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LITIGATION HIGHLIGHTS

Inside

Supreme Court to consider definition of "particularly serious crime" and the scope of review of that determination, and the courts' authority to toll VD

The Supreme Court, on September 25, 2007, granted two petitions for certiorari to decide several issues that are dividing the federal circuit courts. In ***Dada v. Keisler***, 207 Fed. Appx. 425 (5th Cir. Nov. 28, 2006), *cert granted*, __WL__ (Sept. 25, 2007) (No. 06-1181), the Court will consider the question of whether the filing of a motion to reopen automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure. In ***Ali v. Achim***, 468 F.3d 462, *pet. cert. granted* (06-1346), the Court will consider: (1) Whether only "aggravated felonies" can be classified as a "particularly serious crimes" for purpose of eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B), and (2) whether the determination that a crime is particularly serious is a discretionary decision not subject to judicial review even after the REAL ID Act.

The Supreme Court will consider whether only "aggravated felonies" can be classified as a "particularly serious crimes" for purpose of eligibility for withholding of removal.

Dada and the tolling of voluntary departure

Section 240B of the INA sets forth a comprehensive scheme which authorizes the Attorney General and the Secretary of Homeland Security, in the exercise of their discretion, to allow qualified aliens to depart the United States voluntarily in lieu of a formal removal. Voluntary departure may be granted before the commencement of a formal removal proceeding and also at various stages of the removal hearing. Voluntary departure is beneficial to the government and to the alien. When aliens depart voluntarily, the government benefits because it does not have to pay their tickets home. The aliens benefit too because they have flexibility regarding the time and manner of their departure, may choose their destination, and may avoid legal disabilities stemming from removal including a restriction on reentering for at least ten years. However, an alien who fails to depart within the voluntary departure grant becomes statutorily ineligible for certain benefits, including adjustment of

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David Kline receives Presidential Rank Award

OIL's Principal Deputy Director was recently awarded the Presidential Rank Award of Meritorious Executive. The award was presented by Acting Attorney General Peter D. Keisler at the Attorney General's 55th Annual Awards Ceremony.

The Meritorious Award is presented to only five percent of the career Senior Executive Service and recognizes executives who are outstanding leaders that have consistently demonstrated strength, integrity, industry, and a relentless commitment to public service.

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Supreme Court grants in VD tolling , withholding cases

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status.

Samson Dada is a Nigerian citizen who, following his admission as a visitor in 1998, never departed. Instead, he married a U.S. citizen who filed a visa petition (I-130) for his benefit. That petition was denied in February 2003. Almost a year later DHS commenced removal proceedings against Dada. Several months later, on March 17, 2004, Dada's wife filed a second visa petition, and Dada then requested that his removal hearing be continued pending the adjudication of that petition. The IJ denied the request, estimating that it would take about three years for DHS to adjudicate the petition. However, the IJ granted Dada's request for voluntary departure. On November 4, 2005, the BIA affirmed that decision in an order that also included a 30-day voluntary departure period, expiring on December 4, a Sunday. On December 2, 2005, Dada filed a motion to reopen to remand proceedings pending the adjudication of the I-130 and also asked to withdraw his request for voluntary departure. He did not depart in accordance with the terms of the grant of voluntary departure. On February 8, 2006, the BIA denied the motion, holding *inter alia*, that because Dada had failed to depart within the 30-day VD period, he was not statutorily ineligible for adjustment.

The Fifth Circuit, in an unpublished decision, affirmed holding that the BIA's interpretation that Dada was now statutorily ineligible for adjustment because of the VD violation was "reasonable." Dada's claim that he had withdrawn his request for voluntary departure and therefore he was no longer subject to the 30-departure rule was also rejected. Dada also petitioned the Supreme Court to review that ruling, but the Court's grant of certiorari is limited to the question of whether the filing of a motion to reopen automatically tolls the period of voluntary departure.

The courts of appeals have been divided on whether the filing of a motion to reopen automatically tolls the voluntary departure time. Four of the seven that have addressed this issue have held that the filing of a motion to reopen tolls the period of voluntary departure. *Compare Ugokwe v. U.S. Att'y Gen.*, 453 F.8d 1325 (11th Cir. 2006) (filing a timely motion to reopen removal proceedings tolls the voluntary departure period); *Kanivets V. Gonzales*, 424 F.3d 330 (3d Cir. 2005) (same); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005) (same); *Azarte V. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) (same), *with Chedad v. Gonzales*, No. 052782, 2007U.S. App. LEXIS 18185 (1st Cir. July 31, 2007) (a timely motion to reopen does not toll the voluntary departure period); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006) (*same*); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006) (*same*), cert. denied, 127 S. Ct. 1874 (2007).

> The courts of appeals have been divided on whether the filing of a motion to reopen automatically tolls the voluntary departure time.

In opposing Dada's petition for certiorari, the Solicitor General argued that the Fifth Circuit correctly had held that a motion to reopen does not automatically toll the voluntary departure period, and also suggested that review is not warranted at this time because the Department of Justice had determined that it would promulgate regulations specifically addressing the issue.

Ali and particularly serious crimes

Ahmed Ali is a Somali citizen who was admitted to the United States as a refugee in 1999. In June 2000 he was convicted of substantial battery under Wisconsin law after he attacked a man using a box-cutting knife. Ali was sentenced to eleven months of incarceration and seven years probation. DHS sought his removal as an alien who had been convicted of a CIMT committed within five years of admission.

Following two hearings before the IJ and two appeals to the BIA, petitioner was denied withholding of removal and protection under CAT. As to the denial of withholding, the BIA ruled that Ali had intentionally inflicted bodily harm on another with a dangerous weapon and consequently he had been convicted of a "particularly serious crime." The BIA also rejected Ali's motion to reconsider the denial of withholding on the basis that he suffers from post-traumatic stress disorder.

On appeal, the Seventh Circuit granted the petition for review with respect to the CAT claim but affirmed the denial of asylum and withholding. The court rejected Ali's argument that only aggravated felonies may qualify as "particularly serious crimes" for withholding based on the structure of INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The court held that the statute was ambiguous in relevant part and it would defer to the BIA's permissible interpretation that the Attorney General retained discretion to determine whether a crime is particularly serious regardless of whether or not it is an aggravated felony. The court then found that it lacked jurisdiction to consider Ali's argument that the BIA had misapplied its precedents to the facts because that determination was a exercise of the BIA's "statutorily conferred discretion."

Ali's petition for certiorari challenges only the denial of withholding and not the denial of asylum. In particular, Ali contends that the circuits

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Opposing Unreasonable EAJA Fees Motions

OIL attorneys have a wealth of experience on the substantive legal bases for opposing Equal Access to Justice Act ("EAJA") fees (*i.e.*, whether or not the petitioner was a prevailing party and whether our position was substantially justified), but it is also sometimes necessary to argue against a request for EAJA on the additional basis that the fees sought are unreasonable or excessive. Because under EAJA the government has agreed to a limited waiver of sovereign immunity, and the United States taxpayers are being asked to foot the bill, every cent of the requested EAJA fee amount should be regularly justified.

The EAJA statute provides an hourly rate that is adjustable based on the Consumer Price Index ("CPI"), but there are no readily available standards for determining whether the number of hours claimed is reasonable, or whether the total fee claimed is appropriate. Case law provides only general guidelines. A court should exclude from an EAJA fee calculation "hours that were not 'reasonably expended.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting S. Rep. No. 94-1011, at 6 (1976)). The court should "disallow claims for 'excessive, redundant, or otherwise unnecessary charges.'" *Oklahoma Aerotronics v. United States*, 943 F.2d 1344, 1347 (D.C. Cir. 1991) (quoting *Hensley,* 461 U.S. at 434).

Closing the gap between the case law and your particular EAJA case is not necessarily intuitive. An effective method involves an analysis of the hours "billed" for the work performed. You can do this using the itemized bill of costs which accompanies the EAJA application. Itemized bills can offer a wealth of information about how the petitioner's counsel handled the case. Careful attention to the hours spent and the tasks assigned can provide substantial fodder for opposing an unreasonably high fee request.

For example, look to see if the billing statement parcels out time spent on certain parts of the brief. Add up all the hours spent for each component of the brief, if you can, and analyze the result. Consider also that if more than one attorney worked on the brief, that more than one person may have contributed. In one instance, I discovered that an attorney (claiming compensation at over the statutory rate based on his "expertise") had spent four and a half hours *researching* and drafting the "standard of review" section of the brief, at a cost of $675. The resulting section was only a half a page, and contained very basic case law. In another instance, an attorney billed five hours for preparing a 28(j) letter. I discovered in another case that an attorney had billed three and a half hours for "intake," an unexplained task, at the cost, to the taxpayers, of $875. Such inefficiency and overreaching are all the more egregious when the attorneys are claiming compensation at over the statutory rate. If indeed the attorneys are the experts they claim to be, they should not have to spend so much time on basic issues. Put another way, one of the benefits of hiring an expert is that you do not have to pay for his or her learning curve. Neither should the taxpayers.

> "A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."

Another area to search for unreasonable charges is where paralegal and secretarial work is performed by attorneys. Preparation of letters, tables, indices, copying, mailing, etc. should be (arguably, at least) done by paralegals or secretaries, especially if the firm is large. Courts can be receptive to such arguments. *See e.g., Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983) ("Nor do we approve the wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates. . . A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."). In this respect, it is always useful to check if the firm has a website. The website can provide a wealth of information about the staffing and resources of the firm. In one instance, I opposed an EAJA application filed by an attorney working "pro bono" for "a global practice with 1300 lawyers in 13 cities worldwide." With such size comes economies of scale and, one would hope (i.e., you should argue), greater efficiency. Even for a solo practitioner who has no clerical support, we should adopt the position that every penny of the EAJA application has to be justified, and put the burden on petitioner's counsel for showing why taxpayers should pay $175 per hour for typing a letter.

Another approach is to add up all hours spent by a single attorney on different tasks in a single day. This may reveal outlandish or incredible amounts of time that strain credulity. In one instance, I discovered that a single attorney billed an incredible *twenty* hours on a single Saturday. This particular Saturday was during Memorial Day weekend, and the brief was not due until August.

Another profitable tactic is to look for hours spent in litigating matters before the Board of Immigration Appeals. Hours spent in litigation before the Board are not compensable. *Ardestani v. INS*, 502 U.S. 129, at 139 (1991). This is relevant where, for example, the alien files a motion to reopen with

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Supreme Court to review VD tolling issue and PSC

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are split concerning the construction of INA § 241(b)(3)(B), the withholding provision barring eligibility for an alien convicted of an "aggravated felony." The government's position is that not only does that provision bar, without exception, a grant of withholding to an alien convicted of an aggravated felony and sentenced to five years, but also that the statute provides that the Attorney General may deny withholding where he finds that an "alien has been convicted of a particularly serious crime." The BIA has taken the position that whether a crime is a PSC depends upon "consideration of the individual facts and circumstances." *Matter of L-S-,* 22 I&N Dec. 645 (1999). Ali acknowledges that the term "particularly serious crime" is not defined but argues, finding support in *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir. 2006), that the structure of the statutory provision makes clear Congress' intent to tie the two critical sentences in the statute together in ascertaining when a crime is a PSC.

The second issue raised by Ali in his certiorari petition, concerns the issue of the courts' jurisdiction to review the BIA's determination that a crime is a "particularly serious crime." The Seventh Circuit held that Ali's claim was not reviewable because PSC determinations are discretionary decisions not subject to review under INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). Ali contends, inter alia, because the PSC exception is not a decision the authority for which is specified under § 242(a)(2)(B)(ii), it is subject to review as held by the Third Circuit in *Alaka*. In its opposition to certiorari, the government pointed out that the *Alaka* Court was considering a reviewable question of law and therefore reserving Ali's question for another day.

Both cases will probably be heard by the Supreme in early 2008.

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Opposing EAJA fees motions

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the Board while pursuing review in the Court of Appeals. All such time and expense should be excluded. In one recent case, I discovered that two-thirds of the hours being billed were attributed to pursuing a motion to reopen before the Board concurrently with the petition for review. Excising the non-compensable Board litigation reduced the potential award from $14,000 to $5,000.

Another type of overreaching occurs when a petitioner's counsel applies for EAJA fees after the case was remanded for reasons having nothing to do with the briefed issues. For example, imagine that, after reviewing the case, you discover an error by the Board - not cited by the petitioner in his brief - that requires remand. You successfully obtain a remand, and after the remand, petitioner's counsel seeks EAJA fees for the cost of preparing the brief. In such a case, you should argue that counsel for the petitioner should receive no compensation because his brief had nothing to do with the outcome of the case. Had counsel done his homework (which he did not), he would not have had to brief the case in the first place. A similar approach can be taken where a petition for review is granted in part and denied in part. In that case, you should argue that time spent on the losing issue should not be compensated. If it is not apparent from the billing statement how the time was allotted, you should at least argue that the full amount is inappropriate.

Finally, if the billing statement is too vague to allow you to make all these arguments, you can still argue that the amount is excessive and is not properly itemized, thereby preventing the court from obtaining the assurance that the hours billed are appropriate. In such an instance, you should urge the court to require an itemized billing statement.

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USCIS ANNOUNCES NEW NATURALIZATION TEST

USCIS has announced the 100 questions and answers that comprise the civics component of the new naturalization test. USCIS will administer this new test to citizenship applicants beginning in October 2008.

Earlier this year, more than 6,000 citizenship applicants volunteered to take a pilot version of the test at 10 USCIS sites across the country during a four-month period. The 100 new questions on the new naturalization test were selected after USCIS, a panel of history and government scholars, and English as a Second Language teachers conducted a thorough review of the responses to the 142 questions on the pilot test.

The revised naturalization test will help strengthen assimilation efforts by emphasizing fundamental concepts of American democracy, basic U.S. history, and the rights and responsibilities of citizenship. It will also promote patriotism among prospective citizens.

The new test is online at:
http://www.uscis.gov/newtest

ASYLUM LITIGATION UPDATE

Latest Developments In Chinese Population Control Cases

This is the first of two updates regarding new case law regarding Chinese asylum cases. This article covers new developments for two kinds of claims: claims based on forced abortion or sterilization of a spouse or partner and claims alleging persecution for "resistance" to a coercive population control program. Next month's article will discuss new developments regarding asylum claims based on fear of future forced sterilization due to the birth of children in the United States, as well as the law regarding motions to reopen based on the birth of U.S. children.

Statutory Background

To qualify for asylum an alien must come within the definition of a "refugee," 8 USC 1158(b), which is defined as someone who experienced "[past] persecution or [has] a well-founded fear of [future] persecution on account of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (A). In 1996 Congress amended this definition to treat (1) "forced" sterilization or abortion, (2) persecution "for refusal failure or refusal to undergo such a procedure," and (3) persecution "for other resistance to a coercive population control program" as *per se* on account of an alien's "political opinion." *See* 8 U.S.C. § 1101(a)(42) (A) (stating that a "person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . or who has been persecuted for . . . other resistance to a coercive population control program is deemed to have been persecuted on account of political opinion"). As a result, an alien may qualify for asylum based on past, or a well-founded fear of, forced abortion or sterilization in China – or past or future persecution for resistance to coercive birth control policy – without actually having to prove this was on account of any political opinion on the alien's part.

"The Spousal Rule": Asylum Claims Based On Forced Abortion Or Sterilization Of A Spouse, Partner, Girlfriend

Ten years ago, in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), the Board created a spousal rule by holding that the legally married spouse of someone who has been forced to undergo abortion or sterilization qualifies for asylum. The rule was unevenly enforced. The Third and Fifth Circuits enforced *C-Y-Z-*'s spousal rule as written and refused to extend it to unmarried boyfriends or partners. *Chen v. Ashcroft*, 381 F.3d 221, 226-27, 229 (3d Cir. 2004) (no extension of *C-Y-Z* to unmarried partners of woman forcibly sterilized); *Zhang v. Ashcroft, 395* F.3d 531 (5th Cir. 2004) (no extension of *C-Y-Z-* to a boyfriend of woman forcibly sterilized). The Ninth and Seventh Circuits extended the spousal rule to cover not only legally married spouses, but also men who participated in illegal, underage "traditional" marriages. *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). The Seventh Circuit also extended the spousal rule to the husband of a woman who had an abortion even though they were no longer married. *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006). The Eighth Circuit rejected such an approach. *See Cao v. Gonzales*, 442 F.3d 657 (8th Cir. 2006) (stating that the court is unaware of any authority that expands asylum to cover a former spouse's involuntary sterilization, even if performed while the couple was married).

An alien may qualify for asylum based on past, or a well-founded fear of, forced abortion or sterilization in China without actually having to prove this was on account of any political opinion on the alien's part.

In 2005 the Second Circuit remanded a case to the BIA for clarification of the basis for the spousal rule and to explain "whether, when, and why boyfriends and fiancés" may be protected. *Lin v. United States Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005). In response, the Board issued *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006). In *S-L-L-* the Board modified its spousal rule and held that a man no longer automatically qualifies for asylum based on forced abortion or sterilization of his wife. Instead, the Board created a qualified spousal rule, permitting a husband to qualify for asylum, if (1) the couple was legally married at the time of the wife's forced abortion or sterilization, and (2) if the husband opposed the procedure. The Board also held that an unmarried boyfriend or fiancee may only qualify for asylum by showing persecution for "resistance" to a coercive population control program.

The Eleventh and Third Circuits have upheld *Matter of S-L-L-*. *Yang v. U.S. Atty. Gen*. 494 F.3d 1311, 1314 (11th Cir. 2007); *Sun Wen Chen v. Attorney Gen. of U.S.* 491 F.3d 100, 107 (3d Cir. 2007). The Second Circuit did not. In *Shi Liang Lin v. U.S. Dep't. of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc) – which is the same case as *Matter of S-L-L-* at the Board – the Second Circuit reversed the Board's spousal rule as contrary to the plain language of the statute. In response, the Attorney General has certified a case to himself from the Third Circuit to decide whether the spousal rule is consistent with the statute. *Matter of J-S-*, A 95 476 611 (BIA Feb. 24, 2006) (unpublished) (referred to Attorney General Sept. 4, 2007).
This means there is a three-way split among the circuits regarding the

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Social group litigation update

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spousal rule, and an alien's eligibility for asylum based on the forced abortion or sterilization of his spouse. In the Seventh and Ninth Circuits an alien qualifies for asylum based on the forced abortion or sterilization of a legally married spouse, or a non-legally married (traditional marriage) spouse. In the Third, Fifth, and Eleventh Circuits an alien qualifies for asylum based on a forced abortion or sterilization of a spouse, but only if the couple was legally married at the time. In the Second Circuit an alien cannot qualify for asylum based on forced abortion or sterilization of a spouse, but can get asylum on a different theory – persecution for "resistance" to a coercive population control program. Since the AG is reconsidering the spousal rule, if you have a case where an alien applied for asylum based on the forced abortion or sterilization of a spouse or partner, contact Quynh Bain in OIL to discuss whether to brief the case or hold it in abeyance pending a decision by the Attorney General on this question.

> There is a three-way split among the circuits regarding the spousal rule, and an alien's eligibility for asylum based on the forced abortion or sterilization of his spouse.

No Extension Of Spousal Rule To Other Relatives

Courts have refused to extend the *C-Y-Z-* spousal rule to other relatives. *Yuan v. USDOJ*, 416 F.3d 192 (2d Cir. 2005) (no extension of *C-Y-Z* to in-laws of person forcibly sterilized); *Wang v. Gonzales*, 405 F.3d 134, 143 (3d Cir. 2005) (no extension of *C-Y-Z-* to child of parents who were sterilized). *But see Zhang v. Gonzales,* 408 F.3d 1239 (9th Cir. 2005) (no extension of *C-Y-Z* to daughter of man who was sterilized, but daughter may qualify in her own right based on imputed political opinion, due to problems she herself experienced as result of her father's violation of family planning laws).

Asylum Based On "Persecution" For " Resistance" To Family Planning Policy

In *Matter of S-L-L-* the Board held that although a boyfriend cannot get asylum based on forced abortion or sterilization of his girlfriend, he may qualify for asylum if he can show he, himself, was persecuted or fears persecution "for other resistance to a coercive family planning policy." *Matter of S-L-L-* at 10. This means that in order to qualify for asylum on this basis, an alien must prove two things: (1) conduct constituting "persecution"; and (2) the persecution was because of "resistance" to a coercive population control program. *See id.* The Board has construed "resistance" to mean "an act or instance of resisting" or "opposition." *Id*. This includes "expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Id*. The Second Circuit has affirmed this construction. *Shi Liang Lin*, *supra.* The Seventh Circuit has case law consistent with this construction. *See Hao Zhu v. Gonzales*, 465 F.3d 316 (7th Cir. 2006) (boyfriend does not qualify for asylum based on single beating for resisting girlfriend's forced abortion, because it did not rise to the level of persecution). The Ninth Circuit has its own construction of this basis for asylum. *See Li Bin Lin v. Gonzales*, 472 F.3d 1131, 1134-35 (9th Cir. 2007) (to show "other resistance to a coercive population control program," alien must show (1) government was enforcing such a program at time of events; and (2) alien resisted the program).

Persecution For Removal Of An IUD As "Other Resistance"

There is an open question about whether a woman can claim asylum based on persecution for removing an IUD, on the ground that this is "resistance" to a coercive population control program. The Board has not decided this question in a published decision. The Seventh and Eleventh Circuits have suggested in dicta that persecution on this basis could be considered "other resistance" and remanded the question to the Board. *See Feng Chai Yang v. U.S. Atty. Gen*., 418 F.3d 1198, 1203 (11th Cir. 2003); *Xia J. Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004).

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Liberians provided deferred enforced departure (DED)

On September 12, 2007, President George W. Bush issued a Memorandum directing the Secretary of Homeland Security, Michael Chertoff, to defer the enforced departure for 18 months, through March 31, 2009, of any qualified Liberian national (or person without nationality who last habitually resided in Liberia) who is currently present in the United States and who is under a grant of Temporary Protected Status (TPS) as of September 30, 2007.

The President also directed that the Department of Homeland Security (DHS) take steps to implement continued employment authorization for these individuals during the 18-month DED period.

BIA publishes record number of precedent decisions

During his remarks in a panel discussion at the OIL Fall Immigration Seminar, Juan Osuna, Acting Chairman of the Board of Immigration Appeals, noted that the Board has published more precedent decisions in response to guidance from the Attorney General. Indeed, since Memorial Day, the Board has issued twenty precedent decisions, addressing a wide range of issues.

Asylum - REAL ID Act Burden of Proof Provisions

The Board issued two precedent decisions addressing for the first time burden of proof provisions enacted in the REAL ID Act of 2005 and codified at 8 U.S.C. § 1158(b)(1)(B). In ***Matter of J-Y-C-***, 24 I&N Dec. 260 (BIA 2007), the Board addressed the standards for credibility determinations codified at 8 U.S.C. § 1158(b)(1)(B)(iii). The Board found that the inconsistencies identified by the immigration judge in the credibility finding were supported by the record, and that, under the REAL ID Act, inconsistencies do not need to go to the heart of the claim. Although the alien challenged the use of inconsistencies with his airport statement, the Board noted that the respondent did not argue that the airport interview was unreliable and did not attempt to explain the inconsistencies about the passport he used. Finally, the Board noted that Congress in the REAL ID Act had codified the Board's corroboration standards set forth in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997), and held that the absence of corroborating evidence regarding the alien's church attendance, without a satisfactory explanation, supported the credibility and ultimate burden of proof findings.

In ***Matter of J-B-N- & S-M-***, 24 I&N Dec. 208 (BIA 2007), the Board addressed the requirement codified at 8 U.S.C. § 1158(b)(1)(B)(i) that an asylum applicant must prove that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for the claimed persecution. The Board noted that the statutory amendment was a direct response to judicial interpretations of the statute, particularly those of the Ninth Circuit creating a presumption of a protected grounds under certain circumstances. The Board found that the alien must show direct or circumstantial evidence of a nexus to protected grounds that "cannot be incidental, tangential, superficial, or subordinate to another reason for harm."

Asylum and Withholding - FGM

Most recently, the Board issued a pair a decisions in "female genital mutilation" ("FGM") cases, providing welcomed guidance in that area. In ***Matter of A-T-***, 24 I&N Dec. 296 (BIA 2007), the Board rejected an "ongoing persecution" theory for asylum based on past FGM, since the procedure is normally inflicted only once. The Board noted that Congress specifically had created a special status for forcible sterilization but had not done so for FGM. The Board also held that arranged marriage isn't persecution under facts of this case, and expressed doubt about validity of a social group claim for arranged marriage. Finally, the Board agreed that the alien failed to demonstrate a nexus to a particular social group, questioning whether a social group of all women in a country meets the requirement of "particularity." In ***Matter of A-K-***, 24 I&N Dec. 275 (BIA 2007), the Board rejected the contention that a parent is eligible for asylum based on fear of FGM to her United States citizen children if a parent is removed. The Board held that such "derivative" asylum or withholding is contrary to the statutory scheme, and also rejected the proposition of "humanitarian withholding of removal."

In *Matter of A-T–* the Board expressed doubt about validity of a social group claim for arranged marriage.

Asylum - Coercive Population Control

The Board issued a series of decisions addressing issues associated with asylum on account of persecution based on enforcement of Chinese family planning laws. In the first of these decisions, *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), the Board denied an alien's untimely motion to reopen based upon birth of a second child in the United States. Noting that because the alien's testimony had previously lacked credibility, the Board was less inclined to favorably exercise its discretion, the Board found that the motion did not satisfy the "changed circumstances" exception because although some documents indicated that family planning laws had been applied by officials in one location to the birth of a second child overseas, the evidence did not justify extrapolation to other cases. Other evidence contradicted the assertion of application of the laws to overseas births, key documents did not demonstrate that enforcement or sanctions had changed, and did not demonstrate sanctions amounting to persecution. In *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007), the Board held that an alien had not demonstrated that national policy in China requires forced sterilization of a parent who returns with a second child born outside of China, or that sanctions that may be imposed by local officials rise to the level of persecution. In *Matter of J-H-S-*, I&N Dec. Dec. 196 (BIA 2007), the Board held that a Chinese national with two or more children born in China may qualify as a refugee if he or she establishes that the births are a violation of family planning policies that would be punished by local officials in a way

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BIA precedent decisions on the rise

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that would give rise to a well-founded fear of persecution.

Asylum - Material Support for Terrorism

In ***Matter of S-K-***, 24 I&N Dec. 289 (AG 2007), the Attorney General remanded a case to the Board to consider if further proceedings are appropriate where the alien had been barred from asylum based on material support for a terrorist organization where the Secretary of Homeland Security had subsequently exempted the same organization from the application of that provision of the statute where an alien satisfies certain specified criteria.

Asylum - Status Returning from Canada

In ***Matter of R-D-***, 24 I&N Dec. 221 (BIA 2007), the Board found that an alien who left the United States, and is admitted to Canada to seek refugee status, has made a departure from the United States. When seeking to return to the United States upon the denial of refugee status in Canada, the alien is seeking admission into the United States, and is therefore an arriving alien, subject to expedited removal proceedings under 8 U.S.C. § 1225(b)(1)(A) rather than proceedings under 8 U.S.C. § 1229 based on removal grounds under 8 U.S.C. § 1227.

Criminal Aliens

In ***Matter of Chavez-Martinez***, 24 I&N Dec. 272 (BIA 2007), the Board noted that there is a split among the courts of appeals on the issue of who bears the burden of proving in a motion to reopen to show that a conviction was not vacated solely for immigration purposes. The Board found that in a late stage of proceedings, such as a motion to reopen, the burden is appropriately placed upon the alien.

In ***Matter of Solon***, 24 I. & N. Dec. 239 (BIA 2007), and *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007), the Board applied categorical approach analysis certain assault convictions and held that assault in the third degree under section 120.00(1) of the New York Penal Law requires both specific intent and physical injury, and therefore is a crime involving moral turpitude, while assault and battery against a family or household member under Virginia Code section 18.2-57.2 is not categorically a crime involving moral turpitude.

Cancellation of Removal

The Board issued several decisions regarding issues associated with cancellation of removal. In ***Matter of Gonzalez-Silva***, I&N Dec. 218 (BIA 2007), the Board found that although Congress intended the removal grounds established in the 1996 statutory amendments to apply retroactively, and provided that certain convictions to bar eligibility for cancellation of removal, Congress did not intend for a conviction of a crime of domestic violence, etc., under 8 U.S.C. § 1227(a)(2)(E) to bar eligibility for cancellation of removal. The Board found that because the limitation of eligibility for cancellation of removal at 8 U.S.C. § 1229b(b)(1)(C) applies to aliens "convicted of an offense under" 8 U.S.C. § 1227(a)(2), a conviction prior to the creation of the 8 U.S.C. § 1227(a)(2)(E) removal grounds could not be conviction under that removal grounds. In ***Matter of Escobar***, I&N Dec. 231 (BIA 2007), the Board held that an alien who has not been a lawful permanent resident for five years does not become eligible for cancellation of removal as a lawful permanent resident based on a parent's period of lawful permanent residence while the alien was a child. Although the alien has been present in the United States since she was four, and the alien's mother had been a lawful permanent resident since the alien was fourteen, the alien's status was not adjusted until she was 25, three years before her crime ended her accumulation of continuous residence. Finally, in *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007), the Board held that an application for special rule cancellation of removal is a continuing one, so an applicant can continue to accrue physical presence until the issuance of a final administrative decision.

The Board found that the determination of whether a marriage was genuine at its inception may require testimony at the hearing about the prior marriage.

Adjustment of Status Grandfathering under INA. § 245(i)

In ***Matter of Jara Riero and Jara Espinol***, 24 I&N Dec. 267 (BIA 2007), the Board found that an alien seeking to establish eligibility for adjustment of status under 8 U.S.C. § 1255(i) on the basis of a previous marriage-based visa petition must prove that the first marriage was bona fide at its inception. The Board found that the determination of whether a marriage was genuine at its inception may require testimony at the hearing about the prior marriage, and the lack of documents submitted, combined with the prior failure to respond to the Notice of Intent to Deny the prior visa petition, supported the finding that the marriage was not bona fide at the time of the prior petition.

Waiver of Inadmissibility for Returning LPR

In *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007), the Board held that a returning lawful permanent resident seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with an application for a waiver of inadmissibility under 8 U.S.C. § 1182(h). The alien's lawful status had not been terminated, and although a denial of the waiver would have resulted in termination

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FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

The Supreme Court has granted a petition for certiorari in ***Dada v. Keisler***, an unpublished Fifth Circuit. Decision. The question presented is:

> Does the filing of a motion to reopen removal proceedings automatically toll the period within which an alien must depart the United States under an order granting voluntary departure?

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Particularly Serious Crime

The Supreme Court has granted a petition for certiorari in ***Ali v. Achim***, 468 F.3d 462 (7th Cir. 2007). The questions presented are:

(1) Do only aggravated felonies count as particularly serious crimes under the withholding of deportation bar?
(2) Are PSC determinations (in the asylum and withholding context) discretionary under 8 U.S.C. 1252(a)(2)(B)(ii) and hence unreviewable?
(3) Does the Real ID "question of law" exception to jurisdictional bars at 8 U.S.C. 1252(a)(2)(D) permit review of a claim that the BIA misapplied its precedent?

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Asylum – Particular Social Group

The Supreme Court has granted the Solicitor General's petition for certiorari in ***Gao v. Gonzales***, 440 F.3d 62 (2d Cir. 2006), *cert. granted* ***Keisler v. Hong Yin Gao***, 2007 WL 2819676 (U.S. Oct. 01, 2007) and vacated the decision below. The question presented is:

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

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Asylum – Particular Social Group

On July 20, 2007, the Government filed a petition for panel rehearing in ***Hassan v. Gonzales***, 484 F.3d 513 (8th Cir. 2007). The court's decision could be construed as deciding, in the first instance and without prior resolution of the question by the Attorney General, that all Somali women constitute a "particular social group" and that the alien, who underwent female genital mutilation in Somalia as a child, suffered persecution "on account of" that status so as to qualify for asylum.

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Asylum—Adverse Credibility

On June 18, 2007, the Ninth Circuit en banc heard oral arguments in ***Suntharalinkam v. Gonzales,*** 458 F.3d 1634 (9th Cir. 2006). The question presented is whether numerous minor discrepancies cumulatively add up to support an adverse credibility determination, and were those discrepancies central to the asylum claim of a Sri Lankan alien suspected as being a Tamil Tiger terrorist.

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Asylum—Disfavored Group

On May 11, 2007, the Solicitor General filed an opposition to a petition for certiorari in ***Sanusi v. Gonzales***, 188 Fed. Appx. 510 (7th Cir. July 24, 2006). The question presented is whether an alien who has demonstrated membership in a disfavored group must also show individual singling out for persecution to establish it is more likely than not that life or freedom would be threatened.

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Jurisdiction — Sua Sponte Reopening

In ***Tamenut v. Gonzales***, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case.

On July 19, 2007, the court ordered that the case be submitted to the en banc court without oral argument.

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Constitution — Denial of 212(c) Relief Violates Equal Protection Clause

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

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REAL ID Act — Question of Law

The question raised in the petition for rehearing en banc in ***Gui Yin Liu v. INS***, 475 F.3d 135, 138 (2d Cir. 2007), is whether a court can review the factual basis of an IJ's untimely asylum applicant finding.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds That *In re Grijalva's* Presumption Of Receipt Cannot Be Applied To Aliens Receiving Notice By Regular Mail**

In ***Kozak v. Gonzales***, __F.3d__, 2007 WL 2685205 (1st Cir. Sept. 14, 2007) (*Torruella*, Selya, Lipez), the court remanded petitioner's claim that he had never received notice of his hearing date because the BIA had applied a legal standard for non-receipt that was inconsistent with IIRIRA's amendment to the INA allowing notice to be sent by regular mail, rather than certified mail.

Petitioner, an LPR, was placed in removal proceedings due to two convictions for domestic violence. An NTA was sent to petitioner's home by regular mail. When he failed to show up for the hearing, petitioner was ordered removed in absentia. When his motion to reopen was denied, he appealed the decision to the BIA claiming he had never received the notice of his hearing at his address of record. Petitioner submitted a sworn affidavit to support his claim. The BIA denied the appeal, holding that under *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995), petitioner had failed to overcome the presumption of proper delivery.

The court remanded, finding that the BIA had improperly relied on *Grijalva* because subsequent to that decision, IIRIRA had amended the INA to permit service of notice by regular mail. The court stated that *Grijalva* based its presumption of receipt on notices sent by certified mail, not regular mail as the INA now permits. While receipt of notices sent by certified mail "could easily be proven by a return receipt signed by the alien or by postal service records indicating attempts to deliver the notice to the alien's address," the court said, "[this] type of rebuttal evidence [] simply does not exist in the common case of failed delivery through regular mail." Therefore, the court found that "it would be inconsistent with the INA to require an alien to prove non-receipt with evidence that is unobtainable." The court rejected the government's reliance on *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001), holding that *G-Y-R-*'s determination that an alien can be properly charged with receiving notice even though he did not personally see the mailed document "applies only to circumstances such as when 'the Notice to Appear reaches the correct address but does not reach the alien though some failure in the internal workings of the household.'" Finally, the court said it would "leave it to the BIA to come up with a new standard to be applied to aliens who claim non-receipt of notices sent by regular mail."

> The court said it would "leave it to the BIA to come up with a new standard to be applied to aliens who claim non-receipt of notices sent by regular mail."

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■ **First Circuit Upholds Denial Of Alien's Motion To Reopen Because The Alleged Ineffective Assistance Of Counsel Did Not Cause The Motion's Untimeliness**

In ***Guerrero-Santana v. Gonzales,***__F.3d__ , 2007 WL 2349416 (1st Cir. August 17, 2007), (Torruella, *Selya*, Cyr), the First Circuit held that the BIA did not abuse its discretion by denying petitioner's motion to reopen as untimely. The court ruled that petitioner's claim of ineffective assistance by his two previous attorneys could not excuse his failure to file a timely motion to reopen because he failed to explain how his previous counsel caused the untimely filing.

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■ **First Circuit Dismisses Petition For Review As Untimely And Reiterates That Congress Has Plenary Power Over Whether Or Not To Provide Aliens With Judicial Review**

In ***Peguero-Cruz v. Gonzales***, __F.3d__, 2007 WL 2460032 (1st Cir. Aug. 31, 2007) (Boudin, Cyr, *Howard*), the court dismissed a petition for review as untimely notwithstanding the fact that at the time the BIA issued its decision the petitioner could not have filed a petition for review, and instead could have sought review only via habeas corpus.

Petitioner had been ordered removed as a criminal alien. On September 29, 2004, the BIA dismissed petitioner's third motion to reopen and reconsider as exceeding the numeric bar. On May 11, 2005, the REAL ID Act became effective making a petition for review the sole and exclusive means for judicial review of a final order of removal and requiring the petition to have been filed within 30 days of the final order of removal. Also in May 2005, and 8 months following the BIA's denial of his third motion, petitioner filed a petition for review of the BIA's decision. Petitioner argued that the thirty-day time limit on petitions for review should not apply to his case because, at the time the BIA issued its decision, he could not have filed a petition for review due to INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C)'s bar of review for criminal aliens, but could have sought habeas for an indefinite amount of time as the REAL ID Act had not yet passed. Therefore, argued the petitioner, the REAL ID Act impermissibly retroactively eliminated his right to review of the BIA's decision by requiring a thirty-day time limit.

The court rejected petitioner's argument and dismissed the petition for review for lack of jurisdiction. The court stated that its prior holding in *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007), governed its decision. In *Dalombo Fontes*, the court

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held that "because 'Congress's power to fashion immigration procedures is virtually unlimited,' it need not have provided aliens in [petitioner]'s position with the right to seek review in the courts of appeals." The court further noted that petitioner had more than seven months after the BIA's denial of his motion, and before the effective date of the REAL ID Act, to seek review by way of habeas corpus, stating that "we will not carve out an additional path to judicial review where Congress has not."

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■ **First Circuit Upholds Adverse Credibility Determination When Petitioner's Testimony Contained Inconsistencies And Omissions**

In ***Melhem v. Gonzales***, __F.3d__, 2007 WL 2404479 1st Cir. Aug. 24 2007) (*Lynch*, Selya, Lipez), the court held that am asylum applicant from Lebanon, who claimed to have been a member of the Lebanese Forces, had failed to support his claim with credible testimony that it was more likely than not that he would suffer persecution if he returned to Lebanon. The court also concluded that it lacked jurisdiction over petitioner's time-barred asylum claim.

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SECOND CIRCUIT

■ **Second Circuit Affirms That Petitioner Could Not Base His Claim For Humanitarian Asylum On His Mother's Forced Sterilization Because He Lacked An Imputed Political Opinion**

In ***Jiang v. Gonzales***, __F.3d__, 2007 WL 2458415 (2d Cir. Aug. 31, 2007) (*Jacobs,* Parker, Hurd), the court affirmed the BIA's denial of humanitarian asylum based on the applicant's claim that his mother's forced sterilization caused him economic and emotional hardship because he had not shown that he personally suffered past persecution, and had not shown that the Chinese authorities had imputed a political opinion to him.

Forced sterilization, and therefore persecution on account of political opinion, "cannot be presumed to have been imputed to the family of the individual who undergoes the procedure; there must be some evidence that it was so imputed."

Petitioner, a citizen of China, sought humanitarian asylum based on the fact that his mother had been forcibly sterilized shortly after his birth, resulting in adverse medical consequences to this mother that affected the family's ability to make a living. An IJ granted the relief, finding that the economic hardship suffered by petitioner in the wake of his mother's sterilization was sufficiently harsh past persecution to entitle him to humanitarian asylum. The IJ reasoned that while petitioner had not been persecuted because of an imputed political opinion, petitioner was "affected" by the persecution of his mother's political opinion. When DHS appealed, the BIA sustained the appeal. The BIA explained that petitioner had personally suffered no harm by the government and that the economic hardship cited by the IJ did not constitute persecution, not to mention persecution on a protected ground.

The court affirmed the BIA's decision. First, the court held that "to the extent [petitioner]'s claim is based on his mother's sterilization itself, we are bound by *Shi Liang Lin* [494 F.3d 296 (2d Cir. 2007) (*en banc*)]," which held that a claim of persecution based solely on a forced abortion or sterilization procedure without evidence of further harm can only be brought by the individual who had undergone the procedure. Second, the court held that petitioner's mother's illness - caused by the government - and petitioner's resulting hardship did not constitute past persecution on a protected ground. The court stated that while "the question whether the applicant experienced harm 'directly' is not itself dispositive" and that an applicant for humanitarian asylum could prove persecution based on his cumulative experiences, no evidence in the record showed that the government imputed his mother's political opinion to him. The court explained that "as we reasoned in *Shi Liang Lin*, INA § 1101(a)(42) provides that those who have been subjected to forced sterilization are 'deemed' to have suffered persecution by reason of political opinion; but this constructive political opinion - whatever its exact contours - cannot be presumed to have been imputed to the family of the individual who undergoes the procedure; there must be some evidence that it was so imputed."

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■ **Second Circuit Remands Case For Findings As To Whether Alien Is "Grandfathered" Pursuant to INA § 245(i) And For The BIA To Define When A Visa Petition Is "Approvable When Filed"**

In ***Butt v. Gonzales***, __F.3d__, 2007 WL 2452423 (2d Cir. Aug. 23, 2007) (*Feinburg,* Calabresi, Wesley), the court remanded petitioner's claim for adjustment of status based on an I-140 for the BIA to determine whether petitioner had been previously grandfathered under INA § 245(i) via his previously denied I-130 petition and whether his I-140 petition was "approvable when filed" under INA § 245(i)'s implementing regulations.

Petitioner had entered the United States without inspection in February 2000. On April 6, 2001, he married a U.S. citizen who immediately filed a I-

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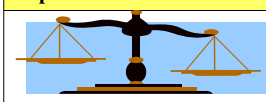

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130 visa petition on his behalf. He sought to adjust his status on the basis of the I-130, but the application was denied when petitioner was a "no show". Removal proceedings commenced in 2003, whereupon petitioner again sought adjustment of status, but this time on the basis of an I-140 visa petition filed by his employer that same year. Petitioner asked an IJ for a continuance in order to allow time for the I-140 adjudication, but was denied. The BIA affirmed without opinion. Petitioner filed a petition for review arguing that the IJ abused his discretion in denying the continuance.

The court held that the IJ erred by requiring that the alien prove Honduran police refused to protect him on account of a protected ground.

Before even reaching the issues raised in the petition for review, the Second Circuit requested supplemental briefing on whether petitioner was even eligible for adjustment of status, as his I-140 was not filed until after the sunset provision in INA § 245(i) allowing adjustment of status for aliens who entered without inspection. Specifically, the court asked the parties to address whether petitioner had met INA § 245(i)'s physical presence requirement on the basis of his I-130 petition and, assuming he had, whether his I-130 was "approvable when filed", and whether a previously denied visa petition can be used to grandfather an alien under § 245(i) so that he may then file a subsequent untimely petition. First, the government submitted that nothing in the record clearly showed that petitioner had met the physical presence requirement. However, noting discrepancies in the record, the court remanded this issue to the BIA because "the agency had not made a finding on this question." Second, the government argued that pursuant to 8 C.F.R. § 245.10(a)(1)(i), "approvable when filed" requires a meritorious application and that because petitioner defaulted on his I-130 petition, this determination could not be made. Petitioner, on the other hand, argued that the term means only that there's no indication of fraud. The court also remanded this issue, finding the term ambiguous. Finally, while the government conceded that a previously denied visa petition could, in fact, serve to grandfather an alien allowing a later visa petition to be filed after INA § 245(i)'s sunset date, the court chose to remand this issue as well.

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THIRD CIRCUIT

■ **Third Circuit Remands Where IJ Failed To Address Particular Social Group Claim**

In ***Valdiviezo-Galdamez v. Gonzales***, __F.3d__, 2007 WL 2554965) (3d Cir. Sept. 7, 2007) (*Rendell*, Ambro, Shapiro), the court held that the IJ erred by denying an asylum applicant's claim of persecution on account of his membership in a particular social group consisting of young Honduran men who had been recruited by criminal gangs and refused to join. Specifically, the IJ erred by requiring that the alien prove Honduran police refused to protect him on account of a protected ground; by requiring proof that police refused to protect the alien, rather than were "unwilling or unable" to protect him from gangs; and by failing to address whether the specified group constituted a "particular social group" under the INA.

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SIXTH CIRCUIT

Alien Admitted Under The Visa Waiver Program Is Not Entitled To Review Of An Adjustment Of Status Application After Overstaying His Term Of Admission

In ***Lacey v. Gonzales***, __F.3d__, 2007 WL 2372304 (*Moore*, Gibbons, Sargus) (6th Cir. August 21, 2007), the Sixth Circuit held that under the terms of the Visa Waiver Program ("VWP"), an alien who overstays his authorized term of admission and applies to adjust status thereafter, but before issuance of a removal order, cannot contest a later administrative removal order. The court also held that the alien had no right to a hearing before an Immigration Judge, and therefore no right to renew his adjustment application in Immigration Court.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That The INA Requires An Asylum Applicant's Untimely Motion To Reopen Be Excused By Changed Country Conditions And Not Changed Personal Conditions**

In ***Chen v. Gonzales***, __F.3d__, 2007 WL 2389766 (7th Cir. Aug. 23, 2007) (*Posner*, Coffey, Flaum), the court affirmed the BIA's denial of petitioner's motion to reopen his asylum application as untimely where petitioner alleged only changed personal circumstances and not changed country conditions.

Petitioner, a citizen of China, was ordered removed in 2001 after his first asylum application was denied. In 2006, petitioner filed a motion to reopen alleging a wholly different grounds for asylum - namely, that his marriage to a U.S. citizen and birth of

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two U.S. citizen children constituted changed circumstances that would subject him to forced sterilization if removed to China. The BIA denied the motion as untimely. Further, the BIA declined to excuse the untimeliness under the exception found in INA § 240a(c)(7)(C)(ii) because petitioner alleged only changed personal circumstances and not changed country conditions as that statute requires.

Before the Seventh Circuit, petitioner argued that the provision excusing untimely motions to reopen for changed country conditions found in INA § 240a(c)(7)(C)(ii), was in conflict with the provision in INA § 208(a)(2)(D) excusing untimely or successive asylum applications when an alien can demonstrate changed circumstances. The court rejected this argument. The court found that "there is no conflict [between the two provisions]. [INA § 208(a)(2)(D)] says nothing about the situation in which the applicant has already been removed, the order has become final, and the time for reopening the removal proceedings has expired. The distinction that [INA § 240a(c)(7)(C)(ii)], allowing reopening after that time has expired, makes between changed *country* conditions and changed *personal* conditions is sensible, since the alien can manipulate the latter but not the former, as the petitioner in this case did." The court noted recent decisions in the Sixth and Second Circuit in tension with the court's holding, but dismissed the language in those cases as dicta.

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■ **Seventh Circuit Holds That IJ's Failure To Distinguish Between Lies and Innocent Mistakes Undermined The Credibility Determination**

In ***Kadia v. Gonzales***, __F.3d__, 2007 WL 2566015 (7th Cir. Sept. 7, 2007) (*Posner,* Wood), the court remanded petitioner's asylum application for a new hearing because the IJ improperly relied on trivial inconsistencies and made "a number of mistakes" when determining that petitioner was not credible.

Petitioner, a citizen of Cameroon, claimed he was persecuted on account of his political opinion. Specifically, he claimed that as a result of his political activity, he was arrested, detained, beaten, and had burning rubber poured down his back. The IJ found petitioner's testimony not credible and "either exaggerated for the purpose of enhancing his eligibility for asylum or completely untrue." The IJ cited a number of inconsistencies between the petitioner's testimony and the written statement earlier submitted in support of his asylum application, and anomalies in the documentary evidence petitioner submitted. Specifically, the IJ found that petitioner had inconsistently testified as to the date of an arrest, on whether or not he had been released from arrest on conditioned parole, had misspelled "diehard" as "die-heart", and failed to mention the burning rubber incident cited in his written statement. The BIA affirmed.

The court reversed the adverse credibility finding noting that petitioner's testimony concerning the date of his arrest was a trivial mistake and that "human memory is selective as well as fallible."

The court reversed the adverse credibility determination and remanded the application not just for a review of the transcript and documentary evidence, but for a whole new hearing. The court found that while a "reasonable trier of fact could have concluded that the petitioner had lied about his political activities in Cameroon[], the immigration judge made a number of mistakes, uncorrected by the Board, in his assessment of the evidence, and we cannot be confident that had he not made those mistakes he still would have disbelieved the petitioner." Specifically, the court found that petitioner's testimony concerning the date of his arrest was a trivial mistake, saying "human memory is selective as well as fallible." The court then found that petitioner had not been inconsistent about his conditioned release from detention, but had merely used different descriptions, and that "in Cameroon as in a number of other countries in which English is the or a principal language, including Jamaica and Pakistan, a common variant of 'diehard' is 'die-heart' or die heart.'" The court also found that petitioner's failure to mention the rubber burning incident in testimony was not the result of lying, but of the "judge playing 'gotcha!' by drawing a negative inference from the petitioner's failure to interrupt him earlier by answering a question not (yet) asked." Therefore, the court remanded the case "because we cannot know whether, had [the IJ] not committed those mistakes, he would nevertheless have rejected petitioner's claim."

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■ **Seventh Circuit Adopts Minority View That A Continuance Denial Is A Discretionary Decision Over Which Courts Lack Jurisdiction**

In ***Ali v. Gonzales***,__F.3d__, 2007 WL 2684825 (7th Cir. Sept. 14, 2007) (Bauer, Evans, *Sykes*), the court held that it lacked jurisdiction to review the IJ's denial of the alien's request for a continuance to await an opportunity to adjust status. While acknowledging that its holding was contrary to the Attorney General's jurisdictional argument and the holdings of six other courts of appeals, the court concluded that the statutory language required that result. Additionally, the court agreed with

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the Attorney General that it lacked jurisdiction to consider the alien's selective prosecution challenge to the NSEERS registration program.

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■ **Seventh Circuit Holds That Indonesian Ethnic Chinese Christian Women Are Not A Disfavored Group**

In *Kaharudin v. Gonzales*, __F.3d__, 2007 WL 2457932 (7th Cir. Aug. 31, 2007) (Bauer, Cudahy, *Ripple*), the court held that it lacked jurisdiction to consider the BIA's denial of an asylum application as untimely and affirmed the BIA's finding that the Indonesian alien had not established her eligibility for withholding of removal based on her Christian religion and Chinese ethnicity. The court concluded that the mistreatment did not rise above the level of "mere harassment," that the alien failed to show that internal relocation within Indonesia was not reasonable, or that authorities were reluctant to protect her from the mistreatment. Citing its previous holding in *Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005), the court also rejected application of the Ninth Circuit's "disfavored group" analysis in the withholding context.

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■ **Seventh Circuit Holds That BIA Failed To Address Aspects Of Alien's Claim Of Well-Founded Fear**

In *BinRashed v. Gonzales*, __F.3d__, 2007 WL 2685148 (7th Cir. Sept. 14, 2007) (Bauer, Flaum, *Williams*), the court vacated the BIA's decision, citing a failure on the part of the Immigration Judge and the BIA to address three aspects of the alien's documentary evidence. While the court rejected the alien's claim of past persecution, it held that the IJ's statement that there was "absolutely no independent evidence" differed with the record, and the failure to opine on the evidence constituted error. The court remanded to allow the BIA to address the evidence.

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■ **Seventh Circuit Upholds Denial Of Asylum Because Petitioner's Fear Of Future Prosecution Was Not Objectively Reasonable**

In *Garcia v. Gonzales* __F.3d__, 2007 WL 2457849 (7th Cir. Aug. 31, 2007) (Bauer, Cudahy *Ripple*), the court held that the IJ's conclusion that petitioner had not demonstrated past persecution or a well-founded fear of future persecution was supported by substantial evidence. The court noted that the petitioner's fear was based on general civil strife resulting from the continued conflict between the Columbian government and rebel forces, and he failed to show an objectively reasonable fear of future persecution where the government had protected him from rebel forces in the past, and there was no indication that it would not similarly protect him in the future.

The court found that petitioner's fear was based on general civil strife resulting from the continued conflict between the Columbian government and rebel forces.

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■ **Seventh Circuit Awards Attorney's Fees Pursuant To The Equal Access To Justice Act**

In *Floroiu v. Gonzales*, __F.3d__, 2007 WL 2377387 (Ripple, Rovner, Williams) (per curiam) (7th Cir. August 22, 2007), the Seventh Circuit held that because the aliens were denied due process by a biased Immigration Judge, the government's position on appeal was unreasonable and not substantially justified. The court concluded that the aliens satisfied the EAJA standards, and thus were eligible for an award of fees. In addition, the court ruled that the aliens should not recover their fees at the requested $160 per hour rate but instead the statutory maximum of $125 per hour totaling $5,937.50, and additional bill of costs of $324.

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■ **Asylum Applicant Established A Well-Founded Fear Of Female Genital Mutilation In Nigeria**

In *Oyekunle v. Gonzales*, __F.3d__, 2007 WL 2377380 (7th Cir. (August 22, 2007) (Posner, Coffey, Sykes), the Seventh Circuit vacated the BIA's decision and concluded that the alien's evidence and testimony supported a well-founded fear of female genital mutilation if she returned to Nigeria. The court rejected the BIA's determination that the alien's fear was not objectively reasonable, and held that her evidence was consistent with having a well-founded fear of persecution.

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NINTH CIRCUIT

■ **Ninth Circuit Rejects BIA's Denial Of Alien's Motion To Reopen And To Rescind His In Absentia Removal Order**

In *Sembiring v. Gonzales*, __F.3d__, 2007 WL 2406863 (9th Cir. August 24, 2007) (Silverman, *W. Fletcher*, Clifton), the Ninth Circuit applied the holding of *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002), to conclude that it was an abuse of discretion for the Immigration Judge to refuse to reopen proceedings in order

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to rescind the alien's in absentia removal order. The Immigration Court had rescheduled the alien's asylum hearing for six days earlier than the original date, and sent the notice by regular mail. The alien, who appeared in Immigration Court on the originally scheduled date of the hearing, claimed that she never received the notice that it had been rescheduled. The court held that because the alien had initiated an affirmative application for a benefit (asylum) and had no reason to avoid immigration proceedings, she overcame the weaker presumption of effective service that arises when a notice is sent by regular mail.

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■ **Ninth Circuit Denies Govt's Petition For En Banc Rehearing Of Ruling That Court May Review BIA's Decision Not To Consider Untimely Asylum Application After REAL ID Act**

In ***Ramadan v. Keisler***, __F.3d__, 2007 WL 2811123 (9th Cir. Sept. 28, 2007) (*per curiam*), the court denied the government's petition for *en banc rehearing* of the February 2007 *per curiam* ruling that the BIA's determination that an alien failed to demonstrate "changed circumstances" that would justify considering an asylum application filed more than a year after the alien's arrival is not an unreviewable discretionary determination.

Judge O'Scannlain, joined by eight Judges (Kozinski, Kleinfeld, Tallman, Bybee, Bea, Callahan, M. Smith, Jr., and Ikuta), dissented from the "unfortunate" decision not to rehear "this very significant case," declaring that "Congress has expressly withdrawn our power to review such discretionary determinations," and the court's opinion "transgresse[s] the clear limits of our constitutional jurisdiction," in conflict with the other circuits that have addressed the issue.

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■ **Ninth Circuit Holds That Application of Matter of Y-L- To Alien's 1999 Drug Conviction Was Impermissibly Retroactive**

In ***Miguel-Miguel v. Gonzales***, __F.3d__, 2007 WL 2429377 (9th Cir. Aug. 29, 2007) (Hug, Rymer, *Fisher*), the court concluded that the Attorney General had authority to create a strong presumption that a drug trafficking crime is a particularly serious crime, but that the presumption had an impermissibly retroactive effect on petitioner.

The court found that nothing in the text of INA § 241(b) unambiguously precluded the Attorney General from creating the strong presumption in *Matter of Y-L-*.

Petitioner, a citizen of Guatemala, had been granted asylum in 1988. In 1998, he was charged with a drug trafficking offense and, on account of the conviction, placed in removal proceedings. Petitioner's application for withholding of removal was denied because an IJ found changed country conditions in Guatemala. However, the IJ noted that petitioner was not precluded from eligibility for withholding of removal due to his drug trafficking offense as the conviction did not constitute a particularly serious crime pursuant to INA § 241(b)(3)(B). Petitioner appealed the IJ's changed country conditions determination to the BIA. While the appeal was pending, the Attorney General issued the opinion *Matter of Y-L-*, 23 I&N Dec. 270 (Op. Att'y Gen. 2002), holding that all drug tracking offenses would be treated as presumptively a particularly serious crime. Consequently, the government moved to remand petitioner's case so that an IJ could reexamine the case in light of *Matter of Y-L-*. On remand, the IJ found that petitioner's drug trafficking offense now constituted a particularly serious crime. Following the BIA's affirmance without opinion, petitioner sought review in the Ninth Circuit relying on two arguments. First, he claimed that *Matter of Y-L-* created what amounts to a *per se* rule that turns all drug trafficking offenses into particularly serious crimes. Second, he claimed that the Attorney General's promulgation of that rule was forbidden by the text of INA § 241(b).

Initially, the court held that it had jurisdiction over the petition for review and rejected the government's claims that petitioner had failed to exhaust his argument and that the BIA's determination on whether petitioner had committed a particularly serious crime was an unreviewable exercise of discretion. First, the court found that "although [petitioner] did not re-raise the argument on remand to the IJ, or in his final appeal to the BIA, there is no requirement that immigration petitioners exhaust an argument before the BIA more than once, particularly where as here the BIA has [] implicitly rejected this argument in its [] decision holding that the case should be remanded." Second, the court held that the petitioner was not challenging the BIA's discretionary determination that his offense was particularly serious, but instead that the Attorney General lacked the authority to issue its opinion and then applying it to his case.

Turning to the merits, the court rejected petitioner's argument that *Matter of Y-L-* laid out a *per se* rule. The court found that the plain language of *Matter of Y-L-* stated that the Attorney General was not creating a per se rule, but only a presumption which could be rebutted. Second, the court found that nothing in the text of INA § 241(b) unambiguously precluded the Attorney General from creating the strong presumption in *Matter of Y-L-*. Rather, the court said, the statute "specifically grants the Attorney General the authority to 'determine that . . . an alien has been convicted of a particularly serious crime'" The court

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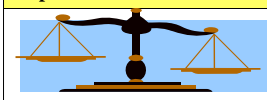

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then found the Attorney General's construction of the statute permissible, rejecting petitioner's contention that it conflicted with the UNHCR Handbook for Determining Refugee status because the Handbook was not binding authority. Despite upholding *Matter of Y-L-*, however, the court held that applying its holding to petitioner would have an impermissibly retroactive effect under the factors it laid out in *Montgomery Ward & Co., Inc. V. FTC*, 691 F.2d 1322 (9th Cir. 1982). Specifically, the court found that *Matter of Y-L-* created a significant difference in standards, that petitioner objectively relied on pre-*Matter of Y-L-* law, and that imposing that standard on petitioner would create a substantial burden. The court found that these factors outweighed the one factor in the government's favor, namely, that there would be a statutory interest in applying the new rule despite the reliance by petitioner on the old standard.

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■ **Ninth Circuit Rules That Unlawful Sexual Intercourse With A Person Under Eighteen Constitutes Sexual Abuse Of A Minor And An Aggravated Felony**

In ***Estrada-Espinoza v. Gonzales,*** __F.3d__, 2007 WL 2325138 (9th Cir. Aug. 16 2007) (Kleinfeld, Thomas, Leighton) (*per curiam*), the court determined that an alien convicted of unlawful sexual intercourse with a person under eighteen had been convicted of sexual abuse of a minor and, therefore, it constituted an aggravated felony offense. The court relied on its decision in *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006), which had previously examined section 261.5(c) of the California Penal Code, and deferred to the BIA's interpretation of that statute.

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■ **Ninth Circuit Upholds Regulation Restricting Exercise Of Discretion In Adjudications Of Waivers For Aliens Convicted Of Violent Crimes**

In ***Mejia v. Gonzales***, __F.3d__, 2007 WL 2406864 (9th Cir. Aug. 24, 2007) (B. Fletcher, *McKeown*, Whyte), the court upheld 8 C.F.R. § 212.7(d) as a permissible exercise of the Attorney General's discretion. The regulation provides that the Attorney General will not favorably exercise discretion under INA § 212(h) in cases involving violent or dangerous crimes unless the alien can demonstrate extraordinary circumstances. In rejecting the alien's challenge, the court reasoned that the regulation does not alter the statutory "extreme hardship" standard but simply guides an adjudicator's ultimate exercise of discretion.

"It would be ironic, indeed, if petitioners who have remained in the United States illegally following an order of deportation were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities."

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■ **Ninth Circuit Joins Second And Seventh Circuits In Holding That The Birth Of Children Is A Change In Personal Circumstances That Does Not Satisfy 8 C.F.R. § 1003.2(c)(3)(ii)'s Exception To Untimely Or Numerically Barred Motions**

In ***He v. Gonzales***, __F.3d__, 2007 WL 2472546 (9th Cir. Sept. 4, 2007) (Thompson, Berzon, *Tallman*), the court affirmed the BIA's denial of petitioners' second motion to reopen as untimely and numerically barred and held that a change in personal circumstances does not constitute changed country conditions within the regulatory exception under 8 C.F.R. § 1003.2(c)(3)(ii).

Petitioners, citizens of China, filed a second motion to reopen alleging that the births of their two U.S. citizen children constituted changed circumstances that would subject them to forced sterilization in China. The BIA denied the motion as untimely and numerically barred.

The Ninth Circuit affirmed the BIA's decision. The court joined the Second and Seventh Circuits in holding that "the birth of children outside the country of origin is a change in personal circumstances that is not sufficient to establish changed circumstances in the country of origin within the regulatory exception to late-filed or successive motion to reopen under 8 C.F.R. § 1003.2(c)(3)(ii)." The court found persuasive the Second Circuit's reasoning in *Wang v. BIA*, 437 F.3d 270 (2d Cir. 2006), stating that "it would be ironic, indeed, if petitioners who have remained in the United States illegally following an order of deportation were permitted to have a second and third bite at the apple simply because they managed to marry and have children while evading authorities. This apparent gaming of the system ... is not tolerated by the existing regulatory scheme." The court then dismissed documents submitted by the petitioners swearing to accounts of forced sterilization of parents of multiple children because "again, it is unclear how th[ese] document establish a change in conditions in China."

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■ **Ninth Circuit Holds That District Court Retains Habeas Jurisdiction To Review Alien's Claim That Prior Counsel Failed To File A Timely Petition For Review**

In ***Singh v. Gonzales***, __F.3d__, 2007 WL 2406862 (9th Cir. Aug. 24, 2007) (Wallace, Nelson, *McKeown*) the court held that a district court has habeas jurisdiction over claims of in-

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effective assistance of counsel where the alien alleges an untimely post-administrative filing of a petition for review because the claim did not seek judicial review of a final order of removal.

Petitioner had filed a habeas petition in district court alleging that ineffective assistance of counsel resulted in his unlawful detention. Specifically, that his first lawyer changed his asylum application without his consent, that his second attorney filed an untimely petition for review, and that his third attorney failed to effectively pursue the ineffective assistance of counsel claim he alleged against his second lawyer. The district court dismissed the petition for lack of jurisdiction under the REAL ID Act's provision providing that the courts of appeal shall be the sole and exclusive means to challenge a final order of removal. Petitioner appealed to the Ninth Circuit.

"[W]e do not take lightly Congress's general concern over the proliferation of habeas petitions in the immigration area. However, we can interpret that concern only in the context of specific statutory language."

On appeal, the court first dismissed petitioner's claim against his first attorney for failure to exhaust as " at the time [petitioner] retained Lawyer 2 to represent him at the removal hearing, the facts surrounding the allegedly ineffective representation by Lawyer 1 were known to [petitioner]." Second, the court rejected the government's argument that petitioner's claim against his second attorney was barred by res judicata because he already raised this claim in a previous timely petition for review as well as a motion to reopen. The court found that the government had waived this defense by failing to raise it before the district court and that this claim had been previously presented by his third attorney - who petitioner also claimed provided ineffective assistance. Finally, the court held that the district court improperly dismissed the habeas petition concerning the second attorney's ineffective assistance. The court found that because the alleged ineffective assistance of the second attorney "occurred *after* the issuance of the final order of removal, and the claimed injury that [petitioner] suffered as a result was the deprivation of an opportunity for direct review of the order of removal in the court of appeals, [] [petitioner]'s second IAC claim cannot be construed as seeking judicial review of his final order of removal, notwithstanding his ultimate goal or desire to overturn that final order of removal." The court found this result consistent with Congressional intent underlying the REAL ID Act to allow every alien "a day in court," stating "[W]e do not take lightly Congress's general concern over the proliferation of habeas petitions in the immigration area. However, we can interpret that concern only in the context of specific statutory language."

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■ **Ninth Circuit Rules That The BIA's Conclusory Statement Is Insufficient To Determine Whether It Abused Its Discretion By Denying Aliens' Motion To File A Late Brief**

In ***Garcia-Gomez v. Gonzales***, __F.3d__,2007 WL 2363606 (9th Cir. August 21, 2007) (O'Scannlain, Hawkins, Wardlaw) (*per curiam*), the Ninth Circuit held that the BIA failed to adequately explain its refusal to accept the aliens' late-filed brief, following the Seventh Circuit in Gutierrez-*Almazan v. Gonzales*, 491 F.3d 341 (7th Cir. 2007). The aliens filed a motion with the brief claiming that the post office had delivered the briefing schedule to their neighbor. The Board refused to accept the late-filed brief, stating that the explanation was "insufficient for us to accept the untimely brief in our exercise of discretion." The court ruled that the Board's ruling was inadequate to allow the court to permit any meaningful review, and remanded to the BIA.

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■ **Ninth Circuit Holds That IJ Erred By Placing Burden On Alien To Prove His Identity**

In ***Kalouma v. Gonzales***, __F.3d__, 2007 WL 2417396 (9th Cir. Aug. 28, 2007) (*Noonan*, Paez, Tallman), the court reversed an IJ's decision denying petitioner's asylum application for failure to prove his identity. The court held that the IJ improperly placed the burden to prove identity on petitioner, when INA § 208 (d), 8 U.S.C. § 1158(d), imposes the duty on the Attorney General or Secretary of State.

Petitioner, a citizen of Sudan, claimed asylum on the basis that Muslims and Arabs persecuted him for his Christian beliefs. An IJ denied asylum, finding that petitioner failed to testify credibly and failed to prove his identity. Specifically, the IJ found that pursuant to INA § 208(d), if an alien's identity is undetermined, then that alien is not eligible for asylum because a background check could not be performed. The BIA affirmed.

The court reversed. Citing INA § 208(d)'s language that "asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State," the court held that "the statute, as amended, imposes duties on the Attorney General and the Secretary of State. No new burden for the asylum-seeker is imposed by the amendment." The court found that no case-

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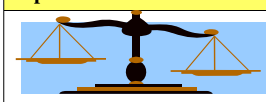

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law or regulation supported placing the burden on the asylum applicant.

Judge Tallman dissented. He would have found that, "an asylum applicant bears the burden of proving that his is a refugee entitled to asylum" and that "doubts about an asylum-seeker's identity can also preclude asylum," citing *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003). "There is substantial fraud in immigration matters, and we should not blind ourselves to the black market in false documentation that exists in many of these cases," he said. Additionally, because the IJ found petitioner not credible, he believed that the court should have affirmed that petitioner did not meet his burden of proof.

"There is substantial fraud in immigration matters, and we should not blind ourselves to the black market in false documentation that exists in many of these cases."

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■ **BIA Did Not Abuse Its Discretion By Finding Petitioner's Appeal Untimely Where Petitioner Wrote The Wrong Zip Code**

In ***Holder v. Gonzales***, __F.3d__, 2007 WL 2403738 (8th Cir. Aug. 24, 2007) (Murphy, *Hansen,* Colloton), the court held that the BIA did not abuse its discretion by finding petitioner's appeal untimely and that BIA regulations requiring a notice of appeal to be filed within thirty days at the BIA's office in Virginia did not violate due process.

Petitioner's appeal to the BIA was due on a Monday. On the preceding Friday, petitioner sent the notice of appeal via Federal Express overnight delivery. However, because petitioner had written the wrong zip code on it, the package did not arrive until Tuesday - one day too late. Consequently, the BIA dismissed the appeal as untimely.

Before the Ninth Circuit, petitioner first argued that the BIA abused its discretion by failing to find that extraordinary circumstances excused the untimely delivery. Petitioner analogized his case to *Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005), where an error on the part of the overnight carrier had excused an otherwise untimely appeal. The court rejected this analogy and found the BIA did not abuse its discretion. Unlike *Oh*, the court said, "any error attributable to the error in the zip code is attributable to [petitioner], not the mail carrier" and that petitioner "allowed little to no time for delay within the delivery system he chose." Next, the petitioner argued that the BIA regulations requiring notice be filed within thirty-day time limit at the office in Virginia violated due process, demanding that the BIA allow for delivery at designated local offices and adoption of the mailbox rule. The court rejected this argument as well. The court held that "the availability of overnight couriers and priority mail makes delivery methods available nationwide, and the Board's procedures for accepting even untimely notices of appeal based on individual unique circumstances bring this regulation within constitutional requirements." The court went on to state that "local filing would place a much larger burden on the Board if it is attempting to process in its offices in Virginia the notices of appeal filed in multiple locations across the country" and that a mailbox rule "would not give sufficient notice to the IJ or the INS that a deportation order is being appealed, as a notice properly postmarked (and thus deemed filed) might never reach its destination."

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Ninth Circuit Distinguishes "Conditional Parole" From "Parole Into The United States," Ruling That The Former Does Not Make Aliens Eligible For Adjustment of Status

In ***Ortega-Cervantes v. Gonzales***, __F.3d__, 2007 WL 2472487 (9th Cir. Sept. 4, 2007) (Schroeder, Trott, *Fletcher*), the court held that petitioner's conditional parole into the United States pursuant to 8 U.S.C. § 1226(a), INA § 236(a), was not the equivalent of "paroled into the United States" for purposes of adjustment of status pursuant to 8 U.S.C. § 1255(a), INA § 245(a). Therefore, because petitioner had not been paroled into the United States, he was ineligible to adjust his status.

Petitioner had attempted to illegally enter the United States from Mexico through use of a smuggler. When INS agents foiled this attempt and captured him, they offered petitioner conditional parole into the United States in exchange for a promise to testify against the smuggler he employed. Petitioner accepted, and a few days after his release, married a U.S. citizen. When placed in removal proceedings, he sought adjustment of status pursuant to INA § 245(a) as an alien "inspected and admitted or paroled into the United States." An IJ denied the relief, finding that petitioner was not eligible for adjustment of status as he had not been paroled into the United States. The IJ found that "conditional parole under [INA § 236(a)] is not [the same as] paroled into the United States under [INA § 245(a)]." Petitioner appealed to the BIA, citing a 1999 INA policy memorandum indicating that Cuban nationals conditionally paroled into the United States pursuant to the Cuban Adjustment Act be treated as having been paroled into the United States. The BIA rejected the memorandum as non-binding, and affirmed the IJ's decision.

Before the Ninth Circuit, petitioner argued that he had not been

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conditionally paroled into the United States pursuant to INA § 236(a), but in fact had been paroled into the United States pursuant to INA § 245 (a), and, even if he had not been conditionally paroled in the United States, that conditional parole was the equivalent of "parole into the United States." The court rejected both arguments. First, the court found that because "none of the forms issued to [petitioner] makes any reference whatsoever to 'parole into the United States' under [INA § 245(a)], and immigration officials did not issue [petitioner] an I-94 card, which is typically given to [INA § 245(a)] parolees," petitioner had not been paroled pursuant to INA § 245(a). Rather, the court noted, the forms issued to petitioner specifically cited INA § 236. The court also rejected petitioner's claim that 8 C.F.R. § 212.5(b)(4), allowing aliens who will be witnesses in proceedings to be paroled into the United States, supported his position. The court stated that the subsections of that regulation specifically apply only to arriving aliens and inadmissible aliens, and petitioner was neither of those. Second, the court, considering the legislative history behind Congress' grant of authority to the Attorney General to "parole" aliens into the United States, held that conditional parole pursuant to INA § 236(a) is not the equivalent of "parole" pursuant to INA § 245(a).

The court explained that Congress' creation of the parole procedure was meant to "ensure that a class of otherwise excludable aliens who were being brought to the United States for humanitarian reasons would have an opportunity to become lawful permanent residents" and that "Congress did not intend for the 1960 amendment to benefit aliens already within the United States who had been taken into custody because they were believed to be deportable but who were then released on parole under the precursor to [INA § 236]." The court then stated that while IIRIRA subsequently merged exclusion and deportation proceedings, aliens who have entered the country without inspection are still classified as inadmissible. Indeed, the court said, "in enacting IIRIRA, Congress did not express any intention to allow conditional parolees to adjust status as aliens 'paroled into the United States" and had, in fact, "narrow[ed] the circumstances in which aliens could qualify for 'parole into the United States' under [INA § 245]." The court also noted that petitioner did not meet the waiver for unlawful entry under § 245(i) and that "it would be odd to read [INA § 245(a)] to authorize unlawful entrants who do not meet those conditions to seek adjustment of status whenever they are conditionally paroled pursuant to [INA § 236(a)]."

Congress' creation of the parole procedure was meant to "ensure that a class of otherwise excludable aliens who were being brought to the United States for humanitarian reasons would have an opportunity to become lawful permanent residents"

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■ **Ninth Circuit Holds That IIRIRA Abrogated The *Fleuti* Doctrine**

In ***Camins v. Gonzales,*** __F.3d__, 2007 WL 2421466 (9th Cir. Aug. 28 2007) (Hug, *W. Fletcher*, Holland), the court deferred to the BIA's decision in *Matter of Collado-Munoz*, 21 I&N Dec. 1061, 1064-65 (BIA 1998) (en banc), and joined the Third, Fourth, and Fifth Circuits in holding that the revision of 8 U.S.C. § 1101(a)(13) effected by the IIRIRA, abrogated the holding in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), regarding "innocent, casual, and brief" departures from the United States. Nevertheless, the court held that the *Fleuti* doctrine survived for an alien who entered into a guilty plea before IIRIRA's enactment with the reasonable expectation that he would be able to casually travel abroad without being subject to removal.

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■ **Ninth Circuit Holds That An Inconclusive Record Of Conviction Is Sufficient To Prove That An Alien Is Not An Aggravated Felon And Thus Eligible For Cancellation**

In ***Sandoval-Lua v. Gonzales,*** __F.3d__, 2007 WL 2421427 (9th Cir. Aug. 28 2007) (Goodwin, Thomas, *Bea*), the court held that, for purposes of establishing eligibility for cancellation of removal, an alien carries his burden of showing that he is not an aggravated felon under *Taylor*'s modified categorical analysis when he produces an inconclusive record of conviction. The court also determined that it had jurisdiction in the case, pursuant to the REAL ID Act, because the question of whether the judicially noticeable documents in the record established that the alien's conviction constituted an aggravated felony was a question of law. The court remanded to the BIA for consideration of the cancellation application.

In a concurring opinion, Judge Thomas would have held that that the government "bears the burden of proving the existence and nature of prior convictions, even when those prior convictions are at issue only as they relate to an alien's application for discretionary relief."

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■ **Ninth Circuit Awards Attorney's Fees And Warns Government Not To Use Previously Rejected Argument Regarding The "Position of the United States."**

In ***Singh v. Gonzales,*** __ F.3d__, 2007 WL 2562964) (9th Cir. September 7, 2007) (Hawkins, Berzon, Silver) (order), the Ninth Circuit granted the

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petitioner's motion for attorney's fees and costs in the amount of $3,807.04. The court noted that it had rejected in a previous case the contention that only the litigation positions of the Department of Homeland Security before the court of appeals, and not the decisions of the Board and Immigration Judges, were relevant in assessing whether the "position of the United States" was substantially justified.

The court warned the Government that repetition of this argument in the court again would be considered sanctionable behavior. The court rejected the Government's remaining arguments and deemed the requested fees reasonable.

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■ **Court Concludes That Injuries To Family Must Be Considered From Perspective Of Child Asylum Applicant**

In *Hernandez-Ortiz v. Gonzales,* 496 F.3d 1042 (9th Cir. 2007) (*Noonan*, Bybee, Smith), the Ninth Circuit announced a new legal rule that injuries to a minor asylum applicant's family must be considered from the child's perspective in determining whether the child suffered past persecution. Although the Immigration Judge acknowledged that the applicants were aged 7 and 9 years old at the time their family was persecuted by the Guatemalan army, the court held that the Immigration Judge nevertheless committed legal error by failing to look at the events from the children's perspective, and by failing to measure the degree of their injuries by the impact on children of their ages.

The court held that "injuries to a family must be considered in an asylum case where the event that form the basis of the past persecution claim were perceived when the petitioner was a child" and a failure to do so is a legal error."

"Injuries to a family must be considered in an asylum case where the event that form the basis of the past persecution claim were perceived when the petitioner was a child" and a failure to do so is a legal error."

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TENTH CIRCUIT

■ **Tenth Circuit Holds That Aliens Cannot Raise Procedural Challenges To BIA's Decision In The First Instance Before The Court**

In *Sidabutar v. Gonzales*, __F.3d__, 2007 WL 2743672 (10th Cir. September 21, 2007)(Henry, *Tymkovich*, Holmes), the Tenth Circuit, in a published upheld the Board's conclusion that the alien did not demonstrate past persecution or a well-founded fear of future persecution in Indonesia. The Tenth Circuit held that it lacked jurisdiction over the alien's procedural challenges to the Board's decision because they were raised for the first time before the court, rather than through a motion to reconsider or reopen filed with the Board.

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ELEVENTH CIRCUIT

■ **Harm Suffered By An Alien In Columbia Amounts To Past Persecution**

In *Mejia v. U.S. Att'y Gen.*, __F.3d__, 2007 WL 2492299 (11th Cir. September 6, 2007) (Barkett, Kravitch, Trager, D.J.), the Eleventh Circuit held that, as the government conceded at oral argument, the Immigration Judge did not make a "clean determination[] of credibility." Therefore, the court accepted the petitioner's testimony as credible. The court also concluded that the harm petitioner suffered — being physically attacked twice: once when a large rock was thrown at him and once when members of the FARC pointed a gun at his head and broke his nose with the butt of a rifle, in addition to several verbal threats — constituted past persecution. The court remanded to the BIA to determine, in the first instance, whether the persecution was on account of political opinion.

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■ **Eleventh Circuit Determines That It Has Jurisdiction Over Criminal Alien's Convention Against Torture Claim Where Questions Of Law Are Involved**

In *Jean-Pierre v. U.S. Attorney General*, __F.3d__, 2007 WL 2712108 (11th Cir. September 19, 2007) (Anderson, *Marcus*, Cox), the Eleventh Circuit held that it had jurisdiction over a criminal alien's Convention Against Torture claim, to the extent that he challenged the application of law to undisputed facts. The court held that the issue of whether a particular "fact pattern" constitutes torture presents such a question of law, and that the BIA erred by failing to address important facts presented by the alien. The court remanded the case to the BIA to address the alien's evidence and to determine whether he established a valid claim.

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13TH ANNUAL IMMIGRATION LAW SEMINAR ATTRACTS LARGE NUMBER OF STUDENTS

More than 130 attorneys attended the 13th Annual Immigration Law Seminar held on September 17-21, 2007, and October 1-5, 2007, 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. In addition to new OIL attorneys, attorneys from ICE, USCIS, DHS, EOIR, Department of State, and USAOs, also attended the seminar.

Above: Chris Fuller on "torture"

L to R: Gus Coldebella, Acting General Counsel, Department of Homeland Security, Mary Catherine Malin, Assistant Legal Adviser, Department of State, and Juan P. Osuna, Acting Chairman, Board of Immigration Appeals.

BIA precedents on the rise

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of lawful status, there was no reason for the alien to apply for a status he already had.

Attorney Discipline

The Board has bolstered its body of law regarding attorney discipline, holding that an attorney who knowingly made a false statement of material fact or law or willfully misled to USCIS concerning a material and relevant matter relating to a case is subject to discipline by the Board in *Matter of Shah*, 24 I&N Dec. 282 (BIA 2007). In *Matter of Jean-Joseph*, 24 I&N Dec. 294 (BIA 2007), in spite of the attorney's reinstatement by his own state bar, the Board denied motion for reinstatement and extended the suspension of an attorney who practiced before the immigration court while suspended by the Board. The Board also denied reinstatement in *Matter of Krovonos*, 24 I&N Dec. 292 (BIA 2007).

By Andy MacLachlan, OIL
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OIL attorneys honored at Attorney General's 55th Annual Awards Ceremony

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Mr. Kline, joined the Department as an Honors Graduate in 1974 and was assigned to work in the Criminal Division's General Crimes Section where he later became Senior Legal Advisor. He began working in the Office of Immigration Litigation as a trial attorney in June 1985. He was promoted to Assistant Director in 1986, to Deputy Director in 1996, and to Principal and Trial Deputy Director in 2000. He received his undergraduate degree from Rutgers College, and his law degree cum laude from Rutgers, Camden, School of Law.

The Acting Attorney General also presented the John Marshall Award for Trial Litigation to **William Peachey**, Senior Litigation Counsel and **Virginia M. Lum**, Trial Attorney. Prior to joining OIL Mr. Peachey and Ms. Lum were members of the A-12 Litigation Team which successfully defended the Government's decision to terminate a $5 billion contract. The John Marshall awards are the Department's highest awards presented to attorneys for contributions and excellence in legal performance.

INSIDE OIL

Welcome on board to the following attorneys who joined OIL in July:

Kristin Moresi received her B.A. from Colby College in 2001, and graduated from Wake Forest University School of Law in 2006. She clerked for U.S. District Court Judge Samuel Wilson, Western District of Virginia, prior to joining OIL.

Yamileth HandUber-Bonilla received a B.A. in Government & Politics and Criminology & Criminal Justice from the University of Maryland, College Park. She received a J.D. from Howard University School of Law, graduating cum laude. Prior to joining OIL through the Honors Program, Yamileth worked as a law clerk with the Office. Before law school, Yamileth worked as a Pretrial Juvenile Diversion Case Manager in Orlando, Florida.

Drew Brinkman was raised in Cincinnati, Ohio. He received a B.A. in English from Georgetown University. After graduating, he took a job as a paralegal in the antitrust group of Shearman & Sterling. He then began law school at the University of Cincinnati, receiving his J.D. in May 2007. During law school, Drew worked for General Electric in the government contracting practice area. He also spent a summer clerking for Judge Herman Weber in the Southern District of Ohio.

Briena Strippoli received both her B.A. in environmental policy and analysis and M.A. in energy and environmental analysis from Boston University in 2003. She then received her J.D. from University of Maryland School of Law in 2006. During law school, Briena worked at the Senate Committee on Environment and Public Works, EPA, and the Army Corp of Engineers. Following law school, she clerked for the Honorable Kaye A. Allison in the Circuit Court for Baltimore City.

Timothy Stanton graduated from the University of Florida and received his J.D. from the George Washington University Law School.

L to R: : Timothy Stanton, Yamileth Handuber, Andrew Brinkman, Kristin Moresi, Briena Strippoli.

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

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

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

Office of Immigration Litigation

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

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