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SUPREME COURT VACATES AND REMANDS NINTH CIRCUIT'S ASYLUM DECISION INVOLVING DERIVATIVE ASYLUM CLAIM AND PARTICULAR SOCIAL GROUP

In ***Gonzales v. Tchoukhrova***, __S.Ct.__, 2006 WL 1221941 (Oct. 2, 2006), the Supreme Court summarily granted the government's petition for certiorari and vacated the decision in *Tchoukhrova v. Gonzales,* 404 F.3d 1182 (9th Cir. 2005), in which the Ninth Circuit held that disabled children and their parents may qualify as a social group for asylum purposes, and that a parent may qualify for asylum and withholding of removal based solely on harms to a child without having to establish any persecution of the parent herself. The court's decision permitting a parent to qualify for asylum based solely on harms to a child was a new, unprecedented ruling.

The Solicitor General had argued that the Ninth Circuit had violated the "ordinary remand rules" as recently applied by the Court in *Gonzales v. Thomas*.

In the certiorari petition the Solicitor General argued that the Ninth Circuit exceeded its role by raising and deciding the question whether harms to a child may be imputed to a parent when there was no prior decision by the agency on this question. The Solicitor General argued that the Ninth Circuit violated the "ordinary remand rule" in administrative law, which holds that a court has no authority to decide, and must remand, questions that were not resolved by the agency in the first instance. The Solicitor General also argued that the Ninth Circuit had invented inflammatory "facts" about the child's past experiences that did not reflect the evidence and were never found by the agency. Finally, the Solicitor General argued that the court's decision permitting a parent to qualify for asylum based solely on harms to a child was contrary to the statutes and regulations, which require the person applying for asylum to prove that she, herself, was persecuted in the past or faces future persecution. The Supreme Court granted certiorari, vacated the decision in *Tchoukhrova,* and sent the case back to the Ninth Circuit to follow the remand rule.

This is the second case in a year in which the government has petitioned for

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EN BANC 9TH HOLDS ARIZONA DOMESTIC VIOLENCE CRIME NOT A CRIME OF VIOLENCE

In ***Fernandez-Ruiz v. Gonzale,*** __F.3d__, 2006 WL 3026023 (9th Cir. October 26, 2006) (*Bea*, Schroeder, Reinhardt, Noonan, Hawkins, Clifton; Kozinski (concurring in part and dissenting in part); Wardlaw, O'Scannlain, Bybee, Callahan (dissenting)), the Ninth Circuit, sitting *en banc*, held that a conviction under the Arizona domestic violence statute is not an 18 U.S.C. § 16(a) crime of violence, and that, therefore, the petitioner who had been convicted of domestic violence was not removable, under INA § 237(a)(2)(E)(i).

The court applied *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where the Supreme Court held that 18 U.S.C. § 16(a) covers only those crimes in-

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PRESIDENT SIGNS THE SECURE FENCE ACT OF 2006

Calling it an "important step toward immigration reform," on October 26, 2006, President Bush signed into law the Secure Fence Act of 2006, Pub. L. 109-367. This new law authorizes the construction of hundreds of miles of additional fencing along our southern border. It authorizes more vehicle barriers, checkpoints and lighting to help prevent people from entering our country illegally. It also authorizes the Department of Homeland Security to increase the use of advanced technology, like cameras and satellites and unmanned aerial vehicles to reinforce the infrastructure at the border.

Speaking at a White House ceremony, the President said that "Ours is a nation of immigrants. We're also a

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Highlights Inside

TCHOUKHROVA VACATED AND REMANDED

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certiorari because the Ninth Circuit violated the remand rule. The first case was *Gonzales v. Thomas*, 126 S.Ct. 1614 (April 17, 2005), in which the Ninth Circuit decision holding that "family" can constitute a "particular social group" for asylum purposes, when that question was never decided by the agency. The Supreme Court vacated the *Thomas* decision, and reaffirmed that basic asylum eligibility questions must be made by the agency, and the courts of appeals have no authority to decide such matters in the first instance.

> The Supreme Court vacated the *Thomas* decision, and reaffirmed that basic asylum eligibility questions must be made by the agency and the courts of appeals have no authority to decide such matters in the first instance.

The facts of Tchoukhrova's case were as follows. She is a Russian citizen who applied for asylum and included her husband and son as derivatives. This means Tchoukhrova was the "principal" asylum applicant and her husband and son were seeking to derive asylum through Tchoukhrova. Tchoukhrova applied for asylum, claiming past and future persecution on account of her "political opinion" (better conditions for disabled children), or membership in a social group (parents of disabled children), because of her objections to conditions for disabled children in Russia. She did not have any evidence that she herself was persecuted, and only showed a few instances of personal harassment. She claimed that her son was born with cerebral palsy. Because his disability, and the lack of equal education laws for disabled children, the child was denied access to public schools, although the government provided home schooling with a visiting teacher.

Tchoukhrova claimed that the child was verbally abused and made fun of by other children in public, because Russian people were not used to seeing disabled persons. He was also picked up and dropped on one occasion by three youths in a public park, and slapped by a woman when he touched her clothing. Tchoukhrova claimed that she felt pressure to institutionalize the child when he was young rather than raise him at home. She found an osteopath in San Diego who helped the child and moved there. Tchoukhrova then applied for asylum to get regular osteopathic treatments for her son and enable him to attend public school in San Diego with special tutors and equipment. Tchoukhrova claimed her son was denied access to public schools in Russia, threatened with institutionalization, verbally abused, and beaten. The IJ found that the harm the family suffered did not rise to the level of persecution. The BIA affirmed the IJ denial of asylum and withholding of removal treating Tchoukhrova as the asylum applicant, but noted the "very sympathetic family history."

The Ninth Circuit reversed. It held that disabled children in Russia and their parents constitute a particular social group. The court then turned to Tchoukhrova's claim of past persecution, since she was the principal asylum applicant. The Ninth Circuit acknowledged that our law does not permit parents to derive asylum from a minor child, although a child may derive asylum from a parent. However, the Ninth Circuit decided not to follow the "formalistic" requirements of our law. Instead, the court held – on its own and for the first time on review – that harms to a child may be "imputed" to a parent so that the parent may qualify for asylum based solely on harms to the child, without the parent establishing any persecution in her own right.

The Ninth Circuit then found that Tchoukhrova's son was persecuted in Russia because he was denied public education, not given adequate medical treatment, threatened with institutionalization, and was beaten (referring to the two incidents with the youths and a woman). The court imputed this persecution to Tchoukhrova to hold that she established past persecution; held that this triggered a presumption that she would be persecuted in the future; decided this presumption was not rebutted; and held that Tchoukhrova was thereby eligible asylum and withholding and could give derivative asylum and withholding to her child and husband.

The government sought rehearing en banc, which was denied over the dissent of seven judges. In a published dissent they criticized the panel for violating the remand rule and for inventing new law contrary to the statutes and regulations, based on a court-invented theory of imputed harms that was never considered, let alone decided, by the agency.

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nation of law. Unfortunately, the United States has not been in complete control of its borders for decades and, therefore, illegal immigration has been on the rise. We have a responsibility to address these challenges. We have a responsibility to enforce our laws. We have a responsibility to secure our borders. We take this responsibility seriously."

The President reaffirmed his views that that we need to create a temporary worker plan where willing workers would be matched by willing employers "to do jobs Americans are not doing on a temporary basis." "We must face the reality that millions of illegal immigrants are already here, " he said.

APPLICABILITY OF MOTION TO REOPEN'S REQUIREMENTS TO ALIENS WITH FINAL ORDERS WHO SEEK TO FILE SUCCESSIVE OR UNTIMELY ASYLUM APPLICATIONS

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended section 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158, to add time and numerical limitations for asylum applications. Under section 208 of the INA, as amended by IIRIRA, an alien physically present in the United States may *not* apply for asylum (1) if he fails to demonstrate "by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States," 8 U.S.C. § 1158(a)(2)(B), *or* (2) if he has previously applied for asylum and had such application denied, 8 U.S.C. § 1158(a)(2)(C). At the same time, Congress provided:

> An application for asylum of an alien *may* be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of *changed circumstances* which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B). 8 U.S.C. § 1158 (a)(2)(D) (emphasis added).

In *Jian Huan Guan v. BIA*, 345 F.3d 47, 49 (2d Cir. 2003), the Second Circuit held that a change in an asylum applicant's personal circumstances, namely the birth of two children, does not entitle the applicant to invoke the exception in 8 C.F.R. § 1003.23(b)(4)(i) for filing an untimely motion to reopen, which contemplates only changed country (not personal) conditions as grounds for relieving a movant of the timeliness requirements in § 1003.23(b)(1). The Court further suggested in *dicta* that "another administrative remedy may still be open," to wit: "a successive, untimely asylum application based upon 'changed circumstances which materially effect [the alien's] eligibility for asylum.'" *Id.*, quoting 8 U.S.C. § 1158(a)(2)(D). More recently, the Sixth Circuit similarly indicated in *dicta* that while "[i]t may seem odd that an asylum application that would not be considered when attached to a motion to reopen very well might be considered when simply filed anew under 8 U.S.C. § 1158, . . . this result *is required* by the statute and regulations." *Haddad v. Gonzales*, 437 F.3d 515, 516 (6th Cir. 2006), citing *Guan*, 345 F.3d at 49 (emphasis added).

Nevertheless, it is the Attorney General's position that Congress has expressly delegated upon him the authority to require aliens with a final order of removal to file a motion to reopen in conjunction with their untimely or successive asylum application. Section 8 U.S.C. § 1158 provides that the Attorney General "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the . . . Attorney General under this section," and directs that the Attorney General "shall establish a procedure for the consideration of asylum applications." 8 U.S.C. §§ 1158(b)(1)(A), (d)(1). Thus, the statute appears to confer upon the Attorney General unfettered discretionary authority to deny asylum applications and to establish procedures for considering asylum applications as set forth in § 1158(d)(1). No express statutory language limits this otherwise unfettered discretion, nor does section 1158 specifically address the filing of successive or untimely asylum applications by aliens with final orders of deportation or removal. *See* 8 U.S.C. § 1158. Indeed, all that 8 U.S.C. § 1158(a)(2)(D) provides is that the successive nature or untimeliness of an asylum application shall not *per se* be used as a basis for denial if the alien demonstrates the requisite changed or extraordinary circumstances. The plain language of § 1158(a)(2)(D) does not preclude the Board of Immigration Appeals ("BIA") from enforcing requirements that call for denial or pretermission of an asylum application on a basis other than it being filed successively or beyond the normal one-year deadline — *i.e.*, on the basis of failure to meet the separate statutory and regulatory motion to reopen requirements.

The plain language of § 1158(a)(2)(D) does not preclude the BIA from enforcing requirements that call for denial or pretermission of an asylum application on a basis other than it being filed successively or beyond the normal one-year deadline.

Given Congress's arguably express and broad delegation of authority, and after public notice and comment, the Attorney General promulgated 8 C.F.R. § 1208.4 (2006), which states that an asylum application must be filed with the BIA "[i]n conjunction with a motion to remand or reopen pursuant to §§ 1003.2 and 1003.8 of this chapter where applicable." By encompassing § 1003.2 (2006), § 1208.4(b)(4) (2006) requires, *inter alia*, the filing of a motion to reopen within ninety days in order for those aliens with final orders to apply for asylum, unless there are changed country conditions.

Where there is an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the resulting regulation must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to statuTe." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1994). As explained above, 8 C.F.R. § 1208.4(b) (2006) and § 1003.2(c) (2006) were promulgated pursuant to Congress's delegation of authority, and, for the following reasons, the Attorney General has contended that they are not arbitrary,

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MOTION TO REOPEN REQUIREMENTS WHEN SEEKING REOPENING OF FINAL ORDER TO APPLY FOR ASYLUM

capricious or manifestly contrary to 8 U.S.C. § 1158(a)(2)(D).

First, these regulations appear to support the interest of finality in removal proceedings. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). *Second*, providing that aliens who seek to file an untimely motion to reopen should be allowed to seek asylum based only on changed country conditions comports IIRIRA's objective to expedite the removal of deportable aliens. *See* S. Rep. No. 104-249, 1996 WL 180026, at *2 (Apr. 10, 1996).

Finally, these regulations are arguably consistent with other statutory provisions in the INA. Although 8 U.S.C. § 1158 provides the general framework for aliens seeking to apply for asylum and contains time and numerical limitations on filing asylum applications, it does not address the procedure to be used in processing those applications; nor does it address the applicability to aliens with final orders of removal. Rather, 8 U.S.C. § 1229a explicitly applies to aliens who have already been ordered removed from the United States. For these aliens, to prevent further delay, and notwithstanding the exceptions to the bars to asylum in 8 U.S.C. § 1158, Congress permitted only one narrow exception to the normal consequences of filing an untimely motion to reopen: to seek asylum based on "changed country conditions arising in the country of nationality." 8 U.S.C. § 1229a(c)(7)(c)(ii) (ninety-day time limit on motion to reopen does not apply in certain circumstances where the basis for the motion is to seek asylum based on "changed country conditions arising in the country of nationality.").

Thus, Congress itself contemplated that aliens with final orders of removal would file successive or untimely asylum applications in conjunction with a motion to reopen their proceedings. Accordingly, if aliens with a final order of removal were allowed to seek relief without satisfying the motion to reopen restrictions, the limitation in 8 U.S.C. § 1229a(c)(7)(C)(ii) arguably would have no purpose.

For the foregoing reasons, and notwithstanding *Guan*'s and *Haddad*'s proposed construction (in *dictum*) of 8 U.S.C. § 1158(a)(2)(D), the Attorney General has requested the courts, including the Second and Ninth Circuits, to uphold the validity of the regulatory requirement that aliens with final administrative orders file their successive or untimely asylum applications under § 1158(a)(2)(D) in conjunction with a motion to reopen. *See e.g., Chen v. BCIS*, 05-3792-ag (2d Cir.); *Chen v. Gonzales*, 05-75394 (9th Cir.).

> To prevent further delay, Congress permitted only one narrow exception to the normal consequences of filing an untimely motion to reopen: to seek asylum based on "changed country conditions arising in the country of nationality."

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If you have an unusual asylum issue you would like to see discussed, you may contact Margaret Perry at:

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USCIS BACKLOG ELIMINATION UPDATE

According to USCIS, it does not include cases in the backlog that it is not able to process. USCIS discounts cases where circumstances beyond its control prevent it from continuing processing. Cases in the following circumstances are not considered by USCIS as a part of the existing backlog as of September 2006:

■ **Cases pending customer action (200,828)**

This includes 187,457 cases where we have identified that a customer did not file necessary evidence or material with their application, or where we find that we need additional evidence rom the applicant before we make a decision.

■ **Cases affected by limits on annual immigration (793,722)**

A vast majority (682,936) of these applications are relative petitions filed by U.S. citizens and permanent residents intended to simply save their relatives a place in the "first come, first served," line to immigrate, despite VISA unavailability. This number also includes 35,630 applications for adjustment of status to permanent residence that we have processed to the point of approval, but annual statutory limits mean we cannot actually complete processing and grant the application.

■ **Cases pending other agency action (136,783)**

This includes 4,905 cases where USCIS has requested full investigations by other federal agencies, and is awaiting the results of these investigations; and 130,091 cases where USCIS has interviewed the applicant and completed all processing, but is still awaiting the final results of the FBI's name check record search. USCIS will not approve a case until all background checks, including the FBI name check, are complete.

BOARD CHAIRMAN SCIALABBA JOINS USCIS

The USCIS Director Emilio T. Gonzalez announced early this month the appointment of Lori Scialabba as the Associate Director of the USCIS Refugee, Asylum and International Operations Directorate effective October 1. In this USCIS leadership role, Ms. Scialabba will be responsible for overseeing the asylum and refugee programs, the administration of USCIS international operations and leading approximately 800 employees worldwide.

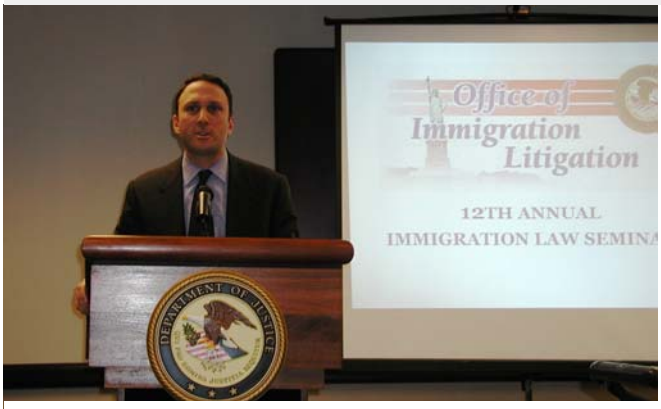
Before joining DHS, Ms. Scialabba most recently served as Chairman of the Board of Immigration Appeals since August 2002. She was appointed to the Board in March 1998. During her tenure, she had responsibility for day-to-day operations of the Board and managed the BIA reorganization and the streamlining of more than 120,000 cases.

"Lori Scialabba is a highly qualified and dedicated official with two decades of outstanding public service

at the Department of Justice," remarked Director Emilio Gonzalez. "She brings a wealth of management and immigration expertise to USCIS, and we are privileged to have her as part of our leadership team at USCIS."

Ms. Scialabba began her career with the Department of Justice in October 1985 through the Attorney General's Honor Program and served as a trial attorney for the former Immigration and Naturalization Service in Chicago, where she litigated deportation cases. From 1986 to 1989, she served as Assistant General Counsel for the Immigration and Naturalization Service (INS) Headquarters. In 1989, she joined the Office of Immigration Litigation, Civil Division at DOJ as a trial attorney. Ms. Scialabba held the position of Associate General Counsel at the INS from 1991 to 1994 when she was appointed Deputy General Counsel for the INS. She held that position until her appointment to the BIA in 1998.

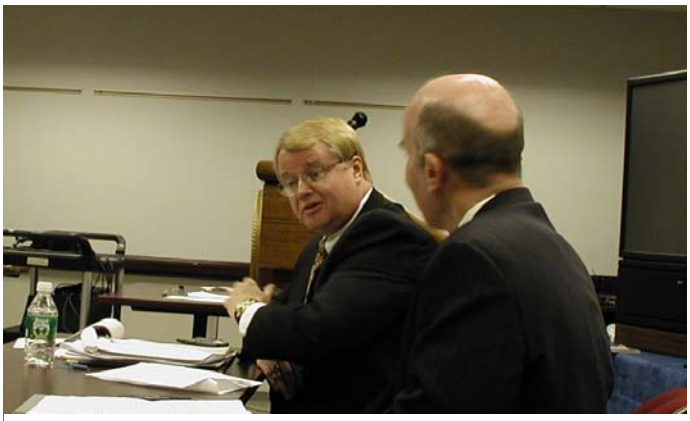
12TH ANNUAL IMMIGRATION LAW SEMINAR—Oct. 23-29, 2006



DAAG Jonathan Cohn welcomes class

Chris Fuller on Torture Convention

Patty Corrales on naturalization



Immigration Judges Christopher Grant and Jeffrey Romig

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **Chinese Asylum Applicant's Testimony That Wife Had Been Sterilized Found Not Credible**

In ***Gao v. Gonzales***, __F.3d__ 2006 WL 3028273 (1st Cir. Oct. 26, 2006) (Torruella, *Lynch*, Howard), the court affirmed the adverse credibility finding against a Chinese asylum applicant who claimed persecution on account of his spouse's forced sterilization. The court noted, in particular, the IJ's finding that petitioner had failed to establish that his wife had in fact been sterilized. However, the court also stated that in affirming the credibility finding, "we do not rely on any reasoning that mere debt to snakeheads establishes that an alien is primarily motivated by his financial situation and thus is not credible in his testimony about grounds for asylum. Poor aliens should not be deemed not credible simply because they pay large sums to enter the United States."

"Poor aliens should not be deemed not credible simply because they pay large sums to enter the United States."

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■ **First Circuit Holds That Petitioner Was Not A Persecutor And Was Credible**

In ***Castaneda-Castillo v. Gonzales***, __F.3d__, 2006 WL 2789159 (1st Cir. Sept. 29, 2006) (*Torruella,* Hug (9th Cir.), and Lynch), the court held that petitioner, a former officer in Peruvian army was not a "persecutor" because he had not "assisted or otherwise participated" in the persecution of others where the massacre of civilians by an army unit had occurred several miles away from petitioner's patrol, and the army unit had acted independently from petitioner whose assigned duty was to watch a trail to intercept Shining Path guerillas. The court also reversed the BIA's adverse credibility findings.

The petitioner was an officer in the Peruvian army in July 1985 when his patrol was involved in a significant operation to search and engage the Shining Path guerillas in a village named Llocllapampa. Petitioner's patrol was one of the two patrols assigned to block the escape routes from the village. Two other patrols were assigned to enter the village. Petitioner and his men, who wore Peruvian military uniforms, stationed themselves about three to five miles from the village on different sides of a path. Petitioner also stated that he could only communicate with his military base and could not contact the other patrols. Petitioner testified that when the two patrols entered the village they massacred civilians. Petitioner stated that he did not find out about the massacre until several weeks later when he heard it on the radio and also heard that one the lieutenants who led one of the patrols into the village had admitted to executing civilians. This massacre was subsequently investigated by the Peruvian Senate Human Rights Commission which found that sixty-nine civilians had been killed, including many women and children. The Commission concluded that the army's operation amounted to genocide but that petitioner's unit was not involved in any confrontations with fugitive civilians. The massacre was also documented by the 1985 Department of State Country Report on Human Rights. Petitioner and other officers were subsequently tried by a military court martial. Petitioner stated that he was found innocent of the charges of first degree murder, homicide, and abuse of authority.

Following the conclusion of the court martials, petitioner returned to duty and was promoted to the rank of captain. However, he and his family began to receive death threats from the Shining Path, and on one occasion explosives were set off in front of his parents' home. In 1989, the Shining Path allegedly attempted to kidnap petitioner's daughter, and in 1990 one of his neighbors who was also in the military was murdered in his home. Fearing for his life, petitioner and his family obtained a visitor's visa and on August 19, 1991, arrived in Miami, Florida.

Petitioner affirmatively applied for asylum in 1993 claiming that he and his family had been persecuted by the Shining Path. When that application was not granted in 1999, he was referred for a removal hearing. Petitioner then renewed his asylum request and testified in support of his claim. On October 4, 2004, the IJ concluded that petitioner was barred from applying for asylum because he had assisted in persecution of others, finding first that he was not credible. Alternatively, the IJ found that even if credible, petitioner and his family were still barred from applying for asylum. The BIA affirmed the adverse credibility finding and also found that even assuming credibility, petitioner had assisted or otherwise participated in the persecution of others and could not apply for asylum.

The First Circuit held that the adverse credibility findings were not supported by substantial evidence. The court reviewed each of the five reasons that the BIA provided for affirming the IJ's credibility finding. In particular, the court discounted the fact that during certain portions of the hearing, petitioner blinked his eyes at an "unusually rapid pace." The court also discounted the finding the petitioner was evasive on the issue of human rights abuses by the Peruvian military.

The court, then, after explaining that it did not have to remand the case to the BIA because both the IJ

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and BIA had considered the adverse credibility issue, held that under *Fedorenko* and its progeny, it was compelled to conclude that petitioner had not assisted or otherwise participated in the persecution of the villagers. The court found significant the fact that the mission of the military operation was directed at the Shining Path and not the civilians; that petitioner and his men we hidden three to five miles away from the village; that during the operation petitioner and his men did not see or hear any one, or fire any shots; that they never entered the village and never directly or indirectly participated in the massacre, that they lacked any control or authority over the rogue patrol; and that they did not know what had occurred in the village.

Accordingly, after finding that petitioner was not barred from applying for asylum, the court remanded the case to the BIA to consider petitioner's asylum claim.

The majority opinion drew and vigorous and lengthy dissent from Judge Lynch who wrote that the majority opinion "has not only erred, but it is at odds with the statutory mandate, the decisions of the Supreme Court, and our own prior case law." She would have found that substantial evidence supported the adverse credibility determination, which by itself was sufficient to support the BIA's conclusion that petitioner had not met his burden of showing that he had not assisted or participated in the persecution of others. Judge Lynch also criticized the majority for its failure to remand the case after it reversed the credibility finding, and for deciding in the first instance an issue of statutory interpretation, namely whether knowledge is a factor that must be considered in determining whether an alien "assisted or otherwise participated in" the persecution of others.

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■ **First Circuit Denies 212(c) Waiver For Petitioner Whose Guilty Plea And Removal Proceedings Post-Date The Effective Date Of AEDPA Not Eligible for 212(c) Relief**

In ***Cruz-Bucheli v. Gonzales***, __ F.3d__, 2006 WL 2709455 (1st Cir. Sept. 22, 2006) (Torruella, Selya, Dyk) (*per curiam*), the First Circuit upheld the denial of petitioner's motion to reconsider the BIA's previous denial of a discretionary waiver of inadmissibility under former section 212(c). The petitioner, a citizen of Colombia and an LPR since 1965, was convicted of several offenses including a May 23, 1996, conviction for drug trafficking crime. Based on the latter conviction, petitioner was placed in proceedings in July 1996, and found removable as charged. In 2005, petitioner fled a motion to reopen to apply for § 212(c) in light of *St. Cyr*. The BIA again found him ineligible for that relief.

"The proper date to be used in determining the applicability of § 440(d) is the date of conviction and that the date of the criminal conduct is irrelevant."

The First Circuit held that § 440 (d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 bars § 212 (c) relief to a petitioner whose criminal conduct pre-dated AEDPA, but whose guilty plea was entered one month after AEDPA had become effective. The court reaffirmed its view that the "the proper date to be used in determining the applicability of § 440(d) is the date of conviction and that the date of the criminal conduct is irrelevant." The court also held that *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), did not support petitioner's position because unlike Goncalves, who filed his application for a 212(c) waiver prior to AEDPA's effective date, petitioner applied after AEDPA's effective date.

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■ **First Circuit Rejects Due Process And Equal Protection Challenges To National Security Entry-Exit Registration System**

In ***Kandamar v. Gonzales***, __F.3d__, 2006 WL 2729954(1st Cir. Sept. 26, 2006) (Boudin, Selya, *Saris*), the First Circuit held that petitioner was not deprived of due process when he appeared at his NSEERS interview without counsel, insofar as he had been advised of the right to have counsel present. The petitioner a citizen of Morocco entered the U.S. as a visitor on April 28, 1999, but did not depart when his authorized stay expired. Following the publication of the NSEER notice requiring the registration of certain alien males from designated countries, petitioner appeared for registration at the DHS office in Boston. At the conclusion of the interview he was placed in removal proceedings as an overstay. Subsequently, petitioner sought to suppress the evidence that DHS had obtained during the interview, and challenged on constitutional grounds the NSEERS program. The IJ declined to rule on the constitutionality of the NSEERS rule, ordered petitioner removed, and denied the request for voluntary departure. On appeal the BIA affirmed, also declining to rule on the challenged rule's constitutionality. The BIA also held that that petitioner had not shown that the government's conduct was egregious, as to warrant the application of the exclusionary rule.

On appeal to the First Circuit petitioner challenged the denial of VD and the motion to suppress. Preliminarily, the court held that it lacked "authority to review a refusal to allow voluntary departure." The court rejected petitioner's contention that

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DHS's seizure of his passport, and consequently, his inability to prove eligibility for VD, amounted to a due process violation. "That claim will not succeed because voluntary departure is a 'privilege not a right," said the court.

The court also rejected the petitioner's claim that he was deprived of equal protection by being ordered to appear for the NSEERS interview on the basis of his nationality. The court explained that although aliens are entitled to equal protection of the law under the Fifth Amendment, "Congress may permissibly set immigration criteria based on an alien's nationality or place of origin." The court noted that Congress had given the Attorney General great latitude under INA 265 to prescribe special registrations of aliens. The court also noted that the Attorney General provided a rationale for establishing the NSEERS program and that every court to address the issue has rejected a challenge to NSEERS on equal protection grounds. The court emphasized that petitioner had been ordered removed because he had overstayed his visa and that "a claim of selective enforcement based on national origin is virtually precluded by *Reno v. ADDC*."

Although aliens are entitled to equal protection of the law under the Fifth Amendment, "Congress may permissibly set immigration criteria based on an alien's nationality or place of origin."

The court also held that it lacked jurisdiction to consider the petitioner's claim that he was subjected to coercive procedures in his NSEERS interview because the petitioner had failed to exhaust that claim before the BIA. The court explained that although in rare circumstance claims of due process violation may be exempted from the ordinary exhaustion requirements, petitioner's complaint involved a procedural error which the BIA had the authority to correct.

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■ **First Circuit Upholds Immigration Judge's Adverse Credibility Finding In Chinese Petitioner's Asylum Claim**

In ***Zheng v. Gonzales***, __F.3d__, 2006 WL 2729692 (1st Cir. September 26, 2006) (Boudin, Torruella, *Cyr*), the First Circuit upheld the IJ's denial of a Chinese petitioner's asylum and withholding of deportation claim based on religion. The IJ's adverse credibility determination, based on eleven findings of fact, was "well supported by substantial evidence" despite the IJ's incorrect analysis of the testimony in reaching one of his fact findings. The court concluded that there was no "realistic possibility" that the IJ would have reached a different conclusion absent the error. The court also rejected the petitioner's claim that the IJ was constitutionally obligated to remind him of the right to retain counsel at each and every subsequent hearing held in his case. The court found no deprivation of due process and noted that a contrary rule could result in endless continuances.

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■ **State Misdemeanor Drug Offense Can Amount To 'Aggravated Felony'**

In ***Berhe v. Gonzales***, 464 F.3d 74 (1st Cir. 2006) (Selya, Lipez, *Howard*), the court consolidated two separate petitions raising the question of whether a state misdemeanor drug offense can constitute an "aggravated felony." The court reaffirmed its holding in *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992), that "a state misdemeanor drug offense can amount to an 'aggravated felony' if that offense would have been a felony had it been charged under the federal drug laws."

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■ **Applicant Suffering From Post-traumatic Stress Disorder Not Eligible For Asylum On That Basis Alone**

In ***Ouk v. Gonzales***, 464 F.3d 108 (1st Cir. 2006) (Torruella, *Lynch*, Howard), the court held that Cambodian asylum applicant who had not been physically harmed during a political demonstration, had not shown past persecution, and that the fact that she suffers from post-traumatic stress disorder was not by itself proof that it was related to any persecution directed at petitioner. The court noted that "under the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm."

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■ **Statute Requires Exhaustion of Remedies And Theories Insufficiently Developed Before The BIA May Not Be Raised To Court**

In ***Silva v. Gonzales***, 463 F.3d 68 (1st Cir. 2006) (Boudin, *Lynch*, Howard), the court held that it lacked jurisdiction to review an asylum application untimely filed by a Colombian student who had violated his student status. The court also held that it could not consider petitioner's argument that it had suffered past persecution because on his appeal to the BIA he had failed to put forward a developed argument. "Under the exhaustion of remedies doctrine, theories insufficiently developed before the BIA may not be raised before this court," the court held.

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SECOND CIRCUIT

■ **Chinese Asylum Case Remanded To Determine Existence of Official Forced Sterilization Policy in Changle City or Fujan Province**

In ***Tian Ming Lin v. U.S. Dept. of***

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Justice, __F.3d__, 2006 WL 3060101 (2d Cir. Oct. 30, 2006) (Pooler, Sotomayor, Katzmann) (*per curiam*), the court remanded this asylum case to the BIA to determine whether evidence established that there is an official policy in Changle City, Fujan Province of forced sterilization of repatriated parents who have foreign-born children. The court noted that in *Shou v Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), it had been presented with documents that would undermine the Department of State's view of no evidence of forced sterilization. "We do not yet know whether these documents are authentic," said the court. "Because the Shou Yung Guo documents are too important to ignore," the court remanded the case to the BIA to determine whether they establish the existence of an official policy in Changle City or Fujan province generally "of forced sterilization of parents of two or more children, including parents whose children were born abroad."

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■ **Second Circuit Affirms Adverse Credibility Finding But Remands To BIA For Statutory Interpretation**

In ***Shao v. Board of Immigration Appeals***, __F.3d__, 2006 WL 2921939 (Calabresi, *Cabranes*, Wesley) (2d Cir. October 12, 2006), the Second Circuit upheld that the IJ's adverse credibility determination of a petitioner who sought asylum, withholding of removal, and CAT. However, the court remanded for the BIA to determine in the first instance under what circumstances, if any, a Chinese national who has two children in China, in apparent violation of that country's family planning policies, may, on that basis alone, establish the "well-founded fear of persecution" needed to support an asylum claim.

The petitioner argued that he was entitled to asylum because he had fled China to escape its family planning program and was at risk of being forcibly sterilized if he returned since he and his wife had already two children. The IJ found that petitioner was not credible and that his testimony was not sufficiently persuasive to meet his burden of proof for any of his desired forms of relief. The court affirmed the adverse credibility finding noting the inconsistencies in petitioner's statements regarding his wife's hiding place in China and the timing of her two pregnancies, as well as petitioner's unresponsive and evasive demeanor on certain lines of questioning, and certain implausible aspects of his story such as his escape from Chinese custody.

The court remanded the case to the BIA to determine, in the first instance, whether, having two children, in violation of China's family planning policy, may, on that basis alone, without any evidence of past persecution or threat of future harm, qualify an asylum seeker as "a refugee."

However, the court remanded the case to the BIA to determine, in the first instance, whether, having two children, in violation of China's family planning policy, may, on that basis alone, without any evidence of past persecution or threat of future harm, qualify an asylum seeker as "a refugee," as defined by 8 U.S.C. § 1101 (a)(42), i.e., "a person who has a well-founded fear that he or she would be forced" by the Chinese government "to abort a pregnancy or to undergo involuntary sterilization." "Neither BIA decisions nor our own cases provide an authoritative answer," to this question said the court. The court concluded that "because of the volume of similar claims being raised in this court, [we] respectfully request that the BIA resolve this matter as soon as possible," and noted that because of the number of similarly situated potential asylum seekers, "it would be unsound for each of the several courts of appeals to elaborate a potentially nonuniform body of law; only a precedential decision by the BIA or the Supreme Court of the United States can ensure the uniformity that seems especially desirable in cases such as these."

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■ **Case Remanded To Require IJ To Specify Legal Standard Applied In Determining Whether Applicant Suffered Past Persecution**

In ***Beskovic v. Gonzales***, __F.3d__, 2006 WL 3013090 (2nd Cir. October 24, 2006) (Calabresi, *Parker*, Lynch (sitting by designation)), the Second Circuit held that the IJ, in concluding that the treatment petitioner had experienced at the hands of Serbian police did not constitute persecution, did not identify the legal standard on which he relied in assessing whether the mistreatment in fact constituted past persecution. "We are stymied," said the court. The petitioner, a citizen of Serbia-Montenegro, entered the United States under the VWP. He later applied for asylum and claimed that the Serbian authorities had detained, interrogated and beaten him on two separate occasions because they believed he was associated with the Kosovo Liberation Army. The IJ found that the mistreatment petitioner received did not amount to persecution and denied his request for asylum, withholding, and CAT.

In finding that the IJ had not sufficiently explained why the mistreatment did not amount to persecution, the court suggested that the BIA ought to be "keenly sensitive" to the fact that a minor beating 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 ruled that in the

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event of a finding of past persecution, the government would have the burden of demonstrating changed country conditions. Since the IJ did not evaluate evidence of changed country conditions with respect to future persecution on the basis of petitioner's imputed political opinion, the court ruled that remand was proper since it is not clear from the record whether petitioner would be subject to political persecution in Serbia today.

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THIRD CIRCUIT

■ **Third Circuit Affirms Denial Of Habeas Brought By Albanian Fugitive Opposing Extradition For Murder**

In ***Hoxha v. Levi,*** __F.3d__, 2006 WL 2806824 (3d Cir. October 3, 2006) (*Fuentes*, Ambro, Greenberg), the Third Circuit upheld the denial of a habeas petition seeking to block extradition of petitioner who is facing murder charges in Albania. The court noted that there was sufficient evidence to support extradition even disregarding testimony that was later recanted. It next ruled that the question of whether a treaty remains in effect is a political question, and that the United States and Albania had continued to consider the old treaty valid. The court held that petitioner's CAT claim was not ripe because the Secretary of State has not yet made a final determination to extradite him.

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■ **Third Circuit Determines That Violating 18 U.S.C. § 922(a)(3) Is Not Illicit Trafficking In Firearms**

In *Joseph v. Attorney General,* __F.3d__, 2006 WL 2796256 (3d Cir. October 2, 2006) (Smith, *Weis* and Roth), the Third Circuit held that a conviction under 18 U.S.C. § 922(a)(3), which makes it illegal "for any person [other than a license holder] to transport into or receive in the State where he resides" any firearm purchased outside that State, was not an offense involving the trafficking of firearms. The court determined that §922(a)(3) did not contain any element of illegal trading or dealing in firearms, and that "the mere movement of an article in interstate commerce does not constitute 'trafficking.'" The petitioner, an LPR and a citizen of Trinidad, had served from 1988 to 1997 in the United States Army, including service in Operation Desert Storm and Operation Desert Shield. During his enlistment he had received numerous awards and was honorably discharged in 1987.

A separation agreement under Maryland law did not constitute "legal separation" under the automatic citizenship provision of former INA § 321(a).

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FOURTH CIRCUIT

■ **Legal Separation Under Former INA 321(a) Requires Formal Judicial End To Marriage**

In ***Afeta v. Gonzales***,__F.3d__, 2006 WL 3031387 (4th Cir. Oct. 26, 2006)(Kelley, Shedd; Widener, dissenting), the court deferred to the BIA's interpretation that a separation agreement under Maryland law did not constitute "legal separation" under the automatic citizenship provision of former INA § 321(a). The petitioner and his parents entered the United States as refugees in 1987, when petitioner was 10 years old. That same year, petitioner's father returned to Ethiopia. In 1994, when petitioner was 17, his mother became a naturalized United States citizen. In 1997, and in 1999, petitioner was convicted of several crimes and on that basis he was ordered removed from the United States. Petitioner claimed that he had become a U.S. citizen by operation of law when his mother naturalized because at that time his parents were "legally separated." The BIA disagreed, interpreting the statute as requiring that the minor alien's parents to have taken formal judicial steps to end their marriage at the time of naturalization. Here, the parents obtained a Maryland Judgment of Absolute Divorce in 2003. That document incorporated a separation agreement dated December 7, 1987. The BIA found that only judicially recognized marital separation are considered "legal" for the purposes of § 321(a).

The majority of the panel deferred to the BIA's interpretation finding it reasonable under *Chevron*. Judge Widener, dissenting, would have found that Maryland courts would consider the written separation agreement executed by petitioner's parents a "legal separation" under Maryland law.

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FIFTH CIRCUIT

■ **Fifth Circuit Upholds Denial Of Married Couple's Separate Asylum Claims**

In ***Tesfamichael v. Gonzales***, __F.3d__, 2006 WL 3012865(5th Cir. October 24, 2006) (*Jones*, Wiener, Prado), the Fifth Circuit upheld the BIA's findings that the female applicant's asylum "test country" was Eritrea, the country of which she was a citizen and where she had firmly resettled, and not Ethiopia, the country of which she was a national, and that as to Eritrea she did not demonstrate past persecution or a well-founded fear of future persecution. The court also upheld the BIA's findings that the male applicant did not demonstrate past persecution or a well-founded

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fear of persecution, where he feared only future prosecution. Finally, the court also upheld the BIA's finding that a married couple's fear of being separated upon removal to different countries does not constitute a basis for a well-founded fear of future persecution claim.

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■ Fifth Circuit Rejects Constitutional Challenges To Removal Of Criminal Lawful Resident Alien

In *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. August 28, 2006) (Jones, Wiener, and *Prado*), the Fifth Circuit denied the petition of a resident alien who, because of her criminal conviction, had been denied admission as an arriving alien when she attempted to return to the United States after a day trip to Mexico. The court noted that the "Fleuti Doctrine" of *Rosenberg v. Fleuti*, 374 U.S. 422 (1963) had been superseded by Congress when it amended 8 U.S.C. § 1101(a)(13) in 1996. The court additionally held that there was a rational basis for the provision rendering a lawful permanent resident categorically inadmissible to United States if she committed an offense of moral turpitude, and that the different treatment of lawful permanent residents and non-lawful permanent residents under that categorical provision did not violate the equal protection clause.

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■ Fifth Circuit Rules That Lying On A Naturalization Application Is A Crime Involving Moral Turpitude

In *Amouzadeh v. Gonzales*, __F. 3d__ 2006 WL 2831020 (Higginbotham, DeMoss, *Owen*) (5th Cir. October 5, 2006), the Fifth Circuit deferred to the BIA's interpretation that the unlawful procurement of naturalization in violation of 18 U.S.C. §1425(a) is a crime involving moral turpitude and that the petitioner is ineligible for concurrent relief under former INA §212(c) and current INA §240A(a).

The "Fleuti Doctrine" of *Rosenberg v. Fleuti*, 374 U.S. 422 (1963), had been superseded by Congress when it amended 8 U.S.C. § 1101(a)(13) in 1996.

The court further held that a waiver under §212(c) does not remove an aggravated felony conviction (drug trafficking) from a petitioner's record. The underlying aggravated felony conviction still exists to preclude cancellation of removal under §240 (a).

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■ Misdemeneaor Marijuana Conviction Under New York State Law 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 petitioner who sought cancellation of removal had not been convicted of an aggravated felony. The court held that because petitioner's earlier conviction under New York law was not final at the time of his later offense, he could not have been sentenced as a recidivist following his conviction for the criminal sale of marijuana in the fourth degree, and such offense did not qualify as a felony under federal law, so that it was neither a "drug trafficking crime" under the Controlled Substances Act (CSA) nor an "aggravated felony" under the INA.

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SIXTH CIRCUIT

■ Sixth Circuit Upholds Exclusion Of Improper Documents, And Finding Of Changed Country Conditions In Albania

In *Ramaj v. Gonzales*, __F.3d__, 2006 WL 3007338 (6th Cir. October 24, 2006) (Clay, *Gilman*, Oberdorfer (by designation)), the Sixth Circuit upheld the immigration judge's adverse credibility finding, deeming it a sufficient basis for denying petitioner's asylum application. The IJ, in finding petitioner not credible, had relied in inconsistencies found between the two asylum applications in the record and petitioner's testimony. The IJ also refused to admit into evidence a set of documents that petitioner proffered to show that he had been detained by the authorities and that he had received subsequent medical treatment. The IJ determined that had the documents had not been properly translated under 8 C.F.R. § 1003.33, and that there was no verification as required by 8 C.F.R. § 1287.6(b), that the signatures on the original documents were actually those of the persons who allegedly signed the documents. The court noted that the IJ might have erred in excluding the documents based on the verification requirement, but that the second reason he provided was a sufficient basis to uphold their exclusion.

The court also held that the IJ's reliance on two Department of State reports which showed that country conditions in Albania had improved constituted substantial evidence supporting the conclusion that country conditions in Albania have improved to the point that any presumption of a well-founded fear of future persecution is rebutted. Thus, said the court, any errors by the IJ on the issue of credibility or the exclusion of the evidence were harmless.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds That It Lacks Jurisdiction Over Particularly Serious Crime Determination And CAT Denial For Aggravated Felons

In ***Petrov v. Gonzales,*** __F.3d__, 2006 WL 2846451(7th Cir. October 6, 2006) (Posner, Evans, *Easterbrook*), the Seventh Circuit held that it lacked jurisdiction to consider the petitioner's fact-based challenge to the denial of his CAT petition. In doing so, it reaffirmed its position that a denial of CAT protection to a criminal petitioner covered by INA § 242(a)(2)(C) is reviewable only to the extent that the petitioner raises a constitutional claim or question of law within § 242(a)(2)(D). The court expressly rejected the petitioner's attempt to invoke *Tunis v. Gonzales*, 447 F.3d 547 (7th Cir. 2006), as authority for the proposition that the jurisdictional bar in § 242(a)(2)(C) does not apply in the CAT context. The court also reaffirmed its decision in *Tunis* that it lacked jurisdiction to review the discretionary finding that a conviction constituted a "particularly serious crime."

The case involved a Russian citizen, who was granted permission to enter the United States on parole, a reward for assistance that he had rendered in a criminal investigation. This status was renewed annually until he was convicted of conspiracy to bribe federal officials as part of an immigration fraud. He admitted helping at least four other persons obtain bogus "green cards," accepting more than $10,000 for his efforts. Petitioner was sentenced to 16 months' imprisonment, and his right to remain in the United States was not renewed. Nonetheless, he asked immigration officials to withhold removal; he also maintained that he would be subject to torture if returned to Russia. An IJ concluded that petitioner's conviction makes him ineligible for withholding of removal and that his return to Russia would be compatible CAT. The BIA dismissed his appeal.

The court also rejected petitioner's argument his due process rights had been violated because the IJ who heard his case, had been the ICE chief Counsel at the time petitioner was placed in removal proceedings. The court found no factual or legal support for this contention, nor did it find that the assignment of the particular IJ presented an "appearance of impropriety."

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■ Seventh Circuit Holds That BIA Failed To Adequately Explain The Rejection Of A Claimed Social Group

In ***Sepulveda v. Gonzales,*** __F.3d__, 2006 WL 2797816 (7th Cir. October 2, 2006) (*Posner*, Coffey, Easterbrook), the Seventh Circuit held that the BIA failed to explain how its rejection of the petitioner's claim for asylum based on his membership in a social group squared with the social group test that the BIA had adopted in *Matter of Acosta,* 19 I. & N. Dec. 211 (BIA 1985).

The petitioner, a former employee of the Colombian Attorney General's Office, claimed that he and his family would face a threat of persecution because he had access to confidential information concerning investigations of insurgents in Colombia. The IJ rejected the claim mainly on the ground that persecution on account of being an employee of the Attorney General's Office is not a ground for asylum. The BIA summarily affirmed.

The court noted that the IJ had misunderstood petitioner's claim as raising the question of whether petitioner's employment with the Attorney General's Office was an immutable characteristic. The court, however, read petitioner's claim as being whether former employees of that Office were a particular social group, and as from that group of former employees, petitioner could not resign and those former employees shared a common immutable characteristic.

Seventh Circuit held that the BIA failed to explain how its rejection of the petitioner's claim for asylum based on his membership in a social group squared with the social group test that the BIA had adopted in *Matter of Acosta.*

The court vacated the decision below, and remanded the case to the BIA for further proceedings.

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NINTH CIRCUIT

■ Ninth Circuit Holds That State Conviction For Taking Indecent Liberties With A Child Is Not "Sexual Abuse Of A Minor"

In ***United States v. Baza-Martinez***, __F.3d__, 2006 WL 2729691 (9th Cir. September 26, 2006), (*B. Fletcher*, Beezer, Fisher), the Ninth Circuit held that the petitioner's North Carolina conviction for taking indecent liberties with a child did not constitute "sexual abuse of a minor" under Ninth Circuit law because the statute did not clearly prohibit conduct that is either physically or psychologically harmful.

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■ Ninth Circuit Upholds Constitutionality Of REAL ID Act

In ***Puri v. Gonzales,*** __F.3d__, 2006 WL 2773841 (9th Cir. September 28, 2006)(Thompson, *Tashima*,

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Callahan), the Ninth Circuit rejected a constitutional challenge to the REAL ID Act, finding that Congress provided an adequate substitute for habeas proceedings. Although the REAL ID Act eliminated the district court's habeas jurisdiction over orders of removal, it retained that jurisdiction exclusively with the court of appeals. The court also held that because the petitioner had independently filed a petition for review (later dismissed by the Ninth Circuit), the district court did not err when it did not transfer the habeas petition to the court of appeals in the "interest of justice" as provided in 28 U.S.C. § 1631.

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■ Ninth Circuit Holds Terrorist Petitioner Ineligible For CAT Withholding And Ineligible For Asylum For Fraud, But Grants Deferral Of Removal To Iran

In ***Hosseini v. Gonzales***, __F.3d__, 2006 WL 2773095 (9th Cir. Sept. 28, 2006) (Canby, Gould, Bea), the Ninth Circuit held that petitioner, an Iranian citizen, had engaged in terrorist activities when he raised funds and recruited for the Iranian dissident group Mujahedin-e Khalq (MEK), a designated terrorist organization. The petitioner entered the United States as a student but did not attend school and overstayed his visa. He later filed two asylum applications using different names and A numbers and was twice ordered deported in absentia. Subsequently, he came to the attention of the Joint Terrorism Task Force because he had been a client of an individual of interest who was helping members of MEK commit immigration fraud. When taken into custody he successfully sought reopening and applied for asylum, withholding, and adjustment under the INA, and withholding and deferral under CAT. Petitioner denied being a member of MEK and claimed that his life would be threatened and that he would be tortured in Iran because he had been labeled as a Mujahedeen terrorist. The IJ denied all applications and the BIA affirmed.

The court explained that under *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004), "it is impermissible to find that an alien is a danger to the security of the United States solely because he engaged in terrorist activity."

Preliminarily, the court held that it lacked jurisdiction to consider the denial of adjustment because the BIA alternatively denied it as a mater of discretion. The Ninth Circuit then held that the BIA's discretionary of asylum was neither "manifestly contrary to law nor an abuse of discretion because there was uncontested evidence that petitioner had committed fraud throughout his immigration proceedings. The court however, reversed the denial of withholding under former INA § 243 (h) because the BIA had failed to articulate sufficiently the bases for its finding. The BIA had denied withholding because of its finding that petitioner "is a danger to the security of the United States." The court explained that under *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004), "it is impermissible to find that an alien is a danger to the security of the United States solely because he engaged in terrorist activity." To render an alien ineligible on this ground "there must be a finding supported by substantial evidence that links the terrorist activity 'with one of the criteria relating to our national security.'" Because the BIA did not make this determination, the court vacated and remanded the withholding of removal claim.

The court, however, affirmed the denial of withholding of deportation under CAT because substantial evidence supported the BIA's finding that petitioner is engaged or is likely to engage in terrorist activity, namely fund-raising and recruiting. The court noted that *Cheema's* requirement that terrorist activities be linked to a finding that petitioner was a danger to the security of the United States did not apply to withholding under CAT. Here, the court found that even though the evidence of fund raising and recruitment was far from overwhelming "we cannot say that it is so insignificant that it 'compels a contrary result' to that reached by the BIA." The evidence showed that had sold newspapers at a rally and that he had offered to make telephone calls to MEK embers to facilitate recruiting a confidential informant to whom he was speaking.

Finally, the court reversed BIA's ruling that petitioner was ineligible for CAT deferral. The court found that petitioner had presented sufficient evidence to prove that Iranian officials would be able to identify him as a person involved with MEK. The court noted that reports from Department of State indicate that once Iranian authorities identity petitioner as a MEK supported he would likely be tortured. The court thought that the fact that petitioner had been identified by the IJ and the BIA as a strong supporter of MEK "almost certainly will catch the attention of Iranian officials."

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■ Ninth Circuit Rules That The BIA Correctly Dismissed Petitioner's Untimely Motion to Reconsider

In ***Mendez Alcaraz v. Gonzales***, __F.3d__, 2006 WL 2796499 (Ferguson, *Kleinfeld,* Graber), (9th Cir. October 2, 2006), the Ninth Circuit held that equitable tolling did not excuse the petitioner's failure to file his motion to reconsider within the thirty-day deadline for filing such motion.

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The court rejected the petitioner's argument that because he was living in Mexico after his removal hearing, he was "unaware" of two decisions that undermined his aggravated felony classification.

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■ **Ninth Circuit Rules It Lacks Jurisdiction To Review Discretionary Denial Of Adjustment Of Status And Rejects Due Process Claim**

In *Bazua-Cota v. Gonzales,* __F.3d__, 2006 WL 2854382 (9th Cir. October 3, 2006) (O'Scannlain, Graber, Clifton) (*per curiam*), the Ninth Circuit held that it lacked jurisdiction over the BIA's discretionary denial of adjustment of status. The court ruled that although it retains jurisdiction over petitions for review that raise colorable constitutional claims or questions of law, the petitioner's argument that the BIA and the IJ violated his right to due process by failing to properly weigh the equities and hardship before denying his adjustment of status application "was an abuse of discretion challenge re-characterized as a due process violation."

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■ **Ninth Circuit Amends Decision But Denies Government's Panel Petition Urging That Petitioner Bears Burden To Show He Is Not Barred From Cancellation By Domestic Violence Conviction**

In *Cisneros-Perez v. Gonzales*, __F.3d__ , 2006 WL 2819961 (9th Cir. October 4, 2006) (*Thompson*, Berzon; Callahan, dissenting), the Ninth Circuit removed language from its June 26, 2006, decision (451 F.3d 1053) to the effect that only "the most convincing proof" could establish, where a state statute expressly addresses domestic violence, that a more general offense is a crime of domestic violence. The majority continued to hold that there was insufficient documentation to establish that the petitioner's conviction necessarily was for a crime of domestic violence, and denied the government's panel petition urging that the petitioner bears the burden to show cancellation eligibility.

The petitioner's argument that the BIA violated his right to due process by failing to properly weigh the equities and hardship before denying his adjustment of status application "was an abuse of discretion challenge re-characterized as a due process violation."

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■ **Ninth Circuit Holds Petitioner's Convictions For Battery Against The Parent Of His Children Do Not Constitute Convictions For Crimes Involving Moral Turpitude**

In *Galeana-Mendoza v. Gonzales* __F.3d__ (9th Cir. October 6, 2006) (*Thompson*, Berzon; Callahan (concurring)), the Ninth Circuit held that because a domestic battery conviction, pursuant to California Penal Code § 243(e), does not include an injury requirement or another element evidencing grave acts of baseness or depravity, such a conviction does not qualify as a crime categorically involving moral turpitude, noting that its holding was consistent with the BIA's decision in *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). In *Sanudo*, the BIA held that the California offense of domestic battery was not categorically a crime involving moral turpitude. The court also held that the documents of record were insufficient to qualify the petitioner's conviction as a conviction for a crime involving moral turpitude under a modified categorical analysis. In a concurring opinion, Judge Callahan explained that the court did not hold that the application of the modified categorical approach in another case could not result in a determination that the particular crime involved moral turpitude.

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■ **Ninth Circuit Remands For BIA To Determine Whether Petitioner's Fourth Degree Assault Conviction Constitutes "Child Abuse"**

In *Velasquez-Herrera v. Gonzales*, __F.3d__, 2006 WL 2979646 (9th Cir. October 19, 2006) (Wallace, Wardlaw, Fisher) (*per curiam*), the Ninth Circuit granted the petition for review and remanded the case because the BIA "has twice touched upon the issue of child abuse without authoritatively defining the term, and that the BIA's two definitions are not consistent with each other." Thus, the court remanded to allow the BIA to issue a precedential decision defining child abuse for purposes of section 237(a)(2)(E)(i) and applying that definition to the petitioner's conviction for fourth degree assault.

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■ **Ninth Circuit Reverses Conviction Of Petitioner For Willful Failure To Comply With Terms Of Release Under Supervision**

In *United States v. Nguyen,* __F.3d__, 2006 WL 2959318) (9th Cir. October 18, 2006) (Reinhardt, McKeown, *Clifton*), the Ninth Circuit reversed defendant's conviction under 8 U.S.C. § 1253(b). The defendant, an alien whose deportation has been complicated by his Vietnamese nationality, was convicted of violating the term of supervision ordering him to "commit no crimes" based upon proof that he was convicted of two Alaska state misdemeanors following pleas of *nolo contendere*. The court of appeals held that judgments based

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on *nolo contendere* pleas were inadmissible under the Federal Rules of Evidence to prove the underlying crimes. The court held that, without proof of crimes, there was insufficient evidence to support the federal conviction and reversed.

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TENTH CIRCUIT

■ **Tenth Circuit Holds Petitioner Not Automatically Naturalized, Was Not Deprived Of Due Process By Mental Incompetence, And Was Properly Denied Withholding Of Removal**

In ***Brue v. Gonzales***, __F.3d__, 2006 WL 2831216 (10th Cir. October 5, 2006) (Briscoe, *McKay*, and Brorby), the Tenth Circuit rejected the petitioner's claim that he was automatically naturalized when his adoptive parents tendered a citizenship application on his behalf. The petitioner was born in Vietnam and entered the U.S. as an LPR in 1973. Petitioner's adoptive parents filed a naturalization application on his behalf in 1985, but they also indicated that at the time petitioner was not residing with them but was place in a juvenile residential treatment facility because he was mentally disturbed. That application was returned "nonfiled" with a notation indicating that petitioner was "not residing with parents in legal custody." The court held petitioner did not acquire citizenship because the statute, 8 U.S.C. 1433, permitted naturalization only where the child was in the custody of the adoptive parents. Here, the court found that, even if automatic acquisition of citizenship was permissible under the statute, petitioner was not eligible because he was not in the legal or physical custody of his adoptive parents.

The court also denied his due process claim that his bipolar disorder prevented him from understanding the nature of the proceedings because unlike criminal proceedings, "removal proceedings may go forward against incompetent petitioners." The court also upheld the finding that the petitioner's criminal conviction was for a "particularly serious crime," rendering him ineligible for withholding of removal.

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ELEVENTH CIRCUIT

■ **Finding Of Frivolity Against Asylum Applicant Vacated Because IJ Did Not Make Specific Findings**

In ***Mingkid v. U.S. Atty. Gen.***, __F.3d__ 2006 WL 3025826 (11th Cir. Oct. 26, 2006) (Birch, Pryor, Fay), the Eleventh Circuit, in an issue of first impression, held that it had the jurisdiction to review finding that aliens had filed a "frivolous" asylum application even though applications had not been timely filed and petitioners were not challenging the denial of asylum.

The petitioners, two brothers from Indonesia, who had entered the United States as visitors in June 2001 and overstayed their visa, applied for asylum when they were placed in removal proceedings. They claimed that they had been subject to persecution and feared future persecution on account of their Christian beliefs. The petitioners testified separately regarding their persecution claim. At the conclusion of the hearing, the IJ denied their applications for asylum as untimely because they were filed more than one year after their arrival in the United States. The IJ then denied withholding after finding that the brothers completely lacked credibility. Finally, the IJ determined that petitioners had filed a frivolous asylum application given the discrepancies in petitioners' testimony. The BIA affirmed and adopted the IJ's decision.

On appeal to the Eleventh Circuit, petitioners conceded that they were not eligible for asylum but contended that the BIA had erred in its frivolity finding. The government argued, on the other hand, that petitioners' case was nonjusticiable due to mootness. Preliminarily, the court held, in an issue also of first impression, that the IJ had the jurisdiction to make a frivolity finding notwithstanding the fact that petitioners' applications were time-barred. "Indeed," said the court, "such prohibition conceivably could allow an alien to file an untimely application for asylum that contained deliberately fabricated material elements without fear of the sanctions associated with a frivolity determination." The court then found that the frivolity determination was not moot because "vacating such a determination incontrovertibly leaves [petitioners] in better position that they would be without our relief."

On the merits, the court stated that the regulations at 8 C.F.R. § 208.20, provide that an application for asylum is frivolous "if any of its material elements is deliberately fabricated." Additionally, the rule requires that such a finding shall only be made where the IJ is satisfied that the applicant has had a sufficient opportunity to account for the discrepancy. Here, the court found that the IJ decision had failed to discuss any material element of petitioners' asylum application that was deliberately fabricated. "More than an adverse credibility finding is needed to support a finding of frivolousness," reiterated the court.

Additionally, the court found that the IJ had not given petitioners sufficient opportunity to account for the "specific concerns" upon which the frivolity finding rested. Accordingly, the court vacated the frivolity finding and remanded the case to the BIA.

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DOMESTIC VIOLENCE CRIME UNDER ARIZONA LAW NOT A CRIME OF VIOLENCE UNDER INA

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volving intentional conduct. The Ninth Circuit concluded that petitioner's offense was not a crime of violence "[b]ecause the relevant Arizona statute permits conviction when a defendant recklessly but unintentionally causes physical injury to another, and because the petitioner's documents of conviction do not prove he intentionally used force against another."

The petitioner, a citizen of Mexico, was admitted into the United States an LPR in 1990. In 1992 he was convicted of a theft offense in Arizona. He subsequently twice violated the terms of his probation and was sentenced to jail for "twelve months at half time." In 2002 and 2003, petitioner was convicted of "domestic violence/assault" in violation of Arizona Revised Statutes 13-1203 and 13-3601. On the basis of these convictions DHS charged petitioner with removability as having been convicted for a crime of domestic violence (the 2003 conviction now at issue), two crimes involving moral turpitude (the 2002 and 2003 convictions), and an aggravated felony (the theft by control of property conviction). An IJ sustained all three charges of removal, found petitioner ineligible to apply for a discretionary waiver of deportation, and denied cancellation of removal. The BIA then adopted and affirmed the IJ's decision.

In *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 588 (9th Cir. 2005) (vacated), a Ninth Circuit panel held that petitioner's class two misdemeanor domestic violence offense constituted a crime of violence under 18 U.S.C. § 16(a) and rendered him removable under § 237(a)(2)(E)(i). Because that conviction occurred in 2003, after the 1996 repeal § 212(c), petitioner was also found ineligible to apply for a discretionary waiver of deportation. Finally, the panel held that because petitioner's theft offense was an aggravated felony, he was ineligible for cancellation of removal. Subsequently, the Ninth Circuit ordered rehearing en banc to resolve an inter- and intra-circuit conflict as to whether, under *Leocal* crimes involving the merely reckless use of force can be crimes of violence.

The *en banc* Ninth Circuit agreed with the other circuits that the reasoning of *Leocal*, that using force negligently or less not a crime of violence, "extends to crimes involving the reckless use of force." *See Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005); *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005). Here, the court found that the offense underlying petitioner's 2003 misdemeanor domestic violence conviction was not a categorical crime of violence under §16 (a), or, by extension, a categorical crime of violence under INA § 237(a)(2)(E)(i).

"Men do no beat their wives by accident. Blind to this truth the majority ignores the realities of domestic violence and disregards Congressional intent."

The court then applied a "modified categorical approach" to determine whether a specified set of documents in the administrative record showed that the petitioner's conviction entailed an admission to, or proof of, the necessary elements of a crime of violence. The court found that three documents, namely the complaint, the judgment, and the pro forma plea agreement, did not show that petitioner used force "intentionally" or "knowingly," as opposed to "recklessly." The court declined the government's suggestion that under *Ventura*, it should have remanded the case to the BIA for further development of the record. The court found *Ventura* inapplicable.

The court then remanded the case to the panel for the issuance of an opinion regarding the remaining issues.

Judge Kozinski, in his concurring and dissenting opinion, agreed with the majority that the government had not shown that petitioner had committed a crime of violence, but would have remanded the case to the BIA for reconsideration in light of the court's opinion. He acknowledged that the *Ventura* and *Thomas* decisions were not on all fours because they involved questions where the agency had special expertise. However, he pointed out that in *Ventura*, the Court also held that an independent ground for remand would be where an opinion "changes the legal landscape, giving the government an opportunity to 'present further evidence.'" "Having twice been summarily reversed for failing to remand to this very agency, I would tread especially lightly in this area. Discretion, in this case, is not only the better part of valor, but the better part of justice as well."

In a dissenting opinion, Judge Wardlaw would have found that "common sense, statutory language, and precedent" compelled the conclusion that petitioner's domestic violence conviction necessarily involved the use of force against another person and consequently was a crime of violence. "Men do no beat their wives by accident" she noted. "Blind to this truth," she wrote, "the majority ignores the realities of domestic violence and disregards congressional intent." The dissent disagreed with the majority's interpretation of *Leocal*, noting that it was unclear whether *Leocal* extends beyond DUI offenses. The dissenters would also have remanded the case to the BIA "in light of the new rule announced by the majority," to allow the government to further develop the record and to apply the modified categorical approach.

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INSIDE OIL

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versity of Pennsylvania School of Law and Cambridge University (where he earned an M.Phil. in International Relations.) Paul clerked for the Honorable Ruggero J. Aldisert on the U.S. Court of Appeals for the Third Circuit. Prior to joining OIL, Paul was a litigation attorney at White & Case LLP in Washington, DC.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

NOTED

Because we are at war, we must govern our conduct by the law of war, and we must acknowledge that some of the limitations of the civilian justice system simply do not hold.

In order to defend the security of our citizens, we must have the ability

■to detain terrorists and remove them from the battlefield;

■to collect from them the vital intelligence that enables us to capture their associates and break-up future plots;

■and to create effective and fair procedures that will allow us to prosecute and punish captured terrorists for their war crimes.

The legal doctrines directed at achieving these ends are not the same as those we would employ during peacetime. The Supreme Court has recognized this in several of its decisions, including its recent *Hamdan* decision. And Congress has endorsed this view with the Military Commissions Act of 2006.

From remarks delivered by Attorney General Gonzales to the JAG Leadership Summit on October 23, 2006.

INDEX TO FEDERAL COURTS*

IMMIGRATION LAW SEMINAR

The Office of Immigration Litigation will be repeating its 12th Annual Immigration Law Seminar on November 27-December 1, 2006, in Washington, D.C. This is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law.

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INSIDE OIL

A warm welcome to the following new OIL Attorneys:

Gladys M. Steffens-Guzmán is a graduate of Fordham University and the University of Puerto Rico Law School. After law school, she clerked for the Puerto Rico Court of Appeals. Thereafter, she clerked for Judge Daniel R. Domínguez in the United States District Court for the District of Puerto Rico.

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From L to R: Ana Zablah, Quhyn Bain, Dalin Holyoak, Liza Murcia, Paul Stone, Ada Bosque, Joseph O'Connell, Stacey Young, Stephen Elliott, Gladys Steffens-Guzman, Julie Iversen

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.

Office of Immigration Litigation

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

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