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FIRST CIRCUIT CALLS ON CONGRESS TO OVERHAUL IMMIGRATION LAWS

"It is not the business of the courts to tell Congress what to do about public policy choices," said the First Circuit in ***Kim v. Gonzales***, __F.3d__, 2006 WL 3317662 (1st Cir. Nov. 16, 2006) (*Boudin*, Selya, Saris (by designation)), "but we are entitled to warn when the machinery that we help administer is breaking down. The current structure of deportation law, greatly complicated by rapid amendments and loop-hole plugging, is now something closer to a many-layered archeological dig than a rational construct. The regime is badly in need of an overhaul."

> "The current structure of deportation law . . . is now something closer to a many-layered archeological dig than a rational construct."

The court's advice was provoked by the fact that petitioner, who had shot a killed another man, contended in his appeal that he had not been convicted of a crime of violence and consequently could not be removed from the U.S. as an alien who had been convicted of an aggravated felony and that, in any event, he was eligible for relief under the now repealed INA § 212(c).

The petitioner, a citizen of Cambodia, became an LPR in 1983. In 1993, he shot and killed another man. In 1994, he pled *nolo contendere* in a Rhode Island state court to the charge of manslaughter and was sentenced to 10 years in prison. An IJ later found petitioner deportable as an having been convicted of an aggravated felony, and also found him ineligible for § 212(c) relief. The BIA affirmed that order in 1998. Petitioner did not seek judicial review. In 2005, he sought reopening to apply for § 212(c) based on a new rule implementing the Supreme Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001). The BIA denied the motion finding petitioner ineligible to apply for the relief.

Petitioner's "first claim - that no crime of violence occurred even though [he] approached the victim with a cocked gun and shot him in the head as the victim fled - might seem frivolous to one not acquainted with immigration law," said the court.

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AIR TRAVELERS IN WESTERN HEMISPHERE WILL NEED PASSPORT

Beginning January 23, 2007, citizens of the United States, Canada, Mexico, and Bermuda will be required to present a passport to enter the United States when arriving by air from any part of the Western Hemisphere. The new rules jointly published by the Department of State and the Department of Homeland Security, are mandated by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), and are designed to beef up security in airports, where heretofore Americans returning from those countries have needed only driver's licenses or other forms of photo identification. 71 *Fed Reg.* 68412 (November 24, 2006). Travel between Puerto Rico and the U.S. Virgin Islands — which are U.S. territories — will be exempt.

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UPDATE ON PRECEDENT DECISIONS OF THE BOARD OF IMMIGRATION APPEALS

In its published decisions in fiscal year (FY) 2006, the Board of Immigration Appeals addressed a range of issues impacting upon a large number of cases in removal proceedings. The Board published 25 precedents in FY 2006, more than in any single year since FY 1999. This article summarizes this body of published decisions, and covers Interim Decisions 3519 through 3544. One precedent issued by the Attorney General will also be discussed.

Of particular note, in the asylum context, the Board addressed claims based on China's coercive population control policies, clarifying who falls within the definition of refugee in the Immigration and Nationality Act (the

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FIRST CIRCUIT CALLS FOR OVERHAUL

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"But Congress' wording, coupled with relevant court decisions, has resulted in a disregard of what actually happened and a focus instead upon the question whether the crime as defined by statute had to involve the identified characteristic (here, violence)."

Petitioner argued that because manslaughter can be committed by accident, under the categorical test, his crime did not qualify as a crime of violence. The court held that petitioner was foreclosed from making this argument because he had never sought judicial review of the 1998 BIA's decision which had affirmed the finding that he had been convicted of an aggravated felony.

> "Congress never itself created waiver authority for those deported for aggravated felonies or crimes of violence (this resulted from judicial decision and administrative action)."

The court then considered whether petitioner was eligible for a § 212(c) waiver of inadmissibility. This legal issue, observed the court, "is not without difficulty because - although formally an issue of statutory construction - the possibility of such a waiver for deportees could not have been considered by Congress. Rather, it was created by post-enactment decisions of the courts."

The court reviewed the tortuous history of § 212(c), including the BIA's acceptance of the ruling in *Francis v.* INS, 532 F.2d 268 (2d Cir. 1976), where the Second Circuit expanded the availability of this waiver to aliens in deportation proceedings based on an equal-protection analysis. Congress first limited the availability of § 212(c) in 1990 and further limited 1996 with the passage of AEDPA. In 1996, IIRIRA repealed § 212(c), but the Supreme Court in *St. Cyr* held that the relief would still be available to certain aliens who pled guilty before the 1996 amendments.

The court then noted that under the *Francis* ruling, any statutory waiver opportunity available to an excludable alien must be made available to a deportable alien. Here, petitioner's grounds for deportation based on "aggravated felony" and "crime of violence," are not by themselves grounds for exclusion, noted the court.

However, petitioner argued that because his crime was voluntary manslaughter, he was guilty of a "crime involving moral turpitude" (CIMT) which is also a ground of exclusion, and consequently waivable under § 212(c). The court held, that it did not matter whether petitioner's crime constituted a CIMT, because there was no waiver authority for one excluded as an "aggravated felon" or for one who committed a "crime of violence" The court said that its approach was consistent with *Matter of Brieva* 23 I&N Dec. 766 (BIA 2005), and most likely consistent with congressional intent because "Congress never itself created waiver authority for those deported for aggravated felonies or crimes of violence (this resulted from judicial decision and administrative action), and Congress' own views on the subject of waivers are reflected in its repeal of section 212(c) in its entirety - an intention compromised by *St. Cyr* but only as to the effective date of the repeal."

Accordingly, the court affirmed the BIA's denial of petitioner's motion to reopen.

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PASSPORT REQUIRED

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"The ability to misuse travel documents to enter this country opens the door for a terrorist to carry out an attack," said Homeland Security Secretary Michael Chertoff. "We cannot continue to allow loopholes that could facilitate access to the United States through false claims of citizenship or fake identities."

The only acceptable alternative documents to a passport for air travel will be the Merchant Mariner Document (MMD) and the NEXUS Air card. The MMD is issued by the U.S. Coast Guard to U.S. merchant mariners and the NEXUS Air card is issued to citizens of Canada and the United States, lawful permanent residents of the United States, and permanent residents of Canada who meet certain eligibility requirements.

DHS indicated that a separate proposed rule addressing land and sea travel will be published at a later date proposing specific requirements for travelers entering the United States through land and sea border crossings.

The travel document requirements make up the departments of State and Homeland Security's Western Hemisphere Travel Initiative (WHTI). This change in travel document requirements was precipitated by the recommendations made by the 9/11 Commission, which Congress subsequently adopted in the IRTPA.

This final rule amends 8 C.F.R. § 212 (documentary requirements for nonimmigrants), and 8 C.F.R. § 235 (inspection of persons applying for admission). It also amends 22 § C.F.R. 41 (nonimmigrant documentation) and 22 C.F.R. § 53 (passport requirement and exceptions)

By Francesco Isgro, OIL

UPDATE ON BIA PRECEDENTS

Act) as amended in 1996. *See Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006). The Board also analyzed the question of what is "membership in a particular social group" within the meaning of the Act in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). Several decisions considered the grounds of inadmissibility relating to previously removed aliens, and the Board continued to interpret criminal grounds of removal and inadmissibility. Adjustment of status was the topic of three Board decisions. The Board considered its first case under the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, §§ 103(b), 104, 119 Stat. 231, 302, 307-9 in *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). Other cases pertained to bond proceedings, background and security checks, procedural issues, derivative citizenship, and attorney discipline.

ASYLUM

The Board addressed claims to refugee status based on the People's Republic of China's (PRC) coercive population control policies as defined in section 101(a)(42) of the Act in two decisions. *Matter of S-L-L-,* 24 I&N Dec. 1 (BIA 2006), and *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006). In *Matter of S-L-L-*, the Second Circuit Court of Appeals requested that the Board clarify its ruling in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), that an alien whose spouse was forced to undergo an abortion or sterilization can qualify as a refugee, and to address whether an unmarried partner can claim refugee status on this basis.

The Board began by noting that due to the parties' agreement on the issue of whether spouses qualified for asylum, it did not provide a detailed analysis of this issue in *Matter of C-Y-Z-*. The Board pointed out that *Matter of C-Y-Z-* is a longstanding decision that has not been reversed by the Attorney General or Congress. The Board found support for its interpretation from the general principles of nexus and level of harm for past persecution, noting that intervention in the private affairs of a married couple persecutes the married couple as an entity. The PRC government implicitly imposes joint responsibility and punishment on married couples as a unit. The Board found that marriage is the linchpin because of its sanctity and long term commitment. Many presumptions and benefits are accorded to marriages in many areas of the law, and requiring marriage is a natural and manageable approach. Without marriage, establishing nexus raises problems such as proof of paternity and whether government officials were aware of the paternity. The Board clarified that the marriage must be legally recognized, which does not include couples married in a traditional marriage ceremony not recognized by the government. The Board stated that an unmarried partner can demonstrate past persecution based upon the phrase contained in 101(a)(42) "other resistance to a coercive population control program," but merely impregnating one's girlfriend does not constitute an act of resistance.

> In the context of deciding asylum cases based on coercive population control policies, the Board found that marriage is the linchpin because of its sanctity and long term commitment.

One Board Member concurred and two others concurred and dissented. The first concurrence indicated that the Department of Homeland Security (DHS)'s original theory, that the spouse stands in the shoes of the other spouse who was persecuted, is not sustainable, but he noted that he would not vote to overrule *Matter of C-Y-Z-* because of the principle of stare decisis. The remaining Board Members stated that the literal language of the statute is not ambiguous and does not include spouses. Derivative refugee and asylum statutes control automatic benefits accorded spouses, and any analysis for a principal applicant whose spouse suffered an abortion or sterilization should be under the "other resistance" clause, this separate opinion stated.

In *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), the Board addressed motions to reopen where the alien claims that the birth of a second child in the United States will result in the alien's forced sterilization if returned to China. The Board distinguished *Guo v. Ashcroft*, 386 F.3d 556 (3rd Cir. 2004), a case in which the Third Circuit reversed the Board's denial of a motion to reopen filed by a Chinese citizen who had two children born in the United States. The Board found that *Guo v. Ashcroft* was not controlling in cases arising outside of the Third Circuit, and the respondent's child spacing in *Matter of C-C-* is consistent with China's population control rules for second children, whereas in *Guo* the children were born less than five years apart. The Board addressed an affidavit submitted by Dr. John Aird, a retired demographer whose affidavits appear in many cases before the Board, and found it to be unspecific, not based on personal observation, and not conclusive on the issue.

In *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), the Board addressed the issue of what is a "particular social group" as that term is used in the definition of "refugee" in section 101(a)(42)(A) of the Act. The specific social group before the Board in *Matter of C-A-* was defined as former noncriminal drug informants working against the Cali drug cartel. The Board reviewed the current case law interpreting this provision, and reaffirmed the analytic structure first set forth in *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985), which defines particular social group

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as a group of persons all of whom share a common, immutable characteristic. The characteristic that defines the group must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

The Board discussed and rejected the definition outlined in some Ninth and Second Circuit Courts of Appeal decisions, which requires a "voluntary associational relationship," or "cohesiveness," or homogeneity among group members. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). and *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). The Board noted, however, that the Second Circuit also requires that members of a social group must be externally distinguishable, a standard also found in the United Nations High Commissioner for Refugees guidelines on International Protection. *See* UNHCR, Guidelines on International Protection: "Membership in a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). The Board highlighted cases that have recognized social visibility as an important characteristic in defining a social group, and adopted this standard.

In applying the above to the social group at issue in the case, the Board found that the distinction advanced by the respondent, the past experience of informing on the Cali drug cartel, is an immutable characteristic, but it does not suffice to define a social group. The respondent's reason for informing on the cartel, which he advanced as a reason to distinguish himself from paid informants, was not helpful, particularly as there was no showing that the cartel considered the respondent's motives to be relevant. The Board declined to find a social group, citing to the voluntary nature of the decision to serve as a government informant, the lack of social visibility of the members of the purported social group, and the information in the record that the Cali cartel retaliates against anyone it perceives as interfering with its operations.

BIA PRECEDENTS UPDATE

CONVENTION AGAINST TORTURE

The Attorney General issued a decision in *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006), regarding a claim for protection under the Convention Against Torture. The respondent asserted that he has schizoaffective and bipolar disorders, medication is not available in the country to which he would be removed (the Dominican Republic), without medication he would be arrested because his of his erratic behavior, and he would be tortured in prison. The Attorney General found that the respondent's eligibility for deferral of removal under the Convention Against Torture cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen.

> Adjustment of status cannot be based on an approved visa petition that has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant.

DISCRETIONARY RELIEF

The Board addressed adjustment of status in three decisions this year. In *Matter of Villarreal-Zuniga*, 23 I&N Dec. 886 (BIA 2006), the respondent, who had adjusted his status in 1992 based upon a visa petition filed by his lawful permanent resident mother, was placed in removal proceedings due to a criminal conviction. The respondent sought to adjust his status based upon the same visa petition that he used in 1992 to first adjust his status. The relevant regulatory provision, 8 C.F.R. § 204.2(h)(2)(2005), does not clearly address this situation. The Board reasoned that section 204.2(h)(2) implies that a petitioner must file a new visa petition to reinstate a previously approved visa petition. This provision is superfluous if an original visa petition was automatically reinstated upon filing an adjustment of status application. Historically, this regulation explicitly indicated that a visa petition ceased to convey a priority date or classification and could not be used again once a beneficiary obtained adjustment of status or admission as an immigrant. *See* 8 C.F.R. § 204.4(f) (1990). Subsequent revisions did not retain this language, but the prohibition against reusing an approved visa petition was essentially retained in the regulation prohibiting reinstatement of a visa petition when an immigrant visa has been issued as a result of the petition approval. 8 C.F.R. § 204.2(h)(2). The Board concluded that adjustment of status cannot be based on an approved visa petition that has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant.

In *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), the Board found that Immigration Judges have no authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under section 204(j) of the Act, 8 U.S.C. § 1154(j), after the alien changes jobs or employers. This is consistent with the Board's prior precedent that Immigration Judges have no jurisdiction over visa petitions. *See Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987). Furthermore, Immigration Judges do not

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have the necessary expertise to determine whether the new employment is the same or similar to an alien's prior employment, and play no part in the "delicate interaction" between the Department of Labor, which provides the labor market analysis, and the DHS, the agency that issues the visa petition.

Lastly, in *Matter of Wang*, 23 I&N Dec. 924 (BIA 2006), the Board found that an alien who entered the United States without inspection is not eligible for adjustment of status under the Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 (CSPA). The Board found that an alien whose CSPA application for adjustment of status was denied as a result of the alien's entry without inspection may not amend or renew the application in immigration proceedings in conjunction with section 245(i) of the Act. The Board noted that applications under section 245(i) could not be filed before October 1, 1994, and CSPA applications had to be filed prior to June 30, 1994. The 2000 LIFE Act Amendments do not change this result because the LIFE Act applies section 245(i) to those who filed an immigrant visa petition, and a CSPA applicant did not file a visa petition, but is the beneficiary of a limited opportunity to adjust status afforded by Congress.

In *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006), the Board resolved the issue of whether section 237(a)(1)(H) of the Act, 8 U.S.C. § 1227(a)(1)(H), authorizes a waiver of removability under section 237(a)(1)(A) based on charges of inadmissibility at the time of admission under section 212(a)(7)(A)(i)(I) of the Act for lack of a valid immigrant visa or entry document. The section 237(a)(1)(H) waiver explicitly provides a waiver for the ground of inadmissibility for fraud or willful misrepresentation of a material fact under section 212(a)(6)(C)(i), whether innocent or not, but does not address the charge at issue here. The Board found that given the legislative history of the waiver and the ambiguity in the language, section 237(a)(1)(H) also waives additional grounds of inadmissibility directly resulting from the fraud or misrepresentation that are subject to the waiver. In this case, the respondent's lawful permanent resident father filed a visa petition on behalf of the respondent. The petition was approved, but the respondent's father died before the respondent sought admission. The respondent was admitted as the son of a lawful permanent resident, even though the petition had been automatically revoked. The DHS did not charge the respondent under the fraud charge, but charged him under section 212(a)(7)(A)(i)(I) as not having a valid visa or entry document when he was admitted. The Board found that the respondent was eligible for a waiver of inadmissibility.

> An alien need not be charged and found inadmissible or removable on a ground specified in section 212(a)(2) in order for the alleged criminal conduct to terminate the alien's continuous residence.

The Board briefly touched on the statutory eligibility requirements for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), in *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006). In that decision, the Board reiterated that an application for cancellation of removal is a continuing one, and the provision in 8 C.F.R. § 1003.23(b)(3) that an applicant for cancellation of removal must demonstrate statutory eligibility for that relief prior to the service of a notice to appear applies only to the continuous residence or physical presence requirement. An alien must establish the remaining statutory eligibility requirements at the time the application is finally decided. In this case, the respondent did not have qualifying relatives at the time the notice to appear was filed and the hearing held, though her parents were granted cancellation of removal at that hearing. The respondent subsequently filed a timely motion to reopen asserting that her parents had become lawful permanent residents, and the Board found that the respondent could proceed with her application.

Eligibility for cancellation of removal was also at issue in *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006). Section 240A(d)(1)(B) of the Act, commonly known as the "stop-time" rule, terminates the accrual of continuous residence when an alien commits a criminal offense referred to in section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2). In *Matter of Jurado*, the Board found that the alien need not be charged and found inadmissible or removable on a ground specified in section 212(a)(2) in order for the alleged criminal conduct to terminate the alien's continuous residence. While the Board has held that an alien must be charged with an offense to make the alien ineligible for former section 212(c) of the Act, the statutory language in the stop-time rule uses the word "render", which the Board found to change the meaning of the provision. The Board found this interpretation to be reasonable based upon the framework of the statute. In this decision, the Board also found that retail theft and unsworn falsification to authorities in violation of title 18, section 3929(a)(1) and section 4904(a) of the Pennsylvania Consolidated Statutes are crimes involving moral turpitude.

Lastly, in *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006), the Board reconsidered the retroactivity of the stop-time rule in light of *INS v. St. Cyr*, 533 U.S. 289 (2001). The Board reaffirmed *Matter of Perez,* 22 I&N Dec. 689 (BIA 1999), and found that *St. Cyr* has no bearing on the issue since section 240A relief did not exist at the time the respondent committed his offense, and he cannot be said to have relied upon the availability of such relief. The Board addressed two other issues in *Matter of Robles*. The Board held that in a published decision with several holdings, when the Attorney General reverses one of the holdings but expressly does not reach the other, the al-

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ternate holdings remain binding authority on the issue. The specific issue in the case was whether misprision of a felony is a crime involving moral turpitude. The Board held in *Matter of Sloan*, 12 I&N Dec. 840 (A.G. 1968; BIA 1966), that neither concealing a person for whom an arrest warrant was issued nor misprision of a felony were crimes involving moral turpitude. The Attorney General reversed the decision as to the former crime, but the latter remained good law. In *Matter of Robles*, the Board reconsidered and overruled the misprision of a felony holding. The Board cited to authority from the Eleventh and the Ninth Circuits in finding that misprision of a felony represents conduct that is inherently base or vile and contrary to the accepted rules of morality and the duties owed between persons.

CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY

The Board further clarified the effect of post-conviction relief on an alien's removability or inadmissibility in two decisions. In *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), the Board considered whether a conviction vacated pursuant to section 2943.031 of the Ohio Revised Code, for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea, is a valid conviction for immigration purposes. The Board applied *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), in which the Board distinguished between a conviction vacated based upon post-conviction events, such as rehabilitation, and those vacated because of a defect in the underlying criminal proceedings. The Board found that in this instance, the failure to advise the respondent of the immigration consequences of entering a guilty plea is a defect in the underlying proceedings.

In *Matter of Cota*, 23 I&N Dec. 849 (BIA 2005), the Board found that a trial court's decision to modify or reduce an alien's criminal sentence *nunc pro tunc* is entitled to full faith

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and credit by the Immigration Judges and the Board regardless of the reasons for the modification. The Board found that there was no basis in the language of the Act regarding sentences at section 101(a)(48)(B) of the Act that would authorize the Board to equate a sentence that has been modified or vacated by a court *ab initio* with one that has merely been suspended. This decision drew a dissent which argued that the sentence was vacated solely to avoid immigration consequences, and that there is no justification for treating sentence reductions differently from vacated convictions.

> The Board found that the offense of possession of child pornography in violation of section 827.071(5) of the Florida Statutes is a crime involving moral turpitude due to the morally repugnant nature of the offense.

The Board visited the issue of how a minor is defined for purposes of determining whether an alien has been convicted of sexual abuse of a minor in section 101(a)(43)(A) of the Act. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). The Board recognized that the age of consent varies widely among states, and federal statutes similarly contain differing ages when defining a minor. The Board found that a broader age limitation best reflects diverse state laws, the common usage of the word "minor," and the intent of Congress, and held that a victim of sexual abuse who is under the age of 18 is a "minor" for purposes of determining whether an alien has been convicted of sexual abuse of a minor. One Board Member concurred, and stated that adoption of a federal age restriction is unnecessary, that the age of the minor is one factor among many to consider when identifying whether the particular conduct constitutes sexual abuse of a minor.

The issue of crimes involving moral turpitude within the meaning of section 237(a)(2)(A)(ii) of the Act was the subject of two interim decisions, *Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006), and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). In *Matter of Olquin*, the Board found that the offense of possession of child pornography in violation of section 827.071 (5) of the Florida Statutes is a crime involving moral turpitude due to the morally repugnant nature of the offense.

In *Matter of Sanudo*, the Board considered whether a conviction for domestic battery in violation of sections 242 and 243(e)(1) of the California Penal Code is a conviction for a crime involving moral turpitude. The Board found that the elements of the offense are simple battery, and a conviction under this statute does not require proof of the actual infliction of harm to the victim. Without further evidence, the crime is not categorically a crime involving moral turpitude. The Board also considered whether a conviction under sections 242 and 243(e)(1) of the California Penal Code constitutes a crime of domestic violence under section 237(a)(2)(E)(i) of the Act. The Board followed the precedent of the Court of Appeals for the Ninth Circuit, in whose jurisdiction the case arose, in finding that the offense does not qualify categorically as a "crime of violence" under 18 U.S.C. § 16 (2000) and therefore is not categorically a crime of domestic violence. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

By Juan Osuna, Acting Chairman of the Board of Immigration Appeals, and Jean C. King, Senior Legal Advisor to the Chairman of the Board .

Ed. Note: This is Part 1 of a two –part article.

ASYLUM LITIGATION UPDATE: DEPARTMENT OF STATE REPORTS — PROBATIVE VALUE AND WEIGHT

As a general rule, applications for asylum, withholding of removal, or protection under regulations implementing the Convention Against Torture ("CAT") require an assessment of conditions in the country the alien claims persecuted him in the past, or will persecute or torture him in the future. Country conditions are relevant to many issues, including: 1) the alien's credibility; 2) whether the alien can establish a "well-founded fear" of future persecution (asylum) or that future persecution (withholding) or torture (CAT protection) is "more likely than not," *see* 8 C.F.R. §§ 1208.13(b)(2); 1208.16(b)(2); 1208.16(c); 3) whether the Government can rebut the presumption of a "well-founded fear" or clear probability of future persecution that arises upon a finding of past persecution by showing a "fundamental change" in country conditions, *see* 8 C.F.R. §§ 1208.13(b)(1)(A), 1208.16(b)(1)(A); 4) whether there are general violations of human rights or any other relevant country information in a CAT claim, *see* 8 C.F.R. § 1208.16(c)(3)(iii) and (iv); 5) whether an alien will experience "other serious harm" in his country so that asylum is warranted even though there is no well-founded fear of future persecution, *see* 8 C.F.R. § 1208.13(b)(1)(iii)(B); 6) whether the alleged persecution is by the government or persons the government is unable or unwilling to control; and 7) whether an alien could reasonably relocate elsewhere in his country to avoid future persecution or torture. *See* 8 C.F.R. §§ 1208.13(b)(1)(i)(A), 1208.13(b)(2)(ii); 1208.16(c)(3)(ii).

The Department of State issues at least three kinds of country reports that may be used by the Attorney General (acting through immigration judges and the Board) to assess these issues: State Department profiles of asylum claims (asylum profiles); State Department reports on general human rights conditions (country reports); and State Department reports on religious freedom (religious freedom reports).

Some circuits, particularly the Seventh Circuit, have been critical of reliance on State Department reports and the deference immigration judges and the Board give these reports in asylum, withholding, and CAT cases. There have been suggestions (see case law below) that reports by non-government organizations (NGO's) like Amnesty International or Human Rights Watch should be given greater deference or weight than the State Department reports. However, under the "compelling evidence" standard of review which the courts must apply, *see* 8 U.S.C. § 1252(b)(4)(B), the weight given to competing country reports, or other evidence, is for the agency, not the courts to decide.

> The Attorney General has made very clear that State Department reports are the best and most reliable source of information on country Conditions.

As shown in the cases below, the Attorney General has made very clear that State Department reports are the best and most reliable source of information on country conditions, and that NGO's have their own agendas and their reports are not as reliable. Even the Ninth Circuit, which is usually not favorable to the Government on asylum issues, has recognized the primacy of State Department reports and held that they may trump live expert testimony. *Marcu v. INS*, 147 F.3d 1078, 1081 (9th Cir. 1998).

1) State Department Reports are the best resource for country conditions:

Attorney General: Attorney General's Preamble, *Board of Immigration Appeals: Procedural Reforms To Improve Case Management,* 67 FR 54878, 54892-54893 (Aug. 25, 2002) ("courts . . . the immigration judges, and the Board owe deference to the Department of State on such matters of foreign intelligence as assessments of conditions [citations omitted]"); *id*. (reaffirming primacy of State Department reports over reports by NGO's, because their "positions are often based on anecdotal experiences of identified and unidentified persons" and "opinions tend to lack the discernment and expertise of those provided by the Department of State").

First Circuit: *Negeya v. Gonzales* 417 F.3d 78, 84 -85 (1st Cir. 2005) (State Department reports are "highly probative evidence in a well-founded fear case"); *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998) (State Department opinions "receive considerable weight in the courts because of the . . . Department's expertise").

Second Circuit: *Xiao Ji Chen v. U.S. Dept. of Justice,* 434 F.3d 144, 164 (2d Cir. 2006) ("a report from the State Department is 'usually the best available source of information' on country conditions"); *Melgar de Torres v. Reno*, 191 F.3d 307, 310, 313 (2d Cir. 1999) (State Department Profile is "substantial evidence . . . of the changed country conditions in El Salvador"); *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976) ("the obvious source of information on general conditions in the foreign country is the Department of State which has diplomatic and consular representatives throughout the world.").

Third Circuit: *Xie v. Ashcroft*, 359 F.3d 239, 244 (3d Cir. 2004) ("We have previously stated, "Country reports. . . are the most appropriate and perhaps the best resource for information on political situations in foreign nations"), quoting *Zubeda v. Ashcroft*, 333 F.3d 463, 477-78 (3d Cir.2003); *Ambartsoumian v. Ashcroft* 388 F.3d 85, 89 (3d Cir. 2004) ("we have held that State Department reports may constitute 'substantial evidence' for the purposes of reviewing immigration decisions"); *Kayembe v. Ashcroft*, 334 F.3d 231, 235 (3d Cir.2003) (same). **Fourth Circuit:** Go-

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nahasa v. INS, 181 F.3d 538, 542 (4th Cir. 1999) (country conditions are "directly within the expertise of the Department of State" and these reports are "highly probative evidence in a well-founded fear case").

Fifth Circuit: *Rojas v. INS* , 937 F.2d 186, 190 n.1 (5th Cir. 1991) (State Department reports are "the most appropriate and perhaps the best resource the Board could look to in order to obtain information on political situations in foreign nations").

Sixth Circuit (unpublished cases may be cited): *Mullai v. Ashcroft* , 385 F.3d 635, 639 (6th Cir. 2004) ("although this circuit acknowledges that State Department reports may be problematic sources on which to rely [citation omitted] . . . in other cases we adopt the view that such reports "are generally the best source of information on conditions in foreign nations," [citing] *Kokaj v. Ashcroft*, 100 Fed.Appx. 506, 508 (6th Cir. 2004)"); *Cacani v. Gonzales* , 188 Fed.Appx. 444, 446 (6th Cir. 2006) (same).

"Our case law well establishes that the country report from our Department of State is the most appropriate and perhaps best resource, for determining country conditions"

Seventh Circuit: *Toptchev v. INS*, 295 F.3d 714, 722 (7th Cir. 2002) (the BIA " reasonably may rely upon the State Department's assessment of current country conditions as they relate to the likelihood of future persecution, given the Department's expertise in international affairs").

Eighth Circuit: *Perinpanathan v. INS,* 310 F.3d 594, 599 n.1 (8th Cir. 2002) (Department of State reports "are persuasive authority for determining whether an asylum-seeker has a well-founded fear of persecution" [citations omitted] and "are 'the most appropriate and perhaps the best resource' for 'information on political situations in foreign nations'"); *Navarijo-Barrios v. Ashcroft*, 322 F.3d 561, 564 (8th Cir. 2003) ("The BIA was entitled to consider [the State Department reports] and 'reasonably may rely upon the State Department's assessment of current country conditions as they relate to the likelihood of future persecution, given the Department's expertise in international affairs'"); *Gebrehiwot v. Ashcroft,* 374 F.3d 723, 726 (8th Cir. 2004) (noting that in most cases a Department of State report is sufficient evidence supporting a finding of no well-founded fear of future persecution).

Ninth Circuit: *Lal v. INS*, 255 F.3d 998, 1023 (9th Cir. 2001), *amended by*, 268 F.3d 1148 (9th Cir. 2001) (State Department country reports are the "most appropriate" and "perhaps best resource" on country conditions); *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir.1995) (State Department reports are "'the most appropriate and perhaps the best resource' for 'information on political situations in foreign nations' "); *Marcu v. INS*, 147 F.3d 1078, 1081 (9th Cir. 1998) (reliance on State Department reports "makes sense because this inquiry is directly within the expertise of the Department of State").

Tenth Circuit: *Yuk v. Ashcroft,* 355 F.3d 1222, 1235 -36 (10th Cir. 2004) ("Our case law well establishes that the country report from our Department of State is the most appropriate and perhaps best resource, for determining country conditions"); *id.* ("A State Department report on country conditions is highly probative evidence in a well-founded fear case' [source quoted omitted]"); *Krastev v. INS,* 292 F.3d 1268, 1276 -77 (10th Cir. 2002) ("[A] state department report on country conditions may be probative in a well-founded fear case.").

Eleventh Circuit: *Reyes-Sanchez v. U.S. Atty. Gen.* , 369 F.3d 1239, 1243 (11th Cir. 2004) (the State Department "'is the most appropriate and perhaps the best resource the Board could look to in order to obtain information on political situations in foreign nations'"), *quoting Rojas v. INS*, 937 F.2d 186, 190 n. 1 (5th Cir. 1991).

2) NGO's Have Their Own Agendas: Their Reports Do Not Require Deference :

Attorney General's Preamble, *Board of Immigration Appeals: Procedural Reforms To Improve Case Management* , 67 FR 54878, 54892 - 54893 (Aug. 25, 2002) (reports by NGO's "simply [are] not as reliable as those of the Department of State because the mission of those organizations is to advocate specific ideas and views, their positions are often based on anecdotal experiences of identified and unidentified persons, and their opinions tend to lack the discernment and expertise of those provided by the Department of State"); *Chen v. U.S. INS.*, 359 F.3d 121, 130 (2d Cir. 2004) (noting law review article criticizing State Department reports for being "sometimes skewed toward the governing administration's foreign-policy goals and concerns" but recognizing that "State Department reports are usually the result of estimable expertise and earnestness of purpose" but are not binding); *Sevoian v. Ashcroft,* 290 F.3d 166, 176 (3d Cir. 2002) ("[W]e think that that the Board could reasonably give the non-governmental sources of evidence offered by Sevoian less weight than the State Department report"); *Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999) ("State Department reports may be flawed and . . . private groups or news organizations often voice conflicting views [,] [but] [[t]hose conflicting reports, for all their insights, may have drawbacks of their own."); *id.* ("State Department reports may be flawed and . . . private groups or news organizations often voice conflicting views[,] [but] [t]hose conflicting reports, for all their insights, may have drawbacks of their own."); *M.A. v. U.S.I.N.S.*, 899 F.2d 304, 313 (4th

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Cir. 1990) ("private investigative bodies [that] expose[e] inhumane practices. . . may have their own agendas and concerns, and their condemnations are virtually omni present"). *But see Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997) ("There is perennial concern that the Department soft-pedals human rights violations by other countries that the United States wants to have good relations with," but "when aliens try to rebut the State Department with self-serving, unsubstantiated, uncorroborated evidence about current political conditions in a country they left years ago, they will not . . . furnish grounds upon which a reviewing court can reverse the agency given the deference that we are obliged to give to decisions of the [BIA]"); *id*. (an alien "had better be able to point to a highly credible independent source of expert knowledge if he wants to contradict the State Department's evaluation of the likelihood of his being persecuted . . . , an evaluation to which courts inevitably give considerable weight").

There is perennial concern that the Department soft-pedals human rights violations by other countries that the United States wants to have good relations with.

3) Weight Is For The Agency, Not The Courts

Under the substantial evidence standard, a court may not reweigh the evidence nor substitute its own fact-finding for that of the agency. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994); *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990); *Moore v. Sullivan*, 919 F.2d 901, 904 (5th Cir. 1990); *Summers v. Freeman United Coal Min. Co.*, 14 F.3d 1220, 1223 (7th Cir. 1994); *Loving v. Department of HHS*, 16 F.3d 967, 969 (8th Cir. 1994); *Livermore v. Amax Coal Co.*, 297 F.3d 668, 672 (7th Cir. 2002) ("the weighing of expert opinions is the province of the ALJ, not this court").

This rule applies to asylum cases, and the weight of country condition evidence. *See Xiao Ji Chen v. U.S. Dept. of Justice* , 434 F.3d 144, 164 (2d Cir. 2006) (("[T][he weight to afford to [Department of State] evidence 'lie [s] largely' within the discretion of the IJ"); *Gonahasa v. U.S. INS,* 181 F.3d 538, 542 -543 (4th Cir. 1999) ("our task is not to reweigh the evidence . . . .Absent powerful contradictory evidence, the existence of a State Department report supporting the BIA's judgment will generally suffice to uphold the Board's decision. Any other rule would invite courts to overturn the foreign affairs assessments of the executive branch"); *Rojas v. INS* , 937 F.2d 186, 190(5th Cir. 1991) ("We will not reverse the BIA's finding merely because we disagree with the BIA's . . . weighing of the evidence); *Singh v. INS,* 134 F.3d 962, 969 (9th Cir. 1998) (under the compelling evidence standard "we may not reweigh the evidence to determine for ourselves whether Petitioner faced persecution. We merely determine whether the evidence compels such a conclusion"); *Yuk v. Ashcroft,* 355 F.3d 1222, 1236 (10th Cir. 2004) ("[W]hile there was other evidence . . . contradicting some aspects of the State Department Report, it is not our prerogative to reweigh the evidence, but only to decide if substantial evidence supports the IJ's decision.").

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USCIS ISSUES Q&AS FOR NEW PILOT NATURALIZATION EXAM

USCIS Director Gonzalez recently announced the release of 144 questions and answers for the pilot test of a new naturalization exam. USCIS will administer the pilot exam in early 2007 to about 5,000 volunteer citizenship applicants in 10 cities.

"We found that the current naturalization exam process lacks standardization and encourages applicants to memorize facts just to pass a test, but that doesn't guarantee that they understand the meaning behind the question," said Director Gonzalez. "Our goal is to inspire immigrants to learn about the civic values of this nation so that after they take the oath of citizenship they will participate fully in our great democracy." USCIS included new questions that focus on the concepts of democracy and the rights and responsibilities of citizenship. In designing the new exam, USCIS received assistance and worked with test development contractors, U.S. history and government scholars, and English as a second language experts. USCIS also sought input from a variety of stakeholders, including immigrant advocacy groups, citizenship instructors and district adjudications officers.

The pilot will allow USCIS to work out any problems and refine the exam before it is fully implemented nationwide in the spring of 2008. The questions and answers are posted on the agency Web site, http://www.uscis.gov. Questions that are not successful in the pilot will be dropped, narrowing the list to the same 100 questions as the current exam. The range of acceptable answers to questions will increase so that applicants may learn more about a topic and select from a wider range of responses. In addition to new questions, USCIS will soon release a new civics-based vocabulary list to help applicants study for the English reading and writing portion of the proposed test. To pass, applicants will have to correctly answer six of 10 selected questions.

REAL ID ACT— Frequently Asked Questions

Question: Does the Court have jurisdiction to review the agency's finding that a crime is "particularly serious" where jurisdiction is otherwise precluded under the criminal alien review bar?

Background: Under 8 U.S.C. § 1252 (a)(2)(D), Congress restored appellate court jurisdiction over "questions of law" and constitutional claims notwithstanding other applicable judicial review bars. Pursuant to the withholding of removal statute at 8 U.S.C. § 1231(b)(3), an alien is ineligible for withholding if he is convicted of a "particularly serious crime." One question that frequently arises is whether a criminal alien's challenge to the BIA's finding that his crime is particularly serious is reviewable as a "question of law" under 8 U.S.C. § 1252(a)(2)(D).

Answer: (1) The answer depends upon the nature of the alien's challenge to the BIA's finding. If the alien challenges the BIA's discretionary balancing of the relevant factors set out in *Matter of Frentescu,* 18 I. & N. Dec. 244 (1982), the claim is not reviewable.

(2) If on the other hand, the alien claims that the BIA applied an improper legal standard or otherwise erred in interpreting the statute, the claim presents a reviewable question of law. We should, however, oppose the contention that the "misapplication" of the *Frentescu* factors raises a reviewable question of law because the BIA applied a "wrong legal standard." That argument is an attempt to circumvent the judicial review bar by cloaking a challenge to the BIA's discretion in the guise of a question of law. At least one court has asserted jurisdiction over such a claim. *Afridi v. Gonzales,* 442 F.3d 1212, 1218-20 (9th Cir. 2006) (asserting jurisdiction over claim that BIA did not fully engage the *Frentescu* factors when deciding alien's crime was "particularly serious").

Example 1 - Alien claims that his crime is not an aggravated felony under 8 U.S.C. § 1101(a)(43), and therefore the BIA erred in finding him statutorily ineligible for withholding of removal. This claim challenges the BIA's construction of the aggravated felony statute and is therefore reviewable as a question of law.

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Example 2 - Alien claims that BIA erred because, although it referred to the <u>Frentescu</u> factors in evaluating the crime, it failed to adequately examine the underlying facts and circumstances of his conviction. This claim is unreviewable because it challenge's the BIA's discretionary balancing of the *Frentescu* factors. *See Ali v. Achim*, __ F.3d __, 2006 WL 3162270, *7 (7th Cir. 2006); *but see Afridi, supra*.

> A significant factor in determining whether to remand is whether the alien challenged the immigration judge's application of the REAL ID Act amendments in his brief to the BIA or to the court of appeals.

Example 3 - Alien claims that under the withholding of removal statute, the Attorney General may determine that a crime is particularly serious *only* if it is an aggravated felony. This claim challenges the BIA's interpretation of the withholding statute and is therefore reviewable. *See Ali, supra*.

Question: How should a litigator proceed where the immigration judge addresses and applies the REAL ID Act's asylum amendments but the BIA fails to do so?

Background: Section 101 of the REAL ID Act includes several significant amendments to the INA's asylum statute and other provisions governing immigration relief and protection. These amendments apply to applications made on or after May 11, 2005. The BIA has not yet issued a published decision addressing the substantive effect of these amendments. One issue raised recently is how should an attorney handle a case where the immigration judge properly applies the amendments in Section 101, but on appeal the BIA is silent.

Answer: (1) The answer depends upon the nature of the BIA's decision. The attorney should consult with his or her team leader.

(2) If the BIA issues an affirmance without opinion or otherwise adopts the immigration judge's reasoning, the Court reviews the immigration judge's decision. In those circumstances, we generally would defend the BIA's and immigration judge's decisions unless the alien had raised REAL ID challenges to the BIA which we think the BIA should have specifically addressed.

(3) If the BIA reviews the immigration judge's decision *de novo* or reviews part of the decision *de novo* and adopts part of the decision, without explicitly addressing the REAL ID Act amendments, we should consider whether the agency's decision is clear enough that a reviewing Court will understand what the agency's position is regarding the REAL ID Act and will defer to that position if reasonable.

(4) A significant factor in determining whether to remand is whether the alien challenged the immigration judge's application of the REAL ID Act amendments in his brief to the BIA or to the court of appeals. If he did not, then we are more likely to defend the decision. If, however, the alien did raise the issue and the BIA's decision is silent, then a request to remand may be more likely. The goal is for the agency to interpret these new provisions in the first instance so that federal courts defer to that interpretation if reasonable. What we want to avoid is having the federal courts take the first crack at interpreting the amendments without the benefit of an agency decision.

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SUMMARIES OF RECENT BIA DECISIONS

Provisions Regarding Credibility Determinations Enacted By The REAL ID Act Applies Only To Applications Initially Filed On Or After May 11, 2005.

In *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006), the Board held that section 101(a)(3) of the REAL ID Act, specifying the factors to be considered by the trier of fact in making a credibility determination, only apply to applications for asylum, withholding, and other relief from removal that were initially filed on or after May 11, 2005, whether with an asylum officer or an Immigration Judge. Thus, where the alien has filed his applications for relief with an asylum officer prior to the May 11, 2005, effective date, but renewed his applications in removal proceedings before an Immigration Judge subsequent to that date, the provisions of section 101(a)(3) – to be codified at 8 U.S.C. § 1158(b)(1)(B)(iii) – were not applicable to credibility determinations made in adjudicating those applications. In so concluding, the Board noted that the filing of asylum applications within the context of the one-year deadline, as well as the 180-day clock for employment authorization following such filing, both refer to the date the application is initially filed with an asylum officer or with an Immigration Judge. Moreover, the Board observed that Congress could have included express language specifying its intent that the statutory credibility provision apply to applications filed prior to the effective date, but then referred for filing with an Immigration judge after the effective date, but did not do so.

An Alien Need Not Be Found Inadmissible Or Removable On A Ground Specified Under The "Stop-Time" Rule For His Continuous Presence To Terminate

In *Matter of Jurado*, 24 I& N Dec. 29 (BIA 2006), the Board determined that an alien's continuous residence for purposes of cancellation of removal stops accruing when he commits a specified criminal offense, and he need not actually be charged and found inadmissible or removable on the applicable ground for termination of the continuous residence to occur. The alien was admitted to the United States as a lawful permanent resident in September 1985. In 1991, he was convicted of retail theft, and in 1992, he was convicted of unsworn falsification, both in violation of Pennsylvania law. In 1997, the alien was also convicted of two crimes involving moral turpitude that were the basis of the charge of removability in his Notice to Appear. He was not charged on the basis of either his 1991 or his 1992 conviction. In finding that the alien's 1991 and 1992 convictions – committed within seven years of his admission to the United States – prevented him from being able to demonstrate the requisite period of continuous residence to be eligible for cancellation of removal, the Board pointed to the plain language of 8 U.S.C. § 1229b(d)(1)(B), commonly known as the "stop-time" rule. That provision states that the period of continuous residence for cancellation of removal is terminated when an alien commits a criminal offense that "renders the alien inadmissible to the United States under [8 U.S.C. § 1182(a)(3)] or removable from the United States under [8 U.S.C. §§ 1227(a)(2) or 1227(a)(4)], whichever is earliest." By using the phrase "renders the alien inadmissible . . . or removable," rather than "is inadmissible" or "is removable" as in other parts of the INA, the Board concluded that Congress intended 8 U.S.C. § 1229b(d)(1)(B) to require "only that an alien 'be or become' inadmissible or removable, i.e., be potentially removable if so charged." As the "stop-time" rule is triggered by the commission of an applicable crime, rather than by a charge on the Notice to Appear or by a conviction resulting from a guilty plea, the Board held that the alien in this case was ineligible for the relief of cancellation of removal. The Board further held that the alien's convictions for retail theft, in violation of title 18, section 3929(a)(1), of the Pennsylvania Consolidated Statutes, and for unsworn falsification to authorities, in violation of title 18, section 4904(a), both constituted crimes involving moral turpitude.

IJ Has Broad Discretion In Deciding What Factors May Be Considered In Custody Redeterminations

In *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006), the Board found that in a custody redetermination under 8 U.S.C. § 1226(a), where an alien must establish to the satisfaction of the Immigration Judge that he does not present a danger to others, a threat to the national security, or a flight risk, the Immigration Judge has wide discretion in deciding the factors that may be considered. The alien was taken into custody by the Department of Homeland Security after he was charged in criminal court with distribution and possession with intent to distribute a controlled substance, namely, five kilograms and more of mixtures and substances containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A). The alien sought release from custody during the pendency of removal proceedings pursuant to 8 U.S.C. § 1226(a), which the Immigration Judge denied. The Immigration Judge found that he posed a danger to the community if released from immigration custody in light of the large quantity and dangerous nature of the drugs cited in the criminal complaint filed against him. The alien appealed to the Board, contending that he has not been convicted of any drug trafficking crimes and that the Immigration Judge should not have found that he poses a threat to the community based on the information contained in a criminal complaint that has not resulted in a conviction. The Board rejected that contention, finding that 8 U.S.C. § 1226(a) affords the Immigration Judge broad discretion in determining whether an alien's release on bond is warranted, and further, that the Immigration Judge is not limited to considering only criminal *convictions* in assessing whether an alien is a danger to the community.

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Recent BIA Decisions

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Board Overrules Previous Holding And Determines That The Offense Of Misprision Of A Felony Is A Crime Involving Moral Turpitude

In *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006), the Board granted the alien's motion to reconsider its previously issued decision and, upon reconsideration, affirmed its dismissal of his appeal. The alien, who entered the United States as a lawful permanent resident in 1983, was convicted in March 2003 of misprision of a felony in violation of 18 U.S.C. § 4, and charged as inadmissible under 8 U.S.C. §§ 1182(a)(2)(C) and (A)(i)(I). The Immigration Judge ordered the alien removed, but did not specify the ground on which that decision was based. The Board dismissed the alien's appeal, finding him removable as charged and ineligible for relief from removal.

In his motion to reconsider, the alien argued that a previously published Board decision, holding that misprision of a felony is not a crime involving moral turpitude, was still binding precedent at the time of his removal proceedings because the Attorney General did not address that question in his decision that subsequently reversed that Board precedent. Finding that a holding in a decision that was reversed by the Attorney General on another ground survives as precedent, the Board agreed and granted the alien's motion. However, observing that misprision of a felony represents conduct that is inherently base or vile and contrary to the accepted rules of morality and the duties owed between persons or to society in general, the Board overruled its previous holding and concluded that misprision of a felony in violation of 18 U.S.C. § 4 "qualifies categorically as a crime involving moral turpitude" within the meaning of the immigration statute.

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U.S. - CANADA SAFE THIRD COUNTRY AGREEMENT

On November 16, 2006, the Department of Homeland Security issued a report on the first year of implementation of the U.S. - Canada Safe Third Country Agreement. The following are excerpts from the Executive Summary.

The Agreement between the Government of Canada and the Government of the United States of America for Co-operation in the Examination of Refugee Status Claims from Nationals of Third Countries (known as the Safe Third Country Agreement, hereafter "the Agreement") came into effect on December 29, 2004.

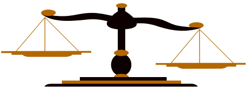
The Agreement affirms the commitment of Canada and the United States (U.S.) to more effectively share responsibility with respect to refugee claims, and builds on a strong partnership between Canada and the U.S. for cooperation on migration and asylum issues. The primary purpose of the Agreement is to reinforce refugee protection by establishing rules for the sharing of responsibility for hearing refugee claims between Canada and the United States. The United Nations High Commissioner for Refugees (UNHCR) has stated that responsibility-sharing agreements between states can, where appropriate safeguards are in place, enhance the international protection of refugees by ensuring the orderly handling of asylum applications.

The objectives of the Agreement are to enhance the orderly handling of refugee claims, strengthen public confidence in the integrity of our respective refugee systems, help reduce abuse of both countries' asylum programs, and share the responsibility of providing protection to those in need. Under the Agreement, a refugee claimant must seek protection in the country she or he first has the opportunity to do so—either Canada or the United States—unless she or he qualifies for an exception.

This report reflects the year one binational review of the implementation of the Agreement. The purpose of this review is to assess the implementation of the Agreement as well as to examine how effectively the binational policy objectives are being met. This review has been conducted in cooperation with the UNHCR and has drawn on input from non-governmental organizations (NGOs) in both countries, as mandated under section 8.3 of the Agreement.

Overall, both governments' assessment of the implementation of the Agreement is positive. Since the Agreement came into force, asylum seekers have been provided with access to a full and fair refugee status determination process in one country or the other. Implementation of the Agreement has been in full compliance with international refugee protection principles and in accordance with international human rights instruments. By establishing clear and consistent criteria for the allocation of responsibility for adjudicating asylum applications, Canada and the U.S. have instituted an effective mechanism to share responsibility for providing protection to refugees in North America. Both governments are effectively adjudicating exceptions. By putting in place an orderly process, the Agreement has served to reduce the potential for misuse. Reduction of the potential for misuse should strengthen public confidence in the integrity of asylum systems in both countries.

Canada and the U.S. consider that implementation of the Agreement has been a success. The strong partnership with UNHCR and ongoing cooperation from NGOs and stakeholders have allowed the transparent and consultative process that characterized the Agreement's development to continue with its implementation and review. This binational report marks an important step in building strong public support and partner confidence in the Canada-U.S. Safe Third Country Agreement.



Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■Court Declines To Reinstate Expired Period Of Voluntary Departure

In *Naeem v. Gonzales,* __F.3d__, 2006 WL3350737 (1st Cir. Nov. 20, 2006) (*Selya*, Lipez, Howard), the court held that the BIA did not abuse its discretion in denying petitioner's motion to reopen to apply for adjustment of status where alien had violated his voluntary departure order.

The petitioner, a Pakistani national, illegally entered the United States in 1994. In 2001 married a woman who later became a U.S. citizen and filed a visa petition on his behalf. While the case was on appeal to the BIA, the visa petition was approved. The BIA, affirmed the removal order and granted a 60 days voluntary departure period. Petitioner did not seek judicial review but instead filed a motion to reopen so that he could apply for adjustment of status. The motion was timely, but the 60-day VD period had expired, leading the BIA to find that petitioner statutorily ineligible for adjustment.

The court observed that while a grant of voluntary departure can be a "win-win situation" for both the alien in the government, it has "a dark side." "An alien who permits his voluntary departure period to run an fails to leave the country before the expiration date faces severe sanctions." Here, the sanction was that petitioner became ineligible for adjustment of status for a period of 10 years.

Petitioner sought to avoid this bar by arguing that the voluntary departure period should have been tolled during the 90-day period allotted for filing a motion to reopen. The court rejected the argument noting first that "a court may not resurrect a voluntary departure order." "This is not a matter of either judicial discretion or punctilious pettifoggery," said the court. "Reinstatement of a lapsed period of voluntary departure would be the functional equivalent of fashioning a new voluntary departure period, which would arrogate unto the court a power deliberately withheld by Congress and, in the bargain, contravene Congress's expressed intention."

> "Reinstatement of a lapsed period of voluntary departure would be the functional equivalent of fashioning a new voluntary departure period, which would arrogate unto the court a power deliberately withheld by Congress."

The court also rejected petitioner's contention that his due process and equal protection rights had been violated. "For due process rights to attach, there must be a cognizable property or liberty interest at stake," said the court. Reopening and voluntary departure are all discretionary and not an entitlement or a right. "It follows inexorably that an alien has no protected property or liberty interest in reopening proceedings, adjustment of status, or voluntary departure."

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SECOND CIRCUIT

■Second Circuit Amends CAT Opinion To Clarify That It Is Not Reviewing The BIA's Factual Findings In A Criminal Alien Case

In *Rafiq v. Gonzales*, __F.3d__, 2006 WL 3208864 (2d Cir. November 2, 2006) (Miner, Calabresi, Restani) (*per curiam*), the Second Circuit amended its prior decision at 458 F.3d 36, by deleting a portion of its opinion in which it reviewed the BIA's factual findings regarding protection under the Convention Against Torture. The government had moved to amend arguing that the court had no jurisdiction to review the factual findings because petitioner was subject to the criminal alien review bar. Under the amended decision, the court remanded the case to the BIA solely on the ground that the BIA applied an improper standard of review in adjudicating the CAT claim, without any review of the BIA's factual findings.

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■Second Circuit Holds That Any Physical Degradation Occurring In The Context Of An Arrest Or Detention On The Basis Of A Protected Ground Rises To Level Of Persecution

In *Nush Gjolaj v. Bureau of Citizenship and Immigration Services*, __F.3d__ , 2006 WL 3257049 (2d Cir. November 9, 2006) (Calabresi, Pooler, *B.D. Parker*), the Second Circuit vacated the BIA's decision and remanded the case in light of a recent clarification of the standard for establishing a claim of past persecution. The Second Circuit followed their earlier decision (*Beskovic v. Gonzales*, __F.3__, 2006 WL 3013090) applying a less restrictive standard, emphasizing that "any physical degradation . . . may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground." The court also held that petitioner's testimony alone (of abuse) was sufficient evidence and arrests made in context of participation in demonstrations protesting Communism was sufficient evidence to establish a connection between arrests and political opinion.

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■Second Circuit Finds That Immigration Judge's Conduct During Hearing Frustrates Review Of The Proceedings

In *Islam v. Gonzales,* __F.3d__, 2006 WL 3257046 (2d Cir. November 9, 2006) (*Parker,* Wesley, Hall), the

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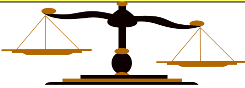

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Second Circuit vacated the BIA's decision and remanded for further proceedings before a different IJ. The court ruled that the IJ's conduct during the petitioner's hearing created "substantial uncertainty as to whether the record below was fairly and reliably developed." "Though we are generally deferential in our review of IJ and BIA decisions, when an IJ's conduct results in the appearance of bias or hostility such that we cannot conduct a meaningful review of the decision below, we remand," said the court.

> "Though we are generally deferential in our review of IJ and BIA decisions, when an IJ's conduct results in the appearance of bias or hostility such that we cannot conduct a meaningful review of the decision below, we remand."

The court also noted that it had criticized the same IJ's conduct during hearings six other times, and that it expected that the BIA had dealt with the situation.

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■Court Holds That IJ's Refusal To Lift The Conditional Basis Of An Alien's Permanent Resident Status Under 8 U.S.C. 1186a(c)(4) Is An Unreviewable Discretionary Determination

In *Astilov v. Gonzales*, __F.3d__, 2006 WL 3190314 (2d Cir. Nov. 6, 2006) (Walker, Leval, Raggi) (*per curiam*), on an issue of first impression, the court held that it lacked jurisdiction to review the determination of the Attorney General denying a hardship waiver to an alien who has admittedly established one of the three grounds for eligibility described in 1186a(c)(4). Under section 1186a(c)(4), an alien who has failed to timely file a joint petition to remove the conditions on his permanent residency based on marriage to a U.S. citizen may still be granted the adjustment if the Attorney General decides, in his discretion, that the alien merits a hardship waiver. Here, the petitioner's application to remove the conditions on his permanent residency was untimely. Thus, a District Director of the INS denied the petitioner's application, terminated his permanent residency status, and placed him in removal proceedings. In his removal proceedings, the petitioner did not dispute the termination of his permanent residency status, but rather sought review of the director's denial of his qualification for a hardship waiver. While an Immigration Judge found the petitioner qualified for a hardship waiver, the IJ ultimately held that favorable exercise of discretion was not warranted and ordered petitioner removed.

On appeal to the Seventh Circuit, the petitioner argued that the IJ's determination that he ultimately did not warrant a hardship waiver was in error. However, the court found that it lacked jurisdiction over the IJ's decision because relief under 1186a(c)(4) is a discretionary determination barred from review. The court looked at the plain language of the statute and noted that the Attorney General "may" grant a hardship waiver - not "shall". The court did not reach the issue of whether or not it could review the threshold eligibility determination of 1186a(c)(4) because the petitioner did not raise the issue.

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■Second Circuit Remands Forced Sterilization Asylum Case On Basis Of Extra-Record Evidence

In *Lin v. DOJ*, __F.3d__, 2006 WL 3060101 (2d Cir. Oct. 30, 2006) (Pooler, Katzman, Sotomayor) (*per curiam*), granted an alien's motion to remand to the BIA for consideration of new evidence suggesting the existence of an official policy in the Fujian Province of forced sterilization of parents of two or more children, including parents whose children were born abroad.

The petitioner had relied on a recent decision of the court in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), suggesting that new documents from China may undermine the State Department reports concluding that China does not have a policy of forced sterilization. Specifically, the new documents discussed by the *Shou Yung Guo* Court included recent decisions of the Changle City Family-Planning Administration and the Fujian Province Department of Family-Planning Administration indicating that parents of children born abroad are subject to the same family-planning policies as parents of native-born children, as well as a 1999 document entitled "Q & A for Changle City Family-Planning Information Handbook" issued by Changle City family-planning authorities stating that forced sterilization is mandated for parents of two or more children. Citing *Shou Youg Guo*, the court remanded the case to the BIA to determine the authenticity of the new documents and whether they establish the existence of an official policy in either Changle City of the Fujian Province generally of forced sterilization.

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■Circuit Holds That IJ Need Not Make Specific Findings Of Changed Country Conditions Where That Country Is The Subject Of An Appreciable Portion Of Asylum Claims

In *Hoxhallari v. Gonzales*, __F.3d__, 2006 WL 3073337 (2d Cir. Oct. 31, 2006) (Jacobs, Walker, Wallace) (per curiam), the Second Circuit held that an IJ is not required to recite a "robotic incantation" of specific findings premised on record evidence when making a finding of changed conditions in a country that is the subject of an appreciable proportion of asylum claims. Here, the petitioner claimed that the former Communist regime in Albania had interned his family for ten years and that the current Albanian police harassed and

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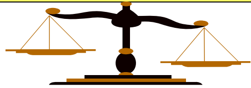

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beat him due to his support for the Albanian Democratic Party. Without providing any meaningful discussion of the facts particular to petitioner's case, an IJ denied the petitioner's application for lack of credibility and because of changed country conditions in Albania following the collapse of the Communist government in 1991. The BIA affirmed without opinion.

The court affirmed the denial of petitioner's asylum application, holding that the IJ's perfunctory finding of a fundamental change in the political structure of Albania beginning in 1990 was sufficient to deny petitioner's claim. In so holding, the court found that the petitioner had not proffered any evidence to support his claim and that deference was owed to the IJ's specialized knowledge of country conditions. Finally, because the court agreed with the IJ's determination of changed country conditions, the court did not reach the perfunctory adverse credibility determination.

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THIRD CIRCUIT

■Court Remands To Allow Consideration Of Evidence Of Systematic Persecution Of Pentecostals in Eritrea

In *Ghebrehiwot v. Attorney General*, __F.3d__, 2006 WL 3108843 (3rd Cir. Nov. 3, 2006) (Sloviter, *McKee*, Rendell), the court remanded the petitioner's claim for asylum and withholding of removal after an IJ failed to consider evidence of systematic persecution of Pentecostal Christians by the Eritrean government. However, the court upheld the IJ's determination that conscription into the Eritrean army did not constitute persecution.

Petitioner was a student in an Eritrean university when war broke out between Eritrea and Ethiopia. Consequently, the petitioner was drafted into the Eritrean army and placed on the border between Ethiopia and the Sudan. Fleeing from advancing Ethiopian soldiers, the petitioner crossed over into Sudan and eventually took up residence there and adopted the Pentecostal faith. The Sudanese government detained the petitioner and tortured him for his religious beliefs. Upon his release, the petitioner found he was unable to return to Eritrea because of new legislation in Eritrea restricting the practice of all religious beliefs with the exception of Eritrean Orthodox, Roman Catholicism, Lutheranism, or Islam. According to the petitioner, after enactment of the legislation, the Eritrean government systematically rounded up and tortured members of all non-sanctioned religions, including Pentecostals. Thus, petitioner fled to the U.S. and sought asylum, withholding of removal, and CAT protection.

> "The fact that Pentecostals are not singled out for persecution and that other religious minorities may also be persecuted does not negate religious persecution or a well-founded fear of future persecution."

In his asylum application, the petitioner claimed he feared persecution by the Eritrean government due to the fact that he deserted from the army and because he practiced Pentecostalism. An Immigration Judge denied his application, holding that prosecution for desertion does not ordinarily constitute persecution, with exceptions not applicable to petitioner's case. The IJ also rejected petitioner's claim of persecution based on his religious beliefs because the petitioner had never personally experienced religious persecution by the Eritrean government and that petitioner's brother continued to practice Pentecostalism in Eritrea without harm. The IJ noted that petitioner had submitted numerous background materials showing religious conflict in Eritrea, but ultimately found them unpersuasive.

On appeal to the Third Circuit, the petitioner argued that the evidence he submitted showed a systematic persecution of adherents of disfavored religions, including Pentecostals. That evidence included the State Department's International Religious Freedom Report 2004 and about 30 different articles documenting incidences of Eritrean persecution of Pentecostals. In response to this argument, the government contended that while the submitted materials evidence a generally repressive regime, it did not establish a systematic practice of religious persecution against Pentecostals. The court disagreed, holding that "the fact that Pentecostals are not singled out for persecution and that other religious minorities may also be persecuted does not negate religious persecution or a well-founded fear of future persecution." However, the Court did not find that the petitioner had established persecution based on his desertion from the Eritrean army and that any attempt to claim that deserters constituted a social group had not been raised before the Immigration Judge and were thus not exhausted. Because the IJ erred in considering petitioner's evidence, the court also remanded for proper consideration of petitioner's CAT claim.

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FIFTH CIRCUIT

■Fifth Circuit Concludes That Second New York Misdemeanor Marijuana Conviction Not An Aggravated Felony

In *Smith v. Gonzales*, __F.3d__, 2006 WL 3012856 (5th Cir. Oct. 24, 2006) (Jolly, Davis, Benavides), the court held that a petitioner's second

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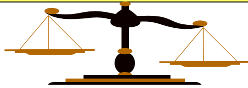

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misdemeanor marijuana offense did not qualify as an aggravated felony such that petitioner was ineligible for cancellation of removal.

Petitioner had been convicted under New York state law of two misdemeanor marijuana offenses, one in March 2004 and the other in October 2004. On his first appearance before an IJ, the petitioner was found removable based on his March 2004 conviction as an alien convicted of an aggravated felony. The BIA disagreed and vacated and remanded the decision in order to determine if the March 2004 conviction actually did constitute a drug trafficking crime. On remand, an Immigration Judge determined that the March 2004 conviction was not a drug trafficking crime and was leaning towards granting cancellation of removal when DHS argued that petitioner's second conviction in October 2004 qualified as a drug trafficking crime because federal law would punish this subsequent conviction as a felony. The IJ agreed with DHS and the BIA affirmed that finding.

On appeal to the Fifth Circuit, petitioner claimed that the BIA improperly used federal law to determine that his second conviction qualified as a felony, arguing that the applicable law was instead New York state law, which defined the second conviction as a misdemeanor. The court sidestepped petitioner's argument, and held that it need not reach this issue as the second conviction didn't qualify as a felony under either state or federal law. The applicable federal law, according to DHS, was 21 U.S.C. § 844(a). Section 844(a) punished a subsequent misdemeanor conviction for possession of marijuana as felony, but only if the prior misdemeanor conviction had become final. Because the petitioner could still seek discretionary review of his first conviction from the New York intermediate appellate court, that conviction was not final and thus the second conviction was not a felony under federal law either.

The court rejected the government's request to hold the case in abeyance pending the outcome of the consolidated Supreme Court cases of *Lopez v. Gonzales* (05-547), and *Toledo-Flores v. Gonzales* (05-7664).

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SIXTH CIRCUIT

■Sixth Circuit Rejects *Matter of S-V-* Requiring A CAT Applicant To Show Public Officials "Willfully Accepted" Tortuous Activities

In *Amir v. Gonzales*, __F.3d__, 2006 WL 3093820 (6th Cir. Nov. 2, 2006) (Merritt, Moore, Collier), the Sixth Circuit upheld an IJ's adverse credibility finding and determination that petitioner did not meet his burden of proof for withholding of removal, but remanded and vacated a denial of CAT relief because the IJ relied on a BIA decision that the court determined to be "manifestly contrary to law."

The petitioner had filed an asylum application in 2002 claiming that he was afraid fanatical Muslim extremists would kill him if returned to Indonesia due to his conversion from Islam to Christianity, and that the Indonesian government was unable or unwilling to protect him. An IJ denied the application, finding the petitioner incredible, the application untimely, and specifically to his CAT claim, that petitioner failed to show the Indonesian government was willfully accepting of the fanatical Muslim activity, citing *Matter of S-V-*, 22 I. & N. Dec. 1306 (2000) for support.

The court affirmed the IJ in all respects, except that it joined the Ninth and Second Circuits in holding that the BIA's decision in *Matter of S-V*, conflicts with Congress's clear intent to include "willful blindness" in the definition of "acquiescence" of a public official to torture. In *S-V-*, the BIA held that a petitioner must do more than show that public officials are aware of tortuous activity and powerless to stop it, but must show that the officials willfully accept the tortuous activity.

> The court held that the BIA's decision in *Matter of S-V-*, conflicts with Congress's clear intent to include "willful blindness" in the definition of "acquiescence" of a public official to torture.

Because in in *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001), the court had concluded that "willful blindness" fell within the definition of "acquiescence" listed in 8 C.F.R. 208.18(a)(1), "today we explicitly hold that the IJ's reliance on *In Re S-V* was manifestly contrary to the law," said the court. Accordingly, it vacated the IJ's denial of petitioner's CAT claim and remanded for an a decision consistent with the new ruling.

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SEVENTH CIRCUIT

■Seventh Circuit Holds That Attorney General Has Authority To Apply Heightened Waiver Standard To Violent Criminals And To Determine That Non-Aggravated Felonies Constitute Particularly Serious Crimes

In *Ali v. Achim*, __F.3d__, 2006 WL 3162270 (7th Cir. Nov. 6, 2006) (Posner, Evans, *Sykes*), the court upheld a denial of a waiver of inadmissibility, asylum, and withholding of removal, but reversed and remanded a determination that petitioner was not more likely than not to face torture if returned to Somalia. In so holding, the court found that the Attorney General acted within his statutory authority in

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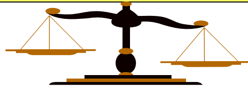

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establishing a heightened waiver of inadmissibility standard for aliens convicted of violent or dangerous crimes, and that the BIA did not err in finding petitioner committed "a particularly serious crime" disqualifying him from asylum and withholding of removal. With respect to petitioner's CAT claim, the court found that the Immigration Judge ignored key pieces of evidence that clearly showed petitioner would face torture in Somalia due to his clan membership and harm previously incurred by rival clans.

Petitioner was a teenager in Somalia when the country erupted in to civil war following the collapse of that government in 1991. Shortly after the outbreak of civil war, rival clans killed the petitioner's brothers and shot at petitioner. When petitioner was just sixteen years old, soldiers raided his home and killed his sister after she resisted their attempts to rape her. Following his sister's murder, petitioner experienced various other humiliations and violence. To escape the violence, petitioner and his remaining family fled to the U.S. Once in the U.S., the petitioner struggled with post-traumatic stress disorder and got into fights with the locals of Madison, Wisconsin, resulting in a felony battery conviction. Removal proceedings were initiated based on the conviction.

The petitioner then sought a waiver of inadmissibility, asylum, withholding of removal, and CAT. Ultimately, the BIA denied all claims for relief. Specifically, the BIA applied *Matter of Jean*, 23 I &N Dec. 373 (2002), to deny the waiver of inadmissibility for violent crime because petitioner had not shown exceptional and extremely unusual hardship, and found petitioner committed a "particularly serious crime" to deny asylum, withholding of removal, and CAT. On appeal to the Seventh Circuit, the petitioner argued that the heightened waiver standard articulated in *Matter of Jean* was an impermissible interpretation of the statute granting the Attorney General discretion to waive a refugee's inadmissibility. The court disagreed, joining the Ninth and Fifth Circuit's in holding that the statute's language was entirely permissive and did not categorically exclude any type of alien from applying for waiver such that it would be in conflict with *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Further, the court held that the BIA's determination that petitioner's battery conviction was a "particularly serious crime" was entitled to *Chevron* deference and thus not in error. Finally, the court reversed and remanded the denial of CAT relief as petitioner had presented ample evidence that he would be targeted for violence due to his clan membership.

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■Seventh Circuit Dismisses For Lack Of Jurisdiction Where Alien Failed To Exhaust Administrative Remedies

In *Pjetri v. Gonzales*, __F.3d__, 2006 WL 3258210) (7th Cir. November 13, 2006) (Manion, Kanne, *Rovner*), the Seventh Circuit, held that petitioner's failure to exhaust his administrative remedies before the BIA precluded the court's review. Citing its decision in *Feto v. Gonzales*, 433 F.3d 907, 912 (7th Cir. 2006), the court ruled that the alien was not aided by the characterization of his claims as "due process" violations, where these arguments were based on procedural failings that the BIA was capable of addressing.

> Petitioner's failure to exhaust his administrative remedies before the BIA precluded the court's review.

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■Seventh Circuit Affirms Denaturalization Of Nazi Affiliate

In *U.S. v. Firishchak*, __F.3d __, 2006 WL 3346149 (7th Cir. November 20, 2006) (Flaum, Ripple, Evans), the Seventh Circuit affirmed a 2005 order of the U.S. District Court for the Northern District of Illinois denaturalizing Osyp Firishchak based on his service during World War II in the Nazi-sponsored Ukrainian Auxiliary Police (UAP). The UAP enforced ideologically-based Nazi persecutory policies against the Jews and took part in a series of actions in 1942 and 1943 to reduce, and ultimately eliminate, the population of the L'viv Jewish Ghetto in Ukraine. The Seventh Circuit agreed with the district court that Firishchak illegally procured his naturalized citizenship in 1954 because he did not lawfully enter the U.S. in 1949. The court held that Firishchak was ineligible for his immigrant visa under three sections of the Displaced Persons Act of 1948, as well as State Department regulations then in effect, barring issuance of a visa to anyone who assisted in persecution, held membership in a hostile movement, or made a material misrepresentation.

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■Seventh Circuit Holds That There's No Pattern Or Practice Of Persecuting Members Of The Midgan Clan In Somalia

In *Ahmed v. Gonzales*, __F.3d__, 2006 WL 3093630 (7th Cir. Nov. 2, 2006) (Bauer, Rovner, Sykes), the Seventh Circuit held that no evidence supported the claim that people of the Midgan clan are systematically persecuted in Somalia.

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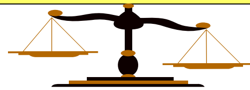

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Petitioner claimed he was a refugee from the systematic persecution of the Midgan clan by the Somalian government, citing three specific incidents as support for his claim. First, the petitioner claimed that while he was riding on a bus carrying passengers of different clans, the bus was attacked by armed men. Second, that he was harassed by the Akishu clan because he married one of their women. Finally, that he was subject to substantial economic deprivation when he lost his job as a barber's assistant following the collapse of the Somalian government in 1992. An IJ denied petitioner's application, finding that petitioner failed to carry his burden of proof. The BIA affirmed without opinion.

In finding that petitioner had not suffered past persecution, the court held that the events cited by petitioner did not occur because of his membership in the Midgan clan, but rather because of the general Somalian civil war. Further, the court declined to recognize the Midgan clan as systematically persecuted in Somalia. While the court acknowledged that "[t]he Midgan are not treated well in Somalia, [] their poor treatment is not a systematic, pervasive, or organized effort to kill, imprison, or severely injure the them," adding that "Midgans who worked for the Barre regime are particularly targeted, [but] not the Midgan as a group . . . ." Finally, the court also held that petitioner could safely relocate to an area in northwest Somalia.

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■Court Rejects Petitioner's Due Process Challenge To IJ's Conduct Of Hearing And Sustains Agency's Determination That Petitioner Failed To Prove Asylum Eligibility

In *Chakir v. Gonzales*, __F.3d__, 2006 WL 2973041 (7th Cir. October 19, 2006)(Bauer, Easterbrook, Rovner), the Seventh Circuit found that the IJ "overstepped the bounds of a neutral arbiter in his questioning of" the petitioner during his asylum hearing, as such questioning exceeded that conducted by the petitioner's attorney and agency counsel and involved matters well beyond the scope of the petitioner's testimony. However, the court rejected the petitioner's due process claim because the petitioner failed to show that he suffered any prejudice as a result of the judge's aggressive questioning. The court further found on the merits that the petitioner failed to prove that he has a well-founded fear of persecution in Morocco as a Christian convert from Islam.

> The court rejected the petitioner's due process claim because the petitioner failed to show that he suffered any prejudice as a result of the judge's aggressive questioning.

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EIGHTH CIRCUIT

■Eighth Circuit Holds That A Certificate Of Nonexistence Of Record Is Nontestimonial

In *United States v. Urqhart*, __F.3d__, 2006 WL 3372863 (8th Cir. November 22, 2006) (Loeken, *Beam*, Gruender), the Eighth Circuit held that admission of a Certificate of Nonexistence of Record (CNR), without a showing of unavailability of a witness or a prior opportunity for cross-examination, did not violate the Sixth Amendment's Confrontation Clause because a CNR is similar enough to a business record so that it is nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004). The Eighth Circuit further ruled that the fact that the CNR was prepared for use at a criminal trial did not make the CNR testimonial.

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NINTH CIRCUIT

■On Remand Ninth Circuit Panel Finds That Arizona Domestic Violence Convictions Are Not Crimes Involving Moral Turpitude

In *Fernandez-Ruiz v. Gonzales*, *__F3d__, 2006 WL 3302660* (9th Cir. November 15, 2005) (*Reinhardt*, Noonan, Fernandez), the Ninth Circuit held that the alien's domestic violence/assault convictions under Arizona law did not constitute crimes involving moral turpitude, and thus that the alien was not removable under 8 U.S.C. § 1227 (a)(2)(A)(ii). The panel's decision followed the *en banc* court's holding that a conviction under the Arizona domestic violence statute is not a crime of violence under 18 U.S.C. § 16(a). With respect to the alien's aggravated felony charge of removability, the panel concluded that the alien's 1992 theft conviction was a "theft offense" as defined in 8 U.S.C. § 101(a)(43)(G), but remanded to the BIA for it to determine whether the one-year sentence imposed in 1994 was unlawful.

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■Ninth Circuit Holds That Government Bears Burden Of Proving The Basis Of Vacatur Of A Prior Conviction

In *Nath v. Gonzales*, __F.3d__, 2006 WL 3110424 (9th Cir. Nov. 3, 2006) (Hug, *Merritt*, Paez), the Ninth Circuit held that the government has the burden of showing that a conviction under California Health & Safety Code 11378(a) remains valid for immigration purposes. Further, that

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11378(a)'s overly broad language requires the BIA to determine whether a conviction under that statute actually falls under the Controlled Substances Act. Finally, the court found that the REAL ID Act did not strip the court of jurisdiction over petitioner's motion to reopen.

Petitioner, a native of Fiji, had two convictions under the California Health & Safety Code § 11378. Petitioner argued in a motion to reopen that his first conviction for possession of a controlled substance had been vacated and thus could not serve as a basis for removal. Petitioner also claimed that his second conviction was not of the type giving rise to removal. Before reaching the merits of petitioner's claim, the court found jurisdiction over the motion to reopen using its prior precedents, *Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006), and *Medina-Morales v. Ashcroft*, 371 F.3d 520 (9th Cir. 2004). Applying *Fernandez*, the court held that petitioner's motion to reopen amounted to a request for new relief, so that no prior discretionary determination existed which would bar review under 1252 (a)(2)(B)(i). Elaborating on this point, the court went on to state that petitioner's request to terminate removal proceedings did not fall under any of the enumerated grounds for relief listed in 1252(a)(2)(B)(i) that were barred from the court's review. Neither did the court find its review barred under 1252(a)(2)(B)(ii), as *Median-Morales* explicitly held that this jurisdiction stripping provision did not apply to motions to reopen.

On the merits of petitioner's claim, the court held the BIA erred by placing on petitioner the burden of proving that his first conviction was vacated for substantive, non-immigration related reasons. The state court's order vacating the petitioner's first conviction only stated that the conviction was vacated for "good cause". Because the government did not show the reasons for why the state court set aside the conviction, the government failed to carry its burden of proof. Moving to petitioner's second offense, the court stated that § 11379 is overly broad, including solicitation offenses which are not prohibited under the Controlled Substances Act, and thus do not qualify as a deportable aggravated felony. Because the BIA assumed that petitioner's second conviction was the same as the prior vacated conviction without considering the possibility that petitioner only pled guilty to a solicitation offense, the court remanded the case so that the BIA could analyze the nature of the second offense.

The court had previously issued on August 24, 2006, an unpublished decision dismissing the petition on the merits. The mandate issued on October 17, 2006. On November 3, 2006, the court simultaneously recalled the mandate, withdrew the August 24 opinion, and issued the new, published opinion, relying on *Cardosa-Tlaseca v. Gonzales*, 460 F. 3d 1102, 1107 (9th Cir. 2006), and *Pickering v. Gonzales*, 454 F. 3d 525 (6th Cir. 2006).

Contact: Cynthia M. Parsons, AUSA

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Juan Osuna, Acting chairman of the Board of Immigration Appeals, spoke at the second session of the 12th Annual Immigration Law Seminar, held on November 27-December 1, 2006.

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INSIDE OIL

OIL Holiday festivities will be held on December 13-14, 2006.

On December 13th, from 5:00-8:00 pm, OIL will host its Holiday Celebration at the Aria Trattoria, located at the Ronald Reagan Trade Center, 1300 Pennsylvania Avenue.

On December 14, OIL will host the Annual White Elephant Holiday Party. The activities will begin at 12:30 with a Fajita Luncheon. At 1:30, Deputy Director David McConnell will lead the Annual White Elephant Gift Trading game.

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NOTED

"I want to be very clear about the facts here: the Terrorist Surveillance Program does not invade anyone's privacy, unless you are talking to the enemy in this time of war. It targets only international communications in which we have reasonable grounds to believe that one party is a member or agent of al Qaeda or an affiliated terrorist organization. The TSP is lawful. The President established the Program under both the authority given to him by Congress when it passed the Authorization for Use of Military Force in the wake of the 9/11 attacks, and by his authority under the Constitution."

Remarks by Attorney General Gonzales at U.S. Air Force Academy, Colorado Springs, on November 20, 2006.

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

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

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

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