to show that petitioner would face torture in a Haitian prison.

Petitioner, a native and citizen of Haiti, claimed that he feared persecution in Haiti because as a former supporter of ousted President Aristide he would be thrown in prison. In addition to fearing persecution as a supporter of Aristide, petitioner also claimed that his status as an HIV positive, amputee would also subject him to torture by prison authorities. However, petitioner had been convicted of an aggravated felony in New York for accepting $10 from an undercover police office to purchase crack. On this basis, an IJ denied asylum and withholding of removal because he found that petitioner had been convicted of a "particularly serious crime." While the IJ cited the BIA's decision in *Matter of Y-L-*, 23 I & N Dec. 270 (BIA 2002), laying out the exception whereby a drug-trafficking crime could be excused from the label "particularly serious crime", the IJ found the case inapplicable. The IJ denied petitioner's CAT claim because petitioner had only shown generally poor prison conditions in Haiti, and not that he himself would be specifically singled out for torture.

The Third Circuit reversed the IJ. First, the court found *Matter of Y-L-*'s exception applicable in all respects. Indeed, the court said "[t]he facts of this offense appear to place [petitioner] squarely within the exception carved out by the six-part test in *Matter of Y-L-*. The court stated that the IJ had incorrectly focused on the fact that petitioner had several drug trafficking convictions, instead of the sole drug trafficking crime that served as the basis for petitioner's removal. Second, the court found that petitioner had not made a general statement of poor prison conditions in Haiti, but rather had specifically claimed that he would be targeted by the prison authorities due to his HIV status, his status as an amputee, and his pro-Aristide political affiliation. The court noted that its prior precedent in *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), had held that Haitian prison conditions did not constitute torture, but the petitioner in that case had no conditions that set him apart from the normal prison population.

The IJ erred because the petitioner had specifically claimed that he would be targeted by the prison authorities due to his HIV status, his status as an amputee, and his pro-Aristide political affiliation.

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■ 212(c) Relief Applies Not Only To Aliens Who Accepted Plea Agreements, But Also To Aliens Who Pled Not Guilty And Went To Trial

In ***Atkinson v. Gonzales***, __F.3d__, 2007 WL 706586 (3d Cir. March 8, 2007) (Smith, Weis, *Roth*), the court held that a criminal alien need not have accepted a plea agreement prior to the enactment of AEDPA in order to remain eligible for § 212(c) relief. Rather, the alien need only show that he at one time had a right to apply for 212(c) relief, but lost that right when 212(c) was repealed.

Petitioner, an LPR, was placed in removal proceedings for having committed an aggravated felony. An IJ denied 212(c) relief and the BIA affirmed. After the Supreme Court decided *St. Cyr*, petitioner timely filed a motion to reconsider. The BIA denied the motion stating that *St. Cyr* only applied to aliens who had entered into a plea agreement in reliance on the continued availability of 212(c) relief, and not to aliens like petitioner who had pled not guilty and gone to trial.

The Third Circuit reversed the BIA, holding that petitioner's ineligibility to seek 212(c) relief was an impermissibly retroactive application of IIRIRA. The court noted that the Supreme Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively," and while "the 'reliance' factor is an element to consider in determining whether the enactment of a new law has created a 'new disability' . . . [i]mpermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." The court found that whether or not an alien had accepted a plea agreement was not determinative and that it only mattered that an alien had the right to apply for 212(c) relief and then lost that right.

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FIFTH CIRCUIT

Fifth Circuit Holds That The Decision Of DHS To Revoke A Visa Is An Unreviewable Discretionary Determination

In ***Ghanem v. Upchurch***, __F.3d__, 2007 WL 666091 (5th Cir. March 6, 2007) (Reavley, DeMoss, *Benavides),* the court held under INA § 205, Congress had invested DHS with the discretionary authority to revoke a visa, and because DHS has complete discretion to deny a visa, the court is barred from reviewing DHS's decision by INA § 242(a)(2)(B)(ii). The court joined the Seventh and Third Circuit in finding that the plain language of INA § 205 - with language like "may" and "at any time" - clearly shows that the decision to revoke a visa is discretionary. The court disagreed with the Ninth Circuit's determination that the phrase "good and sufficient cause" constitutes a legal standard which the court retained jurisdiction to determine.

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SIXTH CIRCUIT

■ **Petitioner's Failure To Submit An Approved Visa Petition In Her First Motion To Reopen Was A Proper Grounds For The BIA's Denial Of Appeal**

In ***Alizoti v. Gonzales***, 477 F.3d 448 (6th Cir. 2007) (Merritt, Batchelder, *Heyburn*), the court upheld a decision of the BIA denying petitioner's motions to reopen for failure to present a prima facie case for adjustment of status and her motion to reconsider as number barred.

Petitioner, a native and citizen of Albania, was placed in removal proceedings in 2002 where she sought asylum, withholding of removal, and protection under CAT. An IJ denied the claims and the BIA affirmed. In the meantime, petitioner married a U.S. citizen who filed an I-130. Petitioner then filed an application for adjustment (I-485) with DHS, which DHS denied because the I-485 should have been presented in a motion to reopen before the BIA. Petitioner then filed a motion to reopen, claiming that the I-130 had been approved. However, DHS offered evidence that the I-130 had not been approved when petitioner filed her motion, and the BIA denied the motion for failure to show prima facie eligibility for adjustment of status. Subsequent to petitioner's filing of her motion to reopen, DHS approved the I-130. On this basis, petitioner filed a motion to reconsider, citing the newly approved I-130. The BIA denied the motion to reconsider because under the regulations new evidence can only be submitted with a motion to reopen, and a second motion to reopen would be barred by statute.

The motion to reconsider was properly denied because petitioner had submitted new evidence with the motion, which the BIA correctly construed as a second - and thus number barred - motion to reopen.

The Sixth Circuit held that the BIA had not abused its discretion in denying the motions to reopen and reconsider. Addressing the motion to reopen, the court found that petitioner had raised serious doubts about her eligibility to adjust status by failing to include various documentary evidence of her marriage to a U.S. citizen in addition to falsely claiming that she had an approved I-130. The court also found that the motion to reconsider was properly denied because petitioner had submitted new evidence with the motion, which the BIA correctly construed as a second - and thus number barred - motion to reopen. While the court agreed with petitioner that the BIA could have accepted the new evidence in its own discretion, the court disagreed that it was an abuse of discretion not to do so. Finally, petitioner's claims for equitable estoppel and due process violations had not been exhausted before the BIA.

Judge Merritt filed a dissenting opinion stating that petitioner's subsequent I-130 approval after petitioner's filing of her motion to reopen but before the BIA decision on the motion, required the BIA to take administrative notice of the approval.

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■ **Sixth Circuit Criticizes IJ's Reliance On Irrelevant Inconsistencies, But Upholds Adverse Credibility Determination**

In ***Hamida v. Gonzales***, __F.3d__, 2007 WL 674596 (6th Cir. March 7, 2007) (*Martin*, Cole, Gilman), the court upheld an IJ's adverse credibility determination and denial of asylum, withholding of removal, and protection under CAT to a couple claiming persecution by the Tunisian government.

Petitioner claimed that because of the Tunisian government's incorrect perception that he (the principal) belonged to the Islamic Orientation Movement, he was thrown in jail for two months, threatened with sexual assault, and then barred from seeking employment as a teacher. An IJ denied relief, finding numerous inconsistencies in petitioners' testimony and asylum applications and that the events described did not amount to persecution. The BIA affirmed.

The Sixth Circuit affirmed the adverse credibility determination, but was critical of the IJ for relying on numerous irrelevant inconsistencies. The court said, "[w]hile our analysis reveals, on balance, that the IJ's adverse credibility finding is supported by substantial evidence, we take issue with many of the alleged

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'inconsistencies' the IJ deemed necessary to rely upon - some of which are not true inconsistencies or are so irrelevant that we are left with the impression that IJ reached for anything he could find." Among the irrelevant inconsistencies, the court cited the fact that the IJ had noted that the wife and mother-in-law had each stated different years for the wife's miscarriages, a mistranslation, and petitioner's failure to mention his threat of sexual assault to his wife and mother. However, the court found the IJ properly relied upon inconsistent information related to the husband's employment as a teacher and the fact that documents submitted concerning his prison time were vague.

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SEVENTH CIRCUIT

■ **Notice Of Appeal To BIA Contains Adequate Warnings Of Consequences For Failure To File A Brief Or Failure To Sufficiently Explain Basis For Appeal**

In ***Kokar v. Gonzales***, __F.3d__, 2007 WL 610037 (7th Cir. March 1, 2007) (Posner, *Ripple*, Wood), the court held that petitioner's due process rights were not violated by the BIA's summary dismissal of her appeal because the notice of appeal form carries adequate warnings of the consequences for failure to file a brief or failure to file a brief that sufficiently explains the grounds for appeal.

Petitioner, a native and citizen of Thailand, had applied for asylum, but had the application denied by an IJ. Petitioner filed a notice of appeal with the BIA, stating that she was challenging the IJ's finding that victims of human trafficking did not constitute a particular social group, and indicated on the notice of appeal that she planned to file a separate written brief. When petitioner failed to file a separate written brief, the BIA summarily dismissed her appeal under 8 C.F.R. § 1003.1(d)(2)(i)(E).

Before the Seventh Circuit, petitioner argued that the BIA's summary dismissal of her appeal was in error because the BIA failed to give adequate reasons for its decision and because summary dismissal violated her due process rights. The court rejected both arguments. First, the court held that the BIA is not required to justify its application of summary dismissal. Second, the court found that the BIA's summary dismissal of petitioner's appeal did not violate her due process rights because once an alien has indicated that she plans to file a separate written brief, "she must comply with the procedural deadlines set forth by the BIA or face the possibility of dismissal, consequences that are clearly set forth on the face of the notice of appeal."

The BIA's summary dismissal of petitioner's appeal did not violate her due process rights because once an alien has indicated that she plans to file a separate written brief, "she must comply with the procedural deadlines set forth by the BIA.

The court explicitly disagreed with *Garcia-Cortez v. Ashcroft*, 366 F.3d 749 (9th Cir. 2004), where the Ninth Circuit held that summary dismissal for failure to file a brief could violate an alien's due process rights if the alien has stated the grounds for appeal in her notice of appeal, finding the suggestion to be dicta and not accompanied by any analysis. The court also disagreed with *Esponda v. United States Attorney General*, 453 F.3d 1319 (11th Cir. 2006), where the Eleventh Circuit found an ambiguity between § 1003.1 and § 1003.3 that created a lack of notice. Finally, the court also noted that petitioner had a duty to exhaust this particular due process argument before the BIA because it involved a procedural error correctable by the BIA.

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■ **Seventh Circuit Upholds Validity of § 212(c) Regulation Implementing *St. Cyr***

In ***Johnson v. Gonzales***, __F.3d__, 2007 WL 601182 (7th Cir. February 28, 2007) (Kanne, Rovner, *Evans*), the court held that EOIR acted within its authority when it promulgated 8 C.F.R. § 1003.44(h) establishing that all aliens seeking 212(c) relief file their motion on or before April 26, 2005.

Petitioner was placed in removal proceedings for having committed an aggravated felony in 1995. Petitioner sought a waiver of removability but was denied by an IJ and subsequently the BIA. Though *St. Cyr* was handed down in 2001, petitioner did not seek to reopen his case until 2006 when DHS took him into custody. Citing 8 C.F.R. § 1003.44(h), the BIA dismissed his motion to reopen as untimely. Petitioner filed a petition for review in the Seventh Circuit arguing that EOIR lacked authority to enact 8 C.F.R. § 1003.44(h), that his due process rights were violated by lack of notice of the regulation and because he was prevented from seeking 212(c) relief, and that the BIA abused its discretion by failing to equitably toll his case.

The court dismissed petitioner's arguments. First, the court held that petitioner had no right to 212(c) relief because such relief was discretionary, and further that he had notice of 8 C.F.R. § 1003.44(h) as it had been published for more than two years. Second, the court held that the BIA did not abuse its discretion in failing to equitably toll petitioner's case as the *St. Cyr* decision came down five years before petitioner sought to re-

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open his case. Finally, the court found that EOIR had acted within its authority in promulgating 8 C.F.R. § 1003.44(h) because "the rule does not eliminate relief; it simply imposes a deadline for requesting relief, the sort of procedural limitation that is commonly found in the law."

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■ **Alien's Conviction For Sexual Solicitation Of A Minor Was Clear From The Record And The Court Had No Jurisdiction Over A Due Process Claim Because It Was Not Exhausted**

In ***Sharashidze v. Gonzales***, __F.3d__, 2007 WL 777666 (7th Cir. March 16, 2007) (*Flaum*, Ripple, Rovner), the court upheld the BIA's determination that petitioner was removable for having committed an aggravated felony and found that a due process claim that the IJ had improperly denied petitioner the right to present evidence had not been exhausted.

Petitioner, an asylee from Georgia, was convicted of indecent solicitation of a sex act. As a result, he was placed in removal proceedings for having committed an aggravated felony. An IJ concluded based on the criminal complaint, a certified statement of conviction, and an Illinois Appellate Court decision that affirmed his conviction and summarized his trial testimony, that petitioner had solicited sex from a minor, which constituted an aggravated felony. The IJ also terminated petitioner's asylee status after balancing the equities and finding no countervailing factors. The BIA affirmed using only the criminal complaint.

In the Seventh Circuit, petitioner argued that nothing in the record clearly identified the victim as a minor and that his due process rights were violated by the IJ's failure to allow him the opportunity to present evidence of countervailing equities. The court denied both arguments. First, the court found that the only "logical interpretation" of the criminal complaint was that it referred to the victim as a minor child. The court found that while the complaint also listed the child's mother, it was clear from the language that the child, and not the mother, was the victim. Second, the court found that petitioner had failed to exhaust his due process argument. Granted, the court said, petitioner's appeal before the BIA had argued that the IJ misconstrued the nature of his conviction, but the appeal "did not complain to the Board about the lack of an additional hearing."

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■ **Court Upholds BIA's Denial Of Motion To Reconsider Because Petitioner Did Not Identify Any Relief For Which She Was Eligible**

In ***Mungongo v. Gonzales***, __F.3d__, 2007 WL 764301 (7th Cir. March 15, 2007) (Posner, *Ripple*, Williams), the court upheld the BIA's denial of a motion to reconsider because petitioner failed to identify any error of fact or law and asked only for "humanitarian" relief not specified by any statute.

Petitioner, a native and citizen of Tanzania, had applied for asylum, but was ultimately ordered removed and granted voluntary departure. Petitioner did not depart and was subsequently discovered and taken into custody by DHS. She moved to reopen her proceedings on the basis that her husband was very ill, causing her to be the sole financial support for their children, and that her husband would be unable to receive medical treatment in Tanzania. Petitioner also claimed that she had an employment based visa pending which would allow her to adjust status. The BIA denied the motion as untimely and further, because petitioner had not identified any specific form of relief for which she was eligible. The BIA found that she was ineligible to adjust status because she failed to depart and had neither procured an approved visa nor submitted an application to adjust status. While the BIA noted the humanitarian factors at work, it concluded that it had no remedy for petitioner. Petitioner then filed a motion to reconsider the BIA's denial, submitting new evidence that her husband had cancer and AIDS and that he had applied for asylum. However, the BIA denied this motion as well, as new evidence can only be submitted with a motion to reopen. Petitioner filed a PFR of the denial of the motion to reconsider.

> "Like the Board, we do not have legal authority to address these [humanitarian] concerns. That authority is vested in the political branches of our national government."

The Seventh Circuit upheld the BIA's denial of the motion to reconsider. First, the court agreed that petitioner had identified no error of law or fact in the BIA's denial of the motion to reopen, and had simply submitted new evidence. Second, the court said that "[l]ike the Board, we do not have legal authority to address these [humanitarian] concerns. That authority is vested in the political branches of our national government."

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■ **Court Reverses Adverse Credibility Determination Because Omissions And Discrepancies Were Minor And Irrelevant**

In ***Adekpe v. Gonzales***, __F.3d__, 2007 WL 756932 (7th Cir. March 14, 2007) (*Cudahy*, Kanne, Sykes), the court reversed an IJ's adverse credibility determination because the cited

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omissions and discrepancies were minor and for the most part were not relevant to his asylum claim.

Petitioner, a native and citizen of Togo, claimed he feared persecution based on his opposition to President Eyamdema's autocratic regime. Petitioner testified that as member of a student opposition group and later the opposition political organization, UFC, he was detained, beaten, and put on a "black list" which meant certain death. An IJ denied his claim because parts of his testimony were inconsistent with his asylum application. Specifically, petitioner inconsistently described the number of students in the student group, the way the students were beaten, and whether his father-in-law was murdered because of petitioner's marriage to his daughter or because of the father-in-law's own political dissent. Also, petitioner failed to previously mention a friendship he had with the Secretary General of Togo that allowed him to escape. Petitioner attempted to explain the discrepancies by stating that he thought the asylum application to be only a summary and not requiring specific details. Consequently, the IJ made an adverse credibility determination and the BIA affirmed.

The Seventh Circuit reversed the IJ, stating that the "majority of the discrepancies the IJ relied upon to discredit [petitioner]'s testimony concerned minor, immaterial parts of his testimony." Though two discrepancies were "arguably important" - his failure to previously mention his friendship with the Secretary General and the description of his father-in-law's death - these discrepancies did not "concern the basic core" which was that he "was detained an beaten for his political activities." Further, the court believed petitioner's excuse that he thought the asylum application was only a summary as nothing in the record showed a reason to disbelieve the excuse. Finally, the court also held that the IJ improperly dismissed corroborating documents as irrelevant.

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■ **Unexplained Gaps In The Administrative Record Lead Court To Find IJ Abused Discretion In Denying Motion To Reopen Inabsentia Removal**

In *Terezov v. Gonzales*, __F.3d__, 2007 WL 764287 (7th Cir. March 15, 2007) (Ripple, Rovner, *Williams*), the court reversed a decision of the BIA finding that petitioner's *in absentia* removal was justified by an administrative record that showed he failed to provide DHS with his current address.

The "Government's Representation . . . is only as good as the file it searched, and in this case the administrative record is so incomplete as to make it impossible to draw any fair inference from the absence of a particular document."

Petitioner, a native and citizen of Bulgaria, had originally settled into Phoenix, Arizona in 2003 where he sought asylum with the Los Angeles Asylum Office. In 2004, he moved to Indiana and sent a handwritten letter to the LA Asylum Office providing his Indiana address. Also in 2004, petitioner moved back to Phoenix. Petitioner sent an employment authorization to the USCIS in California listing the new Phoenix address, which the agency replied to at the same address. At some point after this correspondence with USCIS, petitioner's asylum application was transferred to Chicago and an interview was scheduled. Petitioner did not attend the interview and an NTA was sent to the old Indiana address. Subsequently, petitioner was removed *in absentia* when he failed to respond to the NTA.

Petitioner then filed a motion to reopen, which was denied by an IJ because - as the government pointed out - the only change of address form in the administrative record was the handwritten note listing the Indiana address. The BIA affirmed, giving no weight to the other correspondence in the record.

The Seventh Circuit reversed, rejecting the government's argument that the only change of address in the record was for the Indiana address. The court held that the "Government's representation . . . is only as good as the file it searched, and in this case the administrative record is so incomplete as to make it impossible to draw any fair inference from the absence of a particular document." Specifically, the court found the record contained no evidence that notice of the asylum interview was sent to any address whatsoever and no documents evidenced when and why the LA Asylum Office transferred petitioner's file to the Chicago office. Further, the court stated, the record contained return receipts from the LA office to petitioner's new address in Phoenix.

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EIGHTH CIRCUIT

■ **Court Upholds Denial Of Asylum To Indonesian Petitioners For Failure To Prove That They Were Persecuted On Account Of Their Protestant Faith**

In *Lengkong v. Gonzales*, __F.3d__, 2007 WL 609902 (8th Cir. March 1, 2007) (*Wollman*, Riley, Shepard), the court upheld an IJ's denial of petitioners' application for asylum, withholding of removal and protection under CAT for failure to show that they were persecuted in Indonesia on account of their Christian faith and, moreover, because the incidents described did not rise to the level of persecution.

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Petitioners, natives and citizens of Indonesia, claimed that they had been persecuted by Muslims in Indonesia for their adherence to Protestantism. Petitioners described four specific incidents of persecution. In the first incident, petitioners' car was stopped by men wielding sticks who broke the car's windows and demanded removal of a pro-Christian bumper sticker. In the second incident, people threw stones at the petitioners' house and vandalized their fence. In the third incident, their church was burned down. Finally, one of the petitioners was robbed by a man asking her if she was Christian. An IJ denied asylum and the BIA affirmed.

The court upheld the IJ's denial of asylum, finding that none of the described incidents were motivated by religious beliefs. Specifically, the court found that the first two incidents all took place during the Jakarta riots of 1998 and were the result of general widespread violence. The court also found the robbery to be a simple criminal act rather than an act of persecution. The court then went on to hold that none of the acts rose to the level of persecution, the petitioners having only suffered "minor damage to their car and home, a robbery, and fleeing from a church unharmed." The court also noted that conditions in Indonesia have changed, so that now Protestantism is one of the five recognized religions.

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■ Eighth Circuit Affirms That Iraqi National Filed Frivolous Asylum Application

In ***Aziz v. Gonzales***, __F.3d__, 2007 WL 609895 (8th Cir. March 1, 2007) (*Wollman,* Beam, Riley), the court upheld an IJ's determination that petitioner had deliberately filed an asylum application which she knew to be fraudulent. The court also upheld the IJ's adverse credibility determination and denied withholding of removal and protection under CAT.

Petitioner, a native and citizen of Iraq, filed an asylum application in 2000 claiming that she feared persecution if returned to Iraq because she would be subject to an honor killing due to an extra-marital affair and because Saddam Hussein had previously persecuted her and her family. However, the government determined these claims to be fraudulent based on a visa petition previously submitted on her behalf which contradicted the asylum application and petitioner subsequently recanted her claims. Nevertheless, she continued to maintain that Hussein's regime killed her father and detained her brothers. At her final hearing before an IJ, petitioner sought to withdraw her asylum application and seek cancellation of removal as a battered spouse, alleging that her husband dominated her and had forced her to make the false statements in her asylum claim. An IJ found her asylum application frivolous and denied all claims to relief.

> "While the petitioners described circumstances which are troubling . . . . Absent physical harm, the incidents of harassment, unfulfilled threats of injury, and economic deprivation are not persecution."

Before the Eighth Circuit, petitioner challenged the frivolous determination and argued that the IJ erred in finding that she did not meet her burden of proof for withholding of removal and protection under CAT. The court held that substantial evidence supported the IJ's decision. The court found that petitioner had admitted she lied and submitted fraudulent documents and had been warned through an interpreter that she would be permanently ineligible for asylum if she knowingly made a frivolous application. Those facts, the court said, in addition to the IJ's adverse credibility determination supported the frivolous determination. The court also dismissed petitioner's argument that her husband had forced her to lie in her application because the adverse credibility finding made this claim similarly unbelievable.

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■Eighth Circuit Affirms Denial Of Asylum To Palestinian Family From The West Bank And Finds That It Lacks Jurisdiction To Review Denial Of Voluntary Departure

In ***Quomsieh v. Gonzales***, __F.3d__, 2007 WL 763852 (8th Cir. March 15, 2007) (Wollman, Riley, *Shepard*), the court upheld the BIA's denial of asylum, withholding of removal, and protection under CAT to a Palestinian family from the West Bank claiming they were persecuted by Muslims on account of their Christian faith and by Israeli soldiers on account of their Palestinian ethnicity.

Petitioners testified to numerous incidents where they had been harassed and threatened by either Israeli soldiers or members of the Palestinian Authority. Two incidents in particular were later cited by the court: petitioners' testimony that the husband had once been detained by Israeli soldiers for four hours and beaten with rifles and the husband's claim that his first cousin had been tortured to death by the Palestinian Authority. However, an IJ denied all claims to relief - including voluntary departure - and the BIA affirmed, holding that none of the incidents of threats and harassment amounted to persecution.

The Eighth Circuit affirmed the denial of asylum, stating that "[w]hile the petitioners described circumstances which are troubling . . . Absent physical harm, the incidents of

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harassment, unfulfilled threats of injury, and economic deprivation are not persecution." The court also noted that while they found the husband's detention by Israeli soldiers "bothersome," the family continued to live in the West Bank for thirteen more years after the incident without any similar incidents occurring. Further, the court could not see anything in the record to support the husband's assertion that his first cousin had been tortured to death. Finally, the court dismissed the petitioners' challenge to the denial of voluntary departure because they failed to raise the issue before the BIA, or in the alternative because the court lacked jurisdiction to review that determination.

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■ **Eighth Circuit Has No Jurisdiction To Review Untimely Asylum Application Claim, But Remands For A Determination Of Whether Hezbollah Acts With The Acquiescence Of The Lebanese Government**

In ***Mouawad v. Gonzales***, __F.3d__, 2007 WL 750552 (8th Cir. March 14, 2007) (Loken, *Melloy*, Schiltz), the court held that it lacked jurisdiction to review petitioner's claim that his untimely asylum application was excused by extraordinary circumstances, and upheld an IJ's determination that petitioner had not met his burden of proof for withholding of removal. However, the court remanded petitioner's CAT claim because the IJ failed to consider whether of not the terrorist group Hezbollah acts with the acquiescence of the Lebanese government.

Petitioner, a native and citizen of Lebanon, claimed that he was persecuted by the Muslim militia groups when he refused to join their militias or give them military information. Specifically, petitioner claimed that he feared the terrorist group Hezbollah because they killed his neighbor and now wanted to kill him because he was the neighbor's friend. An IJ, while finding petitioner credible, denied all claims. The IJ held that the asylum application was untimely and found petitioner's excuse that he didn't understand English and asylum procedures unavailing. Further, the IJ denied withholding of removal for lack of persecution on a protected ground and protection under CAT for lack of a nexus between Hezbollah and the Lebanese government. The BIA affirmed.

> The court rejected petitioner's argument that his refusal to provide military secrets to Hezbollah amounted to imputed political opposition.

The Eighth Circuit upheld in part and reversed in part. First, the court found that it lacked jurisdiction to review petitioner's untimely asylum application pursuant to 8 § U.S.C. 1158 (a)(2)(D). Second, the court agreed with the IJ that petitioner was not persecuted on account of protected ground. "Indeed," the court said, "[petitioner] testified that his religious beliefs were irrelevant to this alleged persecutors . . . and that the religion of those from whom they seek support 'doesn't matter' to the Muslim militias in Lebanon." The court also rejected petitioner's argument that his refusal to provide military secrets to Hezbollah amounted to imputed political opposition. Finally, the court remanded the CAT claim because the IJ failed to analyze whether Hezbollah acts with the acquiescence of the Lebanese government, and the record contained State Department reports that may evidence this fact.

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NINTH CIRCUIT

■ **Whistleblowing Against Government Corruption Constitutes An Expression Of Political Opinion**

In ***Fedunyak v. Gonzales***, __F.3d__, 2007 WL 624537 (9th Cir. March 2, 2007) (Gibson, *Fisher*, Callahan), the court held that petitioner's complaints to the Ukranian government about official government corruption constituted a political opinion.

Petitioner, a citizen of Ukraine, had been approached by government officials seeking extortion money on numerous occasions. In response, petitioner filed complaints about the extortion with the mayor of his town, the governor, and eventually the Supreme Soviet Deputy (which the court found to be the equivalent of a U.S. Senator). Each time he made a complaint, the petitioner was either beaten or threatened with beatings or death. Petitioner sought protection under CAT and withholding of removal, which an IJ granted. The BIA, however, reversed for lack of persecution on a protected ground and lack of nexus between the persecution and the government.

The Ninth Circuit reversed the BIA, holding that petitioner's whistleblowing was "political because - in criticizing the local regime's failure to stop the extortion scheme - his acts were 'directed toward a governing institution' and not 'only against individuals whose corruption was aberrational.'" The court found a nexus between the persecution and the whistleblowing because while petitioner did not expose government corruption to the public at large, "[i]t was sufficient that [petitioner] demonstrated that he suffered retaliation for acting governmental corruption." The court rejected the government's argument that the extortion suffered by petitioner was motivated by personal rather than political motives.

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■ **Ninth Circuit Holds That Stalking Is Not Categorically A Crime Of Violence**

In *Malta-Espinoza v. Gonzales*, __F.3d__, 2007 WL 624532 (9th Cir. March 2, 2007) (Schroeder, *Canby*, Duffy), the court held that because the California stalking statute includes long distance harassing, stalking is not categorically a crime of violence.

Petitioner, an LPR, was placed in removal proceedings as an alien convicted of an aggravated felony because he was convicted of stalking. The BIA found that stalking was a crime of violence because the statute in question required a "credible threat with intent to place that person in reasonable fear for his or her safety," thus qualifying under 18 U.S.C. § 16(b)'s definition of a crime of violence as an offense involving "a substantial risk that physical force against person or property of another may be used in the course of committing the offense." The Ninth Circuit disagreed. Applying the categorical approach, the court found that "[h]arrasing can involve conduct of which it is impossible to say that there is a substantial risk of applying physical force to the person or property of another, as 16(b) requires." The court reasoned that "[s]talking under California law may be conducted entirely by sending letters and pictures" and that "[h]arrasment by mail or telephone simply does not carry the same substantial risk." Thus, because the evidence of record could not show that petitioner was convicted of anything more than long-distance harassing, the government had failed to show that he was convicted of a crime of violence. The court left open whether or not the petitioner was removable under 8 U.S.C. § 1227(a)(2)(E) which specifically makes a conviction for stalking a ground of removal, as the BIA did not reach the issue.

The court reasoned that "[s]talking under California law may be conducted entirely by sending letters and pictures" and that "[h]arrasment by mail or telephone simply does not carry the same substantial risk."

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ELEVENTH CIRCUIT

■ **Court Rules That Restitution Order Is Insufficient Proof Of Loss To Show That Petitioner Was Removable As An Aggravated Felon**

In *Obasohan v. U.S. Att'y Gen.*, __F.3d__, 2007 WL 548359 (11th Cir. Feb. 23, 2007) (Black, *Barkett*, Kravitch), the Eleventh Circuit granted the petition for review of the determination that petitioner's prior conviction qualified as an aggravated felony under section 1101 (a)(43)(M)(i) of the INA as the IJ and the BIA erred by relying on conduct that was not charged, proven, or admitted to determine that petitioner had been convicted of an aggravated felony.

Petitioner, a lawful permanent resident, was indicted on one count of conspiracy to produce, use and traffic in counterfeit access devices, in violation of 18 U.S.C. § 1029 (b)(2). He pled guilty to one count of receiving fraudulently a credit card that he never used and was convicted as charged. He was subsequently charged with removability as an alien convicted of an aggravated felony which includes, "an offense that [. . .] involves fraud or deceit in which the loss to the victim exceeds $10,000." INA § 101 (a) (43) (M) (i). Petitioner raised a challenge to the aggravated felony finding arguing that he was not convicted of an offense involving a loss of more than $10,000 because the only conduct alleged in the indictment involved a credit card that was never used. The IJ ruled that because petitioner had been involved in the fraudulent use of other credit cards which had caused substantial losses to financial institutions, he was involved in a conspiracy to defraud credit card owners and ordered removed. The same IJ denied a subsequent motion to reconsider, which the BIA affirmed holding petitioner committed an aggravated felony because he was involved in a conspiracy to defraud financial institutions through the use of credit cards that resulted in significant loss to those financial institutions, a loss in excess of $10,000.

In his petition to the court, petitioner argued that he was charged and pled guilty to only one offense: conspiracy to produce, use and traffic in one or more counterfeit access devices in violation of 18 U.S.C. § 1029 (b)(2). He did not deny that his offense involved fraud and deceit, he only challenged the IJ's decision that it was an aggravated felony based on the loss amount stated in the restitution order.

The court reasoned that neither petitioner's indictment nor his plea agreement specified any loss. The IJ therefore could not have relied on the statutory elements of the offense to conclude that petitioner was convicted of an aggravated felony. The restitution, on the other hand, did not rely on the conspiracy but specified three institutional victims and the fraudulent use of credit cards. These would constitute substantive single offenses rather than a conspiracy. In addition, petitioner never admitted, adopted, or assented to the factual findings or to the loss amount that formed the basis of the restitution order. The court concluded that it was error for the IJ to conclude that the order, standing alone, constituted "clear, unequivocal, and convincing" evidence of the loss necessary to transform petitioner's conviction into an aggravated felony under the INA.

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Recent Naturalization Decisions

New Jersey District Court Holds That It Has Concurrent Jurisdiction With USCIS To Decide A Naturalization Application

In *Perry v. Gonzales*, __F. Supp.2d__, 2007 WL 293424 (D.N.J. February 1, 2007) (*Sheridan*), the district court held that under 8 U.S.C. § 1447(b) it had concurrent jurisdiction with USCIS over plaintiff's naturalization application. In so holding, the court expressly disagreed with the Ninth Circuit's opposite conclusion in *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004), that district courts have exclusive jurisdiction over naturalization applications once a complaint has been filed.

Plaintiff's application for naturalization had been pending without a final decision from CIS for 35 months. Because of USCIS's failure to decide his application within the 120-day statutory period, plaintiff filed with the district court requesting that it grant naturalization or, in the alternative, direct USCIS to render an immediate decision on the application. A magistrate issued a Report and Recommendation recommending the latter request. However, before the court issued its recommendation, USCIS granted plaintiff naturalization. At this point, the case was either moot because the court and USCIS had concurrent jurisdiction to decide the application and USCIS granted naturalization, or the court had exclusive jurisdiction over the naturalization application once plaintiff filed in district court, thus the USCIS decision approving naturalization would be void and the case would not be moot. In order to determine whether the district court's jurisdiction was exclusive, the court analyzed 8 U.S.C. § 1447(b) and the congressional policy objectives behind the statute.

Under the plain language of the 8 U.S.C. § 1447(b), the court found that it had jurisdiction over a naturalization application following the expiration of the 120-day period. However, the court did not find any support, either in the statute or congressional intent, for the argument that § 1447 also worked to strip USCIS of concurrent jurisdiction. The court stated that, "[t]he inescapable conclusion is that much judicial time and resources will be saved if USCIS is not stripped of jurisdiction while the matter is pending in the district court . . . Thus, the Court should encourage USCIS to render decisions on naturalization applications. The Court should not thwart the agency from resolving an applicant's filing." The court found the Ninth Circuit's reasoning in reaching the opposite conclusion was based on a failure to realize the judicial economy saved when both courts and USCIS could grant a naturalization application. Therefore, the court concluded that "the best way to effectuate the Congressional intent is to allow concurrent jurisdiction between USCIS and the District Court as authorized by § 1447(b)."

"The best way to effectuate the Congressional intent is to allow concurrent jurisdiction between CIS and the District Court as authorized by § 1447(b)."

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Virginia District Court Holds 120-Day Period Before Naturalization Applicant May Seek Court Hearing Begins With Interview, Not Completion Of Background Check

In *Manzoor v. Chertoff*, __F. Supp. 2d__, 2007 WL 413227 (E.D. Va. Feb. 5, 2007) (Smith), the Eastern District of Virginia held that the term "examination" in INA § 336, 8 U.S.C. § 1447(b), refers to the interview of a naturalization applicant. Therefore, when 120 days have passed since USCIS interviewed the applicant, a district court has jurisdiction to consider the petition to expedite adjudication of his naturalization application. The court remanded the case to USCIS to make a decision within 120 days, because the court was not equipped to conduct background checks, did not want to discourage USCIS from scheduling interviews before the completion of background checks, and did not want to provide an incentive for petitioners to file suit.

In this case, plaintiff filed with the court a petition for a hearing on his naturalization application under 8 U.S.C. § 1447(b) because two years after he had fulfilled all the requirements for naturalization, USCIS informed him that they had not reached a decision on his application because the three mandatory background checks had not been completed. Defendants filed a motion to dismiss asking the court to dismiss the action for lack of subject matter jurisdiction. To resolve the issue in this case, the court had to determine the meaning of the word "examination" since pursuant to 8 U.S.C. § 1447(b), if USCIS fails to make a decision for naturalization "before the end of the 120 days in which examination is conducted under [8 U.S.C. § 1446], the applicant may apply to the district court for the district in which the applicant resides for a hearing on the matter." Defendant argued that the 120 day period starts to run after the completion of the mandatory background checks while plaintiff argued that the clock starts running after the initial interview. After applying the canons of statutory interpretation, the court agreed with the plaintiff and concluded that "examination" meant the initial interview of the applicant by USCIS, not a process that also includes the mandatory background checks. The court then remanded the case to USCIS requiring it to make a decision on plaintiff's application for naturalization within 120 days of the issuance of the court's order.

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Second Circuit shows interest in Suspension Clause

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cases improperly transferred from district court to the Second Circuit and cases in which the alien filed an untimely petition for review. The government is aggressively defending these cases against any suggestion that either circumstance implicates the Suspension Clause of the United States Constitution. *See* U.S. CONST., art. I, § 9, cl. 2. OIL has worked with United States Attorneys Offices to ensure that responses properly reflect the government's position. If you have a case that presents a similar issue, you are requested to please consult with OIL for guidance on how to respond. The first category of cases concerns the inappropriate transfer of habeas cases from district court to the Second Circuit. Cases falling under this category follow a typical pattern: the BIA issues a final order of removal, the alien fails to file a timely petition for review and instead, after a period of months or years, and after the May 11, 2005 REAL ID Act effective date, files a habeas petition in district court attempting to challenge the final administrative order of removal.

The REAL ID Act explicitly divested the district courts of jurisdiction to entertain challenges to final removal orders.

The REAL ID Act explicitly divested the district courts of jurisdiction to entertain challenges to final removal orders. Section 106(a) of the REAL ID Act, as codified at 8 U.S.C. § 1252(a)(5), makes clear that a petition for review in the appropriate court of appeals "shall be the sole and exclusive means for judicial review" of a final removal order. Congress made these amendments effective immediately and applicable to any "final administrative order of removal, deportation, or exclusion" that was "issued before, on, or after the date of enactment of this division." REAL ID Act § 106(b); *see Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 164 (2d Cir. 2006).

Transfers Under REAL ID Act

The district courts seem to recognize they no longer have jurisdiction over removal orders. Instead of dismissing habeas petitions filed after May 11, 2005, however, many district courts within the Second Circuit have been *sua sponte* transferring these cases to the Second Circuit, purportedly pursuant to the REAL ID Act. Of course, if the Assistant U.S. Attorney has an opportunity to address the issue, he or she should argue that the district court must dismiss, and not transfer, the habeas petition.

The transfer of a habeas petition challenging a removal order is only appropriate under the REAL ID Act if the habeas petition was "pending in a district court on the date of the enactment of this division." REAL ID Act § 106(c). In such cases, the "court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242 [of the INA], except that subsection (b)(1) of such section shall not apply." Id. Under Section 242(b)(1) of the INA, a "petition for review must be filed no later than 30 days after the date of the final order of removal." Accordingly, transfer is appropriate under the REAL ID Act if the habeas petition challenging a removal order was pending on the REAL ID Act's May 11, 2005 enactment date, regardless of when the BIA issued the removal order. Absent such pendency, the REAL ID Act simply does not apply. In these circumstances, the only possible basis for the transfer of a habeas petition to the court of appeals is the general transfer statute at 28 U.S.C. § 1631. Under Section 1631, the district court may transfer a petition for review "to any other such court in which the action or appeal could have been brought at the time it was filed or noticed." In other words, the district court may transfer a habeas petition filed after May 11, 2005, to the appropriate court of appeals only if the alien filed the habeas petition attempting to challenge a removal order within thirty days of the BIA's issuance of the final order of removal. *See* 8 U.S.C. § 1252 (b)(1).

In cases in which the district court inappropriately transfers a habeas petition filed in district court after May 11, 2005, and more than thirty days after the BIA issued the final order of removal, the government files a motion to dismiss for lack of jurisdiction. Instead of dismissing the case outright, however, the Second Circuit has started issuing orders to show cause directing the petitioners to address "whether the application of the 30-day time deadline for filing petitions for review, under 8 U.S.C. § 1252 (b)(1), to a transferred habeas petition that was filed in district court after enactment of the REAL ID Act, would constitute an unconstitutional suspension of the writ of habeas corpus." The court has entered such orders without regard to whether the district court ever entertained a Suspension Clause issue or whether the alien filed an opposition to the Government's motion to dismiss. In the first of these cases identified by OIL, the court ordered the appointment of amicus counsel following the initial response by the alien's counsel to its order to show cause. These three lead cases are *Williamson v. Gonzales*, 05-3662-ag, *Ruiz-Martinez v. Gonzales*, 05-2903-ag, and *Seoud v. BIA*, 06-3605-ag. Petitioners' brief in these cases is currently due on April 23, 2007.

Pre-REAL ID Act

The state of habeas review of removal orders in the Second Circuit prior to the REAL ID Act may shed light on the court's unusual interest in these cases and cases involving un-

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Second Circuit eyes Suspension Clause

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timely petitions for review. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court concluded that neither the Illegal Immigrant Reform and Immigrant Responsibility Act nor the Antiterrorism and Effective Death Penalty Act repealed federal habeas corpus jurisdiction under 28 U.S.C. § 2241. *St. Cyr* concerned a petitioner who was a "criminal alien" unable to obtain judicial review in the court of appeals under the pre-REAL ID Act INA. *Id*. Even though non-criminal aliens could petition for review of a final removal order issued by the BIA in the courts of appeals, the Second Circuit, in Liu v. INS, 293 F.3d 36 (2d Cir. 2002), found no basis under *St. Cyr* for not extending collateral habeas review of final removal orders to "non-criminal aliens." *See also Chmakov v. Blackman*, 266 F.3d 210 (3d Cir. 2001). Liu concerned a non-criminal alien who filed an untimely petition for review in the Second Circuit, and, six months after the court dismissed her petition, filed a habeas petition in district court. *Liu*, 293 F.3d at 38. Accordingly, under Liu and prior to the enactment of the REAL ID Act, both a criminal alien barred from filing a petition for review and a non-criminal alien who missed his petition for review deadline or simply chose not to file a petition for review could obtain habeas review of their removal orders in district court.

The government's position in these cases is clear – the REAL ID Act's elimination of habeas review of removal orders does not violate the Suspension Clause. More specifically, an alien who fails to file a timely petition for review of a final order of removal and, instead, erroneously files a habeas petition after the enactment of the REAL ID Act cannot establish a Suspension Clause violation. As the Supreme Court made clear in St. Cyr, "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals." 533 U.S. at 314 n.38; *see Swain v. Pressley*, 430 U.S. 372, 381 (1977). In passing the REAL ID Act, Congress specifically contemplated that shifting judicial review exclusively to the courts of appeals would provide an adequate and effective substitute to habeas corpus. 151 Cong. Rec. H2813, 2873. As noted by the Eleventh Circuit, who could "find no fault in Congress' reasoning," the REAL ID Act, by explicitly permitting review of questions of law and constitutional issues in the courts of appeals, "does not violate the Suspension Clause of the Constitution." *Alexandre v. U.S. Attorney General*, 452 F.3d 1204, 1206 (11th Cir. 2006); *see also Puri v. Gonzales*, 464 F.3d 1038, 1041-42 (9th Cir. 2006); *Mohamed v. Gonzales*, 470 F.3d 771, 774-75 (8th Cir. 2006).

> The Supreme Court has emphasized that the interest in finality is especially strong in the immigration context and recognized that the judicial review mechanism in place is designed to fight the use of dilatory tactics.

Thirty–Day Filing Deadline

The second type of case in which the Second Circuit has entered orders to show cause regarding what it sees as a potential Suspension Clause issue involves the INA's thirty-day time period for filing a petition for review in the court of appeals following the BIA's issuance of a final order of removal. In response to a standard motion to dismiss an untimely petition for review, the Second Circuit has, in certain instances, entered an order to show cause directing the petitioner to respond to the Government's motion to dismiss and "in that response, to address the timeliness of the petition for review, and whether this Court's application of the 30 day deadline in this case would constitute a suspension of the writ of habeas corpus, in violation of the Suspension Clause of the Constitution." In one case that has already been briefed, the Court ordered the petitioner more specifically to "describe the circumstances that resulted" in her failure to meet the thirty-day deadline, stating that "[s]uch information will assist the Court in determining whether the application of the 30-day deadline in this case would constitute a suspension of the writ of habeas corpus."

In contrast to the scenario involving improperly transferred habeas petitions, OIL is not aware of an untimely petition for review case in which the Second Circuit has appointed amicus counsel. Instead, in at least a handful of cases where the alien failed to respond to the Court's order to show cause, the Court has dismissed the petition.

In cases in which the petitioner responds to the Court's order to show cause, the government submits a reply addressing the Second Circuit's Suspension Clause concerns. The government's reply rests on several arguments. First, binding precedent in the Second Circuit "expressly prohibit[s]" the Court "from extending the prescribed time, even for good cause." *Malvoisin v. INS*, 268 F.3d 74, 75-76 (2d Cir. 2001). As discussed above, the REAL ID Act made the court of appeals the "sole and exclusive means for judicial review of an order of removal," 8 U.S.C. § 1252 (a)(5), and the REAL ID Act supersedes Liu, 293 F.3d 36, which held that an alien failing to timely file a petition for review with the Second Circuit could simply file a habeas petition in district court.

Second, the thirty-day filing limitation is constitutional. Reasonable statutory deadlines do not violate the Constitution, *see, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), and the thirty-day deadline is reasonable. An alien does not have to spend time identifying specific facts or making legal arguments in preparation of filing a petition for re-

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David Neal appointed new Chief Immigration Judge

Kevin D. Rooney, Director of the Executive Office for Immigration Review (EOIR) has announced the appointment of David L. Neal as EOIR's Chief Immigration Judge.

Prior to his appointment, Judge Neal had been acting in this capacity since April 2006. Before becoming Acting Chief Immigration Judge, Judge Neal served as an Assistant Chief Immigration Judge (ACIJ) from April 2005 to April 2006. He also served as an immigration judge at the Headquarters Immigration Court from June 2004 to April 2005.

Prior to his work within the Office of the Chief Immigration Judge, Judge Neal served as special counsel to the Director, EOIR, from January 2003 to June 2004. From October 2001 to January 2003, he served as chief counsel to the Senate Immigration Subcommittee. Judge Neal was an attorney advisor for the Board of Immigration Appeals (EOIR's appellate component) from November 1996 to October 2001.

Judge Neal practiced immigration law in Los Angeles from June 1993 to October 1996 and also served as the director of policy analysis for the American Immigration Lawyers Association from August 1990 to May 1993. He received a Bachelor of Arts degree in 1981 from Wabash College, a Master of Divinity degree in 1984 from Harvard Divinity School, and a Juris Doctorate in 1989 from Columbia Law School. He is a member of the New York and District of Columbia Bars.

Second Circuit shows interest in Suspension Clause

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view. Rather, a petition for review simply consists of an alien stating his or her intention to challenge the final order of removal. See 8 U.S.C. § 1252(c). Moreover, the Supreme Court has emphasized that the interest in finality is especially strong in the immigration context and recognized that the judicial review mechanism in place is designed to fight the use of dilatory tactics. *See INS v. Doherty*, 502 U.S. 314, 323 (1992).

As a tertiary matter, alternative means of obtaining judicial review would negate any perceived constitutional concerns. The absence of meaningful review of questions of law or constitutional claims is a prerequisite to implicating the Suspension Clause. *See, e.g., St. Cyr*, 533 U.S. at 298-300. However, an alien may file a motion to reopen or reconsider the final removal order with the BIA, see 8 U.S.C. § 1229a(c)(6)-(7), and subsequently petition for judicial review of the BIA's decision on that motion. The petitioner is thus afforded the opportunity to obtain judicial review of any question of law or constitutional matter presented in that subsequent petition.

Finally, OIL is also arguing that, based on the particular facts and circumstances of the alien's case, no question of law or constitutional claim is presented that may implicate Suspension Clause concerns. As with improperly transferred habeas petitions, OIL will continue to argue vigorously in the Second Circuit that the provisions of the REAL ID Act eliminating habeas review of removal orders are both textually clear and constitutionally sound.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

NOTICE REGARDING SECOND CIRCUIT ORAL ARGUMENTS

Please be aware that the video argument option remains unavailable for Second Circuit cases. Assistant US Attorneys assigned to Second Circuit arguments should therefore continue to notify OIL Deputy Director David McConnell if they are unable to travel to New York for these cases. Mr. McConnell will assign OIL attorneys to attend these arguments. If you receive notice of a Second Circuit argument and require assistance, please email him at *david.mcconnell@usdoj.gov*. You may also contact Mr. McConnell for assistance with arguments in other circuits, or if you need guidance with respect to any immigration case.

OIL establishes email box for court pleadings

OIL has established a new e-mail box where AUSAs and our agency clients can email new district court pleadings. The email address is called "Filings, Imm" and it is accessible from your US DOJ address book. The full email address is: imm.filings@usdoj.gov.

This email box is monitored daily by OIL and should alleviate the increased mailing of hard copies of pleadings among our offices. It is not necessary to continue to email copies of pleadings sent to this mailbox to OIL Director Hussey or Deputy Directors Kline and McConnell. Please feel free to contact Mr. Kline or Mr. McConnell directly, however, if any matter is particularly urgent or requires special attention.

If you have any questions or problems in using this email box please contact Greg Hicks, OIL, at 202-514-0629.

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INSIDE OIL

OIL bids farewell and a Happy Retirement to Trial Attorney **Genevieve Holm**. Ms. Holm had a long and distinguished career with the U.S. Department of Justice. After graduating from the University of Texas Law School in 1974. Ms. Holm joined the Department's Civil Rights Division as an Honor Graduate. From 1976-80, she served as an Assistant United States Attorney for the District of Columbia. She returned to Main in 1980 as a Trial Attorney for the Environmental and Natural Resources Division. In February 1983 she was appointed AUSA for the District of the Virgin Island where she served until April 1985 when she returned to Main.

From 1985 until April 2002 when she joined OIL, Ms. Holm served as a Trial Attorney in the Commercial Litigation Branch of the Civil Division.

On March 29, Mark Walters Team 3 hosted the Annual Opening Day Baseball Party.

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

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

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

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