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Immigration Litigation Bulletin

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Brand X application to immigration cases

Supreme Court's decision in *Brand X* reinvigorates *Chevron*

The Supreme Court's decision in *National Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005), has important implications for administrative agencies like the Executive Office of Immigration Review ("EOIR") and Department of Homeland Security ("DHS"). *Brand X* establishes that agencies may adopt different interpretations of ambiguous provisions of federal statutes despite contrary federal court decisions. The Court reasoned that allowing a judicial precedent "to foreclose an agency from interpreting an ambiguous statute" would contravene the central premise of its decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), that "it is for agencies, not courts, to fill statutory gaps." *Id.* The Court thus held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency interpretation." *Id.* at 982-83.

In *Brand X*, the Supreme Court examined the relationship between the *stare decisis* effect of an appellate court's statutory interpretation and an administrative agency's subsequent, but contrary, interpretation. The Court held that a "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982 (emphasis added). Thus, under *Brand X*, an

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Seventh Circuit defers to BIA's interpretation of "moral turpitude" and under *Brand X* defers to *Babaisakov*

Few courts have directly addressed the question of whether the BIA's finding that a particular crime is one involving moral turpitude (CIMT) should be entitled to *Chevron* deference. In *Ali v. Mukasey*, __F.3d__, 2008 WL 901467 (7th Cir. Apr. 4, 2008) (*Easterbrook*, Manion, Sykes), the Seventh Circuit held that because "'crime involving moral turpitude' is an open-ended term, the Board and other immigration officials are both required and entitled to flesh out its meaning; and as the Board has done this through formal adjudication the agency is entitled to the respect afforded by the *Chevron* doctrine."

The petitioner, Ali, had been convicted of selling firearms, without a license to people not authorized to own them, an offense under 18 U.S.C. § 371, "against the United States, or to defraud the United States." Petitioner conceded that he had been convicted of an "aggravated felony," and thus became ineligible for most discretionary reliefs. However, he sought adjustment of status because he could get a waiver of that ineligibil-

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Brand X applied to reject application of *Taylor* in immigration proceedings

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ity under INA § 212(h) – unless his offense was a "crime involving moral turpitude."

The BIA, in a decision by a single Board Member, found that petitioner's conviction was a CIMT because trafficking in firearms was "morally reprehensible" and, that the offense was a species of fraud. The Seventh Circuit found the former reasoning "incompatible" with the BIA's prior precedents which distinguish between acts that are wrong in themselves, or *malum in se*, and those that are wrong because they are so decreed, or *malum prohibitum*. Licensing of firearms is in the form of *malum prohibitum,* said the court and the BIA's reasoning that guns require a license "due the inherent potential risk to the public welfare," reflected an ignorance of our nation's history." However, the court noted that if the BIA wanted to categorize all firearms-licensing offenses as CIMTs, it would have to "be done by the Board as a whole after full deliberation" and not by a single Member.

The court then deferred to the BIA's interpretation that petitioner's offense entailed fraud. The court rejected petitioner's contention that the BIA had erred in using the presentence report to support its finding of fraud. Petitioner argued that that report "must be ignored when classifying an offense for immigration purposes." Preliminarily, the court explained that the Supreme Court's reasoning *in Taylor v. United States*, 495 U.S. 575 (1990), and its progeny, did not apply in immigration proceedings because "they are not criminal prosecutions, so the sixth amendment and the doctrine of *Apprendi v. New York*, 530 U.S. 466 (2000), do not come into play." The court explained that in immigration proceedings there are two distinct questions. The first is the fact of the prior conviction and the second is the appropriate classification of that conviction, which may require additional information. The need to decide whether a crime is a CIMT, said the court, does not have a parallel in criminal cases, and may require additional information.

> When deciding how to classify convictions under criteria that go beyond the criminal charge - - such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude', the agency has the discretion to consider evidence beyond the charging papers."

As to the first question, of what crime does the alien stand convicted, INA § 240(c)(3)(B) supplies the rule, said the court. As to the second question, the BIA has held in *Matter of Babaisakov*, 24 I&N Dec. 306 (2007), that the additional evidence may be taken by the immigration judge when necessary. Therefore, reasoned the court, now that the BIA "has fully developed its own position," under *National Cable & Telecommunications Associations v. Brand X*, 545 U.S. 967 (2005), the BIA's interpretation must be due *Chevron* deference notwithstanding prior contrary decisions of the court. Accordingly, the court held that "when deciding how to classify convictions under criteria that go beyond the criminal charge - - such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude', the agency has the discretion to consider evidence beyond the charging papers and the judgment of conviction." Here, said the court, the BIA properly used petitioner's pre-sentence report to endure that there really was deceit involved and to make the moral-turpitude classification.

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NY Attorney found guilty in LULAC scheme

Raghubir K. Gupta was found guilty of immigration fraud late yesterday, following a seven-day trial in Manhattan federal court. According to the evidence, Gupta charged illegal immigrant clients thousands of dollars to prepare applications that he claimed would result in work permits, travel authorization, and/or legal residence.

Gupta submitted these applications under the LULAC program, a limited immigration amnesty and legalization program that allowed certain illegal immigrants -- who, among other things, must have resided in the United States before January 1, 1982 – to apply for legal residence. Gupta, while knowing that his clients had entered the U.S. too late to be eligible for the LULAC amnesty program and that they did not meet other requirements of the program, nevertheless caused his clients to provide false statements on the LULAC applications, including false dates for their entry into the United States. Gupta then presented these applications to USCIS.

Gupta was found guilty of one count of willfully causing the subscription of an immigration document containing a material false statement and presenting an immigration document containing a material false statement. He faces a maximum sentence of 10 years' imprisonment and a maximum fine of $250,000 or twice the gross pecuniary loss or gain derived from the offense.

Assistant United States attorneys Lee Renzin, Arianna Berg, and Daniel Braun prosecuted the case.

Asylum litigation update

Special Briefing Guidance For Social Group Cases

This is the first of a two-part article about and defending social group cases. These cases require special briefing. The question what constitutes a "particular social group" is a law reform issue -- meaning that in 2006 and 2007 the Board of Immigration Appeals refined the law and meaning of "particular social group." The circuits currently have social group requirements that may differ to some extent from the Board's refined approach. If, after internal consultation, OIL determines that a case presents a properly raised, preserved, and decided social group question, our brief needs an opening argument educating the court about the history of social group law, the reasonableness of the Board's refined approach, and the effect of *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005) (holding that agency's reasonable construction of an ambiguous statute trumps prior circuit construction).

■**Briefing Tip: Use the discussion below as the opening argument in your social group brief to make sure the court understands the development of the law, the Board's new decisions, and *Brand X*.**

Next month's article will discuss issues requiring special attention in social group cases, such as: (1) the effect of shifting social group descriptions by the alien; (2) whether the social group question was actually decided by the agency; and (3) recent social group cases in the circuits

History Of The Meaning Of "Particular Social Group" And The Board's Refined Approach

1. The *Acosta* Immutable/ Fundamental Approach

An alien may be granted asylum in the Attorney General's discretion if "the Attorney General determines that such alien is a refugee." 8 U.S.C. § 1158(b). A "refugee" is a person who is unwilling or unable to return to his or her country of origin "because of [past] persecution or a well-founded fear of [future] persecution on account of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Mandatory withholding of removal from a particular country is available if the alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

The question what constitutes a "particular social group" is a law reform issue -- meaning that in 2006 and 2007 the Board of Immigration Appeals refined the law and meaning of "particular social group."

The phrase "membership in a particular social group" is not statutorily defined. See 8 U.S.C. §§ 1101 (a)(42)(A), 1231(b)(3). In *Matter of Acosta,* 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987), the Board used an immutable-fundamental characteristic approach to define "particular social group" as "a group of persons all of whom share a common, immutable characteristic." *Acosta,* 19 I. & N. Dec. 233. The group characteristic must be one which "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." *Id.* This construction created the principle that refuge "is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required to, avoid persecution." *Id.*

2. Varying Approaches Between 1986-2006

After *Acosta,* the law was in a state of flux. There were a number of different approaches courts applied. Several circuits adopted the immutable/ fundamental test. *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003); *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Meguenine v. INS*, 139 F.3d 28 (1st Cir. 1998); *Sarafie v. INS*, 23 F.3d 636 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). But there were other alternatives or variations.

The Ninth Circuit developed a "voluntary association" approach, concluding that a "particular social group" requires either (1) an immutable or fundamental trait, or (2) a voluntary associational relationship or group "actuated by some common impulse or interest." *Hernandez-Montiel*, 225 F.3d at 1093 and n.6; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

The Ninth Circuit, along with the Third and Eighth Circuits, concluded that in addition to immutability, a "particular social group" cannot be too large, diverse, or broadly defined. *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003); *Sarafie*, 25 F.3d at 640; *Fatin,* 12 F.3d at 1240-41.

The Second Circuit developed a social-visibility or group-perception approach, requiring "individuals [to]

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possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor -- or in the eyes of the outside world in general." *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Saleh v. INS*, 962 F.3d 234, 240 (2d Cir. 1992). Under this approach, "[p]ossession of broadly-based characteristics such as youth and gender" is not sufficient to establish a social group. *Gomez*, 947 F.2d at 664; *Saleh*, 962 F.3d at 240. The Ninth Circuit also alluded to the need for group perception. *See Sanchez-Trujillo*, 801 F.2d at 1576 n. 7 ("a persecutor's perception of a segment of a society as a 'social group' will [not] . . . be irrelevant to [the] analysis[,]" but is not "conclusive"). The Board incorporated the social visiblity approach. *See Matter of V-T-S-*, 21 I. & N. Dec. 792 (BIA 1997); *Matter of H-*, 21 I. & N. Dec. 337 (BIA 1996).

The social visibility approach was also used internationally, although those views are non-binding. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 224-25, 227-28 (1999). *See* United Nations High Commissioner of Refugees (UNHCR), "Guidelines on International Protection: 'Membership of 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, Para. 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (defining "particular social group as [a] group of persons . . . who are perceived as a group by society"). *See also, e.g., A. v. Minister for Immigration and Ethnic Affairs and Another* (Australia 1997), 142 A.L.R. 331, 358, per McHugh J.("*A v. Minister*") (Australia 1997) (concluding that "[t]he existence of [a particular social group] depends in most, perhaps all, cases on external perceptions of the group" and what distinguishes members of a social group from other persons in their country "is a common attribute and a societal perception that they stand apart").

The Third Circuit concluded that a "particular social group" cannot be circularly defined by the persecution and must exist independently of it. *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003). This coincided with an international approach rejecting circular or tautological social groups defined by the persecution -- which would in effect construe "particular social group" to mean "persecuted group"; render the other statutory grounds superfluous; and result in the persecution creating the group, rather than requiring the group to be the motive for the persecution. *See* UNHCR Guidelines, para. 11 (recommending that a "particular social group" is "a[] group of persons who share a common characteristic other than their risk of being persecuted"); *A. v. Minister for Immigration and Ethnic Affairs and Another* (Australia 1997) 142 A.L.R. 331, 358, per McHugh J. (Australia) (to circularly define a social group by the persecution "would mean persons who had a well founded fear of persecution were members of a particular social group because they feared persecution"); *id.* ("The only persecution that is relevant is persecution for reasons of membership of a group[,] which means that the group must exist independently of, and not be defined by the persecution"); *Islam v. Sec'y of State for the Home Department and R. v. Immigration Appeal Tribunal and Sec'y of State for the Home Department ex parte Shah* (House of Lords, 1997), 2 W.R. 1015 (1999) (Lord Craighead) *(Islam and Shah)* ("[T]he persecution cannot be used to define a particular social group. . . To define the social group by reference to the fear of being persecuted would be to resort to circular reasoning").

The Third Circuit concluded that a "particular social group" cannot be circularly defined by the persecution and must exist Independently of it.

Some courts also concluded that, as a matter of policy, certain groups were not to constitute a "particular social group." *United States v. Aranda-Hernandez*, 95 F.3d 977, 980-81 (10th Cir. 1996) (holding that the theory that "informants for drug enforcement agencies" could constitute a "particular social group" "is not supported by the principles underlying the" INA); *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (rejecting that argument that "drug traffickers" were protected "social group" under INA, precluding their deportation to Iran); *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004) ("particular social group" does not extend to groups of people "who voluntarily engage[] in illicit activities").

3. The 2006 and 2007 Board Decisions Refining The Law

In 2006 and 2007 the Board clarified the meaning of a "particular social group" and harmonized the law. *Matter of C-A-*, 23 I. & N. Dec. at 956 (holding that "non-criminal informants working against the Cali drug cartel" in Colombia are not a particular social group); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007) (holding that affluent Guatemalans are not a social group). The Board reaffirmed that an immutable or fundamental characteristic is the core requirement. *Matter of C-A-*, 23 I. & N. Dec. 951, 956 ; *Matter of A-M-E-*, 24 I. & N. Dec at 74. However, the Board construed that in addition to an immutable or fundamental characteristic, there are other requirements: (1) a social group must have "social visibility" and be "discrete" and "recognizable" as a group by others in the community; *Matter of C-A-*, 23 I. & N. Dec. 951, 956 ; *Matter of A-M-E-*, 24 I. & N. Dec at 74 (this appears to reflect the "social visbility" approach devised by the Second Circuit, incorporated by the Board, used internationally, and alluded to by the Ninth Circuit); (2) a social group requires "particularity"

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and cannot be defined exclusively by broad characteristics, such as wealth, *Matter of A-M-E-*, 24 I. & N. Dec. at 74-75 (this appears to reflect the approach of Third, Eighth, and Ninth Circuits that a social group cannot be to large, diverse, or broadly defined); and (3) a social group requires "a group of persons who share a common characteristic other than their risk of being persecuted" and "cannot be defined exclusively by the fact that [the group] is targeted for persecution," *Matter of C- A*, 23 I. & N. Dec. at 956, 960; *Matter of A-M-E-*, 24 I. & N. Dec. at 74 (this appears to reflect the international and Third Circuit approaches rejecting circular social groups).

The Board construed that the Ninth Circuit's voluntary associational approach is not an appropriate requirement for a "particular social group." *Matter of C-A-*, 23 I. & N. Dec. at 956-57; *Matter of A-M-E-*, 24 I. & N. Dec. at 74. The Board's construction coincides with international views rejecting such an approach. *See Islam* and *Shah*, *supra* (Great Britain) (rejecting voluntary association approach); *Applicant A, supra* (Australia) (same).

The Board construed that the Ninth Circuit's voluntary associational approach is not an appropriate requirement for a "particular social group."

The Board also indicated that when an alien claims persecution on account of membership in a group of persons who share a common past experience – which is unchangeable or immutable because of the passage of time -- an alien may have to show something more than a common past, unchangeable experience. *Matter of C-A-*, 23 I. & N. Dec. at 958-59. *See David A. Martin, "Major Developments in Asylum Law Over The Past Year," 83 No. 34 Interpreter Releases (Sept. 1, 2006) [Westlaw: TP-All Database; 38 No. 34 Interpreter Releases 1889)].* The Board suggested that assumption of the risk may be a consideration that would preclude a social group based on a shared pastcharacteristic or status where group members assumed the risk of harm -- such as a former police officers or former members of the military.

The phrase "particular social group" is ambiguous. *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005) ("[t]he courts are struggling to set the parameters for the definition of a 'particular social group' in light of *Acosta*. The circuit courts are not in agreement on a test"); *Lukwago,* 329 F.3d at 170-71 (acknowledging that "given the ambiguity of the language, [the court's] role is limited to reviewing the BIA's interpretation."). The Board's construction in *Matter of C-A-* and *Matter of A-M-E-* is reasonable and entitled to *Chevron* deference, since it harmonizes and incorporates reasonable approaches. That being the case, the Board's construction should be controlling and trumps any prior, inconsistent circuit constructions. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (a circuit court must apply *Chevron* deference to an agency's interpretation of an ambiguous statute regardless of the court's contrary precedent).

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USCIS Issues VAWA Guidance

On April 11, 2008, USCIS provided guidance to USCIS adjudicators for adjudicating Adjustment of Status (Form I-485) applications filed by Violence Against Women Act (VAWA) self-petitioners who are present in the United States without having been inspected and admitted or paroled.

VAWA allows battered immigrants to petition for legal status in the United States without relying on abusive U.S. citizen or legal permanent resident spouses, parents or children to sponsor their Adjustment of Status (Form I-485) applications. The purpose of the VAWA program is to allow victims the opportunity to "self-petition" or independently seek legal immigration status in the U.S. Once a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) VAWA self-petition is approved, the immigrant victim may file an Adjustment of Status (Form I-485) application to become a lawful permanent resident (green card holder) directly.

The USCIS guidance provides that the Adjustment of Status (Form I-485) application for an approved VAWA self-petitioner will not be determined to be ineligible for adjustment of status where he or she entered the United States without inspection and admission or parole. In addition, the VAWA self-petitioner will not need to show that his or her illegal entry into the United States had a substantial connection to the domestic violence, battery or extreme cruelty.

The USCIS guidance allows an approved VAWA self-petitioner whose denied Adjustment of Status (Form I-485) application was filed on or after January 14, 1998 to file a Motion to Reopen or Reconsider (Form I-290B) if the only reason for the denial was his or her illegal entry into the U.S. Individuals who believe they are eligible to file, Motions to Reopen or Reconsider (Form I-290B) their denied Adjustment of Status (Form I-485) applications will not be charged a filing fee.

FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

On January 7, 2008, the Supreme Court heard oral arguments in ***Dada v. Mukasey***, No. 06-1181, on whether the filing of a motion to reopen removal proceedings automatically tolls voluntary departure.

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Asylum — Persecutor Bar

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

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IAC — Prejudice

On April 4, 2008, the government filed a petition for en banc rehearing in ***Grigoryan v. Mukasey***, 515 F.3d 999 (9th Cir. 2008), on the issues of whether the BIA is required to apply a presumption of prejudice in ineffective assistance claims, and whether aliens in removal proceedings has a due process right to effective assistance of counsel.

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Criminal Alien — Conviction Modified Categorical Approach

The Ninth Circuit granted the government petition for rehearing en banc in ***United States v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007), *reh'g en banc granted*, 519 F.3d 908 (2008), and ordered that the prior opinion no longer be cited. The question raised is whether a minute order can be considered under the modified categorical approach. Oral argument has been scheduled for June 23, 2008.

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CAT — Definition of "Torture"

The en banc Third Circuit heard oral arguments February 26, 2008 in ***Pierre v. Attorney General***, 509 F.3d 191 (3d Cir. 2007), a case transferred pursuant to the REAL ID Act from the district court. The court of appeals sua sponte ordered rehearing en banc and briefing to address specific issues regarding protection under the U.N. Convention Against Torture, including interpretation of the requirement of specific intent of the torturer, whether lack of medical care in prisons may amount to torture and require protection regardless of the intent of the jailer, and is there any other remedy or humanitarian relief from removal available to severely impaired or diseased persons who will be imprisoned in the country of removal.

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

The Third Circuit sua sponte ordered en banc hearing in ***Lin-Zheng v. Attorney General*** of the U.S., No. 07-2135, addressing whether spouses of those subjected to sterilization or other family planning practices in China should be entitled to "derivative relief" and to seek asylum under 8 U.S.C. § 1101 (a)(42)(B), specifically including whether the court should adopt the reasoning of the Second Circuit in ***Lin v. U.S. Dept. of Justice***, 494 F.3d 296 (2d Cir. 2007), which conflicts with ***Chen v. Attorney General of the U.S.***, 491 F.3d 100 (3d Cir 2007). Oral argument before the en banc court is scheduled for May 28, 2008.

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Removal — Blake issue

The en banc Ninth Circuit heard oral arguments March 25, 2008 in ***Abebe v. Gonzales***, 493 F.3d 1092 (9th Cir. 2007), *reh'g en banc granted sub nom.* ***Abebe v. Mukasey***, 514 F.3d 909 (2008) (also ordering that the panel decision cannot be cited as a precedent). The issue is whether an alien who is charged with deportability on a ground that does not have a comparable ground of inadmissibility is ineligible for § 212 (c) relief. The BIA had held that the agency's longstanding "statutory counterpart" rule, as applied in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), rendered petitioner ineligible for § 212(c) relief because there is no statutory counterpart in INA § 212(a) to the sexual abuse of a minor ground of deportability.

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Crimes — CIMT

The Ninth Circuit has granted the motion for supplemental briefing in ***Marmolejo-Campos v. Gonzales***, 503 F.3d 922 (9th Cir. 2007), *reh'g en banc granted sub nom.* ***Marmolejo-Campos v. Mukasey***, 519 F.3d 907 (9th Cir. 2008), where the Ninth Circuit held that a Mexican alien's Arizona conviction for aggravated driving under the influence ("DUI") constituted a crime of moral turpitude. The government filed its supplemental brief May 1, 2008, and oral argument is scheduled for June 23, 2008.

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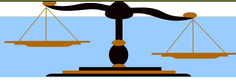

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Upholds Denial Of Asylum To Albanian Citizen Found Not Credible Based On Inconsistencies And Demeanor

In *Cuko v. Mukasey*, __F.3d__, 2008 WL 839749 (1st Cir. Mar. 31, 2008) (Torruella, *Lynch*, Cyr), the First Circuit denied the petition for review, upholding the IJ's finding that an Albanian asylum applicant's testimony was not credible.

The applicant claimed that he had been persecuted on account of his membership and activities on behalf of the Democratic Party. The IJ found that his testimony was inconsistent both internally and with some of the exhibits, and that his demeanor suggested mendacity. In particular, the IJ found that his testimony regarding the custody chain of his Democratic Party membership card, the December 2001 certificate from the party chairman, the testimony regarding the smuggling of his family, and the supporting documents were not credible. On appeal, the BIA affirmed the adverse credibility finding and rejected petitioner's contention that the IJ's conduct in questioning him went beyond his authority.

> **Because the IJ has the best vantage point it from which to assess the witness' testimony and demeanor, the court "accord[s] significant respect to these witness credibility determinations."**

The First Circuit preliminarily noted that because the IJ has the best vantage point from which to assess the witness' testimony and demeanor, it "accord[s] significant respect to these witness credibility determinations." Accordingly it applies a deferential "substantial evidence" standard of review as articulated in *Hoxha v. Gonzales*, 446 F.3d 210 (1st Cir. 2006). Under that standard the court narrowly inquires "whether: (i) the discrepancies articulated by the IJ and/or the BIA are actually present in the administrative record; (ii) the discrepancies generate specific and cogent reasons from which to infer that petitioner or his witnesses provided non-creditworthy testimony; and (iii) petitioner failed to provide a persuasive explanation for these discrepancies." Here the court found that the record did not compel it to make a determination contrary to that of the IJ. The court also held that the IJ was not biased and acted within his broad discretion in questioning the alien during his hearing.

In a dissenting opinion, Judge Cyr criticized the majority's opinion, noting that "in deferring wholesale to the agency's credibility determinations in these circumstances, the majority turns our review function into a hollow exercise in rubber-stamping."

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■ First Circuit Upholds Agency's Denial Of Withholding Of Removal And CAT Protection For Failure To Prove Past Persecution Or A Likelihood Of Future Persecution

In *De Oliveira v. Mukasey*, __F.3d__, 2008 WL 726087 (1st Cir. Mar. 19, 2008) (*Howard*, Boudin, Wallace), the First Circuit held that an asylum applicant from Brazil failed to prove past persecution because the death threats against him were not accompanied by overt action, and the threats stopped for several months before he departed Brazil for the United States. Petitioner had received the threats during his political campaign running for mayor of his town. The court also determined that the applicant failed to prove a likelihood of future persecution because his relatives continued to live in Brazil unharmed, the harm he allegedly feared was limited to one town in Brazil, and the mayor he allegedly feared was no longer in power.

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■ First Circuit Holds That Evidence In Asylum Applicant's Second Motion To Reopen Demonstrated Ongoing Religious Conflict In Indonesia Rather Than Changed Country Conditions

In *Tandayu v. Mukasey*, __F.3d__, 2008 WL 802829 (1st Cir. Mar. 27, 2008) (Lynch, *Lipez*, Howard), the First Circuit held that an Indonesian asylum applicant's evidence submitted with a motion to reopen "merely confirmed the ongoing nature of the religious conflict in Indonesia since 2002, not its intensification." The applicant, who had been denied asylum in 2005, claimed religious persecution as a Catholic. The documents he proffered with his motion suggested that conditions in Indonesia had worsened, especially for Christians. The court further determined that the applicant failed to demonstrate a link between the "general state of continuing violence in Indonesia and his own individualized risk of harm."

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SECOND CIRCUIT

■ Second Circuit Remands For Agency To Address Unexhausted Derivative Citizenship Claim

In *Poole v. Mukasey*, __F.3d__, 2008 WL 817102 (2d Cir. Mar. 27, 2008) (*Newman*, Winter, Parker, B.D.), the Second Circuit held that it had jurisdiction over petitioner's derivative citizenship claim, despite the fact that he had failed to timely appeal the IJ's decision to the BIA. The court explained that "a claim to citizenship does not encounter a juris-

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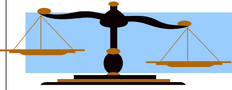

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dictional obstacle for lack of exhaustion. The Executive Branch may remove certain aliens but has no authority to remove citizens." If the government's argument that exhaustion is required were correct, said the court, "it would be possible to unintentionally relinquish U.S. citizenship . . . . The Constitution does not permit American citizenship to be so easily shed."

The court then found that petitioner had failed to satisfy the requirement for derivative citizenship that his mother have naturalized before he turned 18 because the processing of her application had taken two years. Notwithstanding this fact, the court noted that the record provided no indication why the government took two years to process her application. "A more expeditious processing, if completed within two years, would have provided [petitioner] with derivative citizenship," said the court. Accordingly, it found that the equities of the situation, if relevant, appear to favor the exercise of discretion in petitioner's favor and remanded to the BIA to determine whether any relief might be accorded to petitioner.

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■ **Second Circuit Upholds Finding Of No Ineffective Assistance Of Counsel Where Petitioner Withdrew Application For Asylum To Accept Voluntary Departure**

In *Jiang v. Mukasey*, __F.3d__, 2008 WL 817107 (2d Cir. Mar. 27, 2008) (Cardamone, B. Parker, Hall) (*per curiam*), the Second Circuit held that an asylum applicant from China failed to prove ineffective assistance of counsel where he relied on his counsel's advice to withdraw his application and accept voluntary departure. The court held that the applicant's decision was a reasonable strategic decision, and that the record did not compel the conclusion that competent counsel would have acted differently given the alien's questionable asylum claim and his pending visa petition. Given petitioner's "questionable asylum claim, which was based on a forced abortion performed on his putative wife and substantiated by possibly fraudulent documentation relating to her death, together with insufficient evidence to prove that [petitioner] filed his asylum application within the one-year filing period," said the court, "his former attorney reasonably advised Jiang to withdraw his asylum claim in favor of obtaining voluntary departure. We hold that recommending this sort of strategic decision does not constitute ineffective assistance of counsel."

> The court rejected petitioner's IAC claim finding the applicant's decision to accept VD was a reasonable strategic decision, and that the record did not compel the conclusion that competent counsel would have acted differently.

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■ **BIA Directed To Determine Whether State Conviction For Endangering Welfare Of A Child Constitutes Sexual Abuse Of A Minor**

In *James v. Mukasey*, __ F.3d __, 2008 WL 763158 (2d Cir. Mar. 25, 2008) (*Calabresi*, Cabranes, Sotomayor), the Second Circuit held that the BIA erroneously presumed that the statute under which the alien had been convicted, New York Penal Law § 260.10, "Endangering The Welfare Of A Child," was divisible. The court held that following the BIA's decision, the Second Circuit had made clear that the question of divisibility of the statute was an open one. Accordingly, the court remanded the case for the BIA to determine in the first instance whether the statute is divisible. The court also ruled that, if the BIA determines that the statute is divisible, then it should consider what the alien's admission to "sexual contact with a minor" means under New York law. The court further held that it had no jurisdiction to consider the alien's unexhausted adjustment of status claim.

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■ **Second Circuit Upholds Facial And As-Applied Constitutionality Of INA § 237(a)(2)(E)(i) ("stalking")**

In *Arriaga v. Mukasey*, __F.3d__, 2008 WL 817163 (2d Cir. Mar. 27, 2008) (*Jacobs*, Pooler, Sack), the Second Circuit held that INA § 237(a)(2)(E)(i), the provision of the INA making a conviction for a "crime of stalking" a deportable offense is not void for vagueness, either on its face or as applied. The court ruled that the alien did not identify a fundamental right compromised by the stalking provision. The court also held that a state criminal conviction cannot be collaterally attacked in a petition for review of an order of the BIA. With respect to the "as-applied" challenge, the court held that uniformity among state law definitions of stalking is unnecessary to permit use of the term in a federal law. The court concluded that a widely-accepted core meaning of the term "stalking" exists, that the removal statute does not reach any innocent conduct, and that the Connecticut statute of conviction was comparatively stringent.

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■ **Second Circuit Holds That The BIA Errs When It Fails To Articulate A Rational Explanation For Denying Petitioners' Motions To Reopen**

In *Ni v. BIA*, __F.3d__, 2008 WL 681147 (2d Cir. Mar. 14, 2008) (*Cabranes*, Pooler, Sack), the Second Circuit held that the BIA failed to articulate a rational explanation and

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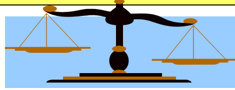

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thus erred, as a matter of law, in denying motions to reopen filed by three arriving aliens who sought to adjust their status through applications before the U.S. Citizenship and Immigration Services ("CIS") in light of an interim federal regulation. The court found that the BIA merely recited the regulation but did not apply the specific facts in the record to its denial of the motion to reopen and that the BIA's decisions were not responsive to petitioners' requests that their cases be reopened and continued before the BIA until CIS had acted on their adjustment of status applications.

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■ Second Circuit Holds That IJ Lacked Jurisdiction To Adjudicate Arriving Alien's Application For Adjustment Of Status

In *Brito v. Mukasey*, __F.3d__, 2008 WL 783365 (2d Cir. Mar. 26, 2008) (*Hall*, Minor, Sack), the Second Circuit upheld the denial of an applicant for adjustment of the status finding that it was a new and separate application, and thus the IJ lacked jurisdiction to adjudicate it. The petitioner, who had obtained advance parole to travel abroad during the pendency of his first application for adjustment of status, upon return was paroled into the United States. That grant of parole was revoked when the INS denied his wife's visa petition for failure to show at a scheduled interview, and also denied his application for adjustment. Petitioner was then placed in removal proceedings as an "arriving alien."

During the pendency of the removal proceedings, petitioner divorced his first wife and remarried another U.S. citizen. The IJ determined that as an "arriving alien" petitioner was not eligible to adjust his status in an immigration court. On appeal, the BIA affirmed and also explained that new regulations promulgated while the appeal was pending clarified that IJs lack jurisdiction to adjudicate an adjustment application.

Preliminarily, the Second Circuit held that petitioner had failed to exhaust his administrative remedy on the issue of whether he was an arriving alien, because he had not raised the issue to the BIA. The court then reviewed the controversy leading to the promulgation of the amended regulation which now provides USCIS with jurisdiction to adjudicate adjustment of status applications for all arriving aliens, even those in removal proceedings. 8 C.F.R. § 245.2(a)(1). The court noted the narrow exception where the Attorney General retains jurisdiction to adjudicate a renewed application for adjustment filed by an advance parolee prior to their departure from the United States. The court agreed, however, with the BIA that petitioner's application did not fall within that exception because it was separate and distinct from his previous application and it was based on a different marriage to a different person. Finally, the court found that petitioner lacked standing to assert his argument that the applicable governing regulations are *ultra vires*.

> The Attorney General retained jurisdiction to adjudicate a renewed application for adjustment filed by an advance parolee prior to their departure from the United States.

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■ Second Circuit Holds That Agency's Denial Of A § 212(c) Waiver Was Not Impermissibly Retroactive

In *Singh v. Mukasey*, __F.3d__, 2008 WL 658239 (2d Cir. Mar. 13, 2008) (Winter, Wesley, Cogan) (*per curiam*), the Second Circuit held that the agency's denial of a § 212(c) waiver was not impermissibly retroactive for an alien who plead guilty to an aggravated felony after the enactment of the Immigration Act of 1990 (IMMACT) and subsequently served a sentence of more than five years' imprisonment, because the alien pleaded guilty to a disqualifying felony after IMMACT's enactment. The court also held that The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was not impermissibly retroactive as to an alien whose conviction pre-dated AEDPA but who was statutorily ineligible for a § 212(c) waiver when he sought the waiver, even under pre-AEDPA law, because he had already served more than five years' imprisonment.

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THIRD CIRCUIT

■ Third Circuit Upholds BIA's Decision Refusing To Impute Parent's Years As Lawful Permanent Resident To Minor Alien In Order To Qualify For Cancellation Of Removal

In *Augustin v. Att'y Gen.*, 520 F.3d 264 (3d Cir. 2008) (Rendell, Chagares, *Pollack*), the Third Circuit held that the BIA's refusal to impute a father's years as a lawful permanent resident to a minor alien was a permissible interpretation of the cancellation of removal statute. The petitioner, a citizen of Haiti, entered the United States as an LPR in 1995 at the age of thirteen. In 2005 he was placed in removal proceedings on the basis, *inter alia,* that in 2000 he had been convicted of two crimes involving moral turpitude. Petitioner then sought cancellation of removal but the IJ pretermitted that application finding that the commission of a single CIMT "stopped the clock" for purpose of accruing the statutory 7-year period of continuous residence. The BIA affirmed that decision and rejected petitioner's contention that a minor alien can count his parents' years as an LPR toward the statute seven-year resi-

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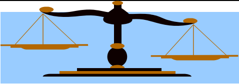

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dency requirement.

The Third Circuit, in denying the petition, applied *Chevron* deference to the BIA's decision and concluded that it was reasonable because imputing time from a parent to a minor child did not accord with the clear statutory dictates of the residency requirements for cancellation. The court noted that the BIA, as it had done in *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), had repudiated the holding in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), in which a divided panel of the Ninth circuit held that, a parent's preceding years of residence in the United States are imputed to a minor child for purpose of meeting the seven-year residency requirement.

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■ Third Circuit Upholds Agency's Decision That Alien Was Ineligible To Renew Adjustment Application.

In *Vakker v. Att'y Gen.*, __F.3d__, 2008 WL 681849 (3d Cir. Mar. 14, 2008) (Sloviter, Smith, *Stapleton*), the Third Circuit upheld the BIAs' determination that a "paroled" alien was ineligible to renew his previously denied adjustment of status application. The court upheld the BIA's determination that petitioner was ineligible to have his request to renew his adjustment of status application reconsidered in the course of his removal proceedings because he did not meet the renewal requirements under 8 C.F.R. § 1245.2(a).

The court also held that the petition for review was timely because the BIA's denial of his motion to remand became final at the same time as the remainder of his case: at the time that the IJ granted the alien withholding of removal.

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FIFTH CIRCUIT

■ An Alien Must Exhaust Administrative Remedies By Filing A Motion To Reopen Regarding A Question Of Law Before The Court Has Jurisdiction

In *Toledo-Hernandez v. Mukasey*, __F.3d__, 2008 WL 651596 (5th Cir. Mar. 12, 2008) (Garwood, Jolly, *Stewart*), the Fifth Circuit held that it lacked jurisdiction to consider the question of law of whether a vacated conviction was a valid basis for a removal order because the alien failed to exhaust his administrative remedies. The court noted that it had previously held that "[w]hen a petitioner seeks to raise a claim not presented to the BIA and the claim is one that the BIA has adequate mechanisms to address and remedy, the petitioner must raise the issue in a motion to reopen prior to resorting to review by the courts."

The court also determined that the BIA did not abuse its discretion in using the Pre-Sentence Investigation Report (PSR) to determine the amount of loss.

The court also held that where the BIA has previously ruled on an issue, an alien need not file a motion to reopen to have the agency reconsider the same issue. However, if the BIA has never had the opportunity to consider the issue but could remedy it, even where the 90 day filing period has passed, an alien must first present the issue to the BIA before the court can have jurisdiction.

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■ Fifth Circuit Holds That Knowingly Filing A False Tax Return Is An Aggravated Felony

In *Arguelles-Olivares v. Mukasey*, __F.3d__, 2008 WL 1799987 (5th Cir. April 22, 2008) (Garwood, Dennis, Owen), the Fifth Circuit, in a split opinion, held that the alien's conviction for filing a false tax return was an aggravated felony under INA § 101(a)(43)(M), which includes: "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in § 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000." The court rejected the alien's argument that subsection (M)(i) does not apply to any federal tax offenses because subsection (M)(ii) specifically identifies tax evasion as the only tax offense that qualifies as an aggravated felony.

The court also determined that the BIA did not abuse its discretion in using the Pre-Sentence Investigation Report (PSR) to determine the amount of loss, and noted that because the crime of filing a false tax return does not itself define a monetary threshold, the BIA may look beyond the statute to the PSR. The panel majority disagreed with the dissenting view that the court had previously applied the categorical or modified categorical approach in the immigration context. It said that the court had done so, "when determining the nature or elements of the offense of conviction but not the amount of loss ."

In a dissenting opinion, Judge Dennis would have held that that the BIA abused its discretion because it improperly looked at the PSR, contrary to circuit's decisions and the Supreme Court decisions in *Taylor* and *Sheperd.* Judge Dennis pointed out that the majority decision created a circuit split "from the four circuits unanimously holding such use of PSRs improper."

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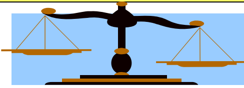

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That The Expedited Administrative Removal Procedure Under INA § 238(b) Did Not Violate Petitoner's Due Process Or Equal Protection Rights**

In *Graham v. Mukasey*, 519 F.3d 546 (6th Cir. 2008) (Merritt, *Daughtrey*, Moore), the Sixth Circuit held that the expedited removal process for aggravated felon aliens under INA § 238 (b), 8 U.S.C. § 1228(b), did not violate petitioner's procedural due process rights because he had failed to establish prejudice. "To establish the requisite prejudice, he must show that the due process violations led to a substantially different outcome from that which would have occurred in the absence of those violations," said the court. Here, the court rejected petitioner's argument that his mail fraud conviction under 18 U.S.C. § 371 was not an aggravated felony, reasoning that the record of conviction established a loss to the victims greater than $10,000, as required under INA § 101(a)(43)(M)(i), (a)(43)(U).

"To establish the requisite prejudice, he must show that the due process violations led to a substantially different outcome from that which would have occurred in the absence of those violations."

The court also rejected petitioner's equal protection claim under the rational basis test, finding "no intrinsic equal protection violation in the expedited removal procedure authorized by § 1228(b)."

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■ **Sixth Circuit Upholds An Adverse Credibility Determination Based On Significant Discrepancies**

In *Ndrecaj v. Mukasey*, __F.3d__, 2008 WL 1733239 (6th Cir. April 16, 2008) (McKeague, *Moore*, Schwartzer) the court held that the IJ did not abuse his discretion in finding an Albanian asylum applicant not credible where he failed to mention his most recent arrest in his asylum application, where he could not identify two persons who wrote letters on his behalf, and where his wife first testified that she did not belong to a political party and then changed her testimony after an outburst by the alien. The court also noted that although the IJ noted other inconsistencies that did not go to the heart of the claim and would be insufficient to uphold the adverse credibility finding, the evidence did not compel a different conclusion. The court then held that country conditions had changed in Albania, and a fear of a minority party returning to power was insufficient to support a claim of well-founded fear of future persecution.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Shallow Treatment Of Issue Did Not Constitute Waiver Of Issue In Whistleblower Case**

In *Haxhiu v. Gonzales*, __F.3d__, 2008 WL 724047 (7th Cir. Mar. 19, 2008) (*Flaum*, Manion, Evans), the Seventh Circuit held that petitioner, a former army colonel in Albania, suffered past persecution because of his anticorruption activities against the Albanian military establishment. Petitioner testified that when he served in the Albanian Army, one of his duties was the eradication of widespread corruption. Apparently, he was so successful at his job that he started receiving threats, particularly when he protested the sale of a military building of interest to a group of corrupted officials in the Ministry of Defense. Ultimately he was fired because of his efforts to resist government corruption. After he was fired he sought to expose corruption through the media his family was also threatened, including an attempted kidnapping of his daughter, and his son was badly beat by strangers who told him to tell his father to "shut up."

Petitioner then fled to the U.S. with his wife and daughter – his son was sent to England. Petitioner, however, returned to Albania after three months in the United States where he claimed he was again threatened. He then returned to the U.S. where he applied for asylum.

The IJ found petitioner credible but denied asylum because petitioner did not take active step to fight corruption outside his official duties and therefore could not show harm on account of political opinion, and that even if there was a connection he could not demonstrate that the Albanian government was responsible for his mistreatment either directly or indirectly. The BIA adopted and affirmed that decision.

The Seventh circuit reversed the denial of asylum holding that petitioner had suffered past persecution with government complicity on account of his political opinion. In particular, the court noted that under its case law, a whistleblower can receive asylum protection if he sought a political result by going outside the scope of his official duties and chain of command. Here, the court found that petitioner's anticorruption activities persisted beyond his employment with the Albanian Army. The court noted that he approached the press after his army employment and suffered persecution for doing so in the form of threats to his son. The court also ruled that the BIA's conclusion that petitioner failed to satisfy the burden of demonstrating the government's

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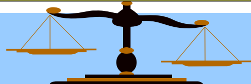

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complicity in persecution was not supported by substantial evidence.

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■ **Seventh Circuit Holds That AEDPA's Bar Against Discretionary Waivers Applies Retroactively To Aliens Who Committed Offenses Before Its Passage, But Were Convicted Afterward**

In *United States v. De Horta Garcia*, __F.3d__, 2008 WL 656909 (7th Cir. Mar. 13, 2008) (*Bauer*, Kanne, Rovner), the Seventh Circuit held that the alien could not collaterally attack his prior deportation order because he could not demonstrate that the entry of the order was "fundamentally unfair" pursuant to 8 U.S.C. § 1326(d). The court held that due process does not encompass a right to be informed of eligibility – or to be considered – for discretionary relief. The court further held that even if the alien could collaterally attack his prior deportation, the bar against discretionary waivers in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applied retroactively to aliens who committed offenses before its passage, but were convicted afterward.

Due process does not encompass a right to be informed of eligibility – or to be considered – for discretionary relief.

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■ **Failure To Provide Oral Warning In Alien's Native Language Of Consequences For Failing To Appear Does Not Automatically Entitle Alien To Reopening Of Removal Proceedings**

In *Aragon-Munoz v. Mukasey*, 520 F.3d 82 (7th Cir. 2008) (Torruella, Lynch, *Lipez*), the Seventh Circuit held that the petitioner, who was ordered removed *in absentia*, was not automatically entitled to reopening on the basis that he did not receive oral warnings in Spanish of the consequences of failing to appear. The court ruled that INA § 240(b)(7) does not purport to require such notice, and only operates as a ten-year bar to future eligibility for certain forms of discretionary relief when oral notice in the alien's native language is given, prior to entry of the *in absentia* removal order. The court explained that the government's failure to give such notice in an alien's native language means only that relief is not precluded by the statute and that the alien must still meet the requirements for motions to reopen. The court concluded that the absence of oral notice was irrelevant in the instant case because the petitioner failed to meet his burden under the general regulations governing motions to reopen.

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EIGHTH CIRCUIT

■ **Eighth Circuit Finds No Abuse Of Discretion In Agency's Denial Of Motion To Reopen And Upholds IJ's *In Absentia* Removal Order**

In *Gitau v. Mukasey*, __F.3d__, 2008 WL 819140 (8th Cir. Mar. 28, 2008) (Bye, *Beam*, Gruender), the Eighth Circuit upheld the BIA's denial of a motion to reopen and the IJ's *in absentia* removal order, concluding that petitioner had failed to present evidence that her former attorney advised her outright not to go to her removal hearing.

Petitioner, a citizen of Kenya, entered the U.S. as a visitor 1998 but did not depart when her visa expired. In 2001 she married a U.S. citizen who filed an immediate relative visa petition, and she in turn filed an application for adjustment of status. However, when the husband withdrew his visa petition, the application for adjustment was denied, and petitioner was placed in removal proceedings. In 2003, petitioner's husband filed a second visa petition but he died before the visa was adjudicated. Petitioner then filed an I-360 Widower Petition on August 22, 2005. However, because neither she nor her attorney appeared at the February 13, 2006, merits hearing, she was ordered removed in absentia. Petitioner then filed a timely motion to reopen with the IJ claiming exceptional circumstances because neither she nor her attorney had received notice of the hearing, and that an INS officer had told them that the case had been closed. The IJ denied the motion finding that oral notice had been properly provided.

Petitioner hired new counsel and appealed the denial to the BIA where she alleged ineffective assistance of counsel. The BIA denied the motion for failure to establish exceptional circumstances. Petitioner then filed another motion to reopen/reconsider claiming ineffective assistance of counsel. This motion was also denied because there was no evidence that petitioner had been advised by her former attorney to not show up at the hearing.

On appeal, in a split decision, the Eighth Circuit denied the petition. Although the court concluded that petitioner's prior attorney had many shortcomings, and that they were presented with a great deal of "he said, she said" as to why she had failed to appear, there was not enough evidence to support a reversal of the BIA's decision under the abuse of discretion standard. The court also noted in particular that unlike the alien in *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996), the BIA here determined that petitioner was not told by her prior counsel not to

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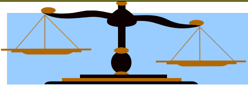

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appear at the hearing.

In a dissenting opinion, Judge Bye would have found that the BIA had not provided specific and cogent reasons for discrediting petitioner's testimony and crediting that of her former attorney.

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■ **Eighth Circuit Upholds Regulation Allowing Service Of Process On An Alien Who Is At Least Fourteen Years Old**

In *Llapa-Sinchi v. Mukasey*, __F.3d__, 2008 WL 819093 (8th Cir. Mar. 28, 2008) (*Melloy*, Gibson, Bye), the Eighth Circuit deferred to the BIA's interpretation that 8 C.F.R. § 103.5a (c)(2)(ii), requires service on an alternative party only for minors younger than fourteen years old, but that for minors over that age, the general notice provision which requires that notice "shall be given in person to the alien" applies. Petitioner was denied suspension of deportation because she could not establish the requisite period of continuous residence. That period had ended in 1995 when she was served with a Order to Show Cause. Petitioner, who was then a fourteen years old minor, contended that service was invalid because the former INS should have served a responsible party.

The court also rejected a constitutional challenge to the regulation, "declining to adopt a per se rule that service to minors alone always violates the constitution." In particular, the court noted that in *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court held that minors could waive their right to appeal deportation and custody determinations. In the absence of further evidence that "the service in this case raised constitutional problems," said the court, "it is not inconsistent with due process for [petitioner] to be the sole recipient of notice."

The court rejected the Ninth Circuit's contrary decision in *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1162 (9th Cir. 2004). In that case, the Ninth Circuit had interpreted the regulation differently "to avoid serious constitutional due process questions."

In a dissenting opinion, Judge Bye would have applied the law of the Ninth Circuit because when petitioner was served with the notice she was within the jurisdiction of that court. "Any other rule encourages and facilitated forum shopping by both parties," he explained.

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The court found that Congress did not intend the statutory 30-day time limit in INA § 208(d)(5)(A)(iv) for filing administrative appeals of asylum cases to be mandatory and not subject to exceptions.

■ **Eighth Circuit Finds That Administrative Appeal Deadline Is Not Mandatory But Finds No Abuse of Discretion in BIA's Dismissal**

In *Liadov v. Mukasey*, __F.3d__, 2008 WL 681108 (8th Cir. Mar. 14, 2008) (*Loken*, Arnold, Colloton), the Eighth Circuit, applying *Bowles v. Russell*, 127 S. Ct. 2360 (2007), concluded that Congress did not intend the statutory 30-day time limit in INA § 208(d)(5)(A)(iv) for filing administrative appeals of asylum cases to be mandatory and not subject to exceptions, and therefore the court had the authority to review the agency's jurisdictional ruling.

The principal petitioner, an asylum applicant from Lithuania and his family, were denied asylum, withholding, and CAT protection by an IJ in January 2003. Petitioner's appeal to the BIA was dismissed because it was filed one day late. Petitioner then filed a motion to reconsider the dismissal, noting that the delay had been caused by the overnight delivery service. The BIA denied that motion finding that it lacked authority to extend the time in which to file an appeal. Following the filing of a petition for review, the case was remanded to the BIA in light of two intervening court decisions indicating that BIA had the authority to extend the appeal time. The BIA in a precedent decision, *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), held that neither the INA nor the regulations authorized it to extend the 30-day limit for filing an appeal, and that petitioner's case would not be certified under 8 C.F.R. § 1003.1(c) because there were no exceptional circumstances to excuse the delay.

The Eighth Circuit, in holding that the INA statutory time limit for filing an asylum appeal was not a "mandatory directive" under *Bowles v. Russell*, acknowledged that the question was "not free from doubt" because the INA § 208(d)(5)(A)(iv) provides that any asylum appeal must be filed within 30 days. The court found some ambiguity in the statute because the statutory time limit only referred to asylum and not withholding or CAT, notwithstanding the agency practice that an asylum application is automatically deemed to request withholding and CAT protection. The court also looked at the legislative history of the 1990 Act, specifically a House Report, to extrapolate that Congress did not intend a mandatory time limit.

The court then examined the BIA's jurisdictional ruling "from the familiar perspective of whether it was an abuse of the agency's discretion to resolve procedural issues 'not governed' by specific statutory commands.'" The court held, in light of the its *en banc* decision in *Tamenut v. Mukasey*, (8th Cir. March 11, 2008) (holding that court lacks jurisdiction to review BIA's denial of sua sponte reopening), that the BIA's refusal to use its self-certification authority under 8

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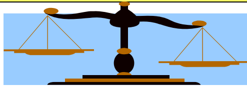

Recent Federal Court Decisions

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C.F.R. § 1003.1(c) was "an unreviewable action committed to the agency's discretion." Alternatively, the court found that even if the BIA's refusal to self-certify was subject to judicial review, the BIA had properly exercised its discretion.

In an opinion concurring in part, Judge Colloton disagreed with the majority holding that under *Bowles*, the 30-day statutory time limit for filing an appeal is not jurisdictional. He found, in particular, the majority legislative analysis "unconvincing" and pointed to the fact that the BIA has maintained steadfastly that the time limit is mandatory.

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■ **Alien Who Checked The "Citizen Or National" Box On A Form I-9 Was Ineligible To Adjust His Status For Falsely Representing Himself As A U.S. Citizen**

In *Rodriguez v. Mukasey*, __F.3d__, 2008 WL 60178 (8th Cir. Mar. 19, 2008) (Murphy, Hansen, *Gruender*), the Eighth Circuit held that an alien who marks the "citizen or national of the United States" box on a Form I-9 for the purpose of falsely representing himself as a citizen to secure employment with a private employer is inadmissible for falsely representing himself for a benefit or purpose under the INA and therefore is ineligible for adjustment of status.

The court determined that an alien's previous failed attempt before an adjudications officer to secure proper identification in his own name and admission constituted substantial evidence that he intended to represent himself as a citizen and not a national – despite his claims that he did not fully understand the questions in English.

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■ **Eighth Circuit Holds That It Lacks Jurisdiction To Review Mischaracterized Due Process Claim**

In *Hanan v. Mukasey*, __F.3d__, 2008 WL 681112 (8th Cir. Mar. 14, 2008) (Murphy, Hansen, *Gruender*), the Eighth Circuit held that a criminal alien had not raised a proper due process argument to justify the court's jurisdiction, where he claimed that the BIA failed to consider recent country reports on Afghanistan and an affidavit submitted with his motion to reopen as support for his claim for protection under the CAT. The court noted that the BIA specifically mentioned the country reports and affidavit in its order determining that the alien claimed only a generalized fear of returning to Afghanistan. The court also held that the BIA's citation to the relevant regulation demonstrated that it used the correct definition of "acquiescence," in determining that the alien had not demonstrated that the Afghanistan government acquiesced, consented, or participated in torture committed by the Taliban.

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NINTH CIRCUIT

■ **Denial of Cancellation Affirmed Because Petitioner's Admission That He Accepted VD In Lieu Of Being Placed In Proceedings Broke His Continuous Physical Presence**

In *Gutierrez v. Mukasey*, __F.3d__, 2008 WL 861689 (9th Cir. Apr. 2, 2008) (Wallace, *Gould*, Ikuta), the Ninth Circuit affirmed the BIA's denial of cancellation of removal finding that petitioner's departure from the United States under the threat of removal had interrupted the accrual of his continuous physical presence.

The petitioner, a Mexican citizen who had unlawfully entered the U.S. in 1983, testified that in 1990 he had been arrested at work, detained for one day, and sent back to Mexico, only to reenter illegally a couple of days later. He also stated that he had been given an opportunity to go before an immigration court, but he "just signed the voluntary departure and that was it." The IJ applied *Matter of Romeles-Alcaide*, 23 I&N Dec. 423 (BIA 2003)(*en banc*) and found petitioner's continuous physical presence was interrupted when he was compelled to depart in 1990, and consequently he could not show that he had accrued the requisite ten years of continuous physical presence for purpose of cancellation. The BIA affirmed without opinion.

> **"Petitioner's admission combined with his rejection to go before an immigration court, "constitutes sufficient evidence of a knowing consent to voluntary departure in lieu of removal proceedings."**

In his petition for review, petitioner contended that he had not voluntarily departed under the threat of deportation because there was no evidence that he had been informed of and accepted the terms of voluntary departure. The court found, distinguishing its decision from that in Ibarra-Flores *v. Gonzales*, 439 F.3d 614 (9th Cir 2006), that petitioner's admission combined with his rejection of an opportunity to go before an immigration court, "constitutes sufficient evidence of a knowing consent to voluntary departure in lieu of removal proceedings."

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■ **Visa Waiver Program Alien Had Waived His Right To Contest Removal Even In Light Of Pending Adjustment Application**

In *Momeni v. Chertoff*, __F.3d__, 2008 WL 835255 (9th Cir. Mar. 31, 2008) (Kozinski, *Kleinfield*, Tallman), the Ninth Circuit held that a German national who entered the United States for a 90-day period under the

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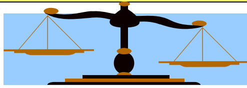

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Visa Waiver Program, waived his right to contest removal even in light of a pending application for adjustment of status. Petitioner, who had entered under the VWP on November 30, 2005, did not depart at the end of the 90-day period. Instead, he married a United States citizen and filed an application for adjustment, accompanied by his wife visa petition. Shortly thereafter ICE took petitioner into custody for violating the conditions of VWP status. He then filed a habeas petition which the district court dismissed for lack of jurisdiction.

On appeal, the Ninth Circuit preliminarily noted that the scope of its jurisdiction was "arguable" but assumed jurisdiction to avoid the constitutional argument raised by petitioner that the REAL ID Act could not deprive the courts of habeas jurisdiction without violating the Suspension Clause. The court then found that petitioner by entering the United States under the VWP, had waived his right to contest any action for removal, other than his right to seek asylum. The court distinguished petitioner's case from *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir, 2006), where the court had carved a narrow exception to the rule because Freeman was eligible to adjust her status at the time she arrived and would have obtained adjustment but for her husband's death. As the court noted, unlike the petitioner here, Freeman had married and had applied for adjustment before the 90 days expired. "These distinctions disqualify [petitioner] from circumventing the Visa Waiver Program's no contest clause by means of adjustment of status," said the court.

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■ Alien Who Presented Fraudulent Green Card Did Not Make Lawful Entry Required For Adjustment Of Status

In *Orozco v. Mukasey*, __F.3d__, 2008 WL 763366 (9th Cir. Mar. 25, 2008) (Bea, *N.R. Smith*, Wardlaw), the Ninth Circuit upheld the BIA's determination that an alien who was allowed to enter the United States after showing the immigration inspector another person's resident alien card is statutorily ineligible for adjustment because he can't satisfy the "lawful entry" requirement. Petitioner contended that because he had been allowed to enter, he had been "inspected and admitted," and thus eligible for adjustment under INA § 245 (a). The court found that based on the unambiguous language in INA § 101(a)(13(A), defining the term "admission," a "lawful entry requires more than simply presenting oneself for inspection and being allowed to enter the United States." The court noted that when IIRIRA defined the term "admission" Congress unambiguously required lawful entry into the Unites States as a prerequisite to adjustment of status.

When IIRIRA defined the term "admission" Congress unambiguously required lawful entry into the Unites States as a prerequisite to adjustment of status.

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■ Ninth Circuit Lacks Jurisdiction To Review Finding That Petitioner's Evidence Of Date Of Arrival Was Not "Clear and Convincing," As Required To Show That Asylum Application Was Timely Filed

In *Sillah v. Mukasey*, __F.3d__, 2008 WL 795342 (9th Cir. Mar. 27, 2008) (McKeown, Clifton, Schwarzer) (*per curiam*), the Ninth Circuit granted the government's request to publish a memorandum disposition denying the petition of an asylum applicant from Sierra Leone. The IJ had found that, despite otherwise credible testimony, the applicant's evidence of arrival was not "clear and convincing" in light of his inability to remember the name on the fraudulent passport he had used, his claim that he was not questioned by immigration officers in either the United States or Sierra Leone, and the lack of evidence corroborating the alleged date of arrival. Given these considerations, the facts were not "undisputed," and therefore the court held that it lacked jurisdiction.

The court also agreed that fundamental changes in Sierra Leone rebutted a presumption of a likelihood of persecution so as to defeat the applicant's withholding claim.

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■ Ninth Circuit Amends Decision To Correct Faulty Statistics Regarding "Rarity of Grants of Cancellation"

In *Fernandez v. Mukasey*, __F.3d__, 2008 WL 763381 (9th Cir. Mar. 25, 2008) (B. Fletcher, Berzon, Rawlinson) (*per curiam*), the Ninth Circuit denied petitioners' rehearing petitions and responded to a government letter by amending the initial published decision (reported at 512 F.3d 553) to correct a statement regarding an alleged "rarity of grants of cancellation of removal" to non-LPR aliens. The statement had miscalculated the number of aliens in removal proceedings granted cancellation. The revised statement illustrates the same purported "rarity" by stating that in 2006, "typical" non-LPR cancellation of removal was granted to 3,144 individuals, "well below" the statutory annual cap of 4,000 for such grants. The initial decision otherwise remained unchanged, denying a petition for review based on a "free exercise of religion" challenge to the cancellation statute.

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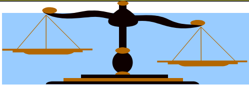

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Ninth Circuit Concludes That IJ Conflated Adverse Credibility With Burden Of Proof Finding

In *Huang v. Mukasey*, __F.3d__, 2008 WL 780745 (9th Cir. Mar. 24, 2008) (Goodwin, O'Scannlain, W. Fletcher) (*per curiam*), the Ninth Circuit found that the IJ did not make clear whether his decision was based on a finding against petitioner's credibility or a determination that the petitioner failed to prove persecution. The BIA then "compounded" the error when its decision relied on the IJ's nonexistent credibility finding. Accordingly, the court, applying *INS v. Ventura*, 537 U.S. 12 (2002), remanded to the BIA for further consideration of petitioner's asylum claim.

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Ninth Circuit Rejects Application Of Exclusionary Rule Where Alien Obtained LPR Status Through Sustaire Conspiracy

In *Hong v. Mukasey*, __F.3d__, 2008 WL 564978 (9th Cir. Mar. 4, 2008) (*D.W. Nelson*, Bea, Oberdorfer), the Ninth Circuit held that the exclusionary rule did not apply where an alien had obtained lawful permanent resident status through her father, who had procured his status through an illegal conspiracy run by Leland Sustaire, an officer at the former INS. Recognizing that the exclusionary rule is generally inapplicable in civil immigration proceedings, the court rejected the petitioner's due process argument. The court held that petitioner's A number was not "non-public information" that required suppression, that it did not appear that Sustaire had violated a particular federal regulation, and that even assuming that he had violated it, petitioner had no protected privacy interest because she never held a lawful benefit warranting protection.

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Ninth Circuit Holds That It Has Jurisdiction To Review Denial Of Deferral On The Merits

In *Lemus-Galvan v. Mukasey*, __F.3d__, 2008 WL 638357 (9th Cir. Mar. 11, 2008) (Kozinski, *McKeown*, Tashima), the Ninth Circuit held that it had jurisdiction to review the denial of an aggravated felon alien's application for deferral of removal on the merits. The court held that the jurisdiction limiting provisions in the INA do not apply when the immigration judge denies deferral of removal on the merits, rather than based on the alien's aggravated felony conviction. However, the court determined that substantial evidence supported the finding that the alien did not show that internal relocation was impossible.

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Ninth Circuit Holds That It Was Bound By Moran In Finding That The INA § 212(d)(11) Family Unity Waiver Is Available For Aliens Seeking Cancellation Of Removal

In *Sanchez v. Mukasey*, __F.3d__, 2008 WL 861600 (Hug, *Schroeder;* Wallace (dissenting)) (9th Cir. April 2, 2008), the Ninth Circuit held that the family unity waiver under INA § 212(a)(6)(E)(iii) is available to an alien denied cancellation because he smuggled his spouse, parent, or child into the United States.

The court rejected the government's contention that *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005), had been wrongly decided and that *Moran's* reasoning did not control because it was dictum. The court held that the Government's position could not be squared with the reasoning in *Moran*. It pointed out that the government didn't seek rehearing en banc in *Moran* or in any of the other cases decided by the court. The court also disagreed with the government's view that Moran was dictum and not binding, noting that "when a panel selects a single line of reasoning to support its result, the reasoning cannot be ignored as dictum." Accordingly, the court found *Moran's* reasoning and remanded the case to the BIA to adjudicate the waiver application.

> **"When a panel selects a single line of reasoning to support its result, the reasoning cannot be ignored as dictum."**

In a dissenting opinion, Judge Wallace would not have found *Moran* controlling, noting that the parties in that case had neither raised nor briefed the issue of whether the family unity waiver in the § 212 admissibility provision applied to cancellation, adding that it "was a panel venture." That decision, said Wallace, has now created a conflict, "in which an alien smuggler applying for voluntary departure cannot avail himself of the waiver, whereas an alien smuggler applying for cancellation of removal, using the same statutory scheme can." This conflict, he wrote, "should be addressed by the en banc court."

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Ninth Withdraws Persecutor Bar Decision

In *Im v. Mukasey*, __F.3d__, 2008 WL 1042920 (9th Cir. Apr. 11, 2008), the court sua sponte withdrew its previously published opinion in Im v. Gonzales, 497 F.3d 990 (9th Cir. 2007), and held further consideration in abeyance pending the Supreme Court's decision in *Negusie*.

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Deference Under The Brand X Rule

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agency's reasonable interpretation of a statute is entitled to *Chevron* deference notwithstanding a different interpretation reached by a court in a prior judicial decision, where that decision was based on a statutory ambiguity rather than the plain language of the statute. *Id.* at 982-83.

The Supreme Court's Decision in Brand X

Brand X involved the Federal Communications Commission's ("FCC") decision to classify the broadband internet service provided by cable services as an "information service" rather than a "telecommunications service" within the meaning of the Communications Act of 1934. 545 U.S. at 973, 977-78. In the proceedings below, the Ninth Circuit refused to apply *Chevron* deference to the FCC's decision, and instead relied on a prior circuit decision interpreting the term "telecommunications service" to includes cable modem service. *Brand X*, 545 U.S. 981. The court determined that it was bound by its prior determination, and thus owed no deference to the FCC's new construction of the statute. *Id.* at 982. The court reached this conclusion without determining whether its prior interpretation was based on an unambiguous reading of the statute, or a statutory ambiguity.

The Supreme Court explained that "*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency."

On appeal, the Supreme Court reversed, explaining that "*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 982 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996)). Thus, the Court held that where a judicial precedent construing a statute does not indicate that the statute unambiguously forecloses alternative meanings, then the "agency may . . . choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.* at 983.

The Ninth Circuit's Application of the Brand X Rule

In *Duran Gonzales v. Department of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit addressed for the first time the application of *Brand X* in an immigration case. *Gonzales* involved a class action lawsuit in which plaintiffs claimed that a DHS Memorandum contradicted mandatory Ninth Circuit precedent. *Id.* at 1231. The Memorandum instructed DHS officers to adjudicate aliens' I-212 applications (for permission to reenter the country) only if ten or more years had passed since the aliens' last departures from the United States. *See* 8 U.S.C. § 1182(a)(9)(C)(ii). The Memorandum was based on the BIA's precedential decision in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006), which held that aliens subject to the ground of inadmissability at 8 U.S.C. § 1182(a)(9)(C)(i)(II) are ineligible to seek permission to reenter the country for ten years after the date of their last departure. *Gonzales*, 508 F.3d at 1239. In that decision, the BIA explicitly disagreed with the Ninth Circuit's prior decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), where the Ninth Circuit concluded that Perez-Gonzalez, an illegally reentering alien who was inadmissible under 8 U.S.C. § 1182 (a)(9)(C)(i)(II), was eligible to apply for permission to reapply for admission even though ten years had not passed from his last departure as required by the statute. *Torres-Garcia*, *supra* at 785, 792, 795-96. In their complaint, plaintiffs argued that DHS' Memorandum violated the Ninth Circuit's holding in *Perez-Gonzalez*. *Gonzales*, *supra* at 1231-32. The district court agreed and issued an order adopting plaintiffs' arguments and granting the motions for injunctive relief and class certification. *Id.* at 1232. The government appealed.

The question before the Ninth Circuit on appeal was whether, under *Brand X*, the district court was required to defer to the BIA's interpretation of 8 U.S.C. § 1182(a)(9)(C) in *Torres-Garcia*, notwithstanding its prior decision in *Perez-Gonzalez*. *Gonzales*, 508 F.3d at 1235. Applying the principles set forth in *Brand X*, the Ninth Circuit concluded that its holding in *Perez-Gonzalez*, regarding the availability of a waiver under 8 U.S.C. § 1182(a)(9)(C)(ii), was premised on a statutory ambiguity rather than the unambiguous terms of the statute. The court reasoned that in *Perez-Gonzalez* it had commented that, "'[i]n the absence of a more complete agency elaboration of how its interpretation of [INA] § 212(a)(9) can be reconciled with its own regulations, we must defer to the regulations rather than to the informal guidance memorandum.'" *Id.* at 1238 (quoting *Perez-Gonzalez*, 379 F.3d 794). By suggesting that a more formal and extensive agency analysis might merit deference, the court was undoubtedly applying the second step in the *Chevron* analysis. The *Gonzales* panel also noted that *Perez-Gonzalez*'s citation to the Supreme Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000), which addressed the *second step* in *Chevron*, further bolstered its conclusion. *Duran*, *supra* at 1237-38.

Having concluded that its prior holding rested on a statutory

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Brand X restores deference rule even in light of contrary court decisions

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ambiguity, the Ninth Circuit had no trouble deferring to the BIA's decision in *Torres-Garcia* as a reasonable construction of the statute. *Id.* at 1242. The court found the BIA's interpretation in *Torres-Garcia* reasonable given the statutory requirement in section 1182(a)(9)(C)(ii) that an alien may obtain permission to apply for readmission from outside the United States only when ten years have passed from the date of his last departure. *Id.* at 1242.

Following the court's decision in *Gonzales*, plaintiffs filed a petition for rehearing en banc. The Ninth Circuit subsequently directed the government to file a response to the petition, which the government did on April 11. The petition remains pending before the court.

The Significance of Brand X in Immigration Cases

The Supreme Court's decision in *Brand X* is significant because it reaffirms the principle that Congress intends the agency to act as the "authoritative interpreter" of ambiguity in the statute. 545 U.S. at 983. *Brand X* clarifies that the BIA may adopt different interpretations of ambiguous provisions of the immigration laws despite contrary court decisions. Those interpretations, if reasonable, are entitled to *Chevron* deference.

In addition to the Ninth Circuit's decision in *Gonzales*, the Fourth Circuit also has had occasion to apply *Brand X* in the immigration context. In *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007), the Fourth Circuit held that the BIA's interpretation of the term "national" for purposes of 8 U.S.C. § 1101(a)(22) superceded its prior decision in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), because its interpretation in *Morin* did not "flow[] from the unambiguous terms of the INA" or hold that "its interpretation was the *only permissible construction* of the statute." *Fernandez*, *supra* at 339 (emphasis in original); *compare Matter of Navas-Acosta*, 23 I. & N. Dec. 586 (BIA 2003) (holding that one acquires U.S. nationality only by birth or naturalization) *with Morin*, *supra* at 126 (interpreting 8 U.S.C. § 1101(a)(22) to provide that a "national of the United States" may be a person who, though not a citizen of the United, owes permanent allegiance to the United States).

***Brand X* clarifies that the BIA may adopt different interpretations of ambiguous provisions of the immigration laws despite contrary court decisions. Those interpretations, if reasonable, are entitled to *Chevron* deference.**

More recently, the Seventh Circuit applied *Brand X* to defer to the BIA's decision in *Matter of Babaisakov*, 24 I. & N. Dec. 306 (2007), which found that when deciding how to classify convictions under criteria that go beyond the criminal charge, such as whether the crime is one of "moral turpitude," the immigration judge may consider evidence beyond the charging papers and judgment of conviction. *Ali v. Mukasey*, ___ F.3d ___, 2008 WL 901467, at *4 (7th Cir. Apr. 4, 2008). The court reasoned that now that the BIA "has fully developed its own position," the court must defer to that decision because prior circuit precedent finding to the contrary left room for administrative discretion. *Id.* at *5.

Additionally, *Brand X* is relevant not only to the Attorney General's adjudicative authority, but also to his rulemaking powers. Accordingly, the Attorney General's regulation setting forth a reasonable interpretation of a statute is entitled to *Chevron* deference notwithstanding a contrary judicial interpretation, if the judicial interpretation is based on a statutory ambiguity. Thus, for example, the Attorney General recently invoked *Brand X* in proposing new rules for the effect of a motion to reopen or reconsider on voluntary departure. *See Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review*, 72 Fed. Reg. 67674, 67678 (Nov. 30, 2007). The preamble to the proposed rule states that "[c]ircuit court decisions holding that the filing of motions to reopen or reconsider tolls the running of a voluntary departure period do not prevent the Department of Justice from rendering an authoritative construction of the Act that does not require tolling . . . ." *Id.* (citing *Brand X*). The preamble further reasons that because "nothing in the Act 'unambiguously' requires that the mere filing of a motion to reopen or reconsider automatically tolls the voluntary departure period," *Brand X* applies, and the BIA has discretion to set forth an alternative interpretation which, if reasonable, warrants deference. *Id.*

In sum, *Brand X* provides the Attorney General with a useful tool to render authoritative interpretations of provisions in the INA even where a court has previously addressed the issue and reached a different result, as long as the court's prior interpretation is not based on the plain language of the statute.

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Contributions to the Immigration Litigation Bulletin Are Welcomed!

43 Minnesotans indicted for marriage fraud

Forty-three people were recently charged in federal court with conspiring to commit marriage fraud in connection with a marriage fraud ring centered in the Twin Cities. The charges resulted from an investigation by U.S. Immigration and Customs Enforcement (ICE).

The operation allegedly involved recruiting U.S. citizens to enter into fraudulent marriages with Chinese nationals so they could obtain visas and other immigration benefits.

The indictment against the 43 defendants, which was unsealed on April 18, 2008, following the arrests of 20 of those charged Thursday and Friday, was filed April 15. It alleges that between 2002 and November 2007 the defendants conspired with themselves and others to enter into fraudulent marriages between Chinese citizens and U.S. citizens to evade U.S. immigration laws.

The indictment alleges that the goal of the conspiracy was to facilitate entry into and residence within the United States by Chinese nationals (the beneficiaries) through fraudulent marriages to U.S. citizens (the petitioners). The petitioners traveled to China on one or more occasions to facilitate the illegal entry of the Chinese nationals into the U.S. The indictment alleges that the petitioners received up to $25,000, minus their travel expenses to and from China, in exchange for their participation in the fraud scheme.

Chinese beneficiaries paid to participate in the scheme to secure fraudulent entry into the U.S., the indictment alleges, and that the purported relationship between a petitioner and beneficiary was documented with "sham" evidence designed to give the appearance of a legitimate pre-marital relationship. The indictment also alleges that if a beneficiary successfully made entry into the U.S., the petitioner and beneficiary would often participate in a civil marriage ceremony to obtain a marriage license.

Most petitioners and beneficiaries complied with the terms of the fraudulently obtained visa by gaining legal status for the sham marriage, the indictment alleges. The indictment also alleges that neither before nor after the marriage license was issued did the petitioner and beneficiary enter into a bona fide marital relationship.

This case resulted from an investigation by ICE's Document and Benefit Fraud Task Force, which includes the U.S. Secret Service and U.S. Department of State's Diplomatic Security Service, and the Hennepin County Sheriff's Office. The case is being prosecuted by Assistant U.S. Attorneys LeeAnn K. Bell and David M. Genrich.

Delay In Excess Of Four Years For Completing Name Check Of Applicant for Adjustment Found Unreasonable

In *Shirmodamadali v. Heinauer*, __F. Supp. 2d__, 2008 WL 508057 (E.D. Ca. Feb. 22, 2008) (Dzozd), Eastern District of California granted the alien's mandamus action directing the government to adjudicate their adjustment applications within 30 days of the court's order. The court held that the government had not shown that the delay in this case was attributable to the aliens, that the aliens' applications were unusually complex, that higher priorities necessitated a delay exceeding four years, or that any efforts had been made to expedite aliens' applications after so long a delay.

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MARK YOUR CALENDAR

OIL's 12th Annual Immigration Litigation Conference will be held at the National Advocacy Center on August 4-8, 2008. Additional information to follow.

OIL 14th Annual Immigration Law Seminar will be held in Washington, DC on October 20-24. This is the basic immigration law course. Contact Francesco Isgro at francesco.isgro@usdoj.gov for additional information.

California Holds That A Delay In Excess Of

INSIDE OIL

OIL bids goodbye to Trial Attorney **Dimitri N. Rocha**, who has accepted an Assistant United States Attorney position in the USAO, San Antonio, Texas. Dimitri joined OIL in June 2006.

Dimitri is a graduate from the University of Texas and the University of Virginia School of Law. Prior to joining OIL, he was an attorney in the Special Litigation Section of the Civil Rights Division.

OIL Director Thom Hussey presenting the USDOJ Seal to Dimitri Rocha

OIL Celebrates Kids Day

Photo by Nannette Anderson

The Office of Immigration Litigation celebrated "Take Our Daughters and Sons to Work" Day on Thursday, April 24, 2008. The future OILers saw a magical show performed by Magic Mike whom they really enjoyed!

They also enjoyed eating pizza, fruit, chips, taking pictures and playing games. But most of all, they enjoyed assisting the parents with their daily work assignments.

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

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

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

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

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