



UPDATE ON PRECEDENT DECISIONS OF THE BOARD OF IMMIGRATION APPEALS by Juan P. Osuna and Jean C. King¹

In its published decisions in fiscal year (FY) 2006, the Board of Immigration Appeals addressed a range of issues impacting upon a large number of cases in removal proceedings. The Board published 25 precedents in FY 2006, more than in any single year since FY 1999. This article summarizes this body of published decisions, and covers Interim Decisions 3519 through 3544. One precedent issued by the Attorney General will also be discussed.

Of particular note, in the asylum context, the Board addressed claims based on China's coercive population control policies, clarifying who falls within the definition of refugee in the Immigration and Nationality Act (the Act) as amended in 1996.² See *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006). The Board also analyzed the question of what is "membership in a particular social group" within the meaning of the Act in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). Several decisions considered the grounds of inadmissibility relating to previously removed aliens, and the Board continued to interpret criminal grounds of removal and inadmissibility. Adjustment of status was the topic of three Board decisions. The Board considered its first case under the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, §§ 103(b), 104, 119 Stat. 231, 302 307-9 in *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). Other cases pertained to bond proceedings, background and security checks, procedural issues, derivative citizenship, and attorney discipline.

ASYLUM

The Board addressed claims to refugee status based on the People's Republic of China's (PRC) coercive population control policies as defined in section 101(a)(42) of the Act in two decisions. *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) and *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006). In *Matter of S-L-L-*, the Second Circuit Court of Appeals requested that the Board clarify its ruling in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), that an alien whose spouse was forced to undergo an abortion or sterilization can qualify as a refugee, and to address whether an unmarried partner can claim refugee status on this basis.

¹Juan P. Osuna is the Acting Chairman of the Board of Immigration Appeals. Mr. Osuna was appointed as a Board Member in August 2000 and began serving as Acting Chairman on October 2, 2006. Prior to this, he served as Acting Vice-Chairman from June 1, 2005, to October 2, 2006. Jean C. King is a Senior Legal Advisor to the Chairman of the Board of Immigration Appeals. Ms. King previously served as Attorney Advisor with the Board from 1996 to 2006. The decisions summarized in this article can be obtained online from the BIA's Virtual Law Library, at www.usdoj.gov/eoir/vll/libindex.html.

²Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 (IRRIRA)(codified at section 101(a)(42)(2000)).

The Board began by noting that due to the parties' agreement on the issue of whether spouses qualified for asylum, it did not provide a detailed analysis of this issue in *Matter of C-Y-Z*. The Board pointed out that *Matter of C-Y-Z* is a longstanding decision that has not been reversed by the Attorney General or Congress. The Board found support for its interpretation from the general principles of nexus and level of harm for past persecution, noting that intervention in the private affairs of a married couple persecutes the married couple as an entity. The PRC government implicitly imposes joint responsibility and punishment on married couples as a unit. The Board found that marriage is the linchpin because of its sanctity and long term commitment. Many presumptions and benefits are accorded to marriages in many areas of the law, and requiring marriage is a natural and manageable approach. Without marriage, establishing nexus raises problems such as proof of paternity and whether government officials were aware of the paternity. The Board clarified that the marriage must be legally recognized, which does not include couples married in a traditional marriage ceremony not recognized by the government. The Board stated that an unmarried partner can demonstrate past persecution based upon the phrase contained in 101(a)(42) "other resistance to a coercive population control program," but merely impregnating one's girlfriend does not constitute an act of resistance.

One Board Member concurred and two others concurred and dissented. The first concurrence indicated that the Department of Homeland Security (DHS)'s original theory, that the spouse stands in the shoes of the other spouse who was persecuted, is not sustainable, but he noted that he would not vote to overrule *Matter of C-Y-Z* because of the principle of stare decisis. The remaining Board Members stated that the literal language of the statute is not ambiguous and does not include spouses. Derivative refugee and asylum statutes control automatic benefits accorded spouses, and any analysis for a principal applicant whose spouse suffered an abortion or sterilization should be under the "other resistance" clause, this separate opinion stated.

In *Matter of C-C*, 23 I&N Dec. 899 (BIA 2006), the Board addressed motions to reopen where the alien claims that the birth of a second child in the United States will result in the alien's forced sterilization if returned to China. The Board distinguished *Guo v. Ashcroft*, 386 F.3d 556 (3rd Cir. 2004), a case in which the Third Circuit reversed the Board's denial of a motion to reopen filed by a Chinese citizen who had two children born in the United States. The Board found that *Guo v. Ashcroft* was not controlling in cases arising outside of the Third Circuit, and the respondent's child spacing in *Matter of C-C* is consistent with China's population control rules for second children, whereas in *Guo* the children were born less than five years apart. The Board addressed an affidavit submitted by Dr. John Aird, a retired demographer whose affidavits appear in many cases before the Board, and found it to be unspecific, not based on personal observation, and not conclusive on the issue.

In *Matter of C-A*, 23 I&N Dec. 951 (BIA 2006), the Board addressed the issue of what is a "particular social group" as that term is used in the definition of "refugee" in section 101(a)(42)(A) of the Act. The specific social group before the Board in *Matter of C-A* was defined as former noncriminal drug informants working against the Cali drug cartel. The Board reviewed the current case law interpreting this provision, and reaffirmed the analytic structure first set forth in *Matter of*

Acosta, 19 I&N Dec. 211 (BIA 1985), which defines particular social group as a group of persons all of whom share a common, immutable characteristic. The characteristic that defines the group must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

The Board discussed and rejected the definition outlined in some Ninth and Second Circuit Courts of Appeal decisions, which requires a “voluntary associational relationship,” or “cohesiveness,” or homogeneity among group members. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) and *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). The Board noted, however, that the Second Circuit also requires that members of a social group must be externally distinguishable, a standard also found in the United Nations High Commissioner for Refugees guidelines on International Protection. *See* UNHCR, Guidelines on International Protection: “Membership in a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). The Board highlighted cases that have recognized social visibility as an important characteristic in defining a social group, and adopted this standard.

In applying the above to the social group at issue in the case, the Board found that the distinction advanced by the respondent, the past experience of informing on the Cali drug cartel, is an immutable characteristic, but it does not suffice to define a social group. The respondent’s reason for informing on the cartel, which he advanced as a reason to distinguish himself from paid informants, was not helpful, particularly as there was no showing that the cartel considered the respondent’s motives to be relevant. The Board declined to find a social group, citing to the voluntary nature of the decision to serve as a government informant, the lack of social visibility of the members of the purported social group, and the information in the record that the Cali cartel retaliates against anyone it perceives as interfering with its operations.

CONVENTION AGAINST TORTURE

The Attorney General issued a decision in *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006), regarding a claim for protection under the Convention Against Torture. The respondent asserted that he has schizoaffective and bipolar disorders, medication is not available in the country to which he would be removed (the Dominican Republic), without medication he would be arrested because his of his erratic behavior, and he would be tortured in prison. The Attorney General found that the respondent’s eligibility for deferral of removal under the Convention Against Torture cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen.

DISCRETIONARY RELIEF

The Board addressed adjustment of status in three decisions this year. In *Matter of Villarreal-Zuniga*, 23 I&N Dec. 886 (BIA 2006), the respondent, who had adjusted his status in 1992

based upon a visa petition filed by his lawful permanent resident mother, was placed in removal proceedings due to a criminal conviction. The respondent sought to adjust his status based upon the same visa petition that he used in 1992 to first adjust his status. The relevant regulatory provision, 8 C.F.R. § 204.2(h)(2)(2005), does not clearly address this situation. The Board reasoned that section 204.2(h)(2) implies that a petitioner must file a new visa petition to reinstate a previously approved visa petition. This provision is superfluous if an original visa petition was automatically reinstated upon filing an adjustment of status application. Historically, this regulation explicitly indicated that a visa petition ceased to convey a priority date or classification and could not be used again once a beneficiary obtained adjustment of status or admission as an immigrant. *See* 8 C.F.R. 204.4(f) (1990). Subsequent revisions did not retain this language, but the prohibition against reusing an approved visa petition was essentially retained in the regulation prohibiting reinstatement of a visa petition when an immigrant visa has been issued as a result of the petition approval. 8 C.F.R. § 204.2(h)(2). The Board concluded that adjustment of status cannot be based on an approved visa petition that has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant.

In *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), the Board found that Immigration Judges have no authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under section 204(j) of the Act, 8 U.S.C. § 1154(j), after the alien changes jobs or employers. This is consistent with the Board's prior precedent that Immigration Judges have no jurisdiction over visa petitions. *See Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987). Furthermore, Immigration Judges do not have the necessary expertise to determine whether the new employment is the same or similar to an alien's prior employment, and play no part in the "delicate interaction" between the Department of Labor, which provides the labor market analysis, and the DHS, the agency that issues the visa petition.

Lastly, in *Matter of Wang*, 23 I&N Dec. 924 (BIA 2006), the Board found that an alien who entered the United States without inspection is not eligible for adjustment of status under the Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 (CSPA). The Board found that an alien whose CSPA application for adjustment of status was denied as a result of the alien's entry without inspection may not amend or renew the application in immigration proceedings in conjunction with section 245(i) of the Act.³ The Board noted that applications under section 245(i) could not be filed before October 1, 1994, and CSPA applications had to be filed prior to June 30, 1994. The 2000 LIFE Act Amendments⁴ do not change this result because the LIFE Act applies section 245(i) to those who filed an immigrant visa petition, and a CSPA applicant did not file a visa petition, but is the beneficiary of a limited opportunity to adjust status afforded by Congress.

³Eligibility for adjustment of status under section 245(a) of the Act is generally limited to aliens who have been inspected and admitted or paroled. For a defined period of time Congress permitted certain aliens who entered without inspection to seek adjustment of status upon payment of a fine. Section 245(i) of the Act.

⁴ *See* Pub. L. No. 106-554, § 1502(a)(1), 114 Stat. 2763 (enacted Dec. 21, 2000).

In *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006), the Board resolved the issue of whether section 237(a)(1)(H) of the Act, 8 U.S.C. § 1227(a)(1)(H), authorizes a waiver of removability under section 237(a)(1)(A) based on charges of inadmissibility at the time of admission under section 212(a)(7)(A)(i)(I) of the Act for lack of a valid immigrant visa or entry document. The section 237(a)(1)(H) waiver explicitly provides a waiver for the ground of inadmissibility for fraud or willful misrepresentation of a material fact under section 212(a)(6)(C)(i), whether innocent or not, but does not address the charge at issue here. The Board found that given the legislative history of the waiver and the ambiguity in the language, section 237(a)(1)(H) also waives additional grounds of inadmissibility directly resulting from the fraud or misrepresentation that are subject to the waiver. In this case, the respondent's lawful permanent resident father filed a visa petition on behalf of the respondent. The petition was approved, but the respondent's father died before the respondent sought admission. The respondent was admitted as the son of a lawful permanent resident, even though the petition had been automatically revoked. The DHS did not charge the respondent under the fraud charge, but charged him under section 212(a)(7)(A)(i)(I) as not having a valid visa or entry document when he was admitted. The Board found that the respondent was eligible for a waiver of inadmissibility.

The Board briefly touched on the statutory eligibility requirements for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b) in *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006). In that decision, the Board reiterated that an application for cancellation of removal is a continuing one, and the provision in 8 C.F.R. § 1003.23(b)(3) that an applicant for cancellation of removal must demonstrate statutory eligibility for that relief prior to the service of a notice to appear applies only to the continuous residence or physical presence requirement. An alien must establish the remaining statutory eligibility requirements at the time the application is finally decided. In this case, the respondent did not have qualifying relatives at the time the notice to appear was filed and the hearing held, though her parents were granted cancellation of removal at that hearing. The respondent subsequently filed a timely motion to reopen asserting that her parents had become lawful permanent residents, and the Board found that the respondent could proceed with her application.

Eligibility for cancellation of removal was also at issue in *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006). Section 240A(d)(1)(B) of the Act, commonly known as the "stop-time" rule, terminates the accrual of continuous residence when an alien commits a criminal offense referred to in section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2). In *Matter of Jurado*, the Board found that the alien need not be charged and found inadmissible or removable on a ground specified in section 212(a)(2) in order for the alleged criminal conduct to terminate the alien's continuous residence. While the Board has held that an alien must be charged with an offense to make the alien ineligible for former section 212(c) of the Act, the statutory language in the stop-time rule uses the word "render", which the Board found to change the meaning of the provision. The Board found this interpretation to be reasonable based upon the framework of the statute. In this decision, the Board also found that retail theft and unsworn falsification to authorities in violation of title 18, section 3929(a)(1) and section 4904(a) of the Pennsylvania Consolidated Statutes are crimes involving moral turpitude.

Lastly, in *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006), the Board reconsidered the retroactivity of the stop-time rule in light of *INS v. St. Cyr*, 533 U.S. 289 (2001). The Board reaffirmed *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999), and found that *St. Cyr* has no bearing on the issue since section 240A relief did not exist at the time the respondent committed his offense, and he cannot be said to have relied upon the availability of such relief. The Board addressed two other issues in *Matter of Robles*. The Board held that in a published decision with several holdings, when the Attorney General reverses one of the holdings but expressly does not reach the other, the alternate holdings remain binding authority on the issue. The specific issue in the case was whether misprision of a felony is a crime involving moral turpitude. The Board held in *Matter of Sloan*, 12 I&N Dec. 840 (A.G. 1968; BIA 1966) that neither concealing a person for whom an arrest warrant was issued nor misprision of a felony were crimes involving moral turpitude. The Attorney General reversed the decision as to the former crime, but the latter remained good law. In *Matter of Robles*, the Board reconsidered and overruled the misprision of a felony holding. The Board cited to authority from the Eleventh and the Ninth Circuits in finding that misprision of a felony represents conduct that is inherently base or vile and contrary to the accepted rules of morality and the duties owed between persons.

CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY

The Board further clarified the effect of post-conviction relief on an alien's removability or inadmissibility in two decisions. In *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), the Board considered whether a conviction vacated pursuant to section 2943.031 of the Ohio Revised Code, for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea, is a valid conviction for immigration purposes. The Board applied *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), in which the Board distinguished between a conviction vacated based upon post-conviction events, such as rehabilitation, and those vacated because of a defect in the underlying criminal proceedings. The Board found that in this instance, the failure to advise the respondent of the immigration consequences of entering a guilty plea is a defect in the underlying proceedings.

In *Matter of Cota*, 23 I&N Dec. 849 (BIA 2005), the Board found that a trial court's decision to modify or reduce an alien's criminal sentence *nunc pro tunc* is entitled to full faith and credit by the Immigration Judges and the Board regardless of the reasons for the modification. The Board found that there was no basis in the language of the Act regarding sentences at section 101(a)(48)(B) of the Act that would authorize the Board to equate a sentence that has been modified or vacated by a court *ab initio* with one that has merely been suspended. This decision drew a dissent which argued that the sentence was vacated solely to avoid immigration consequences, and that there is no justification for treating sentence reductions differently from vacated convictions.

The Board visited the issue of how a minor is defined for purposes of determining whether an alien has been convicted of sexual abuse of a minor in section 101(a)(43)(A) of the Act. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). The Board recognized that the age of consent varies widely among states, and federal statutes similarly contain differing ages when defining a minor.

The Board found that a broader age limitation best reflects diverse state laws, the common usage of the word “minor,” and the intent of Congress, and held that a victim of sexual abuse who is under the age of 18 is a “minor” for purposes of determining whether an alien has been convicted of sexual abuse of a minor. One Board Member concurred, and stated that adoption of a federal age restriction is unnecessary, that the age of the minor is one factor among many to consider when identifying whether the particular conduct constitutes sexual abuse of a minor.

The issue of crimes involving moral turpitude within the meaning of section 237(a)(2)(A)(ii) of the Act was the subject of two interim decisions, *Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006) and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). In *Matter of Olquin*, the Board found that the offense of possession of child pornography in violation of section 827.071(5) of the Florida Statutes is a crime involving moral turpitude due to the morally repugnant nature of the offense.

In *Matter of Sanudo*, the Board considered whether a conviction for domestic battery in violation of sections 242 and 243(e)(1) of the California Penal Code is a conviction for a crime involving moral turpitude. The Board found that the elements of the offense are simple battery, and a conviction under this statute does not require proof of the actual infliction of harm to the victim. Without further evidence, the crime is not categorically a crime involving moral turpitude. The Board also considered whether a conviction under sections 242 and 243(e)(1) of the California Penal Code constitutes a crime of domestic violence under section 237(a)(2)(E)(i) of the Act. The Board followed the precedent of the Court of Appeals for the Ninth Circuit, in whose jurisdiction the case arose, in finding that the offense does not qualify categorically as a “crime of violence” under 18 U.S.C. § 16 (2000) and therefore is not categorically a crime of domestic violence. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

OTHER GROUNDS OF REMOVABILITY/INADMISSIBILITY

Two decisions considered the inadmissibility provisions of section 212(a)(9) relating to aliens previously removed. In *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the Board interpreted the provisions of inadmissibility in section 212(a)(9)(C)(i)(II), which provide that an alien is inadmissible if he or she has previously been ordered removed and attempts to reenter. In this case, the alien had previously been removed, applied for permission to reapply for admission after removal based upon an approved I-130 filed by his United States citizen wife, and the permission was granted. Rather than apply for admission, however, the respondent reentered without being admitted or paroled, and then applied for adjustment of status. The narrow issue addressed in this case is the effect of the grant of permission by the DHS, and whether that insulates the respondent from the ground of inadmissibility under section 212(a)(9)(A)(ii), which provides that an alien who has been ordered removed may not seek admission for 10 years unless he or she is granted permission by DHS. The Board found that the grant of permission to reapply for admission does not mean an alien is authorized to be admitted, as an alien must still have a valid entry document. The grant of permission means that section 212(a)(9)(C)(i)(II) is no longer an obstacle to the acquisition of an entry document, but the alien must still follow the procedures to obtain the visa. Furthermore,

inadmissibility under section 212(a)(9)(C)(i)(II) has no temporal limitations, and no request for permission to reapply may be granted less than 10 years after departure from the United States.

The Board rejected the Ninth Circuit's reasoning in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) which permitted retroactive consent to inadmissibility under 8 C.F.R. § 212.2 (2004). The Board found that 8 C.F.R. § 212.2 was not promulgated to implement current section 212(a)(9), but was published in response to a statutory section repealed by IRRIRA, and contradicts the clear language of section 212(a)(9)(C).

Grounds of inadmissibility under section 212(a)(9)(B)(i)(II), which mandate temporal restrictions in applying for admission after various periods of unlawful presence in the United States, were at issue in *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006). In that case, the respondent entered the United States without inspection in 1993, and remained unlawfully until May 3, 1997, when he departed. In August 1997, he reentered without being admitted or paroled and was apprehended in December 1997 and placed in proceedings. He sought adjustment based upon an immediate relative visa petition filed on his behalf under section 245(i) of the Act. The issue presented was whether the respondent was inadmissible under section 212(a)(9)(B)(i)(II) due to one year or more of unlawful presence and seeking admission within 10 years of his last departure. The Immigration Judge had found that the respondent was inadmissible due to the accumulation of unlawful presence after his May 1997 departure.

The Board began with the principle that section 212(a)(9) is designed to prevent recidivism, not just unlawful presence. It is reasonable to conclude that Congress sought to condition inadmissibility on immigration violations that preceded the alien's departure from the United States. The Board concluded that the respondent's departure triggered the 10-year inadmissibility period specified in section 212(a)(9)(B)(i) only if that departure was preceded by unlawful presence of at least one year. Put another way, the departure must fall at the end of a qualifying period of unlawful presence. In this case, the period that counted was the time before his May 1997 departure, which was only two months of unlawful presence due to the effective date of this provision. Thus, the respondent was not inadmissible under section 212(a)(9)(B)(i)(II).

In *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005), the Board found that removal proceedings may be commenced against an alien who was admitted to the United States as a refugee under section 207 of the Act, 8 U.S.C. § 1157, without prior termination of the alien's refugee status. In this case, the alien was admitted as a refugee, and adjusted his status thereafter. Following two convictions for theft offenses, he was placed in removal proceedings and charged as an alien convicted of two crimes involving moral turpitude. The Board found that the statutory framework for admission of refugees reveals that Congress did not consider termination of refugee status to be a prerequisite to initiating removal proceedings. Sections 207 and 209 of the Act do not distinguish between aliens admitted as refugees and others, and the provisions of section 209 relating to adjustment of status of refugees provides for initiation of removal proceedings in certain circumstances without prior termination of adjustment.

The Board published its first case interpreting provisions of the Real ID Act of 2005, Div. B of Pub. L. no. 109-13, §§ 103(b), 104, 119 Stat. 231, 302 307-9. In *Matter of S-K*, 23 I&N Dec. 936 (BIA 2006), the Board addressed the inadmissibility ground and bar to relief under section 212(a)(3)(B)(i)(I) of the Act for aliens who provide “material support” to terrorist organizations. The respondent in this case was a native and citizen of Burma who feared persecution based upon her religion and ethnicity. The respondent donated S\$1100 (Singapore dollars) and attempted to donate materials to the Chin National Front (CNF). The Board first addressed whether the CNF was a terrorist organization as defined by 212(a)(3)(B)(vi). The respondent argued that the CNF’s goals are democratic, it uses force only in self defense, and the government of Burma is an illegitimate regime. The Board found that the CNF is a terrorist organization within the meaning of the Act, and there is no exception for cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime. The Board reasoned that Congress did not give the Board the authority to determine whether a regime is illegitimate, the provision was broadly drafted, and a waiver is available, though the Board does not have authority to exercise the waiver.

The Board also found that neither an alien’s intent in making a donation to a terrorist organization nor the intended use of the donation by the recipient may be considered when assessing whether the alien provided material support to a terrorist organization under section 212(a)(3)(B)(iv)(VI). The legislation is clearly drafted, no legislative history exists to require otherwise, and any contrary interpretation would be against the intent of the provision since terrorist organizations could easily solicit funds for a benign purpose, but use them for another. The Board did not reach the issue of whether the term “material” excludes *de minimus* support, as the respondent’s donations in this case were substantial.

A concurring opinion agreed with the result given the language of the statute, but questioned whether Congress intended this result. The concurrence highlighted the incongruity present in this case where the respondent, who acted in a manner arguably consistent with the foreign policy of the United States in opposing one of the most repressive regimes in the world, who faces clear persecution in her home country, and poses no danger whatsoever to the national security of the United States, cannot be granted asylum.

In a case of first impression, the Board considered the “purely political offense” exception to the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act in *Matter of O’Calleagh*, 23 I&N Dec. 976 (BIA 2006). The respondent was convicted in 1990 in Northern Ireland of aiding and abetting the murders of two British corporals in 1988, causing grievous bodily harm, and false imprisonment. The incident leading to the conviction occurred during a funeral of another murder victim who had been killed by a loyalist gunman at an Irish Republican Army (IRA) funeral. The conviction was rendered by a court established to try political-type crimes, and the respondent was released from prison under the Good Friday Accord, which was an agreement between the British Government and the IRA. The Board concluded that the offense must be totally or completely political, and here there was substantial evidence that the offense was not fabricated or trumped-up. The Board found that the circumstances surrounding the respondent’s conviction in Northern Ireland for aiding and abetting the murder of two British corporals reflected a sincere effort to prosecute real

lawbreakers and thus the conviction did not fall under the “purely political offense” exception.

DERIVATIVE CITIZENSHIP

In *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006), the Board had occasion to revisit its decision in *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994), in considering whether the respondent, who was born out of wedlock in Guyana and whose natural parents were never married, established paternity by legitimation which would render him ineligible to obtain derivative citizenship under former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3) (1994). The Board held that under the laws of Guyana, the sole means of legitimation of a child born out of wedlock is the marriage of the child’s natural parents, overruling *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994).

BOND

In the bond context, the Board looked at what evidence an Immigration Judge can consider when making a custody redetermination under section 236(a) of the Act, 8 U.S.C. § 1226(a). *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). A criminal complaint introduced in the record alleged that the respondent in this case was facing criminal charges for his involvement in a controlled trafficking scheme. The Board found that when determining whether an alien poses a danger to the community, an Immigration Judge may consider, among the factors set forth in *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000), unfavorable evidence of conduct even if the alleged conduct has not resulted in a criminal conviction.

PROCEDURAL

In response to a request from the Eight Circuit Court of Appeals, the Board considered whether it had authority to extend the 30-day time limit for filing an appeal with the Board. *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006). The Second and the Ninth Circuits had found that an overnight delivery service’s failure to timely deliver a Notice of Appeal (NOA) can constitute an extraordinary circumstance excusing an alien’s failure to comply with the 30-day time limit. *See Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005) and *Zhong Guang Sun v. U.S. Dep’t of Justice*, 421 F.3d 105 (2d Cir. 2005). The Board held that it does not have the authority to extend the filing deadline, and while the Board may certify a case to itself in exceptional circumstances, short delays by overnight delivery services are not in and of themselves rare or extraordinary, in particular when the appealing party waits until the last minute before mailing the NOA..

In *Matter of Alcantara-Perez*, 23 I&N Dec. 882 (BIA 2006), the Board provided guidance regarding how an Immigration Judge should treat a case when the Board has remanded it for completion of background and security checks. Consistent with 8 C.F.R. § 1004.47(h), when a case is remanded and new information that may affect the alien’s eligibility for relief is revealed, the Immigration Judge has discretion to determine whether to conduct an additional hearing to consider the new evidence before entering an order granting or denying relief. The Board also instructed that

when a proceeding is remanded for background and security checks, but no new information is presented as a result of those checks, the Immigration Judge should enter an order granting relief.

ATTORNEY DISCIPLINE

Lastly, the Board ruled on attorney discipline regulations in *Matter of Ramos*, 23 I&N Dec. 843 (BIA 2005). In this case, the attorney was disbarred from the practice of law by the Supreme Court of Florida in 1997. The referee's report, upon which the Supreme Court based its decision, cited insufficient funds in the trust account, forgery of client signatures on settlement drafts, lying to the tribunal and other misdeeds. In 2005, the attorney was expelled from practice before the Immigration Courts, the Board and the DHS. The Board found expulsion to be appropriate in this case. The Board held that under the attorney discipline regulations, a disbarment order issued against a practitioner by the highest court of a State creates a rebuttable presumption that disciplinary sanctions should follow, which can only be rebutted upon a showing that the underlying disciplinary proceeding resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in injustice.