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Immigration Litigation Bulletin

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THIRD CIRCUIT FINDS THAT UNDER REAL ID ACT PENDING HABEAS PETITIONS ARE CONVERTED TO PETITIONS FOR REVIEW

The Third Circuit held in ***Bonhometre v. Gonzales***, __F.3d__, 2005 WL 1653641 (3d Cir. July 15, 2005) (Scirica, Roth, *Van Antwerpen*), agreeing with the government's position, that "all habeas corpus petitions brought by aliens that were pending in the district courts on the date the REAL ID Act became effective (May 11, 2005) are to be converted to petitions for review and transferred to the appropriate courts of appeals." The court observed that "these modifications effectively limit all aliens to one bite of the apple with regard to challenging an order of removal, in an effort to streamline what the Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review)."

> "These modifications effectively limit all aliens to one bite of the apple with regard to challenging an order of removal."

In this case, the petitioner, a citizen of Haiti, had been ordered removed as an alien convicted of an aggravated felony at any time after admission to the United States. INA § 237(a)(2)(A)(iii). The BIA affirmed the IJ's order of removal and petitioner didn't seek judicial review.

Petitioner again came to the attention of DHS when, in May 2003, he sought to renew his work permit. When petitioner was taken into custody he filed a habeas corpus petition in the Eastern District of Pennsylvania. Petitioner contended that his procedural due process rights had been violated because the IJ had not advised him that he could have sought relief under INA §§ 212(h) and 212(c) and CAT protection. The district court found that petitioner had not exhausted the available administrative remedies before the BIA, but concluded that his procedural due process claim was "wholly collateral" to the relevant INA review provisions, and that the BIA had no expertise in adjudicating such a procedural due process claim. The court therefore concluded that it had subject matter jurisdiction and granted the petition. *Bon-*

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GOVERNMENT SEEKS REHEARING EN BANC IN NINTH CIRCUIT REVERSE-DERIVATIVE ASYLUM CASE

On July 20, 2005, the government asked the Ninth Circuit to rehear en banc ***Tchoukhrova v. Gonzales***, 404 F.3d 1181 (9th Cir. 2005), because, *inter alia*, "the panel's newfangled means of obtaining asylum, which the panel refers to as 'reverse-derivative asylum,' is contrary to the relevant statutes and regulations and is in tension with decisions of this Court."

The petitioner, a native of Russia, applied for asylum and included her husband and son in her application. The petitioner sought asylum on the basis that her son, who was born with cerebral palsy, was denied access to public schools, threatened with institutionalization, verbally abused, and beaten. The IJ found that the harm the

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IDENTIFYING THE PROPER RESPONDENT IN IMMIGRATION HABEAS PETITIONS

Who is the proper respondent to a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 in an immigration-related matter? The natural response to this question in the wake of Congress's enactment of the REAL ID Act of 2005 (H.R. 1268, 109th Cong. (2005) (enacted), Pub. L. No. 109-13, Div. B, 119 Stat. 231) might be "Who cares?" But, the question is still relevant. While the REAL ID Act makes clear Congress's intent to preclude judicial review of all challenges to final administrative removal orders in any forum except the courts of appeals by way of a petition for review, habeas review of "challenges to deten-

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Highlights Inside

REVERSE DERIVATIVE ASYLUM

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family suffered did not rise to the level of persecution. The BIA affirmed the IJ denial of asylum while noting the "very sympathetic family history."

The Ninth Circuit panel held that disabled children in Russia constitute a particular social group and that Russian parents of disabled children were properly included in the social group. "Because the parents and their disabled child incur the harm as a unit, it is appropriate to combine family members into a single social group for purposes of asylum and withholding," said the court. Additionally, the court held, after discussing at length the treatment of "family" under our immigration laws, that a parent of a disabled child may file for asylum as a principal applicant in order to prevent the child's forced return to the home country. The court acknowledged that under the asylum statute there is no provision permitting parents to obtain asylum derivatively through their minor children. However, it applied the "pragmatic approach" of viewing the family as a whole without formalistically dividing the claims between "principal" and "derivative" applicants.

"The panel has invented a whole new theory of asylum eligibility running from child to parent. Under this theory, a person can be eligible for asylum without enduring past persecution or having a risk of actual future persecution."

Finally, the panel reversed the finding below that the harm suffered by the family did not rise to the level of persecution. The court found that the injurious conduct to which petitioners were subjected when taken together rose to the level of past persecution. Accordingly, the family also established a presumption of future persecution which the government did not rebut.

In its petition the government contends that "the panel has invented a whole new theory of asylum eligibility running from child to parent. Under this theory, a person can be eligible for asylum without enduring past persecution or having a risk of actual future persecution." Normally, an asylum applicant has to establish that he suffered persecution or has a well-founded fear of future persecution. Moreover, under the normal derivative approach the child's status is expressly dependent on "principal alien's" status, that is his application rises or falls on the parent's. The government contends that, "contrary to this scheme, instead of looking at the persecution of [petitioner], who was the asylum applicant, the panel treated the dependent son's derivative claim as controlling, and looked to his harm concluding that he had been persecuted. The panel then imputed the derivative child's harm to [petitioner], and concluded that this made her eligible for asylum, without having to establish that she, herself, suffered past persecution or has a well-founded fear or clear probability of persecution, contrary to our law. *Id*. The panel thus reversed the operation of our derivative laws, in effect having the derivative child's claim control the principal parent's claim, and then permitted [petitioner] to be eligible without any persecution of herself, violating the principal applicant scheme."

The government also argues that the panel violated *Ventura* principles because neither the IJ not the BIA had an opportunity to "take the panel's invented approach that [petitioner] was (or would be) reversely eligible for asylum solely by imputation from her derivative son – without establishing that she was persecuted in the past or faces future persecution."

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REGULATORY UPDATE

EXCHANGE VISITOR PROGRAM

The State Department has published a final rule amending the Exchange Visitor Program regulations set forth at 22 C.F.R. 62.20 by extending the duration of program participation for professors and research scholars from the current three years to five years. 70 *Fed.Reg*. 28815-01 (June 27, 2005) In addition, this rule implements a limitation on the eligibility of an extension for the professor and research scholar categories, and implements a two-year bar for repeat participation to encourage and foster the purpose of the Mutual Educational and Cultural Exchange Act of 1961 ("Fulbright-Hays Act"). Additional minor modifications have been made throughout Sec. 62.20 for administrative purposes due to the implementation of the Student and Exchange Visitor Information System (SEVIS).

H1B NUMERICAL LIMITS

USCIS has published an interim rule implementing certain changes made by the Omnibus Appropriations Act for Fiscal Year 2005 to the numerical limits of the H-1B nonimmigrant visa category and the fees for filing of H-1B petitions. The fee for an H-1B visa imposed by the American Competitiveness Act of 1998 has been raised to $1,500 (for employers with 26 or more employees), in addition to the base filing fee of $185 for form I-129.

This rule also notifies the public of the procedures USCIS will use to allocate, in fiscal year 2005 and in future FYs starting with FY 2006, the additional 20,000 H-1B numbers made available by the exemption created pursuant to that Act. This interim rule amends and clarifies the process by which USCIS, in the future, will allocate all petitions subject to numerical limitations under the INA. 70 *Fed. Reg*. 23775 (May 5, 2005).

WHO IS THE PROPER RESPONDENT IN HABEAS ACTIONS

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tion that are independent of challenges to removal orders" is still available. *See* 151 Cong. Rec. H2873, 109th Cong., 1st Sess., *available at* 2005 WL 1025891 (May 3, 2005). So, the identity of the proper respondent to a habeas petition in the immigration context is still an issue (albeit arguably less complicated now that removal orders are no longer reviewable in habeas) that merits discussion, especially considering its effect on a court's jurisdiction to consider and decide a habeas petition.

From a litigation standpoint, naming the Attorney General or other Executive agency head as the respondent to a habeas petition is not reasonable.

Like petition for review cases, habeas cases pursued under § 2241 must name a proper respondent and must be brought in the appropriate judicial district. *Compare* 8 U.S.C. §§ 1252(b)(2) & (3) ("The Attorney General is the respondent" in petition for review cases and the review petition must be filed within the Circuit where the immigration judge completed the administrative proceedings) *with* 28 U.S.C. §§ 2241 & 2243 (providing that a court may grant the writ "within [its] respective jurisdiction[]" and instructing that the writ should be granted to the person having custody of the petitioner). The failure to abide by these jurisdictional requirements can result in the dismissal of a habeas corpus petition.

The identity of the proper respondent to a habeas petition seeking review of an immigration-related matter has generated a significant amount of litigation in the immigration arena. Indeed, several federal courts of appeals have addressed the issue. *See, e.g.*, *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667 (7th Cir. 2003); *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003); *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000); *Yi v. Maugans*, 24 F.3d 500 (3d Cir. 1994); *see also Ali Ali, et al. v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003) (extending *Armentero* to removal cases); *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004) (enemy combatant case); *cf. Armentero v. Ashcroft*, 340 F.3d 1058 (9th Cir. 2003), *opinion withdrawn*, 382 F.3d 1153 (9th Cir. 2004); *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998) (identifying and discussing, but declining to decide, the issue). The conflict stems from the government's and the habeas petitioners' competing interests with respect to where a habeas petition can be filed, and whether a court may exercise habeas jurisdiction over the petition.

The overriding issue in cases presenting the proper respondent question is whether the head of an Executive agency, like the Attorney General or the Secretary of the Department of Homeland Security, can be the proper respondent to a habeas petition in an immigration case. Were this so, it would be particularly advantageous for the alien-petitioner, who could arguably file his habeas petition in any judicial district within the United States inasmuch as the head of an Executive agency is subject to the jurisdiction and authority of any federal district court. This, in turn, would provide incentives for forum-shopping, abuse of the judicial system, and delay in the adjudication of habeas petitions. Armed with the ability to file a habeas petition naming the head of an Executive agency in any federal jurisdiction, any alien anywhere in the country would have the incentive to file the habeas petition in what may be perceived as another more favorable court. While considerations of venue might ultimately preclude an alien from proceeding with his habeas petition in his chosen forum, this will only be determined after the court of choice has had to engage in a "fact-intensive [analysis] of venue and forum non conveniens issues." *Roman*, 340 F.3d at 322 (quoting *Vasquez*, 233 F.3d at 694). This, in turn, would negatively affect the federal courts' ability to control their dockets and efficiently adjudicate their cases.

All of these factors illustrate why, from a litigation standpoint, naming the Attorney General or other Executive agency head as the respondent to a habeas petition is not reasonable. But, perhaps the most compelling reason that the Attorney General or other Executive agency head is not the proper respondent to a habeas petition is that such a position is not generally sustainable as a legal matter.

Under 28 U.S.C. § 2243, a writ of habeas corpus "shall be directed to the person having custody of the person detained." *See also Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95 (1973) (a petition for a writ of habeas corpus "acts . . . upon the person who holds him in what is alleged to be unlawful custody"); *Schlanger v. Seamans*, 401 U.S. 487, 491 (1971) (The custodian must be in the territorial jurisdiction of the court; "the absence of the custodian is fatal to . . . [habeas] jurisdiction."). Last summer, the Supreme Court addressed the issue of the identity of the proper respondent in a petition for a writ of habeas corpus under 28 U.S.C. § 2241 filed by an individual detained in military custody as an enemy combatant under a Presidential Executive Order to the Secretary of State. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). The Supreme Court held that only the commander of the Consolidated Naval Brig in Charleston, South Carolina, as Padilla's immediate custodian, was the proper respondent to the habeas corpus petition. 124 S. Ct. at 2721-22. The Court concluded that the proper respondent to a habeas petition challenging present physical confinement is "the warden of the facility where the prisoner is being held, not the Attorney General or some other

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remote supervisory official." *Id.* at 2718. The Court emphasized that its interpretation of the federal habeas statute's plain language was not new or novel, and observed that it has upheld this interpretation in several of its decisions:

> We summed up the plain language of the habeas statute over 100 years ago in this way: "[T]hese provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Id.* (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)); *see also id.* at 2718 (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-95 (1973)).

The "immediate custodian" rule reaffirmed in *Padilla* generally applies with equal force in the immigration context. Because different officials within DHS exercise varying degrees of authority with respect to an alien's immigration detention depending on the reasons for the alien's custody, *see, e.g.*, 8 C.F.R. § 212.12 (setting forth procedures for parole determinations and revocations respecting excludable Mariel Cubans); 8 C.F.R. § 241.4 (setting forth the procedures for the continued detention of inadmissible and criminal aliens after the issuance of a removal order), naming one of these officials or an agency head (as the official with ultimate authority) as a habeas respondent is arguably reasonable.

These factors notwithstanding, habeas's fundamental purpose to "produce the body" means that the "immediate custodian" rule applies in immigration habeas cases and that the person with such power is the proper habeas respondent. The habeas statute's plain language (and purpose) does not change depending on the context of a habeas case. *See id.* at 2719 ("The Court of Appeals' view that we have relaxed the immediate custodian rule in cases involving prisoners detained for 'other than federal criminal violations,' and that in such cases the proper respondent is the person exercising 'legal reality of control' over the petitioner, suffers from the same logical flaw. . . Certainly the statute itself makes no such distinction based on the source of the physical detention. Nor does our case law support a deviation from the immediate custodian rule here"). Sections 2242 and 2243 both "straightforwardly provide" that the proper respondent to a habeas petition is the person with custody over the petitioner. That person, the Supreme Court has held, is the person with "*immediate custody* of the party detained, with the power to produce the body of such party before the court or judge." *See id.* at 2717 (quoting *Wales*, 114 U.S. at 574) (emphasis added in *Padilla*).

> The "immediate custodian" rule reaffirmed in *Padilla* generally applies with equal force in the immigration context.

When an alien is detained, the proper respondent likewise is the person with "immediate custody," who is responsible for the day-to-day control over the petitioner and who is, therefore, the individual with the power and ability to produce the body of the petitioner for any proceeding, or for release from custody if his release is constitutionally required.

No federal court of appeals has addressed the issue of the proper respondent to a habeas petition in an immigration matter since the Supreme Court issued its decision in *Padilla*. *Cf. Armentero v. INS*, – F.3d –, 2005 WL 1431880 (9th Cir. June 21, 2005) (Berzon, J. dissenting) (disagreeing with the majority's ultimate disposition of the case on fugitive disentitlement grounds, and stating that the Supreme Court's decision in *Padilla* would not require a court to apply the "immediate custodian" rule under the circumstances presented in the case). Before *Padilla*, however, the First *(Vasquez)*, Sixth (*Roman*), and Seventh (*Robledo-Gonzales*) Circuits all rejected the argument that, generally speaking, the Attorney General is not the proper respondent to a habeas petition in an immigration case. As the Seventh Circuit stated in *Robledo-Gonzales*, "[t]he power to control some aspect of the petitioner's legal process does not render that official the petitioner's custodian for habeas purposes." 342 F.3d at 673-74.

Certainly, there may be exceptional cases where the Attorney General or the Secretary of Homeland Security might be the proper respondent to a habeas petition. These cases might include: when an alien is detained in an undisclosed location; when there has been an obvious attempt by the government to transfer the alien from one institution to another for the purpose of manipulating or defeating jurisdiction; or when a detainee does not have a realistic opportunity for judicial review of executive detention, and naming the Attorney General is necessary to preserve access to habeas corpus relief. *See Roman*, 340 F.3d at 325-26; *Vasquez*, 233 F.3d at 696. The circumstances may likewise require a different answer to the proper respondent question when an alien is detained in a state or local facility pursuant to a contract with the agency.

Exactly how the immediate custodian rule applies in such circumstances is not entirely clear and may likely require a careful examination by the Departments of Justice and Homeland Security of the agency's contractual relationships, past practice, and DHS's organizational structure all in light of the Supreme Court's decision in *Padilla*. Indeed, regulations on the topic might be appropriate.

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CONVERSION UNDER REAL ID ACT

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hometre v. Ashcroft, 306 F. Supp.2d 510 (E.D. Pa. 2004). The government then appealed.

While the appeal was pending, Congress enacted the REAL ID Act of 2005. The Third Circuit preliminarily noted that under the new judicial review regime "a petition for review is now the sole and exclusive means of judicial review for all orders of removal except those issued pursuant to INA § 235(b)." The court also noted that its jurisdiction was also enlarged, as to consider constitutional claims or questions of law raised in a criminal alien's petition for review. The court then determined that, although Congress was silent as to what was to be done with pending habeas appeals, "it is readily apparent, given Congress' clear intent to have all challenges to removal orders heard in a single forum (the courts of appeals), that those habeas petitions that were pending before this Court on the effective date of the REAL ID Act are properly converted to petitions for review and retained by this Court."

"A petition for review is now the sole and exclusive means of judicial review for all orders of removal except those issued pursuant to INA § 235(b)."

The court also determined that even though petitioner's immigration hearing was conducted within the jurisdiction of the First Circuit, "given that this case has been thoroughly briefed and argued before us, and given that [petitioner] has waited a long time for the resolution of his claims, we believe it would be a manifest injustice to now transfer this case to another court for duplicative proceedings."

On the merits, the court determined the district court's opinion "to be non-existent" and addressed petitioner's contentions as if they were raised in a petition for review in the first instance. The court noted that as a general rule, an alien must exhaust all administrative remedies available to him as of right before the BIA as a prerequisite to raising a claim before us. The court then found that because petitioner's procedural due process claims could have been argued before the BIA, "his failure to do so is thus fatal to our jurisdiction over this petition."

Additionally, the court further held, were it to consider petitioner's claims on the merits, that he would not prevail on a procedural due process challenge, because he had not shown substantial prejudice. First, because petitioner was a lawful temporary alien at the time of his removal hearing, he was not, by the express language of the statute, eligible for a section 212(c) waiver. Second, because petitioner is an aggravated felon, he thus would not have qualified for section 212(h) relief, regardless of any hardship that may befall his wife or children as a result of his removal. Finally, because there were no facts in the record to support a CAT claim, the court found without substance petitioner's contention that the failure to advise him of potential CAT eligibility was a procedural due process violation.

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BIA RULES ON GOOD MORAL CHARACTER PERIOD FOR CANCELLATION OF REMOVAL

In ***Matter of Ortega-Cabrera***, 232 I&N Dec. 793 (BIA 2005), the Board held that because an application for cancellation of removal under INA § 240A(b)(1) is a continuing one for purposes of evaluating an alien's moral character, the period during which good moral character must be established ends with the entry of a final administrative decision by the IJ or the Board. The Board further determined that to establish eligibility for cancellation of removal an alien must show good moral character for a period of 10 years, which is calculated backward from the date on which the application is finally resolved by the IJ or the Board.

The respondents were charged on August 13, 2001, with entering without inspection. However, because two of the respondents entered with the aid of a smuggler in 1991, the IJ determined that respondents were inadmissible under INA § 212(a)6)(E)(i). Consequently, the IJ found that they were precluded from meeting the good moral character requirement because the violation had occurred within the 10-year period preceding service of the NTA.

Before the enactment of INA § 240A(d)(1) the Board treated the continuous physical presence period, and consequently the good moral character period, as continuing to accrue through the time that the Board decided an alien's appeal. *Matter of Castro*, 19 I&N Dec. 692 (BIA 1988). The IIRIRA "stop time" rule altered the calculation of continuous physical presence by halting the accrual of such presence with the service of the charging document. Here, the BIA concluded that when the provisions of INA §§ 240A and § 101(f) are read together, the relevant period for determining good moral character for purposes establishing eligibility for cancellation of removal must include the time during which the respondent is in proceedings.

Summaries Of Recent Federal Court Decisions

ADMISSION

■Eighth Circuit Rules That Lawful Permanent Resident May Be Classified As An Alien Seeking Admission To The United States After Engaging In Illegal Activity Abroad

In ***Sandoval-Loffredo v. Gonzales***, __F.3d__, 2005 WL 1630948 (8th Cir. July 13, 2005) (*Arnold*, Bowman, Gruender), the Eighth Circuit held that a lawful permanent resident could be treated as an applicant for admission under 8 U.S.C. § 1101(a)(13)(C)(iii) where he had engaged in illegal activity after departing the United States.

The petitioner, is a citizen of Ecuador, and has been a lawful permanent resident since 1996. In September 2000, he traveled to Canada where he met with some of his relatives, including his brother. Several days later, the two brothers sought entry into the United States: petitioner did so as a returning lawful permanent resident, and his brother, a citizen of Ecuador, falsely claimed United States citizenship. Subsequently, the INS instituted removal proceedings against petitioner charging him with being inadmissible as an alien who "knowingly . . . encouraged, induced, assisted, abetted, or aided" another alien to enter the United States in violation of law, 8 U.S.C. § 1182(a)(6)(E)(i). The IJ found that petitioner knew that his brother was going to claim to be a United States citizen, and that he assisted his brother's attempted illegal entry by telling the initial immigration inspector that his brother was a citizen.

On appeal petitioner contended that he could not be classified as inadmissible unless the government first proved by clear, convincing, and unequivocal evidence that he was properly regarded as an applicant for admission. The court noted, however, that the alleged "illegal activity" that would cause petitioner to be an applicant for admission was the same activity that formed the basis for the inadmissibility charge, namely assisting another alien (his brother) to attempt to enter the United States illegally. Therefore, the court reasoned that since the INS had established by clear, convincing, and unequivocal evidence that petitioner sought to bring his brother into the United States in violation of the immigration laws "any putative error that the IJ made regarding the burden of proof inured to [petitioner's] favor and cannot supply a basis for reversal."

The court then determined that the IJ's findings were supported by substantial evidence. In particular, the court found adequate support for the IJ's decision not to credit the "self-serving testimony" of petitioner and his brother because it was not consistent with the testimony the United States Immigration Inspectors.

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ASYLUM

First Circuit Defers To BIA's Interpretation Of "Persecution," and Holds That It Lacks Authority To Reinstate Or Extend Voluntary Departure Period

In ***Bocova v. Gonzales***, __F.3d__, 2005 WL 1491490 (1st Cir., Jun 24, 2005), the First Circuit held that under IIRIRA the court lacked jurisdiction to extend or reinstate expired period of voluntary departure. The court also deferred to the BIA's interpretation of "persecution."

The petitioner, an Albanian citizen, sought asylum claiming that on two occasions, within an eight-year span, he had been imprisoned, beaten, and threatened with death for participating in political demonstrations. An IJ and subsequently the BIA denied the application for asylum but granted a thirty-day voluntary departure period. While the case was pending before the First Circuit, petitioner moved to stay the running of the then-expired voluntary departure period.

"Persecution is a protean word, capable of many meanings," and because it is not defined by the statute "it is in the first instance the prerogative of the Attorney General, acting through the BIA, to give content to it."

The First Circuit affirmed the denial of asylum. It first noted that "persecution is a protean word, capable of many meanings," and because it is not defined by the statute "it is in the first instance the prerogative of the Attorney General, acting through the BIA, to give content to it. We are thus bound to accept the BIA's view of what constitutes persecution unless that view amounts to an unreasonable reading of the statute or inexplicably departs from the BIA's earlier pronouncements." The court observed that the BIA has eschewed the articulation of rigid rules for determining when mistreatment sinks to the level of persecution, but rather has chosen to take each case as it comes in deciding whether there has been persecution. The court noted that it had previously upheld the BIA's finding that an important factor in determining whether the mistreatment is persecution is whether the mistreatment can be said to be systematic rather than reflective of a series of isolated incidents. Here, the court found there was little in the record to suggest that petitioner was systematically targeted for abuse. "Although we neither condone nor minimize the mistreatment described by the petitioner, we do not feel free to second-guess the BIA's determination that it fell short of establishing past persecution," said the court.

The court then declined to extend or reinstated the expired period of voluntary departure. The court explained that voluntary departure benefits the government and the alien. "Voluntary departure, however, is not a one-way

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street: its benefits come with attendant responsibilities," said the court. Prior to IIRIRA the court's practice was to reinstate voluntary departure. However, because this case arose after IIRIRA, the court found that it lacked "the authority either to fashion a new period of voluntary departure or to reinstate an expired period of voluntary departure." "The IIRIRA worked a sea change in the federal court's authority over voluntary departure orders by withdrawing from the courts jurisdiction to review grants or denials of voluntary departure," explained the court. However, the court concluded that it possesses "the power, on a timely and properly focused motion, to suspend the running of an unexpired voluntary departure period." Such a motion should be subject, "to scrutiny under the same legal standards used to assess a motion to stay removal."

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■Second Circuit Upholds Denial Of Alien's Applications For Relief On Account Of Her Resistance To China's Coercive Population Control Policy.

In ***Lin v. Ashcroft,*** __F.3d__, 2005 WL 1540799 (2d Cir. July 1, 2005) (Oakes, *Cabranes*, Goldberg (sitting by designation)), the Second Circuit affirmed the BIA's denial of asylum and withholding of removal. The petitioner claimed that she had been persecuted in China due to her opposition to China's coercive family planning policies. To establish that she had been forcibly sterilized, petitioner submitted documentary evidence indicating that she had undergone tubal sterilization surgery. However, the IJ did not find petitioner credible because there were inconsistencies between petitioner's testimony and the documentary evidence. Petitioner gave two different dates of her marriage and could not remember whether she was married in the spring or in the fall. Additionally she was unable to provide a coherent chronological account of her personal history. Accordingly, the IJ denied asylum finding that petitioner was not credible. The BIA adopted and affirmed the IJ decision , noting however, that it had not accepted all of the IJ's credibility findings.

The Second Circuit affirmed the adverse credibility finding and rejected petitioner's contention that the discrepancies regarding the dates of her marriage were isolated. The court noted that petitioner's testimony was "replete with inconsistencies." "Where as here, the 'IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements by the asylum applicant about matters material to her claim of persecution a reviewing court will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise," said the court. The court also found that while the documentary evidence "suggested that petitioner is now sterile, it did not suggest that the Chinese government *forcibly* subjected petitioner to sterilization." Therefore, the court found that the "IJ's sustainable adverse credibility finding [was] fatal to her claim."

Petitioner's "fear of retribution for refusing to participate in a military known to perpetrate crimes against humanity--and specifically against fellow Muslims and ethnic Albanians--clearly rose to the level of past persecution."

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■Second Circuit Determines That Ethnic Albanian Is Ineligible For Asylum In Light Of Changed Country Conditions In Kosovo

In ***Islami v. Gonzales,*** __F.3d__, 2005 WL 1475399 (2d Cir. June 23, 2005) (*Calabresi*, Katzmann, Parker), the Second Circuit affirmed the BIA's denial of asylum, withholding of removal and protection under the Convention Against Torture.

The petitioner fled the Kosovo region in order to avoid compulsory military service where he feared he would be mistreated or forced to engage in military actions contrary to "basic rules of human conduct" by the ethnic Serbian majority government. Petitioner first sought asylum in Germany in 1998. When his request was denied he returned to Kosovo and then traveled to the United States. An IJ denied asylum finding that even if petitioner's claims of harassment and mistreatment were true, the actions committed against him did not rise to the level of persecution. Moreover, the IJ held that petitioner's fears of future persecution were not well-founded in light of improved conditions in Kosovo (particularly given the installation of a new government in Belgrade) since petitioner's departure. The BIA summarily affirmed the IJ's decision.

The Second Circuit held that the IJ's finding that petitioner was unlikely to receive disproportionately excessive penalties simply because he was an ethnic Albanian was supported by substantial evidence. However, the court determined that petitioner's "fear of retribution for refusing to participate in a military known to perpetrate crimes against humanity — and specifically against fellow Muslims and ethnic Albanians — clearly rose to the level of past persecution." The court explained that service in the Yugoslavian army would have likely required petitioner to participate in a military campaign "widely condemned by the international community as contrary to the basis rules of human conduct." Accordingly, this constituted an exception to the general rule that compulsory military service is not a basis for a persecution claim. Moreover, the court found that "individuals who seek to avoid serving in a military whose brutal and unlawful campaigns are directed at members of their own race, religion, nationality, or social or political group, the requirements for stating a persecution claim are met at a significantly lower

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threshold of military wrongdoing than would be required if the objections are simply a matter of conscience."

The court then found that the government had rebutted the presumption of future persecution by "presenting copious evidence that the nationalistic Serb domination of Kosovo has ended." Therefore, substantial evidence supported the denial of asylum. The court also found that petitioner had "not come close to showing that he was likely to be tortured when he returned to Kosovo."

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Eighth Circuit Rules Substantial Evidence Supports Immigration Judge's Denial Of Laotian Alien's Application For Asylum On Account Of His Hmong Ethnicity

In ***Yang v. Gonzales,*** __F.3d__, 2005 WL 1559951 (8th Cir. July 6, 2005) (*Loken*, Riley, Smith), the Eighth Circuit upheld the denial of asylum, withholding of removal, and protection under CAT. The petitioner alien contended that, following a visit to the United States, he was detained and interrogated for one month by the Laos government about his connections to the United States. The court found that petitioner's "vague claim that he was detained and interrogated for one month upon returning to Laos in 1989 does not describe conduct severe enough to establish past persecution." The court also found that the record evidence demonstrated that individuals of Hmong ethnicity such as petitioner are not persecuted today for their ethnicity alone.

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The court found that petitioner's "vague claim that he was detained and interrogated for one month upon returning to Laos in 1989 does not describe conduct severe enough to establish past persecution."

■Eighth Circuit Upholds Denial Of Asylum Based On Lack Of Corroborating Evidence

In ***Eta-Ndu v. Gonzales***, __F.3d__, 2005 WL 1473812 (8th Cir. June 23, 2005) (Colloton, *Benton*; Lay, dissenting), the Eighth Circuit upheld the BIA's denial of asylum and concluded that the IJ had properly found petitioner's corroborating documents not credible, and that the petitioner had failed to provide a plausible explanation why the documents were not bogus.

The principal petitioner, a Cameroonian citizen, entered the United States as a student in 1991, followed by his wife and children. Petitioner violated his student status by failing to attend the university where he was enrolled. When the family was placed in proceedings, petitioner applied for asylum and contended that his family was a "particular social group" because of its opposition to the ruling party in Cameroon and its support for the Socialist Democratic Front (SDF). He also argued that because of his family association the government imputed to him a political opinion and subjected him to past persecution and made him a target of future persecution.

Petitioner testified that on one occasion he had been detained for over three days by the Cameroonian authorities because he had participated in mobilizing people to work for the SDF. He also stated that his uncle had been murdered because of the SDF affiliation, and that petitioner's father had received death threats. Petitioner's wife testified that the Cameroonian government had ended her husband's student salary because of his SDF affiliation. An expert also testified that the SDF is an established opposition political party and that the SDF would be able to verify membership records. At the close of the testimony, the IJ requested that petitioner corroborate his story by showing membership in the SDF, documentation on his uncle's death, and the burning of his father's business. Subsequently petitioner submitted two letters, both allegedly from SDF officials, letters from his relatives, and a police report. The IJ admitted the documents into evidence but became suspicions when he noticed that a letter written by petitioner's father was mailed from New York City, and the letters from the SDF were not typed on official letterhead and appeared to have been typed by the same typewriter. The IJ then requested forensic analysis of the letters which concluded that they came from the same typewriters. The IJ did not make an adverse credibility finding, but found that petitioner's credibility was "seriously shaken." The IJ found no past persecution and determined that he had not met the burden of showing a well-founded fear of future persecution, particularly because he could not corroborate his story. The BIA affirmed the IJ's findings and declined to review additional evidence submitted on appeal.

The Eighth Circuit readily dismissed the past persecution claim, noting that it had denied asylum despite evidence of mote serious abuse. On the claim of future persecution, the court found that it was reasonable for the IJ to require corroborating evidence. The court also found that it was reasonable to doubt the authenticity of the letters from the SDF. Moreover, the court agreed with the IJ that the letters from relatives lacked "objectivity." Accordingly, the court concluded that the denial of asylum was supported by substantial and probative evidence. The court also rejected the claim that the BIA's denial of his motion to reopen and remand based on additional evidence was a denial of due process, holding that petitioner had failed to demonstrate that the proffered evidence was previously unavailable and that the alleged defect was not sufficiently prejudicial to maintain a due process claim.

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In a dissenting opinion, Judge Lay would have found that the denial of asylum was not supported by substantial evidence. "Under the majority's approach, this court provides a rubber-stamp to the BIA's oversight and constitutes a gross miscarriage of justice," he concluded.

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■First Circuit Affirms Denial Of Asylum And Adjustment Of Status Of Indian Citizen

In ***Singh v. Gonzales,*** __F.3d__, 2005 WL 1503126) (1st Cir. June 27, 2005) (Torruella, Selya, *Lynch*), the First Circuit upheld the denial of an asylum application because "the record virtually compelled the conclusion that" the alien was not credible. The court further held that because the alien repeatedly lied in seeking immigration benefits, the record fully supported the denial of his application for adjustment of status based on the determination that he was inadmissible as an alien who sought an immigration benefit through fraud or misrepresentation.

The petitioner entered the U.S. illegally in October 1997 and several months later applied for asylum, withholding and CAT protection. When those applications were not granted petitioner was served with a NTA. During removal proceedings, petitioner renewed his applications for relief. The IJ did not find petitioner's testimony credible and denied all forms of relief. While petitioner's appeal was pending before the BIA, he moved from San Francisco to Boston and also received an approved I-140, an employment based visa petition. Petitioner then filed a motion remand to apply for adjustment and a motion to change venue to Boston. The BIA granted both motions and the case was considered by another IJ in Boston. This IJ also found that petitioner had provided false testimony and information in connection with his asylum request in San Francisco and his adjustment of status application in Boston. The IJ reinstated the denial of asylum, withholding and CAT, and denied the adjustment of status based on a finding of inadmissibility. The BIA then affirmed without opinion

> Petitioner "lied and did so repeatedly; that sealed his fate on admissibility. Being inadmissible, he was not eligible for adjustment of status."

The First Circuit found that the IJ had articulated several specific reasons why petitioner's testimony was not credible and that each was "amply supported by the record." The court rejected petitioner's contention that the Boston IJ's finding of willful misrepresentation was not supported by substantial evidence because the San Francisco IJ did not expressly find he made a willful misrepresentation. "Although a negative credibility finding alone is not the equivalent of a finding of willful misrepresentation and the one does not necessarily lead to the other, here, the Boston IJ correctly read the San Francisco IJ's lack of credibility finding as resting on deliberate falsification," said the court. Petitioner "lied and did so repeatedly; that sealed his fate on admissibility. Being inadmissible, he was not eligible for adjustment of status."

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■Seventh Circuit Rejects Asylum Claim Where Albanian Citizen Relied On Fraudulent Documents

In ***Hysi v. Gonzales,*** __F.3d __, 2005 WL 1399306(7th Cir. June 15, 2005) (*Rovner*, Evans, Sykes), the Seventh Circuit affirmed the IJ's denial of asylum based on an adverse credibility finding. The petitioner and his wife are Albanian citizens. The lead petitioner overstayed his visitor's visa while is wife entered the U.S. without a valid entry document. When placed in removal proceedings petitioners applied for asylum.

The principal petitioner, the husband, testified that his family had been anti-communist, and that after a democratically-elected President Berisha came into power he went to work for that government. However, he had some disagreements with his manager, and was fired. Subsequently, petitioner became a member of the Right Democratic Part (PDD) and published two newspaper articles critical of the Berisha government. As a result of these articles, he was detained, interrogated, and beaten. He claims that because he continued his political activities after this initial detention and beating, he was kidnapped, beaten again, and threatened that he would be "physically eliminated" if he continued his political activities. Petitioner also relied on the articles as proof of his membership in the PDD. Apparently, the articles on their face appeared to have been altered because petitioner's name appeared to be in a different typeface than the rest of the article. The IJ then submitted the article to the INS Forensic Laboratory which subsequently submitted a report indicating that the articles were fraudulent. Based on this finding, the IJ denied the applications for relief. The BIA affirmed without opinion.

The Seventh Circuit found no error in the IJ's conclusion that the author attributions for the newspaper articles were fraudulently added after the fact. Because the articles were central to petitioner's claim that he was persecuted for his political views and membership in the PDD, the court found that "the IJ was entitled to find that [petitioner] was generally not a credible witness. In short, the record evidence does not compel us to find the requisite fear of persecution and the IJ's conclu-

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sions are supported by substantial evidence."

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■First Circuit Holds That Asylum Applicant's Speculation As To The Motives Behind His Mistreatment In Albania Was Not "Conclusive Evidence" Establishing Past Persecution On Account Of A Protected Ground.

In ***Ziu v. Gonzales***, __F.3d__, 2005 WL 1315394 (1st Cir. June 3, 2005) (Lynch, Lipez, Howard) (*per curiam*), the First Circuit, denied the petition for review of an Albanian citizen who sought asylum and withholding of removal based on threats and incidents of violence against him and his family that were allegedly based on his political activities.

"The IJ was free to reject such speculation as to motive," said the court, "even while generally finding petitioner credible as to historical facts."

The petitioner, an anti-communist supporter of the Albania's Democratic Party sought relief on the ground that he had persecuted by the Socialists when they returned to power in 1997. The IJ denied asylum finding that petitioner had failed to establish that the threats to his family were due to his political activities and that the incidents directed at petitioner did not amount to past persecution. The BIA summarily affirmed that decision.

The First Circuit held that while the record could support the conclusion that the threats against his family were attempts by the Socialists to force petitioner to give his support for the Democratic Party, that not sufficient to overturn the alternate inference drawn by the IJ. "The record must compel the conclusion that petitioner advances for us to upset the IJ," said the court citing to *Elias-Zacarias*. Here, the primary evidence of any link between the incidents and petitioner's political opinion was his own belief that certain incidents were orchestrated to discourage his political activities. "The IJ was free to reject such speculation as to motive," said the court, "even while generally finding petitioner credible as to historical facts." The court further found that two episodes of physical abuse of petitioner not requiring hospitalization, a police search, and various threats, did not amount to persecution.

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CRIMES

■Fifth Circuit Holds That First-Offense Deferred Adjudication For Possession Of Marijuana Is An Aggravated Felony.

In ***Salazar-Regino v. Trominski***, __F.3d__, 2005 WL 1532840 (5th Cir. June 30, 2005) (Jolly, *Smith*, Demoss), the Fifth Circuit sustained the removal orders issued against nine lawful permanent resident aliens who pleaded guilty to marihuana possession offenses and received deferred adjudication in state court.

The court held that deferred adjudication for a first offense of drug possession was a "conviction" based on statutory changes adopted after the aliens pled guilty, deferring to the BIA's interpretation in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). In *Roldan*, the BIA applied the 1996 definition of "conviction" finding that the plain language of INA § 101(a)(48), 8 U.S.C. § 1101(a)(48) dictated that "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of a state rehabilitative statute, rather than as a result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes."

The court also held, following *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001), that the offenses, which were misdemeanors under the Federal Controlled Substances Act, were felonies under the law of the convicting jurisdiction and therefore, were "aggravated felonies" under the INA. In *Hernandez-Avalos* the court decided that the plain language of the statutes "indicate[s] that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only as a misdemeanor under the Controlled Substances Act."

The court rejected petitioners' contentions that their due process rights were violated by the retroactive applications of *Matter of Roldan* and *Hernandez-Avalos* to them because they pleaded guilty before those rulings were made. In particular, the court declined to apply the administrative retroactivity test, explaining that *Roldan* was not a change in administrative policy but rather a decision that interpreted a statutory change. The court dismissed as frivolous petitioners' equal protection claims based on timing or location of their proceedings.

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■Fourth Circuit Holds That A Conviction For Involuntary Manslaughter Is Not An Aggravated Felony Crime Of Violence

In ***Bejarano-Urrutia v. Gonzales***, __F.3d__, 2005 WL 1554805 (4th Cir. July 5, 2005) (*Wilkins*, Shedd, Niemeyer), the Fourth Circuit held that involuntary manslaughter under Virginia law was not a crime of violence as defined by 18 U.S.C. § 16(b). The

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petitioner, a citizen of Mexico, legally entered the United States in 1994 and in 1998 he became a lawful permanent resident.

In 2001, petitioner was involved in an automobile accident in which the driver of the other vehicle was killed. As a result, he was indicted by a Virginia grand jury for aggravated involuntary manslaughter, and for driving under the influence. Pursuant to a plea agreement, the government amended the indictment, and petitioner pleaded guilty to simple involuntary manslaughter in violation of Va. Code Ann. § 18.2-36 and to the driving under the influence charge. He was sentenced to 10 years' imprisonment, with eight years suspended. Subsequently, petitioner was ordered removed for having been convicted of an aggravated felony.

The panel majority, applying the categorical approach, determined that *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), controlled its disposition of the case. The court found that the violation here "was apparently accomplished with the very conduct that the *Leocal* Court explained did not involve the potential "use" of physical force — is not a crime of violence under § 16(b)." "Although the crime of violating Va. Code Ann. § 18.2-36 intrinsically involves a substantial risk that the defendant's actions will cause physical harm, it does not intrinsically involve a substantial risk that force will be applied 'as a means to an end,'" said the court.

Judge Niemeyer dissented. He would have found that under *Leocal*'s logic, a crime requiring a *mens rea* of recklessness can be a "crime of violence," and that because Virginia's involuntary manslaughter statute requires a *mens rea* of recklessness, it satisfies 18 U.S.C. § 16's requirement that it involve the use of physical force against the person or property of another.

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■Seventh Circuit Determines That Two Convictions For Food Stamp Fraud, Two Days Apart, Is Not A Single Scheme Of Misconduct

In ***Abdelqadar v. Gonzales,*** __F.3d__, 2005 WL 1540245 (7th Cir. July 1, 2005) (*Easterbrook*, Rovner, Wood), the Seventh Circuit affirmed the BIA's finding that a conviction for food stamp fraud was a conviction involving moral turpitude, and that petitioner's two convictions did not arise out of a single scheme of misconduct under INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

The petitioner, a citizen of Jordan, was convicted twice under for purchasing food stamps in Illinois from welfare recipients. The BIA eventually ordered his removal under INA § 237(a)(2)(A)(i) and (ii). On appeal, petitioner argued that the crime for which he was convicted was one involving moral turpitude and that the conviction came more than five years after his admission to the United States. Preliminarily, the court rejected the government's contention at oral argument that petitioner had not exhausted his administrative remedies on the question of whether the crime was one of moral turpitude. The court found that the government had "forfeited the benefit of this omission by briefing the issue on the merits without observing that [petitioner] had failed to present his contentions to the Board." The court then found that because petitioner admitted when he pleaded guilty that he had purchased the food stamps for cash and arranged to deceive the State of Illinois about the stamps' provenance so that he could make a profit, his conviction became one of moral turpitude.

The court held that the BIA's determination that the alien's conduct was not a single scheme of criminal conduct was reasonable where the petitioner, on two occasions, purchased food stamps with cash, two days apart, from the same individual. The court noted that while under the Sentencing Guidelines the convictions would have been treated as one single scheme for the purpose of aggregating relevant conduct, the BIA in *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992), interpreted "single scheme of criminal misconduct" the way it is employed in recidivist statutes. The court found that this was a reasonable interpretation of the statute and it made a "good deal of sense; otherwise aliens who are career criminal could stay in the United States as long as they kept committing the same crime over and over."

The court, however, did not uphold the finding that petitioner was also removable under §237(a)(2)(A)(i), because the BIA did not adequately explain why the latest admission controlled in calculating the five-year period petitioner's "date of admission." Here, the BIA determined that petitioner's last date of admission occurred when he adjusted his status and not when he initially was admitted to the United States. The court questioned this interpretation because it would mean that "any pleasure trip to one's native land would lead to mandatory removal, even of a permanent resident with a clean record for 20 or 50 years in the United States." The court noted that the BIA has "never explained – why admission in § 237(a)(2)(A)(i) means the most recent, rather than the initial entry . . . silence by an administrative agency does not carry the day."

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■Ninth Circuit Rules That Conviction For Touching A Child In Genital Area Is A Conviction Of A "Sexual Abuse Of A Minor," An Aggravated Felony

In ***Parrilla v. Gonzales,*** __F.3d__, 2005 WL 1606506 (9th Cir. May 14, 2005) (Fernandez, Tashima, *Gould*), the Ninth Circuit, affirmed the BIA's order of removal against petitioner who pled guilty to "communicating with a minor for immoral purposes" in violation of Washington State law. The petitioner is a citizen of the Philippines and a lawful permanent resident since 1995. In January 2001, petitioner was arrested having molested a seven-year-old girl. DHS then initiated

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removal proceedings on the basis that petitioner had been convicted of an aggravated felony. The IJ and the BIA found that petitioner was guilty of an aggravated felony involving "sexual abuse of a minor" under both the categorical and modified categorical approaches.

The Ninth Circuit held that the 2002 version of the Washington statute did not describe "sexual abuse of a minor" under the categorical approach, and that the BIA had erred in concluding otherwise. The court noted that the statute's reach was not limited only to abusive offenses, giving as an example allowing a minor onto the premises of a live erotic performance. Although such conduct is "not commendable" said the court "neither is it 'abusive' as our precedent has explained that term."

However, the court held that under the modified categorical approach, petitioner's conviction constituted sexual abuse of a minor because his plea agreement included his assent that the sentencing court could review a document outlining the factual basis for the charge. The court could therefore consider those facts in its analysis.

Judge Fernandez concurred in the result, but dissented from the holding that the "communicating with a minor" offense was not categorically "sexual abuse of a minor."

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DUE PROCESS

■Fifth Circuit Rejects Equal Protection Challenge To Administrative Removal Procedure For Non-Resident Aliens Convicted Of Aggravated Felony Offenses

In ***Flores-Ledezma v. Gonzales,*** __F.3d__, 2005 WL 1501593 (5th Cir. June 27, 2005) (*Jolly*, Higginbotham, Jones), the Fifth Circuit upheld the administrative removal procedures for non-lawful permanent resident aggravated felons under INA § 238(b).

Petitioner, a citizen of Mexico an a non-LPR, was convicted of an aggravated felony in 1999. Petitioner's conviction came to the attention of the former INS when he sought to adjust his status on the basis of his marriage to a U.S. citizen. The INS then served him with a Notice of Intent to Issue a Final Administrative Removal Order under INA § 238(b). Petitioner's counsel protested requesting instead that petitioner be placed in removal proceedings under INA § 240. In § 240 proceedings an alien can apply for a 212(h) discretionary "hardship" waiver of inadmissibility while such opportunity is not available in § 238(b) removal procedures. The INS declined to do so and ordered petitioner removed under §238(b).

"Given the need for special judicial deference to congressional policy choices in the immigration context a facially legitimate and bona fide reason will satisfy the rational basis test."

Before the Fifth Circuit, petitioner argued that the Attorney General's unfettered discretion in choosing in which proceeding to place an alien such as petitioner, was an equal protection violation because similarly situated aliens are treated differently. Preliminarily, the court determined that none of the jurisdiction-stripping provisions of the immigration statute deprived the court of jurisdiction to consider the petition. In particular, the court noted that the amendment to INA § 242(a)(2)(D) made by the REAL ID Act "certainly preserves, if not expands, our settled case law in which we have found that we have jurisdiction to consider 'substantial constitutional claims.'"

On the merits, the court held there was a rational basis for the Attorney General's exercise of discretion in choosing between expedited and general removal proceedings. "Given the 'need for special judicial deference to congressional policy choices in the immigration context . . . a facially legitimate and bona fide reason" will satisfy the rational basis test," said the court. The court found that there was a rational basis for the Attorney General to choose whether to place a non-LPR in expedited administrative removal or in general removal. For example, the court noted that the AG could exercise "his discretion to grant waivers rationally for reasons of state, policy, courtesy or comity." The court declined to reach the question of whether petitioner had any liberty or property interest in discretionary relief, but noted that it had suggested that such an interest is required for a Fifth Amendment equal protection claim.

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■First Circuit Finds That IJ's Failure To Record Testimony Of Witnesses Was Not A Due Process Violation

In ***Ibe v. Gonzales***, __F.3d__, 2005 WL 1644742 (1st Cir. July 14, 2005) (Torruella, Selya, *Lynch*) , the First Circuit held that the inadvertent failure to tape record the testimony of two witnesses did not violate petitioner's due process because the IJ recreated a record of their testimony with the assistance of counsel, from her notes.

DHS sought the removal of petitioner, a Nigerian citizen, because he had overstayed his visa and had engaged in a marriage fraud. At the removal hearing, petitioner applied for adjustment of status and presented the testimony of his purported wife and two friends. The IJ inadvertently failed to record the testimony of his two friends. Subsequently, petitioner's purported wife withdrew the visa petition (I-130) and the IJ pretermitted the adjustment application. The IJ found that petitioner had entered into a marriage for the purpose of obtaining an immigration benefit, thus permanently barring peti-

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tioner from being granted a visa petition in the future. The BIA affirmed that decision.

The First Circuit determined that while the IJ has a duty to prepare a reasonably accurate and complete transcript, that duty was met here because the IJ recreated the records of the witnesses testimony with the assistance of counsel and without objection. Moreover, petitioner offered no evidence demonstrating that the recreated record was inaccurate. Finally, the court found that petitioner had even failed to argue that "he was prejudiced here, an essential requirement of a due process claim."

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■Seventh Circuit Rejects Alien's Constitutional Challenge To Removal Order

In ***Ramos v. Gonzales,*** __F.3d__, 2005 WL 1618821 (7th Cir. July 12, 2005) (Rovner, *Wood*, Sykes), the Seventh Circuit held that petitioner was not prejudiced by his attorney's waiver of the his appearance at his removal hearings, and therefore the court did not need to decide whether there had been a due process violation. The petitioner, a Mexican citizen, was convicted of attempted possession of cocaine under Nebraska state law. That conviction was subsequently expunged by a Nebraska court. Nonetheless, the BIA eventually upheld an order of removal finding that the conviction was still valid for immigration purposes, and that the failure to personally appear at the telephonic hearing was not a violation of due process.

Preliminarily, the Seventh Circuit noted that the REAL ID Act changed the jurisdictional provision by amending INA § 242(a) to permit the courts of appeals on a proper petition for review to consider constitutional claims and questions of law. The court found that there was "no ironclad rule that aliens subject to removal have a right personally to be present at every stage of the proceedings." Moreover, even it there were, petitioner did not demonstrate that his appearance would have changed the outcome of the case. Additionally, because petitioner did not deny that he had been convicted of a cocaine offense, that conviction provided an independent basis for rejecting his challenge to the BIA's decision.

"There is no ironclad rule that aliens subject to removal have a right personally to be present at every stage of the proceedings."

The court noted that it had previously held in *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003), that deferred dispositions do not negate a "conviction" for immigration purposes. Finally, the court rejected petitioner's equal protection argument that the government was treating his state conviction more harshly than it would an analogous conviction under the FFOA. The court noted that *Gill* had also addressed that question and that since 1996 the BIA has never used the FFOA to preclude removal.

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JURISDICTION

■Fifth Circuit Holds That It Has Jurisdiction To Review Denial Of Motion to Reopen Where BIA Does Not Base Its Decision On Statutorily Mandated Discretion.

In ***Manzano-Garcia v. Gonzales***, __F.3d__, 2005 WL 1400023 (5th Cir. June 15, 2005) (Jolly, Jones, DeMoss), the Fifth Circuit rejected the government's contention that it lacked jurisdiction to review a denial of a motion to reopen under INA § 242(a)(2)(B)(ii). The court explained that in *Zhao v. Gonzales*, 404 F.3d 295, 301-02 (5th Cir. 2005), it had found that it had jurisdiction to review the BIA's denial of a motion to reopen because the BIA had not exercised any statutorily provided discretion under the subchapter of title 8 governing immigration proceedings, but instead had exercised discretion as delineated by a regulation of the Attorney General. The court also disagreed with the government's argument that under INA § 242(a)(2)(B)(i) it lacked jurisdiction to review the denial of the motion to reopen because petitioner was seeking a discretionary relief of adjustment of status under INA § 245. Here, the court found that the BIA had not denied petitioner's motion to reopen based on a discretionary merits determination. Instead, the BIA had concluded that the new evidence presented regarding petitioner's eligibility for adjustment of status could have been available in the immigration court proceedings had he not been dilatory. On the merits, the court found that the BIA's denial of the motion to reopen was "neither unreasonable nor arbitrary."

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■Ninth Circuit Determines That Alien Is Subject To Removal Because State Court Judgment Was Not "In Custody" For Purposes Of Habeas Jurisdiction.

In ***Resendiz v. Kovensky***, __F.3d__, 2005 WL 1501495 (9th Cir. Jun 27, 2005) (Shroeder, Pregerson, *Trott*), the Ninth Circuit held that an alien whose state sentence had expired was not "in custody pursuant to the judgment of a State court" at the time he filed a habeas petition under 28 U.S.C. § 2254. The court concluded that the requirement that the alien register as a narcotics offender pursuant to California state statute did not render the alien "in custody" for purposes of habeas jurisdiction under section 2254. The court also held that the enactments of AEDPA and IIRIRA did not change the long standing principle that a petitioner may not collaterally attack his state court conviction that formed the basis for immigration detention in a habeas petition under 28 U.S.C. § 2241.

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■Court Finds That It Lacks The Power To Review Habeas Petition Filed By Alien Living Freely Abroad

In ***El-Hadad v. United States***, __F. Supp.2d__, 2005 WL 1525097 (D.D.C. June 29, 2005) (*Urbina*), the court held that it could not review either the decision of consular section of American embassy in Cairo denying his request for visa or the Attorney General's denial of petitioner's request for advance parole. Petitioner, an Egyptian citizen, who was employed by the United Arab Emirates (UAE) Embassy in Washington, alleged that he was unlawfully terminated from his job in 1996. Petitioner, who resides in Egypt, has been unable to enter the United States to prosecute this action. The court found that under the doctrine of consular nonreviewability it lacked the power to review the visa denial. Similarly, it could not review a decision of the Attorney General to admit or exclude an alien. The court also held that a nonresident alien living freely abroad is not entitled to habeas corpus relief, noting that the Supreme court and the D.C. Circuit Court have declined to extend habeas jurisdiction in such circumstances.

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MOTION TO REOPEN

■Ninth Circuit Rules That Alien Was Entitled to Reopen His Immigration Proceedings Where He Demonstrated Lack Of Service Of The Notice To Appear

In ***Singh v. Gonzales***, __F.3d__, 2005 WL 1490458 (9th Cir. June 24, 2005) (*Lay*, B. Fletcher, Hawkins), the Ninth Circuit held that the IJ abused his discretion by denying petitioner's motion to reopen removal proceedings where petitioner had been ordered removed *in absentia*.

The petitioner, a citizen of India, entered the United States as a visitor in May 1997. After overstaying that visa, he applied for asylum. On March 30, 1998, petitioner sent a letter to the INS asylum office withdrawing his asylum application and indicating his intention to return to his home country. The INS confirmed the termination of the asylum application on April 16, 1998. Apparently, petitioner departed the U.S. on May 1, 1998, and returned to India. On July 23, 1998, the INS issued an NTA against the petitioner and served it by certified mail to petitioner's last known address. When petitioner failed to appear at his hearing, the IJ ordered him removed in absentia.

> The petitioner was not required to provide a change of address to the INS because he had not been provided with a written notice of the address notification requirement.

In March 1999, petitioner reentered the United States as a visitor. He again overstayed his visa, and on March 12, 2002, moved to reopen the proceedings to rescind the in absentia order. He claimed that he never received the NTA because he had returned to India. The IJ determined that the NTA had been properly served and that the motion was time-barred. The BIA affirmed without opinion. Subsequently, petitioner filed with the BIA a motion to reconsider arguing that the IJ lacked jurisdiction to hold its first hearing because he had left the United States before the NTA had been filed with the immigration court. The BIA reconsidered its opinion and determined that the motion to reopen should not have been adjudicated under 8 C.F.R. § 1003.2(d) because it had been filed after petitioner had left the United States. The BIA also determined that the NTA had been properly served to petitioner's last known address and that there was no evidence that petitioner had left the country.

The Ninth Circuit reversed the BIA's findings. First, the court determined that the BIA had erred in finding that under 8 C.F.R. § 1003.2(d) the IJ and the BIA lacked jurisdiction to consider the motion to reopen. The court found that the rule applies only to aliens who depart the U.S. after removal proceedings have already commenced against them. Therefore, the IJ had the jurisdiction to consider the motion to reopen. Second, the court held that the IJ's denial of the motion was an abuse of discretion because petitioner had proven that he was no longer in the U.S. when the INS mailed the NTA. The court rejected the government's argument that it was petitioner's fault if he had not received the notice because he had not provided a change of address. The court found that a change of address under 8 U.S.C. § 1305(a) is only required of aliens who are within the United States. Additionally, the petitioner was not required to provide a change of address to the INS because he had not been provided with a written notice of the address notification requirement.

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■First Circuit Affirms Denial Of Second Motion To Reopen, And Holds That Equitable Tolling Was Not Warranted Because The Alien Failed To Exercise Due Diligence

In ***Chen v. Gonzales,*** __F.3d__, 2005 WL 1654352 (1st Cir. July 15 2005) (*Lynch*, Boudin, Howard), the First Circuit affirmed the BIA's denial of the alien's second motion to reopen, finding that petitioner had violated the numerical limits on motions to reopen in 8 C.F.R. § 1003.2(c)(2).

The petitioner, citizen of China, was denied asylum and ordered removed but did not seek judicial review of that determination. Instead, he filed two motions to reopen with the BIA, each of which was

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denied. The BIA denied the second motion on the basis that petitioner had waived the ineffective assistance issue because he had not raised it in his counseled first motion to reopen; the second motion violated the numerical limits, and the second motion was impermissible because 8 C.F.R. § 1003.2(c)(2) allows for only one motion to reopen. The BIA noted the possibility that limits on motion filing may be equitably tolled, but it held that equitable tolling is unavailable to parties, like petitioner, who fail to exercise due diligence.

The First Circuit found that the BIA's denial of the motion based on the numerical limit "was clearly correct and alone constituted sufficient ground to reject his petition." The court rejected petitioner's contention that the motion fell within the exception based on changed circumstances because he had failed to argue this point before the BIA. Finally, the court agreed with the BIA's finding that petitioner was not entitled to equitable tolling because he could have raised his various claims with his first motion to reopen.

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■First Circuit Holds That Issuance Of Stay Does Not Toll Deadline To File Motion To Reopen

In ***Chan v. Gonzales***, __F.3d__, 2005 WL 1543195 (1st Cir. Jul. 1, 2005) (Torruella, Selya, Lynch), the First Circuit held on an issue of first impression, that the issuance of a stay of removal pending judicial review of a denial of asylum does not toll the 90-day deadline established by statute for an alien to file a motion to the BIA to reopen its prior determination. The court noted that there has been "considerable litigation" about the authority of the courts of appeals to issue stays of removal and extensions of the period of voluntary departure. The court found that, while Congress contemplated court orders staying removal, "Congress did not contemplate that such orders would implicitly affect the time limits which it had also set for filing motions to reopen before the BIA." Similarly, the court noted that in *Khalil v. Ashcroft*, 370 F.3d 176 (1st Cir. 2004), it had rejected the argument that the reinstatement of the period of voluntary departure excused an alien from meeting the normal rules for filing motions to reopen before the BIA. Just as in *Khalil*, said the court, the petitioner "overreaches and manipulates the system." Accordingly, the court rejected petitioner's argument.

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■Seventh Circuit Affirms Denial Of Motion To Reopen *In Absentia* Removal Order, But Remands Case For BIA To Address Petitioner's Motion To Remand

In ***Uriostegui v. Gonzales***, __ F.3d__, 2005 WL 1653164 (7th Cir. July 15, 2005) (Posner, Kanne, *Wood*), the Seventh Circuit remanded the case to the BIA for further proceedings where it was not clear from the record if the BIA had adjudicated petitioner's motion to remand.

The petitioner, a citizen of Mexico, had moved to reopen and to rescind the *in absentia* removal order on the basis that she had misunderstood the date of the hearing conveyed to her by the Spanish interpreter. The IJ denied the motion and the BIA affirmed without opinion. While the appeal was pending, petitioner filed a motion to remand suggesting she could obtain a visa and adjust her status. The BIA affirmed without opinion the denial of the motion to reopen without any reference to the separate motion to remand.

The Seventh Circuit held that the IJ properly denied the motion to reopen, finding that the mistake about the hearing date fell "far short of the exceptional circumstances that have excused nonappearances in other cases." However, the court determined that remand was required for the BIA to address petitioner's motion to remand in light of the new evidence she had submitted.

> The mistake about the hearing date fell "far short of the exceptional circumstances that have excused nonappearances in other cases"

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NATURALIZATION

In ***Castracani v. Chertoff***, __F. Supp.2d__, 2005 WL 1566443 (D.D.C. July 5, 2005) (*Kennedy, J.*), the district court ordered DHS to approve plaintiff's application *nunc pro tunc* finding that DHS lacked the jurisdiction to grant it in the first place because the court had exclusive jurisdiction over the matter.

The plaintiff filed this action under 8 U.S.C. 1447(b) contending that DHS had not adjudicated his naturalization application within 120 days of his naturalization examination. Petitioner was interviewed by an adjudication officer on March 25, 2003. In September 2003, the adjudication officer informed plaintiff that a computer error had caused plaintiff's unique "A" number to be assigned to a Moroccan national thus delaying the completion of the background check. Accordingly, he informed plaintiff that his application could not be approved pending the background check. On July 1, 2004, petitioner filed this action. Subsequently, DHS approved plaintiff's application for naturalization and, on December 14, 2004, he was sworn as a naturalized citizen in the District Court for the District of Columbia.

The government then moved to dismiss the action as moot. The district court however, agreed with plaintiff's argument that the action was not moot because DHS lacked jurisdiction to adjudicate the naturalization application. The court found that under 8 U.S.C. 1447(b), the district

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court had exclusive jurisdiction over the matter once the suit was filed. The court noted that "DHS [did] not deny that it failed to make a decision on [plaintiff's] application within 120 days of his examination" and that the application had not been approved when plaintiff filed this action. Accordingly, the court remanded the case to DHS with instructions to approve his naturalization application *nunc pro tunc*.

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Ed. Note: Compare this case with *Danilov v. Aguirre*, 370 F.Supp. 2d 441 (E.D. Va. 2005) (summarized at 9 *Imm.Lit.Bull.* 5, 15), where DHS argued successfully that the completion of the examination does not trigger the 120-day period because the "examinations" includes *inter alia*, completion of background check.

■Fifth Circuit Holds Veterans Of Active-Duty Service Seeking Naturalization On That Basis Must Demonstrate Good Moral Character

In ***Lopez v. Henley***, __F.3d__, 2005 WL 1625006 (5th Cir. July 12, 2005) (King, *Davis*, Fitzwater), the petitioner, a Mexican citizen, and a veteran of active service in the Vietnam War, filed a petition for a writ of habeas corpus, alleging that he was erroneously denied naturalization under INA § 329, 8 U.S.C. § 1440, a provision loosening the naturalization requirements for aliens who served honorably in the U.S. armed forces during wartime. Petitioner had been ordered removed on the basis of a conviction for attempting to possess a controlled substance. Petitioner sought to hold the proceedings in abeyance pending the adjudication of his application for naturalization under § 329. However, the IJ and subsequently the BIA determined that due to his conviction petitioner could not show "good moral character" as required by § 329 and the implementing regulations. Petitioner then sought a writ of habeas corpus and asked that court to declare that § 329 does not require an eligible applicant to show good moral character. The court denied the request and dissolved the stay of removal. Petitioner was later removed to Mexico.

The Fifth Circuit affirmed the order of the district court, deferring to the "reasonable interpretation" in 8 C.F.R. 329.2 (e), that under § 329, a veteran of active military service must demonstrate his good moral character as a prerequisite for naturalization. The court agreed with the Second Circuit reasoning in *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003), where that court determined that Congress could not have intended "to single out persons trained and/or experienced in physical confrontations for elimination of the requirement of good moral character."

> Plaintiff's conviction of an aggravated felony barred him "in perpetuity" from establishing the good moral character.

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■Second Circuit Holds That An Aggravated Felony Conviction Precludes A Determination Of Good Moral Character For Wartime Veteran Applying For Naturalization

In ***Boatswain v. Gonzales***, __F.3d__, 2005 WL 1532319 (*Walker*, Pooler, Wesley) (2d Cir. June 30, 2005), the Second Circuit held that a Vietnam veteran was precluded from satisfying the good moral character requirement for naturalization due to his multiple aggravated felony convictions. The petitioner, an LPR and a citizen of Trinidad, served in Vietnam in 1975. Between 192 and 1998, petitioner was convicted of numerous drug offenses. In 1998 he pled guilty to healthcare fraud and was sentenced to one year in prison. In 1999, the INS sought to remove petitioner on the basis of the fraud conviction. Petitioner then applied for naturalization under INA § 329, 8 U.S.C. § 1440, a provision that relaxes the naturalization requirements for persons who have served in the U.S. military on active duty status during wartime. Eventually, the BIA ordered petitioner removed but a district court stayed that order pending the resolution of the application for naturalization. In February 2002, the INS denied petitioner's application finding that he lacked good moral character under INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). That decision was affirmed in June 2003, by the district court.

On appeal, petitioner argued that since § 329 eliminated the period of residence requirement, it also eliminated the requirement that good moral character be shown during a specific period. Thus, petitioner contended that his application was not subject to INA § 101(f), which refers to a specific "period" for which good moral character must be shown. The Second Circuit rejected this argument relying upon the plain meaning of § 101(f). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete," said the court. The court also noted that in *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003), it had deferred to the INS's interpretation that an applicant for naturalization under § 329 must demonstrate good moral character.

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■District Court Holds That Chinese National Is Barred In Perpetuity From Establishing That He Is A Person Of Good Moral Character.

In ***Chan v. Gantner***, __F. Supp.2d__, 2005 WL 1514035 (S.D.N.Y., June 24, 2005) (*Sprizzo*), the plaintiff brought an action, pursuant to 8 U.S.C. § 1421(c), seeking a *de novo* hearing of his application for naturalization following a

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denial of that application by USCIS. Plaintiff, a citizen of the PRC and a lawful permanent resident since 1985, pleaded guilty in 1993 to conspiracy to smuggle illegal aliens. The INS sought his removal, but an IJ granted him § 212 (c) relief. In March 2002, plaintiff filed an application for naturalization. A year later, USCIS denied that application finding that plaintiff's conviction rendered him "unable to establish Good Moral Character" for the statutorily-required period.

"When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

The court agreed with USCIS that plaintiff's conviction of an aggravated felony barred him "in perpetuity" from establishing the good moral character. The court rejected as "frivolous" plaintiff's argument that his 1993 conviction for smuggling aliens was not an aggravated felony at the time of his conviction because a 1996 amendment brought the offense within the aggravated felony definition.

The court also rejected as "unpersuasive" the argument that plaintiff's conviction was not a bar to naturalization because an Immigration Judge had granted him a discretionary waiver of the conviction in deportation proceedings. "Relief of the sort given to plaintiff represents a grant of mercy that "gives the alien a chance to stay in the United States despite his misdeed but it does not result in "a pardon or expungement of the conviction itself," said the court. Consequently, the court held that plaintiff "is barred in perpetuity from establishing that he is a person of good moral character and therefore is incapable of satisfying the burden placed upon him on his application for naturalization."

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VISAS

■Court Find That Suit Filed By Diversity Visa Applicants Was Not Mooted By The Passage Of Statutory Deadline

In ***Basova v. Ashcroft***, __F. Supp.2d__, 2005 WL 1459199 (E.D.N.Y. Jun 22, 2005) (*Trager*), a number of aliens who had been selected for the 20003 Diversity Immigrant Visa Lottery but whose applications for adjustment of status were not approved before the end of fiscal year filed suit to compel the defendants to grant their applications. Plaintiffs alleged that they were denied visas and adjustments of status due to delay by the various defendant agencies. In all cases, plaintiffs were notified after the September 30 deadline that no visas could be issued and, as a consequence, their applications would be denied.

On the government's motion to dismiss, the court held that it had jurisdiction to review the diversity visa claims finding that INA § 242(a)(2)(B)(i) jurisdictional bar did not apply where relief was denied purely because of agency delay or inaction, as opposed to a decision on the merits. The court also rejected the government's claim of failure to exhaust because "there appears to be no meaningful administrative scheme available to plaintiffs." The court also rejected in part the government's argument that the case was moot because all visas for FY 2003 had been given out and therefore none were available. The court found that the case was not moot for those plaintiffs who had filed their claims in district court before the expiration of the statutory deadline. "Their proactive decision should redound to their benefit," said the court. As to those plaintiffs who filed their suit after the statutory deadline, the court found that their cases had to be dismissed. The court also declined to find that the amendment to the complaint, adding new plaintiffs after the statutory deadline had passed, did not relate back to original date of filing.

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■First Circuit Finds That 212(c) Waiver Not Available To Alien Who Served Five Yeaars In Prison

In ***Pereira v. Gonzales***, __F.2d__, 2005 WL 1692877 (1st Cir. July 21, 2005) (Boudin, *Campbell*, Cyr), the First Circuit held that an alien continues to accrue time toward the five-year bar to 212(c) relief after the issuance of a final order of removal, even when the order was found to be based upon an erroneous retroactive application of AEDPA because the removal order was based on a good faith legal interpretation of the law at the time.

The court applied its holding in *Gomes v. Ashcroft*, 311 F.3d 43 (1st Cir. 2002), where it had held that the time an alien served in prison even after a legally erroneous denial of §212(c) relief was to be construed toward the five year bar in § 212(c). The INS's initial position, while eventually found by the courts to be legally erroneous, was not frivolous, said the court, and "there is nothing to suggest it was pursued in bad faith." The resulting delay barred the petitioner from seeking 212(c) relief because he had spent more than five years in prison by the time he was allowed to apply. "The plain language of former § 212(c) clearly provides that an alien who spends a least five years in prison is ineligible to seek § 212(c) relief," said the court. "While it may seem unfair not to allow petitioner to seek discretionary relief now, the fact remains that Congress has mandated that such relief is now no longer available."

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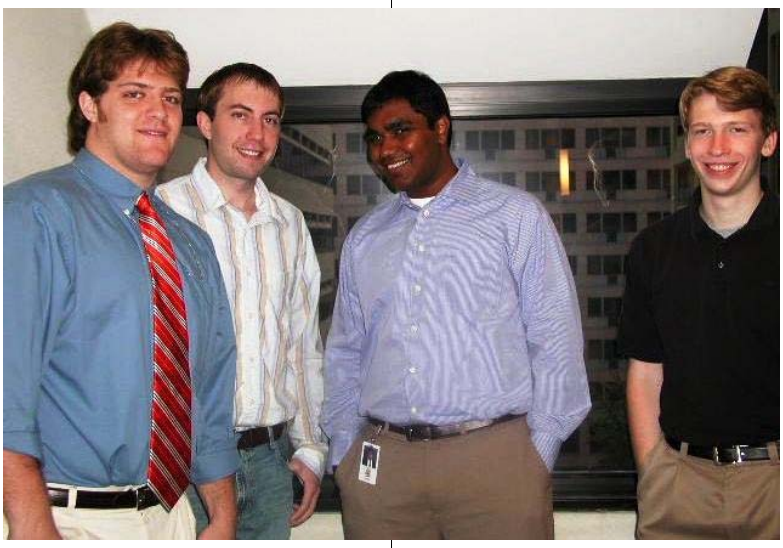
CASES SUMMARIZED

INSIDE OIL

Congratulations and good luck to OIL SLC **Mary Jane Candaux**, whose pool team (the Werewolves of London) qualified to play in the American Poolplayers Association's National Team 8-Ball Championships in Las Vegas in August. Information about the tournament is at www.poolplayers.com/ntc.html.

After a rough start, the **OIL Slicks** have been on a roll the past several weeks. Trusty veterans like Andy MacLachlan and Jonathan Potter, have led the way, with strong support from newer employees, including Anthony Messuri and Katrina Brown. The Slicks will wrap up their season on August 11.

OIL welcomes the following additional summer interns: **Enam Hoque**, SUNY Buffalo Law (rising 3L); **Matthew Lynch,** University of Iowa (rising 3L); **Erica Onsager**, University of Chicago Law (rising 2L); **Tracie Jones**, Syracuse University (rising 3L); **Michael Neville-O'Neill**, Bates College; **Daniel Kovler**, Dartmouth College.



L to R: Daniel Kovler, Matthew Lynch, Enam Hoque, Michael Neville-O'Neill

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

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