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SUPREME COURT TO HEAR WHETHER "THEFT OFFENSE" INCLUDES "AIDING AND ABETTING"

The Supreme Court has granted the Solicitor General's petition for certiorari in ***Gonzales v. Duenas-Alvarez***, No. 05-1629, *cert. granted* (Sept. 26, 2006), raising the question of whether a theft offense, which is an "aggravated felony" under the INA § 101(a)(43)(G), 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting. In *Duenas-Alvazez*, an unpublished decision, the Ninth Circuit applied its holding in *Penuliar v. Gonzales*, 435 F.3d 961 (2006), where it held that aiding and abetting is not encompassed by the generic definition of "theft offense" under § 101(a)(43)(G). The Solicitor General contends that the Ninth Circuit is incorrect and that it conflicts with decisions of other courts of appeals.

> There are approximately 8000 aliens who have either been charged with removability or been ordered removed in the Ninth Circuit on the basis of a conviction for a "theft offense."

The respondent, Duenas-Alvarez, is a native and citizen of Peru and a lawful permanent resident since 1998. In 2002, he was charged with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). The information alleged that respondent willfully and unlawfully drove or took a 1992 Honda Accord without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to three years of imprisonment.

In February 2004, DHS instituted removal proceedings against respondent charging him with removability under INA § 237(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude, and under INA § 237(a)(2)(A)(iii), for having been convicted of an aggravated felony—in particular, a theft offense for which the term of imprisonment is at least one year, INA § 101(a)(43)(G).

The IJ ruled that the California offense of unlawful driving or taking of a vehicle was not a crime involving moral turpitude but was a theft offense (and thus an aggravated felony). The IJ ac-

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STREAMLINING RULE VIOLATED WHEN BIA REDUCED VD PERIOD

In ***Padilla-Padilla v. Gonzales***, __ F.3d__, 2006 WL 2614167 (Tashima, Callahan, *Fletcher)* (9th Cir. Sept. 13, 2006), the Ninth Circuit held, *inter alia*, that when the BIA issues a streamlined order, it is required under the regulation "to affirm the entirety of the IJ's decision, including the length of the voluntary departure period."

The petitioners entered the United States illegally in March 1989. They have two United States citizen children. On the advice of counsel, petitioners filed an application for asylum shortly before the effective date of IIRIRA. That application was not granted and after IIRIRA's enactment petitioners were placed in removal proceedings. Subsequently,

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NINTH CIRCUIT FINDS DUE PROCESS VIOLATION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

In ***Granados-Oseguera v. Gonzales***, __F.3d__, 2006 WL 2720611 (9th Cir. Sept. 15, 2006), the Ninth Circuit held that the failure of petitioner's counsel to seek judicial review of a discretionary denial of cancellation, and the failure to timely file a motion to reopen "prevented petitioner from reasonably presenting his case, thereby denying him due process."

The petitioner, a Mexican citizen, entered the United States illegally in 1984, and subsequently married and had two United States citizen children. In August 1993 he filed an affirmative asylum application, probably to obtain work authorization. That application was not granted and three years later, in September 1997, he was referred for a removal hearing. On April 29,

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Highlights Inside

STREAMLINING REG VIOLATED

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the IJ denied the application for asylum and granted them 60 days of voluntary departure. The IJ also denied petitioners' request to terminate removal proceedings and be placed in deportation proceedings where they would have been eligible to apply for suspension of deportation. On appeal, the BIA affirmed without opinion, but reduced the period of voluntary departure to 30 days. Petitioners then moved to reopen their case based on ineffective assistance of counsel. That motion was denied. Petitioners filed separate petitions for review from both BIA decisions which were later consolidated by the court.

The court held that petitioners were not required to exhaust their claim that the cancellation provisions violate international law, finding that the BIA does "not have jurisdiction to consider this claim."

The Ninth Circuit first held, consistent with its ruling in *Lara-Torres v. Ashcroft*, 338 F.3d 968 (9th Cir. 2004), that petitioners' due process rights were not violated by the ineffective assistance of counsel. The court noted, nonetheless, that petitioners' counsel Mr. Walter Pineda, was "well known" to the court and "others" and that he was currently charged in a separate proceeding before the State Bar of California, with twenty-nine counts of incompetence in representing clients. Nevertheless, the court affirmed the denial of the motion to reopen based on ineffective assistance of counsel.

Second, the court held that the BIA had violated the streamlining regulation at 8 C.F.R. § 1003.1(e)(4), and thereby abused its discretion when it affirmed without opinion the IJ ruling and further ordered a reduction of the voluntary departure period. In reaching the merits of this issue, the court rejected several arguments made by the government that it lacked jurisdiction to review the BIA's discretionary decision to reduce the period of voluntary departure and petitioner's contentions on appeal.

The court determined that petitioners were not challenging the manner in which discretionary authority was exercised by the BIA but rather they were challenging the existence of that authority. Therefore the question was one of law and thus subject to judicial review. The court also rejected the government's failure to exhaust argument, finding that petitioner's claim raised a constitutional question, namely whether the practical effect of IIRIRA's provisions regarding cancellation violated due process of law. "The BIA could not have addressed [petitioners'] due process claim" and therefore they were not required to exhaust it. Similarly, the court held that petitioners were not required to exhaust their claim that the same cancellation provisions violate international law, finding that the BIA does "not have jurisdiction to consider this claim."

Finally, the court said that it does not require an alien to exhaust administrative remedies "on legal issues based on events that occurred after briefing to the BIA has been completed." Here, the BIA's order was issued after briefing and petitioners should not have been expected to anticipate in their briefing that the BIA "would violate its own streamlining regulations," said the court.

The court also rejected the government's contention that petitioners were required to exhaust their claims by filing a motion to reconsider. "The failure to request such discretionary relief does not deprive us of jurisdiction," held the court. The court noted, however, that it could in appropriate circumstances prudentially require exhaustion "in order to develop a proper record, prevent deliberate bypass of the administrative scheme, or allow the agency to correct its own mistake."

On the merits of the claims the court held that the cancellation of removal provisions, namely the combined effect of the ten-year requirement and the stop-time rule, didn't violate petitioners' substantive due process rights because, under *Fiallo v. Bell*, Congress had a "facially legitimate and bona fide" reason for drawing the lines where it did. "The combination of Congress' authority to specify a period of time before an alien becomes eligible for cancellation of removal, and its rationale for adopting the stop-time rule contained in § 1229b(d)(1), is enough to satisfy the due process clause," held the court. The court also held that these provisions did not violate international law because petitioners were "unable to point to any binding obligation under international law that has been violated." Finally, the court held that the BIA's decision violated the streamlining regulation because under 8 C.F.R. § 1003.1(e)(4) "it was required to affirm the entirety of the IJ's decision, including the length of the voluntary departure period."

Having decided that the BIA violated the streamlining regulations, the court was "unsure whether [petitioners] can still have their benefit of voluntary departure order" because they never moved either to stay voluntary departure or to stay removal." Nonetheless, the court remanded the case to the BIA to determine whether *Contreras-Aragon*, decided pre-IIRIRA, would apply to petitioners. In that case, the court held that the period of voluntary departure does not begin to run until the court issued its mandate.

By Francesco Isgro, OIL

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SUMMARIES OF RECENT BIA DECISIONS

■Board Reverses IJ's Determination That Alien's CIMT Conviction Qualifies As A "Purely Political Offense" Exception

In ***Matter of O'Cealleagh***, 23 I&N Dec. 976 (BIA 2006), the Board held that in order for an offense to qualify for the "purely political offense" exception to the ground of inadmissibility under INA § 212(a)(2)(A)(i)(I), based on an alien's conviction for a crime involving moral turpitude, the offense must be completely or totally "political." The alien was convicted in 1990 in Northern Ireland of aiding and abetting the murders of two British corporals in 1988, causing grievous bodily harm, and false imprisonment. The conviction stemmed from an incident in which a crowd of people, attending an Irish Republican Army ("IRA") funeral, pulled the two corporals out of their vehicle, savagely beat them, forced them into a taxi, and drove them to an area where they were forced out of the car and shot. The criminal court found that the alien had been "close to the car when the mob [was] breaking into it and dragging out the soldiers and beating them," and that he was "an active participant in the onslaught." Although the alien was sentenced to life in prison, he served eight years in a prison designed for political prisoners and was released pursuant to the Good Friday Accord in April 1998, following an agreement between the British government and the IRA. The alien obtained lawful permanent resident status in the United States in 2001, after disclosing the arrest in his adjustment application. In February 2004, the alien applied for admission to the United States as a returning resident alien, and was placed into removal proceedings on the basis of his 1990 conviction in Northern Ireland. The Immigration Judge determined that the alien was not inadmissible based on the finding that his conviction was for a "purely political offense," and was therefore expressly excepted from INA § 212(a)(2)(A)(i)(I). The Board rejected that determination, finding that the alien was inadmissible: 1) where he properly conceded that his offense, substantively regarded, was not "purely political," and; 2) where there was substantial evidence that the offense was not fabricated or trumped-up and therefore did not qualify from a procedural perspective as a "purely political offense." Because the circumstances surrounding the alien's conviction in Northern Ireland for aiding and abetting the murder of the two corporals reflected a sincere effort to prosecute real lawbreakers, the Board concluded that his conviction did not constitute a "purely political offense," and thereby did not fall within such exception to the ground of inadmissibility.

> In order for an offense to qualify for the "purely political offense" exception based on an alien's conviction for a crime involving moral turpitude, the offense must be completely or totally "political."

■A § 237(a)(1)(A) Waiver Remains Available Whether The Misrepresentation Made At Time Of Admission Is Innocent Or Not

In ***Matter of Fu***, 23 I&N Dec. 985 (BIA 2006), the Board held that section 237(a)(1)(H) of the INA authorizes a waiver of removability under INA § 237(a)(1)(A) based on charges of inadmissibility at the time of admission under section 212(a)(7)(A)(i)(I) (for lack of a valid immigrant visa or entry document), as well as under section 212(a)(6)(C)(i) (for fraud or willful misrepresentation of a material fact), where there was a misrepresentation made at the time of admission, whether innocent or not. In so concluding, the Board examined the statutory predecessor to section 237(a)(1)(H), and found that Congress intended such waiver to be available to an alien who believed he was admissible and made an innocent misrepresentation at the time of entry. Because a subsequent amendment to that provision of the INA did not indicate any intent by Congress to repudiate that interpretation, the Board held that a waiver under INA § 237(a)(1)(A) remains available to an alien, regardless of the intentional or innocent nature of the misrepresentation made at the time of entry.

■Short Delays By Overnight Delivery Services, While Not The Norm, Do Not In And Of Themselves Constitute "Rare" Or "Extraordinary" Events Excusing An Untimely Appeal

In ***Matter of Liadov,*** 23 I&N Dec. 990 (BIA 2006), the Board determined that, although it may certify a case to itself pursuant to regulation where exceptional circumstances are present, a short delay by an overnight delivery service is not a rare or extraordinary event that would warrant consideration of an untimely appeal on certification. The Board noted that regulations governing appeals to the Board, the statute governing administrative appeals in asylum cases, and the authority of the Supreme Court all require that filing deadlines be strictly enforced and thus that appeals be timely filed. Further, meaningful filing deadlines are critical to the smooth and fair administration of the Board and, in any event, neither the INA nor the regulations grant it authority to extend the 30-day time limit for filing an administrative appeal. Although the aliens in this case missed their appeal deadline by only one day, the Board found that they did not establish any "rare" or "extraordinary" events that "required waiting until the last day or [two] of the mandated filing period and relying so completely on the delivery company's overnight

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SUPREME COURT TO HEAR AG FELON CASE

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cordingly found that respondent was removable from the United States and ordered him removed to Peru. The BIA dismissed the appeal and held that "respondent's conviction for auto theft constitutes an aggravated felony."

While respondent's appeal was pending in the Ninth Circuit, that court decided *Penuliar.* It subsequently applied that holding to respondent's appeal holding that "a violation of section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition."

The Solicitor General contends that the Ninth Circuit rule is incorrect because the Supreme Court in *Taylor* made it clear that a "generic definition of an offense is "the sense in which the term is now used in the criminal codes of most states." The Solicitor General argues that "in the criminal codes of all States, as well as in the criminal title of the United States Code, the definition of 'theft' —and, indeed, of every substantive criminal offense — includes aiding and abetting, because the acts of an aider and abettor are deemed to be the acts of a principal as a matter of law, such that a defendant who aids and abets the commission of a particular offense is guilty of that offense. Aiding and abetting theft is therefore encompassed by the generic definition of 'theft offense' in the INA." For that reason, the government further contends, the fact that California Vehicle Code § 10851(a) (West 2000) makes it a crime, not only to engage in an unauthorized taking or stealing of a vehicle, but also to be 'a party or an accessory to or an accomplice in the * * * unauthorized taking or stealing,' is entirely unremarkable and does not take the offense outside the generic definition."

The Solicitor General also argues that the Ninth Circuit's rule that aiding and abetting liability is not included in the generic definition of a "theft offense" is "inconsistent with the principle applied by the First, Second, Seventh, and Eighth Circuits in analytically indistinguishable circumstances."

Finally, the Solicitor General brought to the Court's attention the fact that there are approximately 8000 aliens who have either been charged with removability or been ordered removed in the Ninth Circuit on the basis of a conviction for a "theft offense," and that if the ruling were left unreviewed it would have a substantial effect on the administration of the immigration laws.

The case has been scheduled for argument on December 5, 2006.

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BIA DECISIONS

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guarantee." Accordingly, the Board dismissed the appeal as untimely.

■Board Clarifies *C-Y-Z-* And Declines To Extend Availability Of Asylum To Applicants Who Are Not Legally Married Under Chinese Law.

In ***Matter of S-L-L-,*** 24 I&N Dec. 1 (BIA 2006), the Board reaffirmed its holding in *Matter of C-Y-Z-,* 21 I& N Dec. 915 (BIA 1997) (holding that an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of INA § 101(a)(42)). However, it clarified the intended scope of that holding in two respects. First, the Board limited its holding to those asylum applicants who were, in fact, opposed to a spouse's abortion or sterilization. An applicant who encouraged or supported a spouse's abortion or sterilization can not, in good faith, claim to have suffered harm amounting to persecution for purposes of asylum. Second, the Board declined to extend the holding in *C-Y-Z-* to an applicant whose claim was that his girlfriend or fiancee was subjected to a forced abortion. In so concluding, the Board recognized that a forced abortion imposed on a married couple is action explicitly directed against both husband and wife for violation of the government-imposed family planning law, and such government action therefore amounts to persecution of both parties to the marriage. The Board also noted that requiring marriage was a practical and manageable approach in drawing the line as to which applicants were eligible for asylum, as it took into account the language and purpose of the statutory definition in light of the general principles of asylum law. It further observed that, in the absence of a legal marriage, evaluating the existence of the requisite nexus was problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement. The Board determined that unmarried applicants claiming persecution related to a partner's coerced abortion or sterilization may nevertheless qualify for asylum if they demonstrated that they had been persecuted for "other resistance to a coercive population control program" within the meaning of INA § 101(a)(42). The alien in this case, however, was unable to do so because "merely impregnating one's girlfriend does not constitute an act of resistance under the family planning laws within the meaning of" INA § 101(a)(42). Board member Pauley filed a concurring opinion.

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REAL ID ACT — Frequently Asked Questions

Scope of Review Over BIA's Prejudice Findings

Question

Does the Court have jurisdiction to review the agency's denial of a due process claim for lack of prejudice 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 constitutional claims notwithstanding other applicable judicial review bars. One question that has arisen recently is whether a court may review, as a "constitutional" claim, the agency's denial of a due process challenge on *prejudice* grounds.

Answer

(1) Simply because the alien has alleged a due process claim does not mean that all of the issues raised by such a claim are reviewable. If there is a *separate* factual or discretionary component to the due process analysis, that specific inquiry would be unreviewable. *See* 151 Cong. Rec. H2813, 2873 ("When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements.").

(2) Thus, whether a "no prejudice" finding would be reviewable depends on the nature of the finding by the agency. If the prejudice determination is guided by the agency's evaluation of facts or its discretionary judgment it is not reviewable because it involves the exercise of discretion.

Example 1 - Alien claims that his prior counsel was ineffective in presenting his case for cancellation of removal. BIA finds that petitioner's claim fails for lack of prejudice because the record shows that he is nowhere close to establishing the necessary showing of hardship to qualify. The BIA's prejudice finding in this case is unreviewable.

Example 2 - BIA denied an ineffective assistance of counsel claim because Petitioner failed to meet his evidentiary burden under of *Matter of Lozada* of establishing an agreement with prior counsel to file an appeal of the immigration judge's decision. The BIA's prejudice finding in this case is unreviewable because it would require review over the BIA's factual findings.

Example 3 - BIA denied an ineffective assistance of counsel claim because it found that the prior counsel's failure to put on a particular witness in support of Petitioner's relief application was a strategic decision that did not rise to the level of ineffective assistance of counsel. This seems to involve a mixed question of law and fact where there are not distinct factual and legal components to the analysis. It is probably a reviewable question.

Example 4 - counsel failed to inform a misinformed client regarding: (1) time/date of hearing; and (2) what was required to establish eligibility for discretionary relief. Reviewable?

Ninth Circuit Orders Regarding *Dearinger*

Question

How should we respond if the Ninth Circuit dismisses a petition for review, and in its order of dismissal states that the alien can file a petition for writ of habeas corpus in district court under *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000)?

> The Ninth Circuit's *Dearinger* orders are erroneous because district courts lack habeas jurisdiction to review removal orders, and the statute provides for no exceptions (other than expedited removal orders).

Background

In the REAL ID Act, Congress clarified that district courts lack habeas corpus jurisdiction to review removal orders. Even after the REAL ID Act, however, the Ninth Circuit is regularly issuing orders dismissing untimely petitions for review and noting that aliens can file habeas petitions in district court under *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000), in cases where the alien raises a *Dearinger*-type claim (*i.e.*, my attorney was ineffective because he filed a petition for review on the 31st day). These orders are erroneous because district courts lack habeas jurisdiction to review removal orders, and the statute provides for no exceptions (other than expedited removal orders).

Answer

If you receive such an order in your case, please notify Dave Kline or Papu Sandhu as soon as you receive the order. In such cases, the Government may seek to file a motion to reconsider the Ninth Circuit's order and ask for full briefing on the question.

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SECOND CIRCUIT CREDIBILITY CASE LAW

In the past few months OIL has taken over responsibility for representing the Government in petitions for review in immigration cases in the Second Circuit. As a result, OIL attorneys are starting to brief Second Circuit cases for the first time. In addition, Second Circuit cases are being outsourced to U.S. Attorney's Offices, as are briefs in other Circuits. The Second Circuit has developed its own case law regarding review of adverse credibility and other decisions. If you have a Second Circuit case you should be aware of this case law. What follows is a summary of Second Circuit case law and rules regarding adverse credibility findings prepared by a Judge of the Second Circuit for the recent Immigration Judge Conference conducted in Washington, D.C.

OIL disagrees with much of this case law, but you should be aware that it is the law of the Circuit. There are two caveats about this case law, however.

First, much of this law has been corrected and superseded by the REAL ID Act of 2005. In REAL ID Congress amended the Immigration and Nationality Act to correct case law in the circuits (like much of the case law below) restricting the kinds of evidence upon which immigration judges may rely in finding an alien not credible, or ineligible for relief for failure to meet his burden of proof, or failure to corroborate his claim. The REAL ID Act became effective as of May 11, 2005. Therefore the case law below pertains *only* to cases in which the application for relief or protection (asylum, withholding of removal, protection under the Convention Against Torture, cancellation of removal, etc.) was filed *before* May 11, 2005. Cases with applications filed *after* May 11, 2005, come under the new law created by the REAL ID Act that is favorable to immigration judges.

If your case has an application filed after May 11, 2005 (is a REAL ID Act case), and involves a decision that the alien failed to meet his burden of proof, did not provide adequate corroboration, was not credible, or a ruling the alien did not show persecution "on account of" one of the necessary grounds contact OIL to discuss whether the case should be defended or remanded.

OIL disagrees with much of the Second Circuit case law on credibility, but you should be aware that it is the law of the Circuit.

If you are in OIL or briefing a case under OIL supervision, bring such a case to the attention of your reviewer. If the IJ and BIA did not discuss the effect of the REAL ID Act and show its effect in your case, it may be that your case should be remanded rather than defended, for a decision by the agency on this question in the first instance.

Second, prior to the REAL ID Act as well as after its enactment, the proper way for a court to review an adverse credibility finding is not to focus on what the immigration judge did or didn't do, but to ask whether the alien has shown, on the record compiled before the immigration judge, that the evidence *compels* the conclusion that the alien is telling the truth (i.e., requires this conclusion and none other). *See* 8 U.S.C. § 1252(b)(4)(B) ("the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"), codifying *INS v. Elias-Zacarias*, 502 U.S. 478, 481 and n.1 (1992) (same). Properly applied, this is a difficult standard of review for an alien to satisfy. However, much of the credibility case law in the courts ignores or functionally reverses this standard of review.

Credibility Case Law In The Second Circuit For Pre-REAL ID Act Applications (Filed Before May 11, 2005):

1. Explicit credibility finding. There must be an explicit adverse credibility finding. *See Moussa Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000).

2. Specific reasons. An adverse credibility finding must be supported with specific, cogent reasons based on the record. *See Cao He Lin v. DOJ*, 428 F.3d 391 (2d Cir. 2005); *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). If one of the reasons is the witness's demeanor, the decision must say so, and state what aspects of the witness's demeanor persuaded the IJ not to believe the witness.

3. Inconsistencies

a. There must really be an inconsistency, rather than just slightly different or incomplete ways of expressing the same thought (or discrepancies in translation).

b. Before relying on an inconsistency, the IJ must have confronted the witness with what appears to be an inconsistency, and afford the witness a chance to explain it. *See Ming Chi Xue v. BIA*, 448 F.3d 102 (2d Cir. 2006) (uncertain whether this remains the law under the REAL ID Act).

c. If the witness provided an explanation for an inconsistency and the IJ did not find it persuasive, the IJ must make it clear that the explanation was considered, *see Ming Chi Xue v. BIA*, 448 F.3d 102 (2d Cir. 2006), and state why the IJ was not persuaded by it, *see Zhi Wei Pang v. BCIS*, 448 F.3d 102 (2d Cir. 2006) (uncertain whether this remains the law

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PRE-REAL ID ACT CREDIBILITY CASE LAW IN THE SECOND CIRCUIT

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under the REAL ID Act).

d. If the IJ relies on an inconsistency between the applicant's testimony and an airport interview, the IJ must have considered the circumstances under which the airport interview was conducted, and may rely on the inconsistency only if the IJ determined that the report of the airport interview was accurate and that the interview was conducted under circumstances that were not coercive. *See Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004) (uncertain whether this remains the law under the REAL ID Act).

e. If the IJ relies on an inconsistency between the applicant's testimony and statements in the asylum application, the IJ must have ascertained the circumstances under which the application was prepared, and inconsistent statements in the asylum application must be fairly attributable to the applicant, rather than the preparer. *See Pavlova v. INS*, 441 F.3d 82 (2d Cir. 2006) (uncertain whether this remains the law under the REAL ID Act).

f. An IJ may not rely on an inconsistency between the applicants' testimony and an omission in the asylum application unless the matter was something it was reasonable and likely for the applicant to have included if true. *See Pavlova v. INS*, 441 F.3d 82 (2d Cir. 2006) (uncertain whether this remains the law under the REAL ID Act).

g. An IJ may not rely on an inconsistency between the applicant's testimony and a State Department country report "in general" and must consider how the alleged conditions, especially changed conditions, would affect the applicant specifically. *See Cheikh Tambadou v. Gonzales*, 446 F.3d 298 (2d Cir. 2006); *Tian-Yong Chen v. INS*, 359 F.3d 121 (2d Cir. 2004) (uncertain whether this remains the law under the REAL ID Act).

h. An IJ may not rely, even partially, on trivial inconsistencies to find an alien not credible. *See Latifi v. Gonzales*, 430 F.3d 103 (2d Cir. 2005) (clearly superseded by the REAL ID Act).

> In the Second Circuit, if the IJ rejects a claim based on religious persecution, the IJ may not rely on the applicant's lack of knowledge of details of the professed doctrine.

4. Vagueness. An IJ may not find an alien failed to meet his burden of proof or was not credible because his testimony was vague, without asking for clarification and details. *See Jin Shui Qui v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003) (uncertain whether this remains the law under the REAL ID Act).

5. Corroboration. If the IJ has found an alien not credible for lack of corroboration, the IJ must explain why it was reasonable to believe that the missing documents were available to the applicant, make some inquiry on this point, and if the applicant explains why the corroboration was not produced, the IJ must state why he rejects the explanation. *Moussa Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000) (uncertain whether this remains the law under the REAL ID Act).

6. Implausibility. A blanket statement that some point in the testimony is implausible cannot support an adverse credibility finding; the IJ must explain at least briefly why it is implausible. *See Xiao Ji Chen v. U.S. DOJ*, 434 F.3d 144 (2d Cir. 2006); *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003) (uncertain whether this remains the law under the REAL ID Act);

7. Conjecture. An IJ may not speculate about matters not in evidence, e.g., state his or her own views about likely medical diagnoses or procedures. See *Zhi Wei Pang v. BCIS*, 448 F.3d 102 (2d Cir. 2006).

8. False Documents. An IJ may not rely on documents that were falsified to avoid persecution or escape from a country that persecutes. *See Rui Ying Lin v. Gonzales*, 445 F.3d 127 (2d Cir. 2006) (uncertain whether this remains the law under the REAL ID Act).

9. Authentication. An IJ should avoid rejection of documents for lack of authentication, unless the IJ cites to some evidence that shows that the document is a forgery or otherwise not authentic. *See Cao He Lin v. DOJ*, 428 F.3d 279 (2d Cir. 2000).

10. Religious Claims. If the IJ rejects a claim based on religious persecution, he may not rely on the applicant's lack of knowledge of details of the professed doctrine. *See Yose Rizal v. Gonzales*, 442 F.3d 84 (2d Cir. 2006).

11. Aggregate Assessment. The IJ and BIA must reckon with all of the positive evidence in the record supporting the claim, including testimony and documents. *See Cao He Lin v. DOJ*, 428 F.3d 391 (2d Cir. 2005); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006).

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Egyptian Petitioner's Past Experiences In Egypt Did Not Amount To Past Persecution

In ***Awad v. Gonzales***, __F.3d__, 2006 WL 2640211 (Torruella, *Lynch,* Howard) (1st Cir. Sept. 15, 2006), the First Circuit found that a Coptic Christian from Egypt had not suffered persecution when during his early youth he had been pushed around and threatened with injury, slapped on two occasions when he was in the army, and where he had witnessed instances of unfair treatment against fellow Christians.

The petitioner claimed that as a Coptic Christian he feared persecution in Egypt on the basis of his religious beliefs. The IJ denied him asylum, withholding of removal, and CAT relief finding that the incidents petitioner described did not rise to the level of past persecution and fell far short of establishing that it was more likely than not that he would suffer future persecution. In particular the IJ noted that petitioner's willingness to return to Egypt twice after international travel, both times without incident. On appeal, the BIA specifically noted that just because "conditions are difficult for millions of Coptic Christians in Egypt does not suffice to establish that [Awad] meets the legal requirements of our immigration laws."

The First Circuit preliminarily held that it has defined persecution to "encompass[] more than threats to life or freedom but less than mere harassment or annoyance." Here, the court found that the incidents suffered by petitioner amounted to being pushed around and threatened with injury once during his early youth, being slapped on two occasions while in the army in the early 1990s, witnessing several instances of unfair treatment against fellow Christians, and learning that a close friend's sister had been sexually assaulted and forced to convert. On these facts, said the court, petitioner "cannot say that the mistreatment he suffered extends so far beyond 'harassment and annoyance' so as to compel a reasonable fact-finder to find past persecution." The court also found that substantial evidence supported the BIA's determination as to future persecution. The court observed, that petitioner's evidence simply showed that of the millions of Coptic Christians living in Egypt, some have been subject to persecution and that is not a sufficient showing that it is more likely than not that he will be subjected to religious persecution upon his return. The court considered the State Department's Religious Freedom Report finding that "for the most part, members of the non-Muslim minority worship without harassment" and noted the fact that petitioner twice returned to Egypt after international travel, both times without incident, which further supported the BIA's conclusion.

Of the millions of Coptic Christians living in Egypt, some have been subject to persecution and that is not a sufficient showing that it is more likely than not that he will be subjected to religious persecution upon his return.

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■ First Circuit Holds That Asylum Applicant Not Credible And Reaffirms BIA's Streamlining Authority

In ***Jean v. Gonzales***, __F.3d__, 2006 WL 2507218 (Torruella, *Lynch*, Howard) (1st Cir. August 31, 2006), the First Circuit held that inconsistencies in the petitioner's testimony about the incidents that formed the basis of his claim, discrepancies between his written statements and oral testimony, and the petitioner and his wife's willingness to return voluntarily to Haiti on multiple occasions amply supported the IJ's adverse credibility determination and undermined the petitioner's contention that he experienced persecution and had a well-founded fear of future persecution. Relying upon *Albathani v. Ashcroft*, 318 F.3d 365, 377-79 (1st Cir. 2003), the court also stated that it had "long since rejected arguments challenging" the BIA's streamlining procedures.

The petitioner, who had entered the United States as a visitor on October 23, 2002, did not depart when his visa expired. Instead one year later on October 22, 2003, he filed an asylum application based on his opposition to the Aristide government and membership of a particular social group, namely his family. The IJ found that petitioner's "testimony was materially inconsistent with his written asylum claim and was contradicted by certain aspects of his supporting documents." The IJ also found it incredible that petitioner and his wife would have voluntarily returned to Haiti several times after having received threats from members of Lavalas-Aristide party, and concluded that even if petitioner had been credible, he still would have failed to establish a well-founded fear of persecution in Haiti. The BIA affirmed and adopted the IJ's ruling.

The First Circuit held that the IJ"s adverse credibility determination was "amply supported by the record." In particular, the court noted that petitioner had offered inconsistent testimony about many of the incidents that formed the basis of his claim and included several incidents in his written application that he did not report to police, including the threatening calls. The court observed that petitioner's and his wife's willingness to return voluntarily to Haiti on multiple occasions undermined the contention that he had experienced persecution and had a well-founded fear of persecution there.

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■ First Circuit Holds That Conviction For Conspiracy To Commit Bank Fraud Is An Aggravated Felony

In ***Conteh v. Gonzales***, __F.3d__, 2006 WL 2406942 (*Selya,* Howard, Hug) (1st Cir. August 22, 2006), the First Circuit , applying a modified categorical approach, sustained the BIA's determination that the petitioner was removable as an aggravated felon under 8 U.S.C. §§ 1101(a)(43)(M) & (U), based upon his conviction for conspiracy to commit bank fraud. The court expressly disagreed with the Ninth Circuit that, for purposes of determining aggravated felony status in a civil immigration case, each essential element of the charged offense must have been proven beyond a reasonable doubt. That standard, the court explained, impermissibly elevates the government's burden above the "clear and convincing" standard required by the INA. The court further held that it lacked jurisdiction to review the petitioner's fact-based challenge to the BIA's denial of withholding of removal, despite the REAL ID Act's limited conferral of jurisdiction for constitutional and legal claims.

The petitioner, a native of Sierra Leone, entered the United States as a visitor and in 1997 was granted asylum. However, a year later, he was indicted on four counts stemming from his alleged involvement in a bank-fraud scheme. Subsequently, a jury found him guilty on two counts, including a conspiracy count. The presentence investigation report (PSI) concluded that petitioner participation in the conspiracy had caused an attempted loss of over $54,000. Eventually petitioner was ordered removed to Sierra Leone based on his aggravated felony conviction under § 1101 (a)(43)(M) & (U). The IJ also denied petitioner's application for withholding because he had failed to show a clear probability of persecution. The BIA affirmed the removal order and also held that the evidence established that the conspiracy offense constituted an aggravated felony. The BIA also affirmed the denial of withholding based on the dearth of evidence and changed country conditions. Finally, the BIA denied petitioner's motion to reopen to apply for adjustment and for a waiver of inadmissibility for failure to make a prima facie showing of eligibility.

The First Circuit first held that it had jurisdiction to consider whether petitioner's conspiracy offense was an aggravated felony because the issue presented a pure question of law. The court then declined petitioner's "invitation to transplant the categorical approach root and branch [from the Ninth Circuit] - without any modification whatever - into the civil removal context." The court explained that the categorical approach devised by the Supreme Court in *Taylor* and *Shepard*, emanated from Sixth Amendment concerns which are "crucial in the criminal context but entirely irrelevant in the removal context (which is civil in nature)." More importantly, the court noted that the use of an unmodified categorical approach "elevates the government's burden in civil proceedings" from a clear and convincing evidence of removability to "proof beyond a reasonable doubt." Accordingly, the court held that "in removal proceedings, a modified approach should prevail."

The court noted that the use of an unmodified categorical approach "elevates the government's burden in civil proceedings" from a clear and convincing evidence of removability to "proof beyond a reasonable doubt."

The court then held that where a removal order is grounded upon a conviction under a generic conspiracy statute, "the government must demonstrate, by clear and convincing evidence mined from the record or conviction, that 'the substantive crime that was the conspiratorial objective . . . qualifies as an aggravated felony.'" Here, the court found that the BIA had improperly relied on the PSI report and petitioner's testimony for the purpose of proving the facts underlying the offense of conviction. However, it found that the BIA had properly relied on the indictment and the final judgment including the restitution order. The court held that the facts gleaned from these documents "compelled the conclusion that the offense charged as the conspiratorial objective qualify as a conviction for an aggravated felony under INA § 101(a)(43)(U) and renders the petitioner removable under INA § 237(a)(2)(A)(iii)." The court then held, agreeing with the government's argument, that under the REAL ID Act, it lacked jurisdiction to challenge the fact-based denial of withholding of removal. The court noted that petitioner's challenge to the denial of withholding was a "classic claim of factual error" because petitioner argued that the BIA had misconstrued the evidence and had relied too heavily on a vague report of changed country conditions.

Finally, the court affirmed the BIA's finding that petitioner was statutorily ineligible for adjustment. The court noted that it would have lacked jurisdiction if the denial of adjusted had been based on discretion. Here, it found that petitioner had raise a question of law when he challenged the BIA's holding that he had failed to make a prima facie showing of eligibility either for adjustment or a waiver of inadmissibility.

Judge Hug, of the Ninth circuit, sitting by designation, would have applied the Ninth Circuit's categorical approach and found that petitioner had not been convicted of an aggravated felony.

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First Circuit Denies Albanian Petitioner's Asylum Claim Based On Political Opinion

In *Tota v. Gonzales*, __F.3d__, 2006 WL 2336988 (Boudin, *Torruella,* Howard) (1st Cir. August 14, 2006), the First Circuit upheld the IJ's denial of asylum and withholding of removal claims to an applicant from Albania who claimed persecution on account of political opinion. The court found that substantial evidence in the record showed that there was no indication of systematic political persecution, no known cases of detention because of political reasons, nor any evidence that the Socialist Party had sought retaliation against Democratic Party members or those returning to Albania. The court held that "substantial evidence culled from the State Department asylum claims report, specifically tailored to the discussion of political persecution of DP members by the Socialist government," supported the IJ's finding that the government met its burden of rebutting petitioner's presumptive well-founded fear of persecution and found no basis to overturn the IJ's denial of asylum. Furthermore, in rejecting the petitioner's argument that the IJ failed to consider the record as a whole, the court stated that "in the absence of clear evidence to the contrary, courts presume that [government agencies] have properly discharged their official duties."

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SECOND CIRCUIT

■ The REAL ID Act Does Not Compel The Court To Transfer To The Circuit Where The Immigration Proceedings Were Held

In *Moreno-Bravo v. Gonzales*, __F.3d__, 2006 WL 2615254 (2nd Cir. Sept. 12, 2006) (*Cardamone*, McLaughlin, Pooler), the Second Circuit held that the venue provision under INA § 242(b)(2), 8 U.S.C. § 1252 (b)(2) is not jurisdictional and therefore court could consider merits of a habeas petition appeal converted to petition for review, instead of transferring the case to the Fifth Circuit where his removal hearing had been completed.

The petitioner, a Peruvian citizen and an LPR since 1998, was ordered removed by an IJ in Oakdale, Louisiana, as an alien who had been convicted of an aggravated felony. Petitioner then collaterally attacked the final order by filing a habeas petition in the Eastern District of New York, contending that his criminal conviction for second-degree robbery required at least five years of imprisonment to qualify as an aggravated felony under the pre-IIRIRA statutory provision. The district court denied the petition and petitioner filed an appeal to the Second Circuit. While the appeal was pending the REAL ID Act was enacted.

> The court held that INA § 242(b)(2), as amended by the REAL ID Act, was a venue provision and not a jurisdictional mandate.

The Second Circuit preliminarily converted the habeas appeal into a petition for review pursuant to § 106(c) of the REAL ID Act, thus "vacating as a nullity the district court's decision below. "The court then held that the statutory language at § 242(b)(2), as amended by the REAL ID Act, requiring that a petition for review be filed "with the court of appeals of the judicial circuit in which the immigration judge completed the immigration proceedings," was a venue provision and not a jurisdictional mandate. The court rejected the government's contrary interpretation as being "unpersuasive . . . given the statutory and legislative context of the REAL ID Act and § 1252 and Congress' careful attention to matters of jurisdiction, and in the face of a strong presumption in favor of judicial review of final removal orders, such an oblique method for creating a jurisdictional limitation would be a highly disfavored construction."The court then declined to dismiss or transfer the petition, noting that the petitioner had been in custody for more than three years. On the merits, the court held that under the law in effect when he pled guilty to his crime of second-degree robbery, his offense constituted an aggravated felony. The court noted that the applicable statute had been amended several months before petitioner's guilty plea and that the new definition applied regardless of when the conviction was entered.

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■ Second Circuit Upholds Bar On Adjustment Of Status For Failure To Depart Voluntarily

In *Iouri v. Ashcroft,* __F.3d__, 2006 WL 2615320 (Sotomayor, Raggi, *Hall*) (2d Cir. September 13, 2006), the Second Circuit held that the period of voluntary departure begins to run from the time the BIA enters its order, and that an alien "who wishes to stay the period of voluntary departure must explicitly ask for such a stay."

The petitioners, citizens of Ukraine, sought review of a BIA decision denying their application for asylum, withholding, and CAT, and the denial of a motion to reopen to apply for adjustment on the basis of an approved immediate relative visa petition. An IJ did not find credible petitioner's testimony that he had been subject to religious persecution and denied the requested reliefs. However, the IJ granted voluntary departure and warned petitioners of the consequences of failing to depart. The BIA summarily affirmed the IJ's decision and granted a new period of voluntary departure. Subsequently, the BIA denied petitioners' the motion to reopen because they had remained in the United States beyond the period granted for voluntary departure and were, therefore, statutorily barred from

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seeking adjustment of status. Petitioner then filed a petition for review and requested a stay of deportation. They did not request a stay of their voluntary departure period.

On the merits of the asylum claim, the court affirmed the denial of asylum holding that the IJ had "clearly set forth specific and cogent reasons for his adverse credibility finding." The court declined to consider petitioners' argument that the IJ and the BIA should have considered the passage of time and their advanced age in assessing credibility, because that issue had not been raised to the BIA and therefore they had failed to exhaust their administrative remedies.

"An alien who wishes to stay the period of voluntary departure must explicitly ask for such a stay."

The court also held that the BIA properly denied the motion to reopen. First, the court held that the period of voluntary departure begins to run from the time the BIA enters its order. The court rejected petitioners' contention that it should follow the Ninth Circuit decision in *Contreras-Aragon*, noting that it was an "old law" case. Second, the court held that it had the authority to stay a voluntary departure order pending consideration of a petition for review. However, the court further held, as a matter of first impression, that "an alien who wishes to stay the period of voluntary departure must explicitly ask for such a stay." The court declined to follow the decision in *Desta* where the Ninth Circuit held that the filing as a motion to stay removal before expiration of voluntary departure, was construed a motion to stay the voluntary departure period. The court explained that voluntary departure is a privilege. "An alien granted voluntary departure has a choice - leave within the specified time period and retain the benefits afforded, or remain, litigate the claim to the very end, but bear the consequences of having decided not to depart." The court also declined petitioner's request to adjudicate *nunc pro tunc* petitioners' request for a stay of voluntary departure. The court explained that nunc pro tunc is a far-reaching equitable remedy whose application was not warranted in this case. However, the court suggested to petitioners to ask the ICE Field Office Director to exercise his discretion to extend voluntary departure so that they can adjust their status to lawful permanent residents.

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■ **Second Circuit Upholds BIA's Reversal Of Immigration Judge's Adjustment Of Status Grant To A Youthful Offender**

In ***Wallace v. Gonzales***, __F.3d__, 2006 WL 2588018 (McLaughlin, Cabranes, Sack) *(per curiam)* (2d Cir. September 8, 2006), the Second Circuit held that the BIA has authority to consider a juvenile offense as an adverse factor when making an adjustment of status determination. The IJ had granted adjustment of status to a citizen of Trinidad who had pled guilty to robbery in the first degree and had received a "Youthful Offender Adjudication" under New York Law. Following an appeal by DHS, the BIA reversed the IJ and denied adjustment as a matter of discretion in light of petitioner's criminal history. The court held that it lacked jurisdiction to review the BIA's adjustment of status determination because the BIA's determination of the significance of the juvenile offense was a discretionary judgment.

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■ **Second Circuit Upholds Denial of Chinese Petitioner's First Motion To Reopen Asylum Proceedings But Reverses Denial Of His Second Motion To Reopen**

In ***Shou Yung Guo v. Gonzales***, __F.3d__, 2006 WL 2588089 (Meskill, Sack, *B.D. Parker*) (2d Cir. September 6, 2006), the Second Circuit, in a consolidated petition for review of two orders denying motions to reopen, held that the BIA did not abuse its discretion in denying the motion to reopen asylum proceedings to pursue a CAT claim, since the factual allegations for her claim (fear of forced sterilization for violations of China's one-child policy) were the same for her asylum claim and those allegations were found not credible. However, the court held that the BIA abused its discretion in denying a second motion to reopen, because the BIA overlooked previously unavailable documents that were "self-evidently" material to petitioner's claim of changed country conditions. One of the documents reflected the adoption of a new policy where foreign-born children would be counted in determining violations of the one-child policy. "It is not apparent to us that the BIA ever really paid any attention to the documents," said the court.

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■ **Second Circuit Holds That Immigration Judge Erred By Applying Heightened Standard To Asylum Claim And Aliens Failed To Exhaust Other Claims**

In ***Karaj v. Gonzales***, __F.3d__, 2006 WL 2551326 (*Pooler*, Sotomayor, Korman (sitting by designation)) (2d Cir. September 5, 2006), the court held that the IJ erroneously used the higher standard for withholding of removal when considering petitioners' asylum claim. The court rejected the government's contention that petitioners had not raised this issue to the BIA

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and therefore had not exhausted their administrative remedies. The court, while reaffirming that INA § 242(d)(1), 8 U.S.C.§1252(d)(1), was a jurisdictional provision, noted at the same time that "we continue to refine our view of the specificity with which issues and arguments must be raised to the IJ and the BIA."

Here, the court found that that petitioners' brief to the BIA stated the correct standard and cited cases which delineated the differing standards for asylum and withholding of removal, and thereby had raised and exhausted that issue. The court, however, found that the petitioners had failed to exhaust their claims as to withholding of removal and the Convention Against Torture.

> "We continue to refine our view of the specificity with which issues and arguments must be raised to the IJ and the BIA."

The court rejected petitioners' contention that because the BIA had issued a decision under its streamlined procedure under 8 C.F.R. § 1003.1(e)(4), they had sufficiently exhausted their withholding and CAT claims.

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■ Second Circuit Holds That An IJ's Finding Of Removability Is An Order Of Removal

In ***Lazo v. Gonzales***, __F.3d__, 2006 WL 2528553 (2d Cir. Sep. 1, 2006), the Second Circuit joined the majority of circuits in concluding that the need for an "order of removal" is satisfied by an IJ's finding of removability. The court declined to address the government's alternative argument that the BIA is empowered to issue orders of removal in the first instance, as an "administrative officer to whom the Attorney General has delegated the responsibility," within the meaning of INA § 101(a)(47), 8 U.S.C. § 1101(a)(47).

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FIFTH CIRCUIT

■ Fifth Circuit Reviews *Nunc Pro Tunc* Judgment And Holds That Conviction Under Kansas Aggravated Battery Statute Is Not A Crime Of Violence.

In ***Larin-Ulloa v. Gonzales***, __F.3d__, 2006 WL 2441387 (Wiener, *Barksdale*, Dennis) (5th Cir. August 24, 2005), the Fifth Circuit held that the petitioner's *nunc pro tunc* judgment was entered to correct a clerical mistake and was the proper judgment to be reviewed. The court then held that the amended conviction under one of the subsections of the Kansas aggravated battery statute was not categorically a crime of violence because the offense did not necessarily require the intent to injure, or even an act of nonconsensual physical contact, and also did not involve a substantial risk that the offender would use intentional force.

The court also ruled that the conviction documents on which it could rely, which did not include the journal entry form, did not establish that the offense was a crime of violence under the modified categorical approach.

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■Fifth Circuit Grants Rehearing And Remands In Light Of New Regulations

In ***Momin v. Gonzales***, __ F.3d__, 2006 WL 2458670 (Reavley, *Clement*, Prado) (5th Cir. August 25, 2006), the Fifth Circuit, following the request of both parties, granted rehearing and remanded the case in light of the new regulations at 71 Fed. Reg. 27585. The Fifth Circuit in an earlier published decision (447 F.3d 447) had joined the Eighth Circuit in upholding the Attorney General's discretion to promulgate 8 C.F.R. 245.1 (c)(8). That regulation barred aliens who were paroled into the United States from seeking adjustment in removal proceedings. However, the new regulations, which allow such petitioners to seek adjustment in removal proceedings, were issued before the court issued its mandate in this case.

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■ Fifth Circuit Rules That Aiding And Abetting Bank Fraud Constitutes An Aggravated Felony But Remands For IJ To Issue The Removal Order

In ***James v. Gonzales,*** __F.3d__, 2006 WL 2536614 (5th Cir. Sept. 5, 2006)(Garwood, Higginbotham, Clement), the Fifth Circuit upheld the BIA's decision that an alien convicted of an "offense involving fraud or deceit," was convicted of an aggravated felony. Though the aiding and abetting statute under which the alien was convicted does not define a distinct criminal offense, it does provide a means of obtaining a conviction for an underlying offense involving fraud or deceit, and the alien's restitution order satisfied the statutory "loss to the victim" threshold. Because the IJ had terminated proceedings and never made a finding of removability and the BIA had entered the removal order in the first instance, the court (agreeing with *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003, that the BIA lacks such authority)) remanded for proper entry of a removal order.

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SIXTH CIRCUIT

■ **Asylum Applicant From Albania Failed To Show Persecution on Account Of Political Opinion**

In ***Lumaj v. Gonzales***, __F.3d__, 2006 WL 2547466 (6th Cir. Sep. 6, 2006), the court affirmed the denial of asylum to an applicant from Albania. The applicant claimed that as a member of a youth group of the Albanian Democratic Party she had been attacked by two men at a political rally. The IJ denied the relief finding that the applicant had not met her burden and held that petitioner's "limited political knowledge and activity make it unreasonable to assume that she will be persecuted on this ground. Even if she were politically active, the Country Conditions Report for Albania indicates that while there is a danger of violence in Albania, it is due mostly to individual acts or organized crime, and there is "virtually no evidence that individuals are targeted for mistreatment on political grounds . . . Lumaj cannot show that she has a well-founded fear of future persecution."

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■ **Repeal Of Section 212(c) Discretionary Relief From Deportation By AEDPA Did Not Have An Impermissibly Retroactive Effect**

In ***United States v. Zuniga***, __F.3d__, 2006 WL 2418942 (Gilman, *Cook,* Dowd) (6th Cir. August 23, 2006), the Sixth Circuit held that the repeal of discretionary relief from deportation under INA § 212(c) by AEDPA, did not have an impermissibly retroactive effect upon a defendant who entered his plea of guilty after the effective date of AEDPA. The Sixth Circuit distinguished the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), where the defendant had entered his plea of guilty to an aggravated felony before the effective date of AEDPA and presumably had relied upon the continued availability of § 212(c) relief at the time of his decision to plead guilty.

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> The court held that petitioner could not base her asylum claim on her fear that her daughters living in Guinea will be subjected to female genital mutilation.

■ **Sixth Circuit Upholds Denial Of Asylum To Alien Who Claimed That Her Children Would Be Subject To Female Genital Mutilation**

In ***Bah v. Gonzales,*** __F.3d__, 2006 WL 2571393 (*Siler*, Gibbons, Lawson (by designation)) (6th Cir. September 8, 2006), the Sixth Circuit affirmed an IJ's denial of the asylum application of a Guinean alien. The court upheld the IJ's adverse credibility finding. It also stated that petitioner could not base her asylum claim on her fear that her daughters living in Guinea will be subjected to female genital mutilation. The court distinguished *Abay v. Ashcroft,* 368 F.3d 634 (6th Cir. 2004) where it granted asylum to a mother who feared her citizen daughter living with her would be subject to FGM upon return; Bah's daughters, however, remain in Guinea.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That It Lacks Jurisdiction Over Denial Of Application For Adjustment Of Status**

In ***Jarad v. Gonzales***, __F.3d__, 2006 WL 2441682 (Posner, Coffey, *Easterbrook*) (7th Cir. August 24, 2006), the Seventh Circuit held that the court lacked jurisdiction over the IJ's discretionary denial of Petitioner's application for adjustment of status. The petitioner had entered the United States illegally in 1991. Subsequently, an IJ ordered the petitioner deported but granted his requested for voluntary departure. Petitioner never departed. Instead he married and had three children. After his wife became a naturalized citizen, petitioner filed a motion to reopen to apply for adjustment under INA § 245(i), on the basis of his marriage to a U.S. citizen. The IJ concluded that petitioner was statutorily eligible for relief but noted that his favorable equities had been accumulated after he failed to voluntarily depart the United States more than a decade before he applied to reopen proceedings and adjust his status. Accordingly, he denied adjustment as a matter of discretion.

The Seventh Circuit held that under 8 U.S.C. § 1252(a)(2)(B), it lacked jurisdiction to review the discretionary denial of asylum and that none of the issues raised to the court were "constitutional claims or questions of law." "An IJ who thinks that an alien should not benefit from deceit, or disobedience to a lawful order of removal, does not violate any statute or regulations," said the court.

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■ **BIA Does Not Need Court's Permission To Reopen *Sua Sponte* When There Is Pending Petition For Review**

In ***Gao v. Gonzales***, __F.3d__, 2006 WL 2714691 (7th Cir. Sept 25, 2006), the court held that where there is a pending petition for review, the BIA does not need judicial permission to reopen a case *sua sponte*. "It is only a small step to say that, if the Board may grant a motion to reconsider or reopen without leave of court, it may reopen *sua sponte*," said the court.

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■ Seventh Circuit Dismisses Petition Where Alien Was Inadmissible For A Conviction Of A CIMT

In ***Korsunskiy v. Gonzales,*** __F.3d__, 2006 WL 2423028) (*Easterbrook,* Posner, Coffey) (7th Cir. August 23, 2006), the Seventh Circuit held that its jurisdiction was limited by INA § 242(a)(2)(C) due to the petitioner's conceded inadmissibility based upon his conviction for a crime involving moral turpitude, and that the only issues of law raised in the petitioner's opening brief over which the court otherwise retained jurisdiction had not been administratively exhausted and were either forfeited or waived by the petitioner. The court rejected the petitioner's argument that exhaustion, forfeiture, and waiver should be excused because the petitioner had been *pro se* in his administrative proceedings.

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■ Asylum Applicant Established Past Persecution In Togo On Account of Her Political Opinion

In ***Kantoni v. Gonzales,*** __F.3d__, 2006 WL 2466171 (*Posner*, Easterbrook, Coffey) (7th Cir. August 28, 2006), the court vacated the BIA's decision, citing a number of errors in the IJ's decision. The petitioner, a citizen of Togo claimed that in 1976, when she was 18 she was asked to dance for the president of Togo and that the following day he had her brought to his residence, where he raped her. Petitioner claimed that the motivation for the rape was in part to retaliate against her father who had criticized the president. In 1991, petitioner joined an opposition party. The following year her neighborhood was attacked by soldiers who broke in to homes of suspected members. Petitioner was not around but her workshop was destroyed. In 2002, shortly after returning from a year in the United States she was arrested and jailed. She was told that unless she switched her allegiance to the president's party severe measures would be taken against her. Petitioner promised to do so. But when hearing that she would be arrested again, petitioner "fled to the United States and sought asylum." The IJ found her testimony largely credible but denied asylum based on a number of inferences. For example, the IJ inferred that petitioner had been raped because the president made a practice of raping girls selected to dance for him. The IJ also inferred that it was unlikely that soldiers would ransack an entire neighborhood in order to punish petitioner.

The court held that the IJ's reasons for drawing inferences were not supported by the record or consistent with the judge's belief of the petitioner's testimony. The court "repeat[ed] its recent suggestion [in *Banks v. Gonzales*, 453 F.3d 449 (7th Cir. 2006)), that an asylum equivalent of the Social Security Administration's vocational experts be retained to testify about relevant aspects of national culture."

> "A rape, the destruction of one's business, threats, detention, more threats, and threatened seizure of one's children, all emanating from the government and all on account (except perhaps the rape) of peaceful political opposition to the nation's ruler, add up to persecution."

The court also held that the IJ should not have considered each of the four incidents of persecution in isolation and should have ruled that the burden shifted to the government to prove that the applicant had no solid reason to fear being persecuted in Togo in the future. "A rape, the destruction of one's business, threats, detention, more threats, and threatened seizure of one's children, all emanating from the government and all on account (except perhaps the rape) of peaceful political opposition to the nation's ruler, add up to persecution," said the court.

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■ Seventh Circuit Rules That The BIA Failed To Address Claims Of Persecution

In ***Youkhana v. Gonzales,*** 460 F.3d 927 (Kanne, Rovner, *Wood)* (7th Cir. 2006), the Seventh Circuit ruled that while the IJ's denial of the Iraqi's claim of persecution based upon political opinion was supported by substantial evidence, the case had to be remanded because neither the IJ nor the BIA addressed his claims of persecution based upon Christian religion and Chaldean ethnicity.

The petitioner, an Assyrian Christian who left Iraq in 2001, claimed that he had been persecuted by the ruling Ba'ath regime on the basis of his religion, ethnicity, and political opinion. The IJ determined that although petitioner had been persecuted for his refusal to join the Ba'ath Party, he had not shown a well-founded fear of future persecution because that party had been removed from power in 2003. The IJ did not address the religious and ethnic persecution claims. The BIA summarily affirmed.

In holding that the IJ and the BIA erred in not addressing petitioner's claims of religious and ethnic persecution, the court was critical of the fact that there was no discussion of the 2001 State Department Report on Iraq stating that the Ba'ath regime had engaged in various abuses against Assyrians and Chaldean Christians. The court also took judicial notice of the recently released 2005 Country Report in Iraq indicating the continuing "harassment of Christians" in a "climate of extreme violence." On this issue, the court specifically directed the BIA to consider on remand

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the question of "whether the Iraqi government has failed to protect Assyrian Christians like Youkhana from persecution by insurgent Ba'ath Party members or Muslim extremist organizations, and if so, whether this constitutes a ground for granting asylum (or some other form of relief from removal) to [petitioner]." In light of the remand, the court did not reach the CAT claim, but noted that the IJ had erred in concluding that petitioner was foreclosed from bringing a CAT claim because there was "no government of Iraq any longer." Even at the time of the IJ hearing, said the court, there was a Coalition Provisional Authority, which "probably qualified as 'public officials . . . acting in an official capacity.'"

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EIGHTH CIRCUIT

■ Eighth Circuit Defers To IJ's Adverse Credibility Finding

In ***Kifleyesus v. Gonzales***, __F.3d__, 2006 WL 2595988 (Murphy, *Melloy,* Colloton) (8th Cir. Sept. 12, 2006), the Eight Circuit deferred to IJ's adverse credibility finding and held that an asylum application was frivolous under 8 C.F.R. 208.20, where Eritrean national admitted falsity of testimony.

The court, after summarizing the state of the law on the issue of "frivolousness," held that it was "unnecessary to adopt or approve any of the specific "emergent standards" for the application of Rule 208.20 - all would be satisfied by the present facts. It is undisputed that the petitioner filed a false application, failed to modify that application when given the chance, swore to the truth of the application, lied in response to the IJ's questions, and subsequently admitted to the falsity of testimony and her application. Accordingly, there were fabrications. She was given 'sufficient opportunity to account for any discrepancies or implausible aspects of [her] claim,' before the IJ, but admitted rather than denied the falsity of her testimony regarding time spent in Eritrea."

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■ Eighth Circuit Holds That Drug Conviction Makes Petitioner Ineligible For Cancellation Of Removal

In ***Munoz-Yepez v. Gonzales,*** __F.3d__, 2006 WL 2483209, (*Loken*, Gibson, Colloton) (8th Cir. August 30, 2006), the Eighth Circuit affirmed the BIA's dismissal of the petitioner's appeal. The petitioner pled guilty to a controlled substance offense in 1994 and to battery of his girlfriend in 2004. He argued that the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), waived the consequences of his felony drug conviction, thereby making him eligible for cancellation of removal. The court held that the petitioner's drug conviction constituted an aggravated felony because he served fifteen months in prison. The court also ruled that INA § 212(c) did not retroactively eliminate the consequences of that conviction.

The court held that the petitioner's drug conviction constituted an aggravated felony because he served fifteen months in prison.

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■ Eighth Circuit Upholds BIA's Denial Of Untimely Motion To Reopen

In ***Ibarra-Terraza v. Gonzales,*** __F.3d__, 2006 WL 2466170, (Loken, *Arnold*, Doty (sitting by designation)) (8th Cir. August 28, 2006), the Eighth Circuit upheld the BIA's denial of an untimely (one day late) motion to reopen. After holding that it had jurisdiction under the REAL ID Act to consider questions of law, notwithstanding the criminal alien bar in INA § 242(a)(2)(C), the court rejected the petitioner's claim that the BIA relied on the wrong regulation governing motions to reopen and held that BIA properly relied upon 8 C.F.R. § 1003.38, which states that a notice of appeal shall be filed within 30 calendar days after the IJ's decision. The BIA properly dismissed his appeal as untimely and declared the IJ's decision final.

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NINTH CIRCUIT

■ En Banc Ninth Circuit Holds That Alien Was Admissible At Time Of Adjustment To Lawful Temporary Status

In ***Perez-Enriquez v. Gonzales,*** __F.3d__, 2006 WL 2640530 (9th Cir. September 15, 2006) (Schroeder, Reinhardt, O'Scannlain, Thomas, Silverman, McKeown, Wardlaw, *W. Fletcher*, Fisher, Paez, Berzon, Tallman, Rawlinson, Bybee, Callahan), the Ninth Circuit, sitting *en banc*, held that admissibility as a special agricultural worker under 8 U.S.C. § 1160 is determined as of the date of adjustment to lawful *temporary* resident status, and is not redetermined at the date of adjustment to lawful *permanent* resident status.

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■ Ninth Circuit Holds That Deported Criminal Alien Can Obtain Reopening Upon Vacation Of His Conviction If Conviction Was A "Key Part" Of Government's Case.

In ***Cardoso-Tlaseca v. Gonzales***,

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__F.3d__, 2006 WL 2390298 *(Leavy*, Rymer, Moskowitz (sitting by designation)) (9th Cir. August 21, 2006), the Ninth Circuit held that, notwithstanding 8 C.F.R. § 1003.2(d) (barring motions to reopen by aliens who have departed from the United States), a criminal alien who had been removed from the United States on multiple grounds can obtain reopening if a criminal conviction that was a "key part" of the government's case was subsequently vacated on the merits. The court explained that its prior decisions in *Estrada-Rosales* and *Wiedersperg* were not limited to the circumstances were the vacated court conviction was the sole ground of deportability. The court remanded the case to the BIA for a determination of whether the conviction was vacated "on the merits" or for rehabilitative or immigration purposes.

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■ Ninth Circuit Reaffirms Previous Holdings That Omissions And Inconsistencies That Do Not Relate To The Heart Of The Claim Do Not Support An Adverse Credibility Determination

In ***Suntharalinkam v. Gonzales,*** __F.3d__, 2006 WL 2381882 (*Wardlaw,* Rawlinson, Cebull (sitting by designation)) (9th Cir. August 18, 2006), the Ninth Circuit held that the IJ erred when he found the petitioner's testimony implausible because of omissions and minor discrepancies when there was no reason to question the petitioner's explanation. The court held that where the IJ did not give the petitioner the opportunity to explain discrepancies, he should not have relied upon them in making the adverse credibility determination.

The petitioner attempted to enter the United States illegally with a group of twenty-three other aliens who were being smuggled from Sri Lanka via Mexico. The petitioner claimed that the Sri Lankan government had persecuted him for the mistaken belief that he was a Tamil Tigers, a member of an organization designated as a foreign terrorist organization under U.S. laws. The IJ did not find petitioner credible and identified "a tapestry of inconsistency that simply strains credulity to the breaking point." The majority opinion reviewed each of the findings underlying the IJ's determination and held that they were not supported by substantial evidence.

Judge Rawlinson, in a dissenting opinion, said "I simply cannot agree that we are compelled to find [petitioner] credible."

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds That In Absentia Removal Of Petitioner Does Not Deprive The Agency Of Jurisdiction Over Motion To Reopen

In ***Contreras-Rodriguez v. U.S. Att'y Gen.***, __F.3d__, 2006 WL 2473974 (11th Cir. August 29, 2006) (Tjoflat, Black, Kravitch) (*per curiam*), the Eleventh Circuit held that in cases in which removal was ordered in absentia, the removal of the petitioner does not deprive the IJ or the BIA of jurisdiction to consider a motion to reopen alleging a lack of notice of the removal hearing. The court ruled that the petitioner's argument of a violation of due process regarding notice had been raised sufficiently before the IJ and the BIA in the motion to reopen.

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In cases in which removal was ordered in absentia, the removal of the petitioner does not deprive the IJ or the BIA of jurisdiction to consider a motion to reopen alleging a lack of notice of the removal hearing.

■ Eleventh Circuit Holds That Immigration Judge Abused His Discretion In Denying A Continuance For Adjudication Of Pending Visa Petition

In ***Merchant v. U.S. Att'y Gen.***, 461 F.3d 1375 (11th Cir. 2006) (*Anderson,* Hull, Cudahy), the Eleventh Circuit held that it was an abuse of discretion for the IJ to deny a continuance where the petitioner had an approved labor certification and a pending visa petition. The court ruled that the pending petition was sufficient to demonstrate that the petitioner was "eligible to receive an immigrant visa" for purposes of 8 U.S.C. § 1255(i), and that he, therefore, was eligible to adjust his status under that section. The court rejected the government's contention that the petitioner was ineligible for adjustment under INA § 245(i), 8 U.S.C. § 1255(i), absent an approved visa petition.

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■ Eleventh Circuit Holds That Administrative Exhaustion Is Required For Judicial Review, Even Where The BIA Addresses An Issue Sua Sponte

In ***Amaya-Artunduaga v. U.S. Attorney General***, __F.3d__, 2006 WL 2589713 (Dubina, Black, and Hull) (*per curiam*) (11th Cir. September 11, 2006), the Eleventh Circuit reiterated it lacks jurisdiction to consider unexhausted issues raised in a petition for review. Petitioner had failed to challenge the IJ's adverse credibility finding in his appeal to the BIA. The BIA premised its dismissal of petitioner's appeal on the absence of clear error in the IJ's adverse credibility finding, thereby raising that issue *sua sponte*. The court ruled that it did not have

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authority to address the adverse credibility challenge petitioner mounted before the court because the BIA had not had an opportunity to consider and build a record for review on petitioner's credibility arguments in the first instance.

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■ REAL ID Act Amendment To Asylum Statute Applied To Reject Challenge to Adverse Credibility Determination

In ***Wei Chen v. U.S. Atty. Gen.***, __F.3d__, 2006 WL 2570870 (11th Cir. Sep. 8, 2006), the Eleventh Circuit applied the REAL ID Act amendment to the asylum statute to reject a challenge to an adverse credibility finding.

The petitioner, a citizen of China, entered the United States on June 4, 2005, without a valid entry document and days later was placed in removal proceedings. He then applied for asylum alleging past persecution and fear of future persecution on account of his religious practice of Falun Gong. The IJ did not find him credible and denied all relief. The BIA dismissed the appeal finding a reasoned basis for the IJ's adverse credibility finding.

Preliminarily, the court noted that the IJ's credibility determinations were subject to the REAL ID Act amendments as codified at INA § 208 (b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii). The court held that the IJ's specific, cogent reasons for making the adverse credibility determination [were] supported by substantial evidence. The court rejected petitioner's argument that the discrepancies were "trivial" and "irrelevant to the dispositive issues." The court said that this ignored the REAL ID Act amendment, "applicable in this case, which provides that in considering the totality of the circumstances, the "trier of fact may base a credibility determination on . . . any inaccuracies or falsehoods in [the applicant's] statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor* (emphasis added)."

The REAL ID Act provides that in considering the totality of the circumstances, the "trier of fact may base a credibility determination on . . . any inaccuracies or falsehoods in [the applicant's] statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor*."

DISTRICT COURTS

■ District Court Grants Plaintiffs' Summary Judgment And Remands H-1B Visa Application

In ***Fred 26 Importers, Inc. v. DHS,*** __F. Supp.2d__, 2006 WL 2466933 (C.D. Cal. August 23, 2006) (Pregerson), the district court granted the plaintiffs' motion for summary judgment and denied the defendants' motion for summary judgment. The court ruled that while there were facts in the administrative record which supported, in part, the Administrative Appeals Office's (AAO) decision, the AAO did not discuss these facts or apply them to the regulatory standard. This lack of analysis by the AAO persuaded the district court to grant summary judgment to the plaintiff.

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■Attempt To Defraud Insurance Company Of Disability Benefits Constitutes Lack Of Good Moral Character

In ***Meyersiek v. Gonzalez,*** __F. Supp. 2d__ 2006 WL 2380795 (D.R.I. August 17, 2006) (Lisi), the district court denied the petitioner's petition for naturalization. At the hearing, the government offered evidence that the petitioner, a former Fortune 500 Company executive, was terminated from his position for misconduct; that he had been working without accommodation; and that he continued to travel and work, despite his contrary representations. There was no conviction. The district court held that even though it could not make a conclusive finding that the petitioner intended to commit insurance fraud, the record precluded a determination that the petitioner met his burden of establishing good moral character.

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NOTED WITH INTEREST

In ***Williams v. Mohawk Industries, Inc.***, __F.3d__, 2006 WL 2742005 (11th Cir. Sep. 27, 2006) (Anderson, Hull, Gibson) (*per curiam*), the Eleventh Circuit held that plaintiffs, current and former hourly employees of Mohawk Industries, had alleged sufficient proximate cause to proceed with a RICO action based on their allegations that Mohawk had engaged in widespread hiring and harboring of illegal aliens with the express purpose and direct result of lowering the wages of legal workers.

Mohawk is the second largest carpet and rug manufacturer in the United States and has over 30,000 employees. Accordingly to the complaint, Mohawak employees had, *inter alia*, traveled to the southern border where they recruited undocumented aliens and transported them to Northern Georgia to procure employment at Mohawak. According to the complaint, the hiring of illegal workers has helped Mohawak reduce labor costs and depress the wages that it pays to hourly workers.

INEFFECTIVE ASSISTANCE OF COUNSEL

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1998, with the assistance of counsel, he conceded his removability and applied for cancellation of removal. One year later, petitioner's counsel obtained an extension because he had lost the case file. A hearing on the merits was eventually held on January 23, 2001. The IJ held that petitioner had met the good moral character and 10-year physical presence requirements for cancellation. However, he also held that petitioner had failed to show that this U.S. citizen children would face exceptional and unusual hardship if he were removed form the United States. Petitioner timely appealed to the BIA but that appeal was summarily dismissed on September 6, 2002. The BIA granted, however, voluntary departure until October 6, 2002.

Following the discretionary denial of cancellation by the IJ, petitioner also applied for a labor certification. When that application was approved, the petitioner, on December 6, 2002, moved to reopen his proceeding to seek adjustment of status. On July 23, 2003, the BIA denied the motion because it was filed outside the 30-day voluntary departure period and because petitioner had been given notice of the consequences of failing to depart. Petitioner filed a pro se petition for review from the denial of the motion to reopen. The court then appointed counsel for petitioner.

On appeal, petitioner's appointed counsel raised for the first time the claim of ineffective assistance of counsel. The court held that petitioner did not have to exhaust this claim because it raised a due process violation, namely an ineffective assistance of counsel claim "where the proceeding was 'so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" The court further held that petitioner did not have to satisfy the *Lozada* requirements because the "prejudice [was] clear." "Counsel failed to petition for review of the BIA's summary affirmance, forfeiting permanently his client's opportunity to challenge the underlying order of removal," said the court. The court also noted that the former counsel did not seek an extension of voluntary departure when his petitioner and his daughter allegedly fell ill. The court then remanded the case to the BIA to rule on the claim of ineffective assistance of counsel and the request for adjustment of status.

> "Creating an exception for a due process claim would obliterate the rule that an ineffective assistance of counsel claim must first be raised to the BIA."

The majority opinion drew a sharp dissent by Judge Callahan who criticized the panel's "expansion of our jurisdiction – in contravention of our precedents – to reach an ineffective assistance of counsel claim that has never been raised before the BIA and is not supported by substantial evidence." In particular, the dissenter opined that "creating an exception for a due process claim would obliterate the rule that an ineffective assistance of counsel claim must first be raised to the BIA." Moreover, in the dissenter's view, the majority's approach to petitioner's claim, "places the proverbial cart before the horse by concluding that we have jurisdiction before examining the factual basis for the claim."

By Francesco Isgro, OIL

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STATE DRUG CRIMES GUIDANCE

the OIL web site). If you have any questions, please contact Donald or Bryan.

If the Supreme Court adopts the government's position, then the Board decision must be vacated and the case must be remanded for further consideration because the Board's decision, in that event, would rest upon an incorrect reading of the law. Unless and until the Supreme Court decides the case, the relevant circuit's precedents are binding. Additionally, the Supreme Court may not accept the government's argument. We should encourage the courts of appeals to await the Supreme Court's decision before they receive briefing and decide cases that may be affected the Court's decision.

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IMMIGRATION LAW SEMINAR

The Office of Immigration Litigation will present its 12th Annual Immigration Law Seminar on October 23-27, 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. The seminar will be repeated on November 27-December 1, 2006.

For additional information contact Francesco Isgro at:

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DRUG CRIMES GUIDANCE

OIL recently issued the following guidance regarding the government's litigating position in cases where an alien has been convicted of a drug crime in state court:

If any of your cases involve aliens who were convicted of drug crimes in state court, you should be aware that the government's Supreme Court brief filed in *Lopez v. Gonzales* and *Toledo-Flores v. United* States includes a significant change in our position regarding whether a state drug conviction is an aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). The brief abandons the "hypothetical federal felony" approach applied by some courts, and argues that a state drug crime is a "a drug trafficking crime (as defined in section 924(c) of Title 18)" if the maximum term of imprisonment authorized by the convicting state exceeds a year, and the offense conduct is encompassed by the Controlled Substances Act. Whether the offense is labeled a "misdemeanor" is not determinative. As soon as possible, you should review your cases in with the following guidance in mind.

A. If the Board decision does not include a ruling that the alien's conviction is a "drug trafficking crime," and holds only that the alien's conviction is "illicit trafficking in a controlled substance," typically because the Board concludes that the offense includes a trafficking element, you do not need to do anything. *Lopez* and *Toledo-Flores* concern the meaning of "drug trafficking crime (as defined in section 924(c) of Title 18)," not the meaning of the phrase "illicit trafficking in a controlled substance."

B. However, if the Board decision includes a "drug trafficking crime" ruling, you should take the following steps:

1. Report your case to Donald Keener and Bryan Beier by e-mail. Please include the alien's A-number, the court's docket number, and if you have filed a brief, an electronic copy of your brief.

2. If you have filed a brief in the case, please file a 28(j) letter. A sample is attached (also available on the OIL web site). Please modify as appropriate. If you have any questions, please contact Donald or Bryan.

3. If no government brief has been filed, please file a motion to hold the case in abeyance pending the Supreme Court's decision, unless it is determined in consultation with Donald and Bryan that briefing is appropriate under the circumstances of the case. The motion should include the same substance as the 28(j) letter. A sample is attached (also available on

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After working in private practice at Akin, Gump, Strauss, Hauer & Feld and Howrey & Simon, specializing in antitrust cases, Lee worked the Antitrust Division since 1994, where she specialized on antitrust issues involving intellectual property.

Brianne Whelan received her B.A. from Rutgers University and graduated with a J.D. from American University, Washington College of Law. Ms. Whelan joins OIL through the Honors Program.

Sada Manickam is a graduate of State University of New York at Buffalo School of Law and Cornell University. Prior to joining OIL, he served as a trial attorney at the Civil Rights Division.

Patricia Hurt is a graduate of George Mason University and The Catholic University of America, Columbus School of Law. Following her clerkship at the Federal Energy Regulatory Commission, Patricia practiced at Paul, Hastings, Janofsky & Walker. Prior to joining OIL, she worked in the Civil Rights Division.

INSIDE OIL

OIL welcomes the following new attorneys:

Kevin Conway is a graduate of Salem State College and Suffolk University Law School. After law school, he was a judge advocate in the United States Marine Corps. Prior to joining OIL, Kevin worked as a litigation attorney for Adler, Pollock & Sheehan, PC in Boston, MA.

Terri León-Benner is a graduate of the University of Massachusetts and Boston University School of Law. She returns to OIL after working at the Florida Parole Commission's Office of Counsel for the past three years.

Annette Wietecha is a graduate of Notre Dame College of Ohio and Case Western Reserve University School of Law. Prior to joining OIL, she worked in the Tax Division, Appellate Section for 16 years

Kohsei Ugumori is a graduate of the State University of New York at Binghamton and New York Law School. Kohsei joined OIL through the Honors Program in 2006.

Jessica Sherman is a 2006 graduate of Washington University School of Law and is joining OIL through the Honors Program. Jessica also received a Bachelor of Arts degree with honors from Washington University. Last summer, she worked as an intern at OIL.

Lee Quinn is a graduate of the Washington & Lee University School of Law.

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Pictured from L to R: Lee Quinn, Brianne Whelan, Jessica Sherman, Terri Leon-Benner, Kevin Conway, Annette Wietecha, Kohsei Ugumori

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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"

To add your name to our mailing list or to change your mailing please contact karen.drummond@usdoj.gov

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