



Immigration Litigation Bulletin

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Third Circuit Holds That Aliens Have A Due Process Right To Challenge Diplomatic Assurances

In *Khouzam v. Mukasey*, __F.3d__, 2008 WL 5101940 (3d Cir. Dec. 5, 2008) (Rendell, Smith, Fisher), the Third Circuit held that the district court lacked jurisdiction under INA § 242(a)(4), 8 U.S.C. § 1252(a)(4), to review petitioner's habeas challenging the revocation of his deferral of removal under CAT, but ruled that the DHS's revocation decision was a reviewable final order of removal.

The petitioner, an Egyptian national, was denied admission to the United States in 1998 and taken into custody upon arriving without proper documentation. He was eventually granted deferral of removal because it was more likely than not that he would be tortured if returned to Egypt. Petitioner's re-

moval was deferred, rather than withheld, because there were serious reasons to believe that he had committed a murder prior to departing Egypt. Petitioner was released from custody in 2006.

In 2007, without notice or a hearing, DHS again detained petitioner, and prepared to remove him based on diplomatic assurances by Egypt that he would not be tortured. Petitioner then filed a habeas petition which the district court granted after concluding that he had been denied due process.

Petitioner also filed a petition for review challenging the termination of his deferral of removal raising similar issues as those raised in the

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Final Voluntary Departure (VD) Rule Published

Aliens who have been granted voluntary departure but then seek reopening or reconsideration of their cases with an immigration judge or the Board, will have their VD grant automatically terminated under a final rule recently published by the Attorney General. See 73 Fed. Reg. 76927 (December 18, 2008). However, under the amended 8 C.F.R. § 1240.26 (b)(3)(iii), the penalties for failure to depart voluntarily under INA § 240B(d) "shall not apply if the alien has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure."

The rule also adopts new 8 CFR § 1240.26(i) to provide that if an alien who was granted voluntary departure files a petition for review, any grant of voluntary departure shall terminate automatically upon the filing of the petition and the alternate order of removal shall immediately take effect, except that the alien will not be deemed to have departed under an order of removal if the alien (i) departs the United States no later than 30 days following the filing of a petition for review; (ii) provides to DHS such evidence of his or her departure as the ICE Field Office Director may

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Diplomatic Assurances Subject To Review

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habeas petition. When the government appealed the habeas grant, the Third Circuit consolidated both cases.

On appeal, the Third Circuit held, agreeing with the government's view, that the REAL ID Act removed habeas jurisdiction over petitioner's claim. Petitioner's claim said the court, "is appropriately deemed to fall within the broad ambit of 'any cause or claim under [CAT]' and therefore the "habeas-stripping provision of section 1252(a)(4) applies." This interpretation does not cause Suspension Clause problem said the court, because petitioner's petition for review affords an alternative avenue for review.

The court then found that it had jurisdiction over the petition for review because DHS's termination of petitioner's deferral of removal "was effectively a final order, and thus subject to our review under section 1252." The court explained that under *Boumedienne*, a statute denying an alien the ability to test the legality of the alien's detention through a habeas petition is subject to constitutional scrutiny, and upon failing such scrutiny, may be invalidated as an unconstitutional suspension of the writ. However, the Suspension Clause would not be implicated where Congress provides an adequate and effective alternative to habeas review.

Here, said the court, a "serious constitutional question would be raised," if petitioner were afforded no alternatives to the habeas review denied by 1252(a)(4). However, a petition for review provides an adequate substitute to habeas review. Therefore, said the court, if "it's fairly possible . . . to conclude that we have jurisdiction over the petition for re-

view, we will do so to avoid the serious constitutional questions that would be raised if [petitioner] lacked any judicial forum in which to challenge his removal."

The court held that aliens have a due process right to challenge the sufficiency of diplomatic assurances.

The court then concluded that since petitioner had been granted deferral of removal and could not have been removed while that grant was in effect, the government's termination of deferral was effectively a final order of removal under INA § 242, and therefore subject to judicial review.

The court also rejected the government's argument that the lawfulness of the termination of deferral based on diplomatic assurances was a non-justiciable issue under the political question doctrine and the rule of non-inquiry. The court found that the claims raised by the peti-

tioners were legal and not political even though some of the factors informing that decision may not be subject to judicially manageable standards, and that the rule of non-inquiry was inapplicable.

Finally, the court held that aliens have a due process right to challenge the sufficiency of those assurances and that petitioner was not afforded notice and a full and fair hearing prior to his imminent removal based on those diplomatic assurances. The court noted that neither the *Schaughnessy* nor the *Mezei* case was applicable to petitioner, because unlike the aliens on those cases, petitioner had already been granted statutory relief from removal. Because the government did not conduct a hearing or provide any meaningful record justification for the termination of deferral, concluded the court, that process was "inherently prejudicial" for purpose of establishing a due process violation.

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Voluntary Departure Rules Amended

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require; and (iii) provides evidence DHS deems sufficient that he or she remains outside of the United States.

The rule also mandates that immigration judges provide notice of the bond requirements before an immigrant decides whether to accept voluntary departure and it requires individuals with voluntary departure who seek administrative review of the removal order to provide proof of posting the voluntary departure bond. The rule also provides a rebuttable presumption that the civil penalty for failure to depart, pursuant to INA § 240B(d)(1)(A), shall be set at \$3,000 unless the immigration judge specifically orders a higher or lower amount at the time of granting voluntary departure

within the permissible range allowed by law.

As explained in the proposed rule, these and other amendments to the voluntary departure rules are "intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions and judicial review without risking the imposition of the voluntary departure penalties, to promote uniformity, and also to bring the voluntary departure process back to its statutory premises."

The final rule became effective on January 20, 2009, and will apply to all cases pending before EOIR, or adjudicated by EOIR, on the effective date and any cases that later come before it.

Substantial Evidence versus Clear Error Review: Which is More Deferential, and Why? The Debate In The Second Circuit

A curious debate has unfolded in the Second Circuit between Chief Judge Jacobs and Judge Calabresi concerning whether the substantial evidence standard of review in the immigration context is stricter (*i.e.*, less deferential) than the clear error standard, or whether the two standards are about the same. Judge Calabresi said in 2003, "Substantial evidence review in the immigration context is 'slightly stricter' than the clear-error standard that the circuit courts typically apply in reviewing a district court's factual findings." *Qiu v. Ashcroft*, 329 F.3d 140, 149 (2d Cir. 2003). Since then, Second Circuit cases have repeated the same words again and again, often as a prelude to reversing the agency's findings of fact. *E.g.*, *Zhong v. United States Dep't of Justice*, 480 F.3d 104, 116 (2d Cir. 2007); *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 337 (2d Cir. 2006); *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir. 2005); *Secaída-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

In a footnote in *Siewe v. Ashcroft*, 480 F.3d 160, 168 & n.1 (2d Cir. 2007), Chief Judge Jacobs examined the legal basis for the rule, and found it to be illusory:

In *dicta*, and without analysis, this Court has said that "[s]ubstantial evidence review in the immigration context is 'slightly stricter' than the clear-error standard that the circuit courts typically apply in reviewing a district court's factual findings." *Qiu v. Ashcroft*, 329 F.3d 140, 149 (2d Cir.2003). However, the Ninth Circuit case cited and quoted in *Qiu* as sole support for that proposition, *Aruta v. I.N.S.*, 80 F.3d 1389, 1393 (9th Cir.1996), in turn cites without analysis to *Shirazi-Parsa v. I.N.S.*, 14 F.3d 1424, 1427 (9th

Cir.1994), which in turn cites without analysis to *Rodriguez-Rivera v. I.N.S.*, 848 F.2d 998, 1001 (9th Cir. 1988), which in turn cites without analysis to *Diaz-Escobar v. I.N.S.*, 782 F.2d 1488, 1492 (9th Cir.1986), which in turn cites without analysis to *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1282 n.8 (9th Cir. 1984). But *Bolanos-Hernandez* gives no support to the proposition; the passage cited states only that, after passage of the Refugee Act of 1980 . . . withholding of removal was no longer discretionary, so abuse-of-discretion review had been replaced by "a heightened, substantial evidence standard of review." *Id.* at 1282 n.8.

Chief Judge Jacobs concluded that comparison of the clear error standard applied to a judge's findings of fact, on the one hand, and the substantial evidence standard applied to an Immigration Judge's findings, on the other, shows that the court must accord "no lesser deference to an IJ than to a district judge when each draws inferences from the evidence as a finder of fact." *Id.* at 168.

In response, in a later case, Judge Calabresi dropped his own footnote, not exactly defending his earlier position, but not giving it up either: "In the end, this disagreement over formal labels is not the real issue . . . In practice, '[p]anel will have to do what judges always do in similar circumstances: apply their best judgment, guided by the statutory standard governing review and the holdings of our precedents, to the administrative decision and

the record assembled to support it.' And sound judgment of this sort cannot be channeled into rigid formulae." *Mei Chai Ye v. United States Dep't of Justice*, 489 F.3d 517, 524 n.4 (2d Cir. 2007). He characterized

Chief Judge Jacobs' opinion as having stated, "also in dicta, that the clear error and substantial evidence standards are identical." *Id.*

So, who's right?

Is the substantial evidence standard **stricter** (*i.e.*, less deferential to the trier of fact) than the clear

error standard or the **same** as the clear error standard? Neither. The substantial evidence standard is the same as (we might have guessed) the substantial evidence standard – that is, the substantial evidence standard used to review a **jury's** findings. In *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939) (on which Justice Scalia relied in stating the standard of review in *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)), the Supreme Court expressly equated the administrative substantial evidence standard with the standard used to review jury verdicts, stating that both standards required "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In another case from the same era, Justice Jackson contrasted the substantial evidence standard with the clear error standard used for reviewing a judge's findings of fact; substantial evidence review, he said, is "much more restricted," meaning that substantial evidence review is more deferential to the trier of fact than clear error review. *District of Columbia v. Pace*, 320 U.S. 698,

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In *Elias-Zacarias* the Supreme Court expressly equated the administrative substantial evidence standard with the standard used to review jury verdicts.

Substantial Evidence versus Clear Error

702 (1944). In a 1999 case that actually turned on the difference in standards of review, the Supreme Court contrasted the administrative substantial evidence standard with the clear error standard and considered it established that the administrative substantial evidence standard has always been understood to be more deferential to the trier of fact than the clear error standard. *Dickinson v. Zurko*, 527 U.S. 150, 159-62 (1999).

Judge Morris Arnold of the Eighth Circuit recapped this history in an immigration case in 2004:

The substantial evidence standard was originally imported into administrative law from cases dealing with the review of jury verdicts. See 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 174-75 (3d ed. 1994) (citing *ICC v. Louisville & Nashville, R.R. Co.*, 227 U.S. 88, 94 (1912)); see also Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 74-75 (1944). Hence, it has always involved a large amount of deference to the relevant fact-finder. For example, it is a more deferential standard than the “clearly erroneous” standard that we use for reviewing factual determinations by lower court judges. See, e.g., *United States v. Abad*, 350 F.3d 793, 797 (8th Cir.2003). Under that standard, we can overturn factual findings that we conclude are clearly wrong even though they are not unreasonable. In contrast, under the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong. Cf. *Felleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997); see also 2 Davis

& Pierce, *supra*, at 174. Rather, before we can reverse we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by the administrator. See *Elias-Zacarias*, 502 U.S. at 481 & n.1, 483-84, 112 S. Ct. 812.

Menendez-Donis v. Ashcroft, 360 F.3d 915, 918 (8th Cir. 2004).

Justice Breyer’s opinion for the Court in *Dickinson* cited a 1944 law review article that traced the history of the administrative substantial evidence standard, Robert L. Stern, *Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70 (1944). The Stern article noted that the substantial evidence standard for review of administrative findings and jury verdicts is “identical.” *Id.* at 74, 76. Stern explained that the underlying reason for deferring to findings of juries and of administrators is to entrust substantive policy to a tribunal believed to have superior wisdom, though the jury’s wisdom is homely and administrator’s is learned:

The reasons why questions of fact are left to juries and administrative officials are well known. As to the jury, the purpose is to permit decisions to be made by persons embodying the underlying sense of fairness of the community, rather than by a single man, no matter how expert, who might have arbitrary notions of his own. Matters are left to administrative determinations, for largely opposite reasons, in order to secure the advantage of expertness and specialization.

58 Harv. L. Rev. at 81-82. In contrast, the clear error standard applies when one set of judges reviews the work of another judge, where finder and reviewers all have the same kinds of skills and knowledge. *Id.* at 82. According to Stern, the reasons for deferring to the trial judge are, first, that he saw the evidence live, and so has the advantage of non-verbal clues that are unavailable to appellate judges reviewing a transcript, and second, that putting the trial judge primarily in charge of factual matters in-

creases administrative efficiency. *Id.* Neither of these reasons have “the same stature as the constitutional and statutory bases for the substantial evidence rule in jury and administrative cases.” *Id.* In *Dickinson*, Justice Breyer reiterated this policy justification for according greater deference to administrative findings than to trial judge findings. 527 U.S. at 161-62.

By this reasoning, the difference between substantial evidence review and clear error review is more than the “formal label,” of which Judge Calabresi was so dismissive in *Mei Chai Ye*, 489 F.3d at 524 n.4. The choice between the substantial evidence and clear error standards determines whether the reviewing tribunal appropriately defers to the superior expertise of the administrative tribunal or instead inappropriately treats it as just another judge. The impropriety is even more pronounced in the Second Circuit cases treating the substantial evidence standard in immigration cases as *even less* deferential than the clear error standard. Certainly, the “slightly stricter” formula has appeared in many Second

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The choice between the substantial evidence and clear error standards determines whether the reviewing tribunal appropriately defers to the superior expertise of the administrative tribunal or instead inappropriately treats it as just another judge.

Substantial evidence review

Circuit cases that were in the vanguard of the trend to second-guess administrative findings of fact in the immigration area, e.g., *Secaida-Rosales*, 331 F.3d at 287; *Qiu*, 329 F.3d at 149; *Poradisova*, 420 F.3d at 177.

The “slightly stricter” language seems to have fallen into desuetude in the Ninth Circuit, where it originated, but it crept up in a recent Sixth Circuit unpublished decision, *Wang v. Gonzales*, 188 Fed. Appx. 454, 457 (6th Cir. 2006). The language is wrong, it frustrates the Congressional policy of relying on administrative expertise, and we should energetically debunk it.

Be aware of *Universal Camera* and *Chenery*

That said, anyone making this argument should be aware that there are two significant ways in which review of administrative findings differs from review of jury verdicts:

First, under the rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88, (1951), in reviewing administrative fact findings [the Court is] required to take into account the record “as a whole,” considering evidence that detracts from the administrative finding. *Menendez-Donis*, 360 F.3d at 918. In contrast, in reviewing a jury verdict, we draw every reasonable inference in favor of the verdict and may not make credibility determinations or weigh the evidence. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (applying Fed.R.Civ.P. 50).

Second, under *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), any administrative agency must describe its reasoning with “such clarity as to be understandable,” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), whereas a jury generally does not explain its reasoning. Because of these princi-

ples of administrative law, “substantial evidence” review of administrative findings entails review of an IJ’s credibility determinations, see, e.g., *Singh v. Gonzales*, 495 F.3d 553, 556-59 (8th Cir. 2007), whereas “substantial evidence” review of a jury’s findings defers almost entirely to the jury’s credibility determinations, *Reeves*, 530 U.S. at 150-51 (reviewing court disregards all evidence “favorable to the moving party that the jury is not required to believe.”).

Chen v. Mukasey, 510 F.3d 797, 801 (8th Cir. 2007) (emphasis added).

Neither *Universal Camera* nor *Chenery* gainsays the underlying principle of deference to administrative expertise. Instead, both cases state emphatically that the principles they announce do not interfere with agencies’ ability to make findings on the basis of their expertise. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“To be sure, the requirement for canvassing ‘the whole record’ in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence.

Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board’s

choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.”); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943) (“What was said in [*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197

(1941)] is equally applicable here: ‘We do not intend to enter the province the belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.’”). Thus, while *Universal Cam-*

era and *Chenery* affect the kind of things courts take into account on review of administrative findings, they do not diminish the level of deference the courts must employ.

Conclusion

In the Second Circuit’s debate over whether substantial evidence review of administrative findings is “stricter” (less deferential) or the same as clear error review, both sides are asking the wrong question. Supreme Court authority shows that substantial evidence review is supposed to be *more* deferential than clear error review, and for good reason. A correct understanding of the substantial evidence standard would place policy-making power back in the hands of the agency, where Congress put it.

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Supreme Court authority shows that substantial evidence review is supposed to be more deferential than clear error review, and for good reason.

Board asked to define “country” under INA

In *Dzyuba v. Mukasey*, 540 F.3d 955 (9th Cir. 2008), the Ninth circuit remanded the case to the Board to determine whether pre-independent Ukraine qualified as country, under INA.

Nikolay Alexandrovich Dzyuba, a Georgian native and citizen of the former Union of Soviet Socialist Republics, was ordered pursuant to INA § 241(b)(2)(E)(i), which permits the Attorney General to remove an alien to “[t]he country from which the alien was admitted to the United States.

Dzyuba was born in Georgia, and seven years later left it to travel to pre-independent Ukraine. After suffering alleged religious persecution, Dzyuba left pre-independent Ukraine to emigrate to the United States. He entered the U.S. as a refugee and two years later became a lawful permanent resident. However, when Dzyuba applied for naturalization, DHS arrested him on the basis that he was subject to removal because he had been convicted of two crimes involving moral turpitude. Petitioner conceded removability and applied for withholding of removal and CAT protection. After review, the Board ordered Dzyuba removed to the Ukraine under INA § 241(b)(2)(E).

The term “country” is not defined by the INA. The Board’s decision to remove Dzyuba to the Ukraine was based on the fact that he had entered the United States with a Ukrainian passport.

On appeal to the Ninth Circuit, the government defended the Board’s decision by arguing that it had properly exercised its discretion by affirming the designation of the Ukraine as the country of removal. The government asserted that Dzyuba was an ethnic Ukrainian who lived in the Ukraine continuously for nineteen years immediately before coming to the United

States from that country and that it was irrelevant whether the Ukraine was an independent country when Dzyuba left for the United States in July 1991.


Petitioner, relying heavily on *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004), argued that because the Ukraine did not exist at the time Dzyuba was admitted into the United States, the Board erred in ordering him removed to that country. The petitioner also asserted that “The Law of Ukraine on Citizenship,” defined Ukrainian citizens as individuals residing in the Ukraine when it declared independence, or individuals who will residing in the Ukraine when its citizenship law went into effect and who were not citizens of other states. Since Dzyuba was not in the Ukraine during either of those time periods, he contended that he was not citizen of that country.

In *El Himri*, the Ninth Circuit noted that section 241(b)(2) of the INA established three steps for determining the country to which an alien may be removed. First, the alien is entitled to designate one country to which he or she would like to be removed. INA § 241(b)(2)(A). Second, if the alien refuses, the Attorney General is authorized to remove them “to a country of which [they are] subject[s], national[s], or citizen[s] unless the government of that country . . . is not willing to accept the alien[s] into that country.” INA § 241(b)(2)(D). Finally, INA § 241(b)(2)(E) lists seven potential alternate countries of removal: the country from which the alien was admitted to the United States; the country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States; a country in which the alien resided before the alien entered the country from which the alien entered the United States; the country in which the alien was born; the country that had sovereignty over the

alien’s birthplace when the alien was born; the country in which the alien’s birthplace is located when the alien is ordered removed; or if impossible to remove the alien to a country in a previous subparagraph, another country whose government will accept the alien into that country.

Here, the Ninth Circuit determined that the Board’s finding was erroneous because the passport in the record reflected that Dzyuba entered the U.S. with a passport issued by the Soviet Union. The court remanded the case to the Board to determine the definition of “country” in the first instance. The court noted that pre-existing case law was not dispositive of this question because it did not address the meaning of “country” in the context of the INA. Instead, the court found that existing case law defined “country” in the context of predecessor statutes to the INA. Moreover, the court found that since the term “country” is used numerous times in the INA, the term should have the same meaning each time it is used. Finally, the court afforded *Chevron* deference to the Board to determine whether pre-independent Ukraine qualifies as a “country.”

The Board’s eventual decision defining “country” for purposes of the INA, will more explicitly identify and clarify how a “country” is identified for purposes of removal. However, OIL attorneys should remember that the *El Himri*’s three-step analysis is still applicable when determining an appropriate country for removal. Since the situation that occurred in *Dzyuba* was specific to an alien holding a Soviet passport, OIL attorneys should not assume that 8 U.S.C. § 1231 cannot be applied without the definition of “country.” As such, OIL attorneys should complete the *El Himri* analysis, and determine whether their case can be distinguished from *Dzyuba* before contemplating remand or holding the case for the Board’s definition.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Asylum — Persecutor Bar

On November 5, 2008, the Supreme Court heard oral arguments in *Negusie v. Gonzales*, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (per curiam), cert. granted sub nom. *Negusie v. Mukasey*, No. 07-499, 2008 WL 695623 (U.S. Mar. 17, 2008). The question presented is: Does "persecutor exception" prohibit granting asylum to, and withholding of removal of a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

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GMC - Family Unity Waiver

On December 18, 2008, the government argued before the en banc Ninth Circuit *Sanchez v. Mukasey*, 521 F.3d 1106 (9th Cir. 2008). The issue in the case is whether the "family unity" alien-smuggling waiver of inadmissibility under INA § 212(d)(11), 8 U.S.C. § 1182(d)(11), may also be applied to waive the good moral character requirement for cancellation of removal, where the alien would otherwise be barred from cancellation because of alien smuggling involving a spouse, child, or parent.

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Coercive Family Planning Spouses — *Lin/S-L-L* Issue

On May 28, 2008, the Third Circuit submitted *Lin-Zheng v. Attorney General of the U.S.*, No. 07-2135, without oral argument to the en banc court. Prior to the Attorney General's decision in *Matter of J-S*, 24 I&N Dec. 540 (A.G. 2008), the court had sua sponte ordered en banc hearing based on the issue of whether spouses of those subjected

to forced sterilization or other family planning practices in China should be entitled to eligibility as refugees under 8 U.S.C. § 1101(a)(42)(B) for purposes of asylum, specifically including whether the court should adopt the reasoning of the Second Circuit in *Lin v. U.S. Dept. of Justice*, 494 F.3d 296 (2d Cir. 2007), which conflicts with *Chen v. Attorney General of the U.S.*, 491 F.3d 100 (3d Cir. 2007).

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Stay of Removal — Standard

On November 25, 2008, the Supreme Court granted petitioner's application for a stay of removal in *Nken v. Mukasey*, __S. Ct.__, No. 08-681. The question before the Court is "whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in INA § 242(f)(2), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief." Oral argument has been scheduled for January 21, 2009.

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EAJA — Prevailing Party

On November 14, 2008, the First Circuit granted the government's petition for rehearing en banc in *Aronov v. Chertoff*, 536 F.3d 30 (1st Cir. 2008), and vacated its panel opinion. The question before the court is whether an alien who filed suit under INA § 336(b), 8 U.S.C. § 1447(b) to compel Citizenship and Immigration Services ("CIS") to adjudicate his application for naturalization is entitled to EAJA fees, where the district court merely entered a brief electronic order granting the parties' joint motion for remand, and where the delay in adjudicating the application was the

result of CIS's practice of awaiting the results of an FBI name check.

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VWP — Waiver, Due Process

On October 15, 2008, the government filed a petition for rehearing en banc in *Bayo v. Chertoff*, 535 F.3d 749 (7th Cir. 2008). The question presented is whether a waiver of the right to contest removal proceedings under the Visa Waiver Program is valid only if entered into knowingly and voluntarily, and is the alien entitled to a hearing on whether the waiver was knowing and voluntary?

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Fourth Amendment Exclusionary Rule

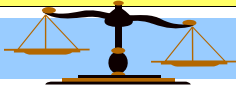
On October 22, 2008, the government filed a petition for rehearing en banc in *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008). The question presented is: Must the exclusionary rule be applied in removal proceedings if the agents committed violations of the 4th Amendment deliberately or by conduct that a reasonable person should have known would violate the Constitution?

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CIMT—DUI

On June 23, 2008, the en banc Ninth Circuit heard argument in *Marmolejo-Campos v. Mukasy*, No. 04-76644. The question is whether a conviction for aggravated DUI (driving under the influence plus knowingly lacking a valid license) under Arizona Revised Statutes § 28-1383(A)(1) is a crime involving moral turpitude.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Denial Of Restriction On Removal Upheld Because Pakistani National Did Not Establish That Single Mistreatment Amounted To Persecution

In *Khan v. Mukasey*, 549 F.3d 573 (1st Cir. 2008) (Torruella, Boudin, Howard), the First Circuit upheld the BIA's denial of restriction on removal (withholding) because the petitioner's one-time detention was an isolated incident that did not rise to the level of past persecution. The petitioner, a Pakistani national who had overstayed his nonimmigrant visa, claimed that he had suffered persecution in Pakistan on account of his political opinion. Petitioner testified that in 1998, while attending a political demonstration, he was arrested and imprisoned for 10 days. While in prison he was beaten with wooden sticks and shocked with electrical wires.

The IJ found that petitioner's asylum claim was time-barred and that his mistreatment in prison was not so severe as to constitute persecution, noting that petitioner did not require medical intervention. On appeal, the BIA agreed, noting that petitioner's alleged arrest and mistreatment did not rise to the level of persecution. The BIA also agreed that petitioner failed to prove future persecution, pointing to the fact that his wife and children continued to remain unharmed in Pakistan for three years following petitioner's arrest.

The First Circuit held that under its deferential stand of review, it could not "second-guess the determinations of the BIA" if supported by substantial evidence. "An important factor in determining whether alleged incidents rises to the level of persecution is whether 'the mistreatment can be said to be systematic rather than reflective of a series of isolated incidents,'" explained the

court. Here, the record supported the BIA's conclusion that petitioner's mistreatment was an isolated event which by itself supported the finding that he had not been persecuted. The court found it significant that petitioner had provided little information regarding the duration or severity of the beatings he had received. The court also found that petitioner failed to establish a clear probability of future persecution because his family members remain in Pakistan without incident, and because petitioner had left Pakistan in April 2000 and voluntarily returned to Pakistan eight months later.

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■ First Circuit Holds That Chinese Christian Indonesian Did Not Establish Persecution And The Indonesian Government Is Attempting To Quell Violence Against Women

In *Budiono v. Mukasey*, 548 F.3d 44 (1st Cir. 2008) (Lynch, Boudin, Stahl), the First Circuit upheld the BIA's denial of asylum because petitioner failed to show that the systematic maltreatment she suffered in Indonesia rose to level of persecution. The petitioner, an Indonesian woman, entered the United States as a tourist, overstayed her visa, and then applied for asylum claiming persecution on account of her Christian Protestant religion and Chinese ethnicity. She claimed that she had been subject to discrimination at school because of her ethnicity and had been targeted by Muslim men because of her religion. The IJ denied her request finding, inter alia, that nothing had ever happened to petitioner and that she had led "a fairly quiet and peaceful life in Indo-

nesia." The BIA affirmed the denial except for the finding that petitioner had led a "fairly quiet and peaceful life in Indonesia."

On appeal, the petitioner claimed that the IJ's finding that "nothing happened" to her had so infected the IJ's reasoning that he had failed to correctly analyze their testimony. The court held that while the IJ's remarks were "unfortunate," substantial evidence nonetheless supported the finding that the harm she had suffered in Indonesia did not constitute persecution.

The court also noted that the Indonesian government is attempting to quell violence against women, and that the petitioner's family continues to live in relative safety in Indonesia. The court explained that its decision was consistent with its prior rulings involving similar allegations of persecution in Indonesia.

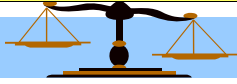
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■ First Circuit Holds That Alien Failed To Exercise Due Diligence Warranting Equitable Tolling

In *Fustaguio do Nascimento v. Mukasey*, 549 F.3d 12 (1st Cir. 2008) (Torruella, Boudin, Schwarzer), the First Circuit held that the BIA did not abuse its discretion when it denied the petitioner's untimely and number-barred motion to reopen based on a claim of ineffective assistance of counsel. Petitioner, a Brazilian citizen, entered the United States without inspection in November 1994. On March 25, 1996, she was placed in proceedings. Due to the claimed ineffective-

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"An important factor in determining whether alleged incidents rises to the level of persecution is whether the mistreatment can be said to be systematic rather than reflective of a series of isolated incidents."



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ness of her counsel she never learned of her IJ hearing date, and in 1997, was ordered removed in absentia.

On July 28, 1997, Petitioner married an American citizen who, on April 17, 2001, filed a petition to adjust her immigration status. When petitioner attended the adjustment interview she was told that, although she was prima facie eligible for adjustment, her petition could not be granted because an order of deportation had been entered against her. Petitioner then hired a second attorney who, on November 4, 2002, filed a motion to reopen her immigration proceedings on grounds that she had been denied effective assistance of counsel. The IJ denied the motion as time-barred and the BIA affirmed under *Matter of Lozada*.

On March 30, 2007, petitioner's fourth lawyer filed a second motion to reopen directly with the BIA, alleging that she had fulfilled all of the *Lozada* requirements. The BIA nonetheless denied this motion on September 27, 2007, finding that it was both time and number-barred. The BIA also held that equitable tolling did not apply to petitioner's second petition because she had failed to exercise due diligence.

The court agreed with the BIA and ruled that equitable tolling did not apply because petitioner failed to reasonably explain why it took her years to file her motion to reopen, and because the delay was not caused by her first attorney's alleged ineffective assistance. In particular, the court noted that petitioner failed to account for either the five-year delay in filing her first motion to reopen or the subsequent three-year lapse before the filing of her second motion.

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SECOND CIRCUIT

■ Conditional Permanent Resident Status Was Terminated By Operation Of Law When Alien Failed To Appear At Interview

In *Severino v. Mukasey*, 549 F.3d 79 (2d Cir. 2008) (*Jacobs, Wesley, Hall*), the Second Circuit held that petitioner's conditional resident status terminated when he had failed to attend the required interview to remove the conditions. Petitioner unlawfully entered the U.S. in 1995 and obtained his conditional LPR status in 1997 on the basis of his marriage to a U.S. citizen. Petitioner then petitioned to have the conditions removed but failed to appear with his wife at a 1999 personal interview – his wife having left him in 1998. In 2006, an IJ ordered petitioner removed and the BIA affirmed.

The Second Circuit held that petitioner's conditional status was terminated by law in March 1999 and therefore he was also ineligible for cancellation of removal. Petitioner contended that because he had filed a subsequent I-751, with a request for a waiver of the joint application requirement in light of his divorce, that filing extended his status at least until the second petition was denied in 2003. The court rejected that argument noting that the second petition had not been filed within thirty days of the decision at issue and therefore it did not restore his conditional status.

The court also held petitioner lacked the requisite five years of lawful permanent residency to be eligible for cancellation of removal.

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■ Second Circuit Holds That BIA Erred In Not Conducting A Mixed-Motive Analysis of Ethnic Uyghur's Claim of Persecution In Kazakhstan

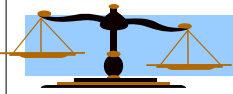
In *Aliyev v. Mukasey*, ___ F.3d ___, 2008 WL 5101655 (2d Cir. Dec. 5, 2008) (*Calabresi, Kearsse, Sack*), the Second Circuit held that the BIA erred when it did not apply a mixed-motive analysis and did not indicate whether it fully considered the claims presented when it denied asylum to a Kazakh Uyghur. The BIA had concluded that the persecutor's conduct appeared to be extortionist in nature rather than motivated by ethnic animosity, and that the petitioner failed to show a governmental connection to the persecutor's conduct.

Petitioner's conditional status was terminated by law when he failed to attend the required interview to remove the conditions.

The petitioner and his family entered the United States as nonimmigrants. Two days after their admission, they crossed into Canada to seek asylum. When their claim was denied, the Canadian government deported them to the United States. When placed in proceedings, the petitioner claimed persecution on account of Uyghur ethnicity and political opinion. Petitioner testified that he had been involved in the creation of a Uyghur youth group which was involved in providing refuge to Uyghur political activists fleeing from China. He also testified that Kazakh nationalists sought to take over his furniture business and when he refused he was attacked and beaten. When he closed down the business, his house was destroyed by an explosion. Although he reported the crime, the local sheriff did not pursue the matter. The IJ denied petitioner's asylum request finding him not credible.

On appeal, the BIA held that the adverse credibility ruling was not sup-

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ported by the record but affirmed the denial of asylum on the merits. Petitioner then filed a petition for review. Subsequently the parties agreed to remand the case in the wake of *Ivanishvilli v. U.S. Dep't of Justice*, 433 F.3d 332 (2d Cir. 2006), where the court held that cumulative harassment could constitute persecution. On remand, the BIA again denied asylum, finding petitioner's case distinguishable from *Ivanishvilli*, and held that even considering petitioner's harm in the aggregate, the harm did not rise to the level of persecution. The BIA also found that petitioner had failed to show that the Kazakh government was unwilling or unable to control the alleged civilian persecutors.

The Second Circuit vacated and remanded the BIA's decision finding that petitioner had been persecuted by the civilians who sought to take over his business, and that the BIA had not applied the required mixed-motive analysis and therefore not considered the claim that petitioner's attackers had been motivated in part by petitioner's ethnicity.

Additionally, the court found that the BIA had erred by not having considered substantial evidence that the actions for petitioner's attackers had been condoned by the Kazakh government. In particular, the court noted that petitioner had reported the bombing incident to the local police and that no significant action had been taken on his behalf. Accordingly, the court remanded the case to the BIA for further proceedings.

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■ Second Circuit Faults IJ's Reliance On Guinean Country Reports

In *Diallo v. U.S. Dep't of Justice*, 548 F.3d 232 (2d Cir. 2008) (*Calabresi*, Parker, and Goldberg), the Second Circuit held that the IJ "place[d] undue weight on" Department of State Country Reports in finding that the petitioner was not credible.

The court found that the IJ "placed undue weight on" Department of State country reports in finding that the petitioner was not credible.

The petitioner, a citizen of Guinea, claimed political persecution, including multiple arrests and torture, that he suffered as a result of his affiliation with the Rally of the People of Guinea Party, a political party that opposes the government of President Lansana Conté.

The IJ found petitioner's testimony not credible. On appeal he argued that he was credible, emphasizing that his testimony was consistent, responsive, and sufficiently detailed. He further argued that the Country Reports corroborated his claims, and that the IJ overemphasized small disparities between his testimony and what was, or was not, included in those Country Reports. The BIA summarily adopted the IJ's decision.

The Second Circuit found that a review of the administrative record revealed that the IJ erred in his reading of the background material on conditions in Guinea and in his conclusion that the Country Reports did not corroborate petitioner's testimony. While acknowledging that a "fair number of" the issues petitioner raised to the court "were not expressly raised before the" BIA, the court nevertheless remanded the case to the BIA to "consider the plausibility of [the] newly claimed errors" in light of the agency's erroneous reliance on Country Reports.

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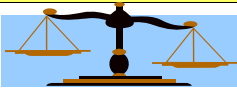
FOURTH CIRCUIT

■ Alien's Former Counsel Did Not Render Ineffective Assistance In Conceding Deportability As An Aggravated Felon Because The Law Was Unsettled At That Time

In *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008) (Niemeyer, King, and Duncan), the Fourth Circuit held that the alien failed to show ineffective assistance of counsel arising from his former counsel's concession of deportability, because it was not clear at the time of the concession if the law required a substantial risk of physical force for a conviction for the offense of reckless endangerment to qualify as an aggravated felony. The petitioner, a Jordanian national who had entered the U.S. as an LPR in 1974, was charged in 1995, with attempted murder and reckless endangerment when he chased his wife and two young girls with an ax in a residential neighborhood, screaming "I am going to kill you." He was placed in removal proceedings as an aggravated felon following his guilty plea to one count of reckless endangerment and one count of criminal conduct.

Petitioner, through counsel, conceded that he was deportable as charged but sought a § 212(c) waiver. The IJ granted the request but the BIA reversed that decision finding petitioner did not merit relief under § 212(c). Petitioner, who had retained new counsel before the BIA, obtained a third counsel who filed a habeas petition. Subsequently, that petition was transferred to the court of appeals under the REAL ID Act. Petitioner's new counsel also filed a motion to reopen and reconsider with the BIA asserting a claim of ineffective assistance of counsel based on the initial concession of deportability. The BIA denied the motion because it had not been filed within a reasonable period of the alleged ineffective assistance. Petitioner

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then filed a petition for review and both matters were consolidated by the court of appeals.

On the issue of ineffective assistance, the court agreed with the BIA that, given the state of the law in 1998, petitioner's first counsel had made a reasonable tactical decision in conceding deportability and therefore that action could not constitute ineffective assistance. Moreover, said the court, the BIA did not abuse its discretion in denying the motion because it had been filed three months after the decision of the BIA. The court also held that petitioner's due process claim based on ineffective assistance was precluded under *Afanwi v. Mukasey*, 526 F.3d 788 (4th Cir. 2008), as the actions of an alien's counsel do not implicate the Fifth Amendment.

Finally, the court held that because petitioner had failed to contest his deportability below, the court lacked jurisdiction to consider whether his conviction for the offense of reckless endangerment constituted an aggravated felony. "An alien's failure to dispute an issue on appeal to the BIA constitutes a failure to exhaust administrative remedies that bars judicial review," said the court.

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■ Fourth Circuit Holds That IJ Failed To Consider Totality Of Circumstances In Denying Asylum As A Matter Of Discretion

In *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008), the Fourth Circuit held that the IJ abused her discretion in denying an asylum application as a matter of discretion based on a "split credibility finding," because she failed to consider the totality of the circumstances and credible evidence of the alien's past persecution and well-founded fear of future persecution.

The petitioner, a Cameroonian

citizen, claimed persecution on account of his political activities in two opposition parties. An IJ initially denied him all relief. However, the BIA remanded the case to the IJ in light of new evidence that had been presented on appeal. On remand, petitioner provided additional documentary evidence from his family, indicating that he had been reluctant to provide it initially because he did not want to endanger them. At the conclusion of the hearing, the IJ granted withholding and protection under CAT, yet she denied asylum relief finding that petitioner had submitted "incredible documentation" and had not been completely truthful. The BIA affirmed with- out opinion.

The Fourth Circuit vacated the denial of asylum. The court reasoned that the IJ's decision was untenable because she had relied on the very documents and testimony she found incredible in denying asylum to grant withholding of removal and CAT protection. The court then outlined relevant factors that immigration judges should consider as part of the totality of the circumstances in exercising their discretion to deny asylum.

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SEVENTH CIRCUIT

■ Seventh Circuit Rejects Petitioner's Due Process Claim That Her Merits Hearing Was Too Short

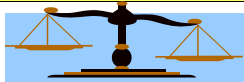
In *Chavez-Vasquez v. Mukasey*, ___ F.3d ___, 2008 WL 5120492 (7th Cir. Dec. 8, 2008) (*Ripple*, Evans, Tinder), the Seventh Circuit held that it lacked jurisdiction to review the BIA's denial of petitioner's application for cancellation of removal based on her failure to establish hardship where she did not raise a question of law. The petitioner,

a Guatemalan citizen, was placed in removal proceedings after she attempted to obtain, under a false name, a Missouri state identification card. When placed in proceedings she claimed that the older of her two U.S. citizens sons was afflicted with asthma and could not obtain adequate medical care in Guatemala. The youngest son could not read or write in Spanish and had become ill when he visited Guatemala. The IJ denied cancellation because petitioner has not established the "exceptional and extremely unusual" hardship requirement. The BIA affirmed, noting that the children's hardship was not "so disproportionately severe" that it could be characterized as exceptional and unusual.

The court preliminarily noted that although petitioner lived in Missouri, a state within the Eighth Circuit, it would apply Seventh Circuit case law because her case was heard via video conferencing by an IJ sitting in Chicago. The court then held that it lacked jurisdiction under INA § 242(a)(2)(B) to review the denial of cancellation. The court then rejected petitioner's due process claims. First, the court found petitioner did not exhaust her claim that the brevity of her two-hour hearing violated due process because it was based on procedural failings that the BIA could have addressed. In any event, said the court, petitioner had not shown prejudice. The second claim that her due process rights were violated because the IJ neglected to consider evidence of country conditions was also dismissed as being beyond the review of the court and also because it was contradicted by the record.

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■ Seventh Circuit Holds That Criminal Recklessness Is Not A Crime Of Violence

In *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557 (7th Cir. 2008)(Coffey, Ripple, Manion), the Seventh Circuit, in an issue of first impression, held that criminal recklessness is not a crime of violence under 18 U.S.C. § 16(b), and therefore not an aggravated felony under the INA. The petitioner, a permanent resident pleaded guilty to criminal recklessness for shooting a firearm from his truck into an apartment located in a residential neighborhood. When placed in removal proceedings he argued that he had not been convicted of a crime of violence. The IJ and the BIA disagreed and ordered him removed as an alien who had been convicted of an aggravated felony.

The Seventh Circuit joined several circuits which have held that under *Leocal* § 16(b) is “limited to crimes that require purposeful conduct, rather than negligent or reckless conduct.” The court then found, applying the categorical approach, that under Indiana law, criminal recklessness can encompass both accidental and aggressive conduct. Accordingly, it held that petitioner’s conviction was not a crime of violence.

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NINTH CIRCUIT

■ Ninth Circuit Vacates And Remands Visa Revocation Case, Rejecting DHS’s Interpretation Of Religious Worker Visa Regulations

In *Love Korean Church. v. Chertoff*, 549 F.3d 749 (9th Cir. 2008)

(Canby, Bybee, Smith), the court reversed the revocation of a special immigrant religious worker visa because the AAO’s interpretation that a proposed position must be “not primarily secular in nature” and must be “related” to religious activities – was inconsistent with the definition of “religious occupation” set forth in 8 C.F.R. § 204.5(m)(2).

Love Korean Church, a non-profit religious organization affiliated with the Korean Presbyterian denomination, had sought to have its choir director, a Korean citizen, classified as a “special immigrant” religious worker within the meaning of 8 U.S.C. § 1101(a)(27)(C). The Church views religious music as a form of worship and an integral component of its ritual celebrations.

USCIS initially had approved an I-360 petition for a religious worker visa but subsequently revoked on the basis that the beneficiary was a full-time student during the two-year period from November 1999 to November 2001, and he therefore could not have been carrying on full-time salaried work as choir director for the Church. USCIS also concluded that the duties listed in the Church’s petition could be performed by a part-time volunteer and did not reflect a full-time position. The decision was affirmed by the AAO, which interpreted the term “religious occupation,” as requiring that all duties proposed by the Church be related to the position of choir director and not be primarily secular in nature. The AAO also found that the position of choir director was not “traditionally a permanent, full-time, salaried occupation within the denomination.”

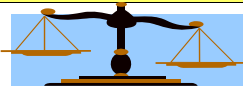
Although the district court ruled in favor of the government, on appeal, the Ninth Circuit rejected the AAO’s

interpretation. The court cited the Third Circuit opinion in *Soltane v. U.S. Dept. of Justice*, 381 F.3d 143 (3d Cir. 2004), in rejecting an interpretation of 8 C.F.R. § 204.5(m)(2) “that would require each discrete duty of a qualifying religious occupation to be primarily non-secular and directly related to core religious activity.” The court declined to adopt in the first instance, its own characterization of the quantum of religious activity that a proposed position must include to qualify under the rule leaving to the agency to decide whether an occupation that has merely “some religious significance” suffices under the statute, or whether some greater level is required: for example, that the occupation must be substantially or even primarily comprised of religious duties.

The court also found that by requiring the Church to show that it had traditionally employed a permanent, full-time, and salaried choir director, the AAO had “imposed a standard that is inconsistent with the controlling regulation.” Although the court recognized that there is a threshold ambiguity as to the correct interpretation of the term “traditional religious function,” it found that the AAO had unduly focused on the labor history of the institution filing the petition as opposed to the type of work described in the petition. “That a growing church has moved from a volunteer to a paid worker for a traditional religious function does not change the traditional religious nature of the work as set forth in the regulatory examples,” said the court.

Accordingly, the court found the AAO’s interpretation of § 204.5(m)(2) unreasonable with respect to both the requirements that the AAO found unsatisfied in this case: (1) that “all of the duties listed [in the petition be] related to the position of choir director and . . . not primarily secular in nature,” and (2) that the Church must have traditionally employed a perma-

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nent, full-time, and salaried choir director.

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■ Ninth Circuit Holds That IJ Is Not Required To Advise Alien Of Availability Of Asylum Where Record Shows No Apparent Eligibility For Relief

In *Valencia v. Mukasey*, 548 F.3d 1261 (9th Cir. Dec. 4, 2008) (Schroeder, Rawlinson, Sandoval), the Ninth Circuit rejected the alien's contention that due process required the IJ to give her blanket notice of a right to apply for asylum, withholding of removal, or CAT protection.

The court joined the Fifth Circuit opinion in *Ramirez-Osorio v. INS*, 745 F.2d 937 (5th Cir. 1984), in holding that "there is no requirement than an alien be advised of the availability of relief from deportation where there is no apparent eligibility to receive it." "Requiring the IJ to advise an alien of the availability of relief for which there is no apparent eligibility would invite the filing of meritless applications," said the court. The court distinguished its prior holding in *Orantes-Hernandez v. Thorburgh*, 919 F.2d 549 (9th Cir. 1990), where it had affirmed an injunction requiring the former INS to give a written advisal of rights to the Salvadoran class members. In that case, said the court, there had been a "demonstrated pattern and practice of abuses by the INS against members of the class. No such pattern has been suggested here."

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■ Ninth Circuit Leaves Intact Holding That The BIA May Not Deny A Motion To Reopen On Jurisdictional Grounds Where There Is An Adjustment Application Pending

In *Kalilu v. Mukasey*, 548 F.3d 1215 (9th Cir. 2008) (Nelson, Reinhardt, Bea)(*per curiam*), the Ninth Circuit denied the government's petition for panel rehearing without explanation, leaving intact the

"Requiring the IJ to advise an alien of the availability of relief for which there is no apparent eligibility would invite the filing of meritless applications."

court's holding in *Kalilu v. Mukasey*, 516 F.3d 777 (9th Cir. 2008). *Kalilu* holds that where an alien subject to a final removal order has an application for adjustment of status pending with USCIS and files a motion to reopen with the Board to avoid removal while the application is pending, it is an abuse of discretion for the Board to deny the motion exclusively on jurisdictional grounds. This maintains a conflict with *Scheerer v. United States Att'y Gen.*, 513 F.3d 1244 (11th Cir. 2008).

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■ Ninth Circuit Holds That BIA May Not Rely Solely On DHS's Opposition In Denying A Motion To Reopen For Adjustment Of Status

In *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008) (Nelson, Schroeder, Reinhardt), the Ninth Circuit held that the petitioner had received ineffective assistance of counsel when she pursued reopening to adjust status based on marriage to U.S. citizen and that BIA erred in denying her motion to reopen under *Matter of Velarde* solely based on DHS's opposition to reopening.

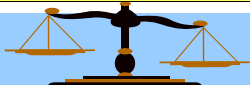
The petitioner, a citizen of Ethiopia, was placed in removal proceedings in 2000 and applied for asylum with the assistance of counsel who was also Ethiopian. On July 22,

2002, the IJ denied her application for asylum. Four days later, petitioner married a United States citizen who subsequently filed an I-130 on her behalf. On January 8, 2004, the BIA affirmed the IJ's decision. Petitioner's first counsel then referred petitioner to another attorney suggesting that she pursue a motion to reopen her case on the basis of her marriage. It was not clear who was representing the petitioner. The motion to reopen was filed 270 days after the BIA had dismissed the appeal. DHS opposed the motion because it was untimely and because of a lack of evidence that marriage was bona fide. The BIA denied the motion.

In 2007, petitioner, represented by new counsel, filed a second motion based on the ineffective assistance of her former counsels. She also submitted additional evidence regarding her marriage and provided the birth certificate of her son who was born on June 22, 2006. The BIA denied the second motion concluding that she had not established prejudice because the first motion would have been denied even if it had been timely because DHS had opposed the motion.

The Ninth Circuit held that petitioner had received ineffective assistance by her first two counsels because they had failed to advise her of the necessary documentation to support the motion to reopen and by filing the motion well beyond the deadline. The court rejected the government's contention that petitioner had not been prejudiced, stating that she need only show a "plausible ground for relief." The court found that when DHS opposes a motion to reopen for adjustment of status based on a marriage entered into during removal proceedings, the BIA may consider the objection but may not rely solely upon it to deny the motion. The court relied primarily on the Second Circuit's decision in *Melnitsinko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008), and reasoned

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that such veto power would allow DHS to unilaterally block a motion.

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■ Ninth Circuit Holds That It Has Jurisdiction To Review Determination That Alien Did Not Timely File His Asylum Application

In *Khunaverdians v. Mukasey*, 598 F.3d 760 (9th Cir. 2008) (Gould, Bea, Sedwick), the Ninth Circuit held that it had jurisdiction to review the BIA's determination that the petitioner did not timely file his asylum application where facts established, by clear and convincing evidence, that he had filed his application within one year of his arrival even though he was unable to establish the precise date of his departure from Iran.

The petitioner, an Iranian citizen, alleged that on April 11, 2001, he was smuggled, hidden in a car, into the United States. On August 6, 2001, he filed an affirmative asylum application claiming that because he was a Christian he had been accused of being a spy, was imprisoned, beaten, and tortured from July 2000 to January 25, 2001. He said he was released from prison when his wife sold their house in order to pay off the prison officials. The Asylum Office denied asylum finding that petitioner had not provided credible testimony that his application for asylum had been timely filed. The case was then referred to the immigration court for a removal hearing.

At the IJ hearing petitioner submitted additional documentation, including an Iranian bail receipt for \$22,000, and summons and a warrant for his arrest. The IJ denied asylum, concluded that petitioner had not shown that he had filed the application within one year of arriving in the United States, but granted the request for withholding. On appeal, the BIA affirmed, noting discrepancies regarding petitioner's departure dates from Iran.

Preliminarily, the court held that it had jurisdiction over the timeliness issue because it involved a mixed question of and fact. The court explained that petitioner had consistently testified that he had entered the United States on April 11, 2001. Therefore, regardless of whether he had left Iran on March 19 or June 19 of that year, the application would have still been timely. The court found to be an undisputed historical fact that petitioner was in the United States less than one year before filing his asylum application.

On the merits, the court then concluded that petitioner had established by clear and convincing evidence that he had filed his application for asylum within one year of his arrival into the United States. The court also concluded that it was not necessary to remand the case to the BIA to consider the petitioner's asylum claim because petitioner had been granted withholding of removal. The only issue on remand, said the court, is whether the Attorney General would grant asylum as a matter of discretion.

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■ Eleventh Circuit Holds That Alien Cannot Establish Past Persecution Based On Girlfriend's Forced Abortion

In *Lin v. Mukasey*, ___ F.3d ___, 2008 WL 5090550 (11th Cir. Dec. 4, 2008) (*Birch*, Kravitch, Pryor), the Eleventh Circuit upheld the BIA's decision that petitioner could not establish past persecution on the basis of his girlfriend's forcible abortion.

The petitioner, a Chinese national from the Fujian province, sought to enter the United States in May 2001, without a valid entry document. At his credible fear interview he alleged that he was persecuted on account of his political opinion because Chinese officials forced his girlfriend to undergo an abortion procedure as part of a coercive family planning policy. He also claimed that he punched an officer who had attempted to fine him for living with his girlfriend. Subsequently, an IJ denied asylum concluding that petitioner could not rely on his girlfriend's coerced abortion to establish past persecution because they were not married. The BIA affirmed.

The court found no error in the BIA's denial of asylum based on petitioner's claim that his girlfriend was forced to have an abortion.

The court noted that although it had not decided whether *Matter of C-Y-Z* was entitled to deference, it had previously held that the subsequent BIA's interpretation in *Matter of S-L-L* was a permissible construction of the statute. In *C-Y-Z* the BIA had held that an applicant whose spouse was forcibly sterilized in China was eligible for asylum, but in *S-L-L* the BIA declined to extend that holding to unmarried partners. Accordingly, the court found no error in the BIA's denial of asylum based on petitioner's claim that his girlfriend was forced to have an abortion. The court also found that petitioner had not shown eligibility under the "other resistance" clause of INA § 101(a)(42), noting that petitioner had suffered no harm amounting to persecution following the striking a family planning official.

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New Board Members Sworn in by Attorney General Mukasey

Attorney General Michael B. Mukasey administered the oath of office to five new members of the Board of Immigration Appeals (BIA) at an investiture ceremony held on December 15, 2009, at EOIR Headquarters. The new members, who were appointed by the Attorney General earlier this year, are: Charles K. Adkins-Blanch, Anne J. Greer, Garry D. Malphrus, Hugh G. Mullane, and Linda S. Wendtland.

Charles Adkins-Blanch was appointed as a member of the BIA in August 2008. He received a bachelor of arts degree in 1984 from Grinnell College and a juris doctorate in 1990 from George Washington University's National Law Center. From June 2004 to August 2008, Mr. Adkins-Blanch served as an immigration judge at the Headquarters Immigration Court. During this time, from May 2006 to May 2007, he served as a temporary BIA member. From 2000 to 2004, Mr. Adkins-Blanch served as general counsel for EOIR, after serving in the position in an acting capacity. From 1990 to 1995, Mr. Adkins-Blanch worked for the BIA as an attorney advisor entering on duty through the Attorney General's Honor Program.

Anne Greer was appointed as a member of the BIA in August 2008. She received a bachelor of arts degree in 1980 from Allegheny College and a juris doctorate in 1992 from George Mason University School of Law. From April 2003 to August 2008, Ms. Greer served as an Assistant Chief Immigration Judge. From 1992 to 2003, she worked as a senior panel attorney, supervisory attorney advisor, and attorney advisor for the BIA. From 1989 to 1992, Ms. Greer was a law clerk at the U.S. Department of Commerce, Office of the Chief Administrative Law Judge, in Washington, DC. She has been an adjunct professor of law, George Mason University School of Law, since 1996.

Garry Malphrus was appointed

as a member of the BIA in August 2008. He received a bachelor of arts degree in 1989 and a juris doctorate in 1993, both from the University of South Carolina. From March 2005 to August 2008, Mr. Malphrus served as an immigration judge at the Arlington Immigration Court. From 2001 to 2004, Mr. Malphrus served as associate director of the White House Domestic Policy Council. From 1997 to 2001, he worked on the U.S. Senate Judiciary Committee, which included serving as chief counsel and staff director of the Subcommittee on Criminal Justice Oversight and later, with the Subcommittee on the Constitution.

Hugh Mullane was appointed as a member of the BIA in August 2008. He received a juris doctorate in 1993 from Georgetown University Law Center. From May 2005 to August 2008, Mr. Mullane served as special counsel, Office of Legal Policy, Department of Justice (DOJ). From June 2004 to April 2005, he worked as director of immigration security, Homeland Security Council, White House. From May 1995 to June 2004, Mr. Mullane served as a senior litigation counsel, Office of Immigration Litigation, Civil Division, DOJ. From August 1994 to May 1995, he was an attorney with the Federal Trade Commission.

Linda Wendtland was appointed as a member of the BIA in August 2008. She received a juris doctorate in 1985 from the University of Virginia. From May 1996 to August 2008, Ms. Wendtland served as Assistant Director and Senior Litigation Counsel at the Office of Immigration Litigation (OIL), Civil Division, DOJ. From October 1990 to May 1996, she was in private practice. From August 1985 to October 1990, Ms. Wendtland served as a trial attorney at OIL, entering on duty through the Attorney General's Honor Program.

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OIL's White Elephant



INSIDE OIL

Congratulations to Senior Litigation counsel **Stephen Flynn** who has been promoted to Assistant Director. Steve joined OIL in September 2000. He is a graduate of the College of William and Mary and Creighton University School of Law. Before joining OIL, Steve served as a judge advocate in the United States Marine Corps. During his tenure at OIL, Steve was deployed twice to Iraq.

Congratulations to the following

OIL attorneys and Support Staff who were the recipients of the 2008 Civil Division Awards: **Karen Riggleman** for Excellence in Paralegal support; **Nannette Anderson** for Excellence in Administrative Support; Immigration Outsourcing Project Team comprised of **David Bernal, Richard Evans, Michelle Latour, William Peachey, Emily Radford, Terri Scadron, Mark Walters, Linda Wernery, Jocelyn Wright**, and **Linda Wendtland**, for Perseverance; and **Gjon Juncaj**, Special Commendation.

INSIDE EOIR

Attorney General Michael B. Mukasey has announced the appointment of **David L. Neal** as Vice Chairman of the Board of Immigration Appeals (BIA), effective January 5, 2009.

Neal was appointed as Chief Immigration Judge in March 2007 after serving as acting Chief Immigration Judge. He received a Bachelor of Arts degree in 1981 from Wabash College, a master's degree in 1984 from Harvard Divinity School and a juris doctorate in 1989 from Columbia Law School. Prior to his serving in various capacities within the Executive Office for Immigration Review, Neal practiced immigration law in Los Angeles and also served as the director of policy analysis for the American Immigration Lawyers Association. Neal is a member of the New York and District of Columbia bars.

Immigration Judge **Thomas Snow**, from the Arlington Immigration Court, will serve as acting Chief Immigration Judge, effective January 5, 2009, and will remain in this position until a new Chief Immigration Judge is appointed. Snow was appointed as an immigration judge in October 2005.



On December 18, 2008, OIL celebrated the Holiday Season with a Barbeque Luncheon followed by the traditional Annual White Elephant Affair orchestrated by Deputy Director David McConnell.

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.

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.



*“To defend and preserve
the Executive’s
authority to administer the
Immigration and Nationality
laws of the United States”*

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