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Recent Developments in the Specific Intent Standard in Convention Against Torture Cases

by Sarah Cade

When the United States Senate ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (“Convention”) in 1994, it did so with an explicit understanding about what the term “torture” included. The Senate had decided that “in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.”¹

Four years later, Article 3 of the Convention, which prohibits refoulement of an individual to a country where he or she faces torture, was implemented by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-761, 2681-822. The regulations promulgated to comply with the Convention sought to preserve the understanding of the Senate. The regulations, then as now, define torture as “any act by which severe pain or suffering . . . is intentionally inflicted on a person” for various illicit purposes. 8 C.F.R. § 1208.18(a)(1) (2008). Such illicit purposes include “obtaining from [a person] or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind.” *Id.* The regulations further state that to constitute torture, the act “must be specifically intended to inflict severe physical or mental pain or suffering,” and that “[a]n act that results in unanticipated or unintended severity of pain and suffering” does not qualify as torture. 8 C.F.R. § 1208.18(a)(5).

It was not until 2002 that the Board of Immigration Appeals received its first opportunity to analyze the intent requirement. In *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), the respondent, a young man with a controlled substances conviction, failed to convince the Board that he would

experience “torture” in a Haitian prison. The conditions in Haitian prisons—which included starvation, lack of water or medical care, and squalor—were deplorable, the Board determined. However, the Board stated that “there is no evidence that [Haitian authorities] are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.” *Id.* at 301. Rather, because the conditions result from “budgetary and management problems,” the treatment in those prisons cannot constitute “torture” for purposes of relief under the Convention. *Id.* Knowledge of the prison’s conditions and knowledge that those conditions would cause pain and suffering would be insufficient. Instead, the respondent would have to show that the authorities consciously desired the pain and suffering, and since Haiti was attempting to reform its prisons, the respondent necessarily failed to meet his burden. *Id.*

The Board contrasted the general conditions with certain isolated treatment by guards—such as beatings, the burning of inmates with cigarettes, and electric shocks—which were done with specific intent to harm. Some of those acts, such as the burnings and electrical shocks, were both intentional and severe enough to constitute torture but were too “isolated” to sustain a Convention claim. *Id.* at 303. As to the others, the Board held that, in general, “[i]nstances of police brutality” are not severe enough to constitute torture despite being intentional. *Id.* at 302.

Further, the Board determined that the “illicit purpose” requirement “emphasizes the specific intent requirement.” *Id.* at 298. Therefore, to constitute torture, the prison conditions must have been deliberately created “for a proscribed purpose” such as obtaining confessions or punishing the detainees. *Id.* at 300.

Five members of the Board joined in a dissent, arguing that because Haiti continued to detain returnees “with the full knowledge” that they would be “forced to endure horrific prison conditions,” the Haitian authorities had the requisite mental state for the detainment to constitute torture. *Id.* at 307 (Schmidt, dissenting). The “specific intent” requirement, as the dissent acknowledged, required more than “negligence,” but because the Haitian Government could not claim ignorance of the prison conditions, “its conduct falls squarely within the meaning” of the regulatory definition of torture. *Id.* at 308.

The Third Circuit was the first of the circuit courts to touch on the issue of specific intent. *Zubeda*

v. Ashcroft, 333 F.3d 463 (3d Cir. 2003). *Zubeda* was a young woman from the Democratic Republic of Congo (“DRC”) who claimed she had suffered, among other atrocities, gang rape and sexual slavery at the hands of government-backed militias, and that she would likely face detention and rape at the hands of security forces if removed. The Immigration Judge granted relief under the Convention but the Board reversed, noting the similarities between prison conditions in the DRC and those in Haiti in *Matter of J-E-*. *Id.* at 475. In addition, the Board stated that there was “a dearth of evidence to support any finding that the respondent is likely to be detained for any reason.” *Id.* (quoting the Board’s decision). The court remanded, criticizing the Board’s decision in several respects and including a passage analyzing the Convention’s “intent” requirement.

In assessing what sort of “intent” *Zubeda*’s tormentors must have in order for their actions to constitute torture, the court focused on the language in 8 C.F.R. § 1208.18(a)(5) that “[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.” *Id.* at 473. The court held that such language “distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable [sic] consequence of deliberate conduct,” concluding that such a requirement “is not the same as requiring a specific intent to inflict suffering.” *Id.* The court additionally took note that 8 C.F.R. § 1208.18(a) states that torture can include harm caused by threats, including the threatened infliction of pain and suffering or the threat of imminent death. *Id.* Consequently, the court reasoned, “[t]he persecutor need not intend to ‘make good’ on his/her threats for the resulting suffering to constitute torture so long as the threats are sufficiently protracted, and/or of such an egregious nature to elevate the foreseeable suffering to the level of ‘torture.’” *Id.* at 474.

Zubeda appeared to articulate a new standard, namely, that an act that creates pain and suffering could constitute torture so long as the act that caused the harm was intentional and the harm was foreseeable. *Id.* at 473-74. This differed from the holding in *Matter of J-E-*, in which the Board concluded that the conditions in Haitian prisons were not torture, even if the pain and suffering that would result from deliberate incarceration were foreseeable and could be anticipated by the Haitian Government.

The next year, both the First and Eleventh Circuits handed down cases that applied the *Matter of J-E*- standard of specific intent. All three cases dealt with individuals who faced prison detentions in impoverished countries, where the prison conditions were more a result of inadequate funding than the government's intent to create pain or suffering. *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004) (Haiti); *Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004) (Uganda); *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004) (Haiti). In each case, the courts engaged in relatively little analysis of the specific intent standard and primarily analogized the cases as being factually similar to *Matter of J-E*-.

The Third Circuit again dealt with a Convention claim the next year, this time in the context of a person facing detention in Haiti. *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005). Auguste did not argue that his case was factually distinguishable from *Matter of J-E*-, and the Third Circuit, like the Immigration Judge who heard the case, found it to be on all fours with that prior Board decision. The court consequently spent little time analyzing the specific intent standard. Auguste attempted to argue that under *Zubeda* he was entitled to relief since the pain and suffering he would endure in the Haitian prison was not "unanticipated." *Id.* at 139. However, the court attempted to distinguish the basis of its holding in *Zubeda* as "limited to the defects in the BIA's reversal of the IJ's ruling" and stated that the discussion of the specific intent standard in that case was dicta. *Id.* at 148. In so holding, the court seemingly back-tracked from the language in *Zubeda*, which implied that the infliction of pain and suffering was torture so long as the suffering was foreseeable and the causal act was intentionally done, appearing to recognize that such a standard would be at odds with the Board's decision in *Matter of J-E*-. *Id.*

Not until 2006 did a circuit court analyze the issue of specific intent in a nondetention context. In *Majd v. Gonzales*, 446 F.3d 590 (5th Cir. 2006), the Fifth Circuit held that a young man from the West Bank, who described, among other experiences, being in a taxi which was accidentally shot at by soldiers during a conflict and witnessing the death of the other passenger, could not show he had been "tortured" because "[m]ost of the suffering he described was inflicted without any specific intent on the part of the Israeli forces in the West Bank." *Id.* at 597. More significantly, the court determined that in another incident Majd did not suffer torture when he was shot at by soldiers while fleeing from the area of a gun fight. The

court concluded that while the soldiers were acting with deliberate intent to harm the respondent, they did not have any illicit purpose. The Israeli forces did not have "a goal of extracting information or a confession from Majd, but rather...they were trying to halt his escape." *Id.* *Majd v. Gonzales* did not cite *Matter of J-E*- and appeared to rely solely on the applicable regulation in its analysis. Nor did the court clarify what constituted "specific intent." The question whether knowledge was sufficient was therefore left unanswered.

In the meantime, a separate line of cases developed dealing with the Convention requirement that the "torture" be at the hands of the government or with government "acquiescence." See 8 C.F.R. § 1208.18(a)(7). A number of circuit courts adopted a "willful blindness" standard to determine when a government acquiesces to torture committed by a third party. See, e.g., *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).² Even if a person could not show that the government itself committed the torture, he or she could succeed by showing the government was "willfully blind" to torture committed by a third party.

Quite possibly that language prompted the Third Circuit to abandon the *Matter of J-E*- standard in 2007 and write that the court "cannot rule out the generally accepted principle that intent can be proven through evidence of willful blindness." *Lavira v. Att'y Gen. of U.S.*, 478 F.3d 158, 171 (3d Cir. 2007). In stating that proposition, the court relied on a district court decision from 2005, which relied on cases dealing with government acquiescence to determine that intent may be shown through "willful blindness." *Id.* (citing *Thelemaque v. Ashcroft*, 363 F.Supp.2d 198 (D. Conn. 2005)). The respondent in *Lavira* also faced removal to a Haitian prison. However, because he was HIV-positive, the Third Circuit held that his circumstances separated him from the claims in *Matter of J-E*- and *Auguste v. Ridge*, where the alien was "understood to be presenting a generalized claim against the Haitian facility." *Id.* at 169. Instead, the court adopted the argument that Lavira was "uniquely vulnerable" to the conditions at the prison, and therefore "to place him *knowingly* in the disease-infested Haitian facility is to *intentionally* subject him to severe pain and suffering." *Id.* (emphasis added).

The court did not base that holding on any targeted maltreatment that Lavira was likely to receive. Instead, it focused on the fact that he would not receive treatment "because the Haitian system does not have antiretroviral

drugs for HIV patients.” *Id.* at 171. He “presented an individualized attack” which was “obviously specific to his case,” and the court claimed to distinguish *Matter of J-E-* on that ground. *Id.* at 172. Lavira, the court held, could succeed on his claim because “a finding of specific intent could be based on deliberate ignorance or willful blindness” of the pain and suffering that a particular respondent would experience. *Id.* at 171. In so holding, the court appeared to articulate a new standard under which an individual could show “specific intent” by demonstrating that he or she would endure pain and suffering that was different in kind or severity from the suffering of other individuals in the prison, so long as the prison officials had knowledge of that difference. The court focused primarily on the circumstances of the individual respondent and spent little time considering the motives of the prison authorities. *Id.*

In addition, the *Lavira* court did not consider the illicit purpose requirement. The court gave no indication whether it determined that the respondent had met his burden in this regard, or whether it considered such demonstration to be unnecessary if a respondent had proven specific intent.

The *Lavira* holding created some measure of confusion regarding the appropriate meaning of “specific intent” and the position of the Third Circuit.³ The Second Circuit later that same year called *Lavira* a “wrinkle[].” *Pierre v. Gonzales*, 502 F.3d 109, 117, (2d Cir. 2007). Since *Lavira* had not specifically overruled *Auguste*, the court asked rhetorically how “willful blindness towards a fact [could] be legally significant if actual knowledge of it is not.” *Id.* at 122 n.10. One respondent before the Ninth Circuit raised an argument similar to Lavira’s, which prompted that court to respond that the “willful blindness” standard to show government acquiescence “should not be read to hold that the torture itself can exist without specific intent of *someone*—either the government official or the private party to whom the official acquiesces—to inflict severe harm.” *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008).

In the meantime, the Eleventh Circuit cited *Lavira* to support the proposition that an applicant for protection under the Convention must show that he or she “would be *individually* and *intentionally* singled out for harsh treatment.” *Jean-Pierre v. U.S. Att’y Gen.*, 500 F.3d 1315, 1324 (11th Cir. 2007) (referencing the *Lavira* court’s statement that Lavira’s application presented “not

merely an attack on the ‘general state of affairs,’” but, rather, “detail[ed] how guards will treat this HIV-positive prisoner”). In *Jean-Pierre*, the Eleventh Circuit indicated that the respondent—who argued that he would be deliberately and individually mistreated because an AIDS-induced mental illness would cause him to behave irrationally and lead the guards to torment him—might face torture if he could show he would “be singled out for crawl-space confinement, beatings with metal rods” and other physical mistreatment. *Id.* at 1327. The court expressed concern that the prison guards, “acting out of fear or prejudice,” would deliberately cause pain to the respondent. *Id.* at 1323. The court appeared to require some showing that tormentors would deliberately create pain rather than simply possess knowledge of likely pain, and it focused its opinion primarily on evidence that Jean-Pierre would be targeted for the types of severe mistreatment that the Board had held to constitute torture in *Matter of J-E-*. *Id.* at 1325-26.

This past June, the Third Circuit released a new case, *Pierre v. Att’y Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008), in which the en banc court explicitly overruled *Lavira*. Pierre—a lawful permanent resident—had stabbed his ex-girlfriend with a meat cleaver multiple times when he was interrupted by a neighbor who heard the woman’s screams. *Id.* at 183. In an attempt to commit suicide, Pierre drank a container of battery acid; consequently, he began to suffer from a condition called esophageal dysphagia. The condition limited his intake to a liquid diet via a feeding tube, which would need to be replaced on a monthly basis. In addition, he required daily medical care. Because Haitian prisons did not have the capacity to care for someone in his position, Pierre argued that his removal to Haiti would result in certain death. *Id.*

The Third Circuit held that he did not have a valid claim for relief under the Convention because he could not show specific intent on the part of Haitian authorities to cause him pain and suffering. According to the court, for Pierre to meet the specific intent requirement, he had to demonstrate that “his prospective torturer will have the motive or purpose to cause him pain and suffering.” *Id.* at 189. In so holding, the court determined that the specific intent requirement meant that a torturer must actively desire to cause pain, and it relied on Supreme Court language from a criminal law context that ““purpose” corresponds loosely with the common-law concept of specific intent, while “knowledge” corresponds loosely with the concept

of general intent.”” *Id.* at 190 (quoting *United States v. Bailey*, 444 U.S. 394, 405 (1980)).

Pierre’s claim also failed because he could not demonstrate that any targeted acts were designed to further a proscribed purpose, and the Third Circuit overruled *Lavira* on that ground, as well. The court held that Pierre only faced imprisonment “because the Haitian government has a blanket policy of imprisoning ex-convicts who are deported to Haiti in order to reduce crime.” *Id.* at 189. Consequently, he did not face imprisonment for an illicit purpose. *Id.* In short, to succeed on a claim for relief under the Convention, an alien would have to show that the actor would act for the purpose of causing pain and suffering, and that the pain and suffering would be for the purpose of furthering some illicit goal. The court noted, however, that the torturer need not have only one purpose and that the pain and suffering does not have to be the torturer’s ultimate purpose. *Id.* at 190 n.7 (noting that “people commonly have dual purposes”).

In the concurring opinion, one judge expressed concern about some possible scenarios where “purpose” would not be found, such as a military official who “desires information from a detained, suspected terrorist.” *Id.* at 196. The judge reasoned that if the military official used electric shock to solicit information, the tortured individual would still not have a valid claim for relief, because the official’s “real” purpose was not to cause pain but to elicit information. *Id.* The majority responded by stating that “the reason a jailer uses torture tactics is the jailer’s belief that the pain caused will induce the prisoner to reveal information.” *Id.* at 190 n.7. The military official would be deliberately employing electric shock in order to cause pain and would also be deliberately using that pain as a tool in order to gain information. The military official’s actions would thus meet the requirement for a specific intent to cause pain and the “purpose” requirement that there be an illicit goal for the pain.⁴

The concurring opinion also argued that a specific intent standard could be met by demonstrating knowledge that a result was certain and did not require motive or purpose, stating that “the mental element is *knowledge or desire that pain and suffering will result.*” *Id.* at 195. The concurrence did not analyze the standard under *Matter of J-E-* or make an argument as to how “knowledge” could be sufficient when the Board had held the opposite in *Matter of J-E-*. Rather, the concurrence argued that the meaning

of specific intent in criminal case law is “ambiguous” and that “specific intent” could include knowledge that a result is certain to occur. *Id.* at 192-94.

With the *Pierre* decision, the major “wrinkle” in jurisprudence on the meaning of “specific intent” has been smoothed. The prevailing view is now that “specific intent” requires more than simple knowledge that pain and suffering will result from an act, as the circuit courts appear to be moving toward consensus. The Second, Third, and Ninth Circuits have all used as a touchstone the idea that specific intent requires that “the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences.” *Villegas*, 523 F.3d at 989 (citing *Pierre v. Gonzales*, 502 F.3d at 118); *see also Pierre v. Att’y Gen. of U.S.*, 528 F.3d at 189. This echoes the analysis in *Matter of J-E-*, where the Board noted that “[a]lthough Haitian authorities are intentionally detaining criminal deportees knowing [about the conditions], there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions” in order to create pain and suffering. *J-E-*, 23 I&N Dec. at 301. Each of the cases require that for an act that causes pain and suffering to be torture, the actor must have consciously desired pain and suffering to result. The Fifth and Eleventh Circuits, judging by the decisions in *Majd*, *Cadet*, and *Jean-Pierre*, also appear poised to follow this standard. The First Circuit has only dealt with detention cases that were found to be factually indistinguishable from *Matter of J-E-*. It is therefore difficult to predict how that circuit might rule in other contexts.

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1. *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 101-30, at 9 (1990); *see also* 136 Cong. Rec. S10,091 (daily ed. July 19, 1990) (statement of Sen. Pell), 1990 WL 100492 (Cong. Rec.).
2. For a more thorough discussion of the law regarding “acquiescence” and a “willful blindness” standard, *see* Theresa Donovan, *The Convention Against Torture: When does a Public Official Acquiesce to Torture Committed by a Third Party?*, Immigration Law Advisor, Vol. 1, No. 3 (Mar. 2007).
3. *See, e.g.*, Henry Mascia, Comment, *A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 Pace Int’l L. Rev. 287 (Fall 2007).
4. The Second Circuit, in considering the holding in *Zubeda*, dismissed similar concerns that under a “specific intent” standard, rape would no longer be considered “torture,” stating that it “presents special difficulties if (though only if) one thinks that the intent of a rapist is satisfaction that does not depend on the pain inflicted on the victim.” *Pierre v. Gonzales*, 502 F.3d at 117 n.5.

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR DECEMBER 2008

by John Guendelsberger

The United States Courts of Appeals issued 436 decisions in December 2008 in cases appealed from the Board. The courts affirmed the Board in 394 cases and reversed or remanded in 42, resulting in an overall reversal rate of 9.6% compared to last month's 10%. Six of the circuits issued no reversals or remands.

The chart below provides the results from each circuit for December 2008 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	9	9	0	0.0
2nd	93	83	7	7.8
3rd	12	10	2	16.7
4th	12	12	0	0.0
5th	23	23	0	0.0
6th	9	9	0	0.0
7th	9	7	2	22.2
8th	6	6	0	0.0
9th	231	203	28	12.1
10th	5	5	0	0.0
11th	30	27	3	10.0
All:	436	394	42	9.6

The Ninth Circuit issued well over half the decisions this month with reversals or remands in just over 12% of the cases decided. About half of the Ninth Circuit reversals or remands came in asylum cases. Of these, only four involved an adverse credibility determination. Other Ninth Circuit reversals in asylum cases included one denied for lack of nexus and two involving the level of harm for past persecution. Issues in other cases included a remand to reassess a frivolous filing determination under the Board's *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), framework and two Convention Against Torture remands. The court also reversed or remanded several denials of motions to reopen, two involving ineffective assistance of counsel and another in which the Board did not fully address an issue raised. The court remanded three cases to consider whether the conviction at issue was for "sexual abuse of a minor" under the approach recently outlined in *Estrada-Espinosa v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008). Two other

remands involved the "obstruction of justice" aggravated felony ground and the length of sentence imposed under the "crime of violence" aggravated felony ground.

Of the seven Second Circuit reversals, only two involved asylum. One remanded for further assessment of the nexus determination; the other remanded to further address evidence of changed country conditions in a motion to reopen. Two other decision were remanded to reconsider whether the recidivist drug possession conviction was an aggravated felony under *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008). Other remands involved reopening for an arriving alien's request for adjustment of status and for further consideration of section 212(h) eligibility.

The chart below shows the final stats for calendar year 2008 arranged by circuit from highest to lowest rate of reversal. The overall reversal rates by circuit from 2007 and 2006 are shown in the last two columns on the right.

Circuit	Total	Affirmed	Reversed	%	2007 %	2006 %
7th	111	92	19	17.1	29.2	24.8
9th	2023	1696	327	16.2	16.4	18.1
6th	92	81	11	12.0	13.6	13.0
2nd	1110	979	131	11.8	18.0	22.6
3rd	422	384	38	9.0	10.0	15.8
11th	225	205	20	8.9	10.9	8.6
8th	88	74	14	8.2	15.9	11.3
10th	55	52	3	5.5	7.0	18.0
1st	96	92	4	4.2	3.8	7.1
5th	159	154	5	4.2	8.7	5.9
4th	144	140	4	2.8	7.2	5.2
All:	4510	3942	568	12.6	15.3	17.5

During calendar year 2008, the Ninth Circuit issued the most reversals (327), about 57% of all reversals. The Second Circuit issued 131 reversals to account for 23%. Together, these two circuits issued 70% of the total decisions and 80% of all the reversals.

The number of total decisions, the number of reversals, and the reversal rate for all circuits taken

together fell over each of the last 2 years. In calendar year 2006 there were 944 reversals or remands out of 5398 total decisions (17.5%). In calendar year 2007 there were 753 reversals out of 4932 total decisions (15.3%). This year there were only 568 reversals out of 4510 total decisions, and the reversal rate dropped to 12.6%.

In 2006 and 2007, seven of the eleven circuits reversed in over 10% of decisions. In 2008, seven circuits reversed below 10%. The Seventh Circuit reversed at the highest rate in all 3 years, but the rate dropped significantly in 2008 from 29.2% to 17.1%.

John Guendelsberger is Senior Counsel to the Board Chairman and is currently serving as a temporary Board Member.

Nonreviewable Calls: Courts Limit Their Jurisdiction on Matters of “Agency Discretion”

by Edward R. Grant

The Super Bowl has come and gone and, with it another season of endless scintillating mysteries on the gridiron. The mysteries I refer to are not the gossipy fare, such as “How are the Jets going to blow it *this* year?” or “The Giants’ best receiver did *what* at a nightclub?” Rather, it is those spine-tingling moments when the referee is “under the hood” for Instant Replay, often (it seems) for longer than it takes to complete an average Master Calendar.

But before the aggrieved coach throws the replay flag, before the referee enters the *sanctum sanctorum* of “the hood,” and before the network cuts to another crummy Lite beer commercial, there is the question of jurisdiction: Do NFL rules allow a particular call made on the field to be reviewed on instant replay? Has a team exhausted its allotment of challenges? And when does a booth review become automatic, as opposed to discretionary?

As any fan will say, unresolved controversial calls remain a part of the game precisely because the rules do not allow certain on-field calls to be reviewed on replay. In one playoff game this season, for example, a team could not challenge the fact that the play clock had expired before the opposing offense had snapped the ball. The video evidence was unequivocal, but under the rules, there is no jurisdiction to review the matter. In addition,

some questionable calls are not reviewed because a team has exhausted its allotted challenges (think of this as a “number-barred” motion), or because the replay flag is thrown too late (think of this as a “time-barred” motion). Then there is the question of standard of review: What exactly is “conclusive evidence” that the on-field call was wrong? Are there parallels here to our own familiar standards of “clearly erroneous” and “manifestly contrary to law”?

For our purposes, we will stick to the question of jurisdiction. In recent months, the Federal circuit courts have issued a series of rulings that, for the most part, have acknowledged limits on their jurisdiction over matters entrusted to the discretion of Immigration Judges and the Board of Immigration Appeals. A new Congress, like the poo-bahs overseeing NFL replay rules, is free to change those jurisdictional rules. But for the moment, we appear to be in a phase where the Federal courts are closely examining whether they even have the authority to rule on certain questions presented to them in a petition for review. The cases discussed here will illustrate the point.

There Must Be a Standard To Review, or Does One Knee Really Equal Two Feet?

John Madden famously entitled his popular guide to watching pro football “One Knee Equals Two Feet.” Simply put, a receiver is in bounds if he gets both feet, or at least one knee, on the playing field before going out of bounds. A clear enough standard, set forth in the rule book, for a replay official to rely on and apply.

But what if that were not the rule? What if rule book gave the on-field referee wide discretion to decide if the receiver, even if he did not get both feet on the ground, still caught and gained control of the ball in bounds? And what if the rule book provided minimal standards for making that decision? In all likelihood, that would be a decision incapable of being reviewed.

The U.S. Court of Appeals for the Ninth Circuit, never known to be shy about asserting its own jurisdiction in immigration matters (even to the point of provoking intra-circuit squabbles on the subject, *see, e.g., Abebe v. Mukasey*, ___F.3d___, 2009 WL 50120 (9th Cir. Jan. 5, 2009); *Suntharalinkam v. Keisler*, 506 F.3d 822 (9th Cir. 2007)), recently faced a similar dilemma. The court concluded that it could not review for abuse of discretion

the Board's denial of an alien's request to "administratively close" her removal proceeding while she waited for her approved visa number to become current. *Diaz-Covarrubias v. Mukasey*, ___F.3d___, 2009 WL 50117 (9th Cir. Jan. 9, 2009). The reason? In the court's own words, the fact that the Board "has not set forth any meaningful standard for exercising its discretion to implement an administrative closure." *Id.* at *3.

Diaz-Covarrubias ("Ms. Diaz"), the petitioner in this case, first entered the United States in 1990 when she was apprehended at the border and then released. No charging document was issued until a Notice to Appear was filed in October 2000. She was denied cancellation of removal by an Immigration Judge, and while her appeal was pending before the Board, the visa petition filed for her by her sister was approved. However, a visa was not available because of the "sibling backlog." Ms. Diaz asked the Board to administratively close her proceedings until a visa number became current, but the Board declined. She petitioned the Ninth Circuit, claiming that the Board's denial was an abuse of discretion.

"[W]e have jurisdiction to determine our own jurisdiction," the court stated. *Id.* at *2 (quoting *Sareang Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000)). But on matters involving the exercise of administrative discretion, that determination requires that there be a standard for the exercise of discretion. Otherwise, the court has no basis to assess whether administrative discretion was abused.

The court pointed to two circumstances where there is no definable standard for the exercise of the Board's discretion: sua sponte authority, which is reserved for "exceptional circumstances," *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997), and administrative closure, which is a device of administrative convenience that cannot be employed if either party objects. *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996). In neither case, the Ninth Circuit concluded, is there a "sufficiently meaningful standard' for evaluating the BIA's decision." *Diaz-Covarrubias*, 2009 WL 50117, at *3 (quoting *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002) (finding no jurisdiction to review the denial of a request to reopen sua sponte)). Where such a "meaningful standard" is absent, the law should be construed to have committed the decision "to the agency's judgment absolutely. . . . [I]f no judicially manageable standards are available for judging how and when an agency should exercise its

discretion, then it is impossible to evaluate agency action for "abuse of discretion.'" *Id.* (quoting *Ekimian*, 303 F.3d at 1158 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985))). The court analogized Ms. Diaz's claim to cases where the Board or an Immigration Judge has declined to exercise sua sponte authority to grant an otherwise time-barred motion to reopen or reconsider. *See Ekimian*, 303 F.3d 1153.

Ms. Diaz's case was distinguishable, the court found, from two prior decisions in which the court seemingly expanded its jurisdiction over matters traditionally committed to agency discretion. *Alcaraz v. INS*, 384 F.3d 1150 (9th Cir. 2004), held that the court had jurisdiction to review whether the Board improperly failed to consider an alien's request for administrative closure and "repapering" of her deportation case. The difference in *Alcaraz*, the court found, was that detailed INS memoranda set forth criteria for "repapering" older deportation cases and allowing aliens to be placed in removal proceedings. *Alcaraz* held that these memoranda provided legal standards that "legally circumscribed" the agency's decision whether to "repaper," standards which the court could then apply in assessing whether the Board abused its discretion. *Id.* at 1161. No such standards, the court noted, were present in a straightforward application for administrative closure to await the availability of relief. *Diaz-Covarrubias*, 2009 WL 50117, at *4.

The Ninth Circuit also distinguished Ms. Diaz's case from its 2008 decision holding that it does have authority to review decisions to deny a continuance of immigration proceedings. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243 (9th Cir. 2008); *see also* Immigration Law Advisor, Vol. 1, No. 10 (Oct. 2007). The difference, again, was the presence in *Sandoval-Luna* of a legal standard for granting a continuance: the simple words "for good cause shown." 8 C.F.R. § 1003.29. That's right—those four simple words, according to *Sandoval-Luna*, provide a "hook" for judicial review of agency discretion that the "exceptional circumstances" standard for the exercise of sua sponte authority does not provide. *Sandoval-Luna*, 526 F.3d at 1246. And in the case of administrative closure, Ms. Diaz "has not pointed to *any* standard that the BIA could have mis-applied in denying her request for administrative closure, much less a 'sufficiently meaningful' standard." *Diaz-Covarrubias*, 2009 WL 50117, at *5.

The court's jurisdictional line-drawing seems reasonable enough but is perhaps not air tight. The difference between "exceptional circumstances" and "for good cause shown" seems paper-thin—yet the Ninth Circuit finds only the latter to constitute a "judicially manageable" standard that can be reviewed for abuse of discretion. Perhaps the real explanation lies not in the words, but in the reality: requests for a continuance arise in the midst of proceedings, and the context of the proceeding, coupled with the reasons for the requested continuance, can be addressed objectively, and at a distance. Decisions whether or not to grant motions *sua sponte*, however, almost always arise when a proceeding has been concluded and interests of finality (as well as adherence to rules governing the timing and numbers of motions) come into play. Perhaps this unarticulated distinction explains, as much as specific words like "exceptional" and "good cause," the jurisdictional lines currently painted by the Ninth Circuit.

On an Issue of Discretion, "Replay" Is Not a "Do Over"

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA") barred judicial review of denials of most forms of discretionary relief and waivers. Courts have uniformly found that this divests them of jurisdiction on the issue of "exceptional and extremely unusual hardship," one of the statutory prerequisites for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C § 1229b(b). *Barco-Sandoval v. Gonzales*, 516 F.3d 35 (2d Cir. 2008) (finding no jurisdiction to review a factual issue pertaining to hardship); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219 (11th Cir. 2006) (holding that REAL ID Act amendments to section 242(a)(2)(D) of the Act, 8 U.S.C § 1252(a)(2)(D), did not restore jurisdiction to review determinations of hardship in cancellation applications); *Meraz-Reyes v. Gonzales*, 436 F.3d 842 (8th Cir. 2006) (same); *De La Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006) (same); *Martinez-Rosas v. Gonzales*, 424 F.3d 926 (9th Cir. 2005) (same).

However, some cracks in this façade have emerged. The Third Circuit, in a recent unpublished case, found jurisdiction to review a Board decision on "hardship" that it found deficient as a matter of law. *Moran-Hernandez v. Att'y Gen. of the U.S.*, 294 Fed. Appx. 726, 729 (3d

Cir. 2008) (finding that the Board failed to consider all the evidence of hardship in reversing an Immigration Judge's decision that the requisite hardship had been established). That decision followed a Ninth Circuit precedent from 2006, holding that jurisdiction exists to review the question whether the Immigration Judge failed to apply the "controlling standard" in making a hardship determination. *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006), *overruled on other grounds*, *Estrada-Espinoza v. Gonzales*, 546 F.3d 1147 (9th Cir. 2008). Would these cases start a trend and convert questions of administrative fact-finding and discretion into ostensible questions of law?

A more recent Ninth Circuit decision suggests not. The court clarified that its limited jurisdiction on the issue of whether the correct "controlling standard" has been applied stops at that point: once it is clear that the Immigration Judge applied the correct standard, the court will not review the Immigration Judge's *application* of that standard in a specific case. *Mendez-Castro v. Mukasey*, ___F.3d___, 2009 WL 57046 (9th Cir. Jan. 12, 2009).

The petitioners in *Mendez-Castro* contended that the Immigration Judge had failed to apply the correct standard in ruling on their claim of hardship, and that his decision was inconsistent with other agency determinations involving similar facts and thus was an abuse of discretion amenable to judicial review under the *Afridi* exception. The court rejected both claims, first noting that the Immigration Judge had specifically cited to the Board's decision in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), and had also specifically addressed the special education needs of the petitioners' United States citizen daughter. The court also rejected the "similar case" claim, making the salient point that such decisions are inherently "subjective" and thus depend "on the 'identity' and the 'value judgment of the person or entity examining the issue.'" *Mendez-Castro*, 2009 WL 57046, at *4 (quoting *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003)).

Accordingly, a challenge to an IJ's hardship determination on such ground would require us to step into the IJ's shoes and reweigh the facts in light of the agency's subjective treatment of purportedly similar cases. This second claim is not even colorable, but merely constitutes an

attempt to “cloak[] an abuse of discretion argument” in the garb of a question of law.

Id. (quoting *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001)).

The court’s analysis makes some surprising points regarding the nature of determinations made in the exercise of administrative discretion. The court distinguished its holding in *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007), which found jurisdiction to review whether an alien’s late filing of his asylum application was justified by “changed circumstances.” That particular “call,” the court explained, is less “value-laden” than a question such as “exceptional and extremely unusual hardship,” and thus “does not reflect the decision maker’s beliefs in and assessment of worth and principle.” *Mendez-Castro*, 2009 WL 57046, at *4 (quoting *Ramadan*, 479 F.3d at 656). Note the acceptance, with no adverse comment, of the inherently subjective and “value-laden” aspects of an Immigration Judge’s decision on “hardship.” Note further the acceptance of the inevitable inconsistencies built in to this aspect of the administrative process, and the court’s reluctance to substitute its own personal, subjective, and value-laden judgment for that of the Immigration Judge or the Board. Indeed, the court offers these factors as pivotal reasons why it should not extend its jurisdictional writ to such questions.

Sua Sponte Issue? Throw the Flag at Your Own Risk

Both Immigration Judges and the Board have the authority on their own motion to reopen any case in which they have made a decision. 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). This is commonly referred to as the sua sponte authority, and may be employed in “exceptional circumstances” to waive the time and number limitations on motions to reopen. See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). As of this month, with a decision from the Fourth Circuit, the circuit courts are now unanimous that the decision whether or not to grant a motion in the exercise of this sua sponte authority is entirely within the discretion of the Board or Immigration Judge and is thus insulated from judicial review. See *Mosere v. Mukasey*, ___F.3d___, 2009 WL 58941 (4th Cir. Jan. 12, 2009); see also *Tamenut v. Mukasey*, 521 F.3d 1000, 1004-05 (8th Cir. 2008) (en banc) (per curiam); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Enriquez-Alvarado v.*

Ashcroft, 371 F.3d 246, 249-50 (5th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Luis v. INS*, 196 F.3d 36, 40-41 (1st Cir. 1999); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

While this jurisdictional rule is clear, the question of what constitutes a nonreviewable “sua sponte” matter is less certain. Recently, the Fifth Circuit held that the “no jurisdiction” rule extends to whether alleged ineffective assistance (or, now, “deficient performance”) of counsel should “equitably toll” the deadline for filing a motion to reopen. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). The petitioner in *Ramos-Bonilla* may have been genuinely victimized by his attorney’s misfiling of a NACARA application in 1999, resulting in the denial of relief. However, he did not file a motion addressing the issue of ineffective assistance until 5 years after the final Board decision in his case. The Board denied the motion as both untimely and number-barred and noted that even if the doctrine of equitable tolling applied in the Fifth Circuit, the respondent was not entitled to tolling because he had not shown due diligence.

Ramos-Bonilla did not directly address the availability of “equitable tolling”—a question on which the Fifth Circuit remains silent. But it found that the Board’s sole authority to grant the untimely motion lies in its nonreviewable discretion to waive the deadline sua sponte. As such, the question is beyond the purview of judicial review. The Fifth Circuit thus treated the motions deadline as jurisdictional, and the Board’s sua sponte authority as the only relief available from the deadline. Only the Eleventh Circuit has adopted a similar approach. See *Abdi v. U.S. Att’y Gen.*, 430 F.3d 1148 (11th Cir. 2005). Other circuits have treated the motions deadline as a statute of limitations, not a limit on jurisdiction, and thus amenable to equitable tolling. See, e.g., *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Iavorski v. U.S. INS*, 232 F.3d 124 (2d Cir. 2000). However, even in these circuits, the scope of review on questions of equitable tolling may be limited. The Seventh Circuit recently held that as long as the Board considers the issue of equitable tolling in denying an untimely motion to reopen based on ineffective assistance of counsel, its decision that the alien has failed to exercise due diligence in presenting the claim

is purely discretionary, and thus not subject to judicial review. *Johnson v. Mukasey*, 546 F.3d 403 (7th Cir. 2008). The same court also recently held that a determination by the Board that the alleged ineffective assistance of counsel did not alter the result in the case was a discretionary determination, and thus not subject to judicial review. *Jeziarski v. Mukasey*, 543 F.3d 886, 890-91 (7th Cir. 2008) (stating that review of ineffective assistance of counsel claims is limited to questions of law, including alleged deprivation of constitutional rights); *see also Adebowale v. Mukasey*, 546 F.3d 893, 896 (7th Cir. 2008) (finding no jurisdiction to review factual claims regarding an alien's failure to appear; review of legal questions is limited to whether the Board "has misinterpreted a statute, regulation, or constitutional provision, misread its own precedent, applied the wrong legal standard, or failed to exercise its discretion"); *Malik v. Mukasey*, 546 F.3d 890, 892-93 (7th Cir. 2008) (finding no jurisdiction to review the denial of a continuance where the aliens' claim for discretionary relief was "hopeless").

Occasionally, when the "sua sponte rule" bars a court from disturbing the denial of a motion, it may seek to influence the ultimate outcome through persuasion. *See, e.g., Mason v. Mukasey*, No. 07-4431, 2009 WL 40018 (6th Cir. Jan. 7, 2009). The petitioner, from Liberia, was denied asylum in 1998, and her appeal to the Board was dismissed as untimely later that same year. She claimed that she was not aware of the Board's decision and that she moved to Texas and lost contact with her former counsel. She later married a U.S. citizen, who filed an I-130 visa petition on her behalf, and who later developed cancer. Learning of the final order of removal against her, she moved to reopen her proceedings. The untimely motion was denied by the Immigration Judge, and that decision was affirmed by the Board. The court held that any claim to waive the motions deadline was solely within the discretion of the Board, and thus not reviewable. However, the court added: "Although we are unable to influence the BIA or the DHS in their discretionary decisions," the facts of the case warrant consideration of discretionary relief in the form of "deferred action" from DHS. *Id.* at *5. The court noted, among other things, that had the petitioner not come forward to apply for adjustment of status, she may have remained in the United States undisturbed, albeit unlawfully, for an indefinite period of time.

Finally, even a claim of manifest injustice—based on an alien's criminal offense no longer being considered a deportable offense as a result of judicial rulings since

the time of his hearing—is not an exception to the jurisdictional limits discussed here. If the alien or counsel conceded the charge and/or failed to contest deportability before the Board, a subsequent judicial ruling finding the crime not to be an aggravated felony or a crime involving moral turpitude does not exempt the alien from the consequences of his "failure to exhaust" his administrative remedies. *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008); *Grullon v. Mukasey*, 509 F.3d 107, 114-15 (2d Cir. 2007) (finding no "manifest injustice" exception to the exhaustion requirement in light of the holding in *Bowles v. Russell*, 551 U.S. 205 (2007)). *Grullon* stated that in light of *Bowles*—which emphasized the jurisdictional nature of statutory requirements that litigants exhaust their remedies—it would overrule *Marrero Pichardo v. Ashcroft*, 374 F.3d 46 (2d Cir. 2004) (finding that "manifest injustice" required granting a petition for review where the basis for the prior order of removal was vitiated by a subsequent judicial decision).

Immigration Judges and Board Members remain free to grant sua sponte relief from the time and number of motion limitations in circumstances as compelling as those presented in *Massis* and *Marrero Pichardo*, as well as in other "exceptional circumstances." But their decisions seem as insulated from judicial review as any decision within their jurisdiction. Prudent use of the sua sponte authority is likely to maintain that state of affairs for years to come.

Not Every Agency Decision Is a Matter of "Discretion"

A recent Second Circuit case reminds us that not all decisions committed to the authority of the Attorney General (or the Secretary of Homeland Security) are questions of "discretion" that, as such, are insulated from judicial review. *Ruiz v. Mukasey*, ___ F.3d ___, 2009 WL 57485 (2d Cir. Jan. 12, 2009). At issue was whether the Federal courts have jurisdiction to review DHS's denial of an I-130 spousal visa petition, and thus, whether the court should transfer the ill-filed petition for review to the district court (which has initial jurisdiction to review administrative determinations such as those on visa petitions).

The key question, the court held, is not whether the Immigration and Nationality Act commits the visa petition decision to the *authority* of the "Attorney General" [sic—reflecting obsolete language in section 204(b) of the

Act, 8 U.S.C § 1154(b)], but whether the Act specifically commits that decision to the *discretion* of the Attorney General. While the Act authorizes the Attorney General to “determine” whether the facts alleged in a visa petition are true and, whether, based on those facts, the alien meets the definition of an “immediate relative” under the Act, it does not specifically state that such decisions are within the “discretion” of the Attorney General. Thus, language elsewhere in the Act limiting judicial review of matters committed to agency discretion is not applicable. *See* section 242(a)(2)(B)(ii) of the Act.

Conclusion

Jurisdictional rules, the bane of every law student trying to comprehend Civil Procedure II, remain difficult to comprehend even after years of practice, and even when Congress has defined the jurisdiction of the Federal courts, as it did in IIRIRA and the REAL ID Act. This brief tour of recent cases illustrates the point. But what Congress has given, Congress can take away—or, more precisely, what Congress has taken away (from Federal court jurisdiction), Congress can also give back. The cases discussed here demonstrate no appetite on the part of the circuit courts to review questions that are genuine issues of discretion. And they provide some solid legal reasoning for why such decisions should remain the sole province of the Immigration Courts and the Board. It remains to be seen if a new Congress, and a new Administration, aim to rewrite the rules for this particular form of “instant replay.”

Edward R. Grant has been a member of the Board of Immigration Appeals since John Elway finally redeemed himself and won the Super Bowl.

RECENT COURT DECISIONS

Supreme Court:

Nijhawan v. Mukasey, ___S.Ct.___, 2009 WL 104300 (Jan. 16, 2009): The Supreme Court granted certiorari, limited to the following question: “Whether petitioner’s conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an ‘offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000,’ where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded \$100 million,

and the judgment of conviction and restitution order calculated total victim loss at more than \$680 million.”

First Circuit:

Ravix v. Mukasey, ___F.3d___, 2009 WL 57820 (1st Cir. Jan. 12, 2009): The First Circuit dismissed the respondent’s appeal from an Immigration Judge’s denial of her asylum application, which was affirmed by the Board. The asylum claim of the respondent, a citizen of Haiti, was based on threats resulting from the political activities of her husband, who had come to the U.S. in 2001 but never filed for asylum himself. The Immigration Judge denied the claim for a variety of reasons, finding that the threats were not based on the respondent’s own actions but on those of her husband; that the respondent suffered no harm and the threats were not shown to be sufficiently credible or imminent; that an incident in which a rock was thrown at her husband had not been shown to be politically motivated; that the respondent traveled to the U.S. and returned to Haiti several times; and that the Government of Haiti had changed since the incidents occurred. The court found that although the Immigration Judge could have granted the petition under the facts of the case, the denial was supported by substantial evidence.

Second Circuit:

Zheng v. Mukasey, ___F.3d___, 2009 WL 71192 (2d Cir. Jan. 13, 2009): The Second Circuit sustained the appeal from an Immigration Judge’s decision (affirmed by the Board), pretermittting the respondent’s asylum application as untimely and, alternatively, finding him not credible. The court found that a due process violation resulted from the Immigration Judge’s failure to consider the respondent’s date of entry as alleged in the Notice of Appeal. The court also reversed the adverse credibility finding (which was not governed by the REAL ID Act), because it was based on one assumption that was in error and another that the court deemed irrelevant.

Singh v. Mukasey, ___ F.3d ___, 2009 WL 129913 (2d Cir. Jan. 21, 2009): The petitioner, a citizen of India and permanent resident of the U.S., sought review of the Board’s decision which ordered him removed and deported from the U.S. as an “alien smuggler.” He claimed that the Immigration Judge erred in making unsupported credibility findings, and in not suppressing statements the he had allegedly made. The court determined that under the totality of the circumstances, the Immigration Judge’s adverse credibility finding was improper, and, since the

petitioner's statement was substantially undermined, it should have been suppressed.

Fourth Circuit:

Mosere v. Mukasey, __F.3d__, 2009 WL 58941 (4th Cir. Jan. 12, 2009): The Fourth Circuit dismissed the respondent's appeal from an Immigration Judge's decision denying her motion to reopen as untimely. The respondent had been granted voluntary departure by an Immigration Judge, requiring her to depart by June 1997. She filed her motion to reopen more than 10 years later. In her motion, she claimed that she had failed to timely depart because of country conditions in Sierra Leone and health problems. She sought reopening as she was eligible to adjust status based on an approved I-130 filed by her U.S. citizen son. The court upheld the Immigration Judge's determination that the motion was untimely. As to the respondent's claim that the Immigration Judge erred in failing to reopen sua sponte, the court noted that the regulations allow, but do not require, an Immigration Judge to reopen on his or her own motion. The court agreed with the holdings of eight other circuits, which found the issue unreviewable because of the lack of meaningful standards governing the appropriate exercise of such authority.

Fifth Circuit:

McCarthy v. Mukasey, __F.3d__, 2009 WL 91710 (5th Cir. Jan. 13, 2009): The Fifth Circuit dismissed the respondent's appeal from an order of removal issued by DHS. The respondent entered the U.S. under the Visa Waiver Pilot Program, which required her to depart the country within 90 days. She married a U.S. citizen on the 88th day and then filed an adjustment application a year later. The court agreed with the DHS that by entering under the VWP program, she had waived her right to adjust her status and to contest removal before an Immigration Judge.

Ninth Circuit:

Abebe v. Mukasey, __F.3d__, 2009 WL 50120 (9th Cir. Jan. 5, 2009): The court reissued an en banc decision previously published in November 2008, dismissing an appeal from an Immigration Judge's finding that the respondent was ineligible for section 212(c) relief because the crime for which he was convicted had no corresponding exclusion ground. The court revisited its 1981 ruling in *Tapia-Acuna v. INS* and overruled its holding extending section 212(c) relief to deportable aliens under an equal protection argument. Noting Congress's broad and

sweeping powers over immigration, the court found that the proper standard for its review was not whether the availability of a section 212(c) waiver to excludable (but not deportable) aliens made sense to the court, but rather whether it could conceive of a rational reason for such distinction. The court concluded that such a reason could have been to create a motive for deportable aliens to depart the United States. The new decision contains additional language in the majority decision addressing the dissent; the previous concurring and dissenting opinions are unaffected.

Mendez v. Mukasey, __F.3d__, 2009 WL 57046 (9th Cir. Jan. 12, 2009): The Ninth Circuit dismissed the appeal from an Immigration Judge's denial of an application for non-LPR cancellation of removal, which was affirmed by the Board. The court noted that the REAL ID Act limited its review only to constitutional claims or questions of law. The court found that the Immigration Judge applied the proper legal standard. The respondent argued that the Immigration Judge erred in failing to afford proper weight to his daughter's speech impediment under the Board's precedent decision in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). The court noted that the Immigration Judge referenced both the speech impediment and *Monreal* in the decision; therefore, the issue was with the Immigration Judge's subjective consideration of these factors, which was beyond the scope of the court's jurisdiction.

Minasyan v. Mukasey, __F.3d__, 2009 WL 115368 (9th Cir. Jan. 20, 2009): the court addressed the question of when the "1 year" period for filing an asylum application begins. The court found that section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B), was "perfectly clear" that the "year" in question commences after the date of arrival (meaning that the date of arrival does not count as "day one" for purposes of this filing deadline). The court reversed the decision of the Board, which found that the year period ran from one date to the prior date in the next year. The petitioner had arrived on April 9, 2001, and filed his application on April 9, 2002. Under the Board's calculation he was not eligible for asylum, but under the court's holding, he was not barred.

Eleventh Circuit:

Singh v. U.S. Atty Gen., __F.3d__, 2008 WL 5412352 (11th Cir. Dec. 31, 2008): The Eleventh Circuit dismissed the appeal of an Immigration Judge's order of removal, finding the respondent deportable as an aggravated

felon. The respondent committed the underlying crime of burglary when he was 15 years old. However, he was not tried as a juvenile; he was convicted in State court and sentenced to 364 days in prison, community control, and 3 years' probation. He was subsequently placed into removal proceedings, where he was granted cancellation of removal. After violating the conditions of community control, the respondent was resentenced to 6.6 years in prison. Removal proceedings were again instituted, and the Immigration Judge found the respondent removable as an aggravated felon and ineligible for CAT protection. The court dismissed the respondent's arguments that his State court conviction could not render him deportable, as Federal law would have required him to be tried as a juvenile, and that *res judicata* prohibited his removal for the same underlying crime for which he was previously granted cancellation of removal. The court further upheld the CAT determination within the limited scope to review the issue afforded by the REAL ID Act.

BIA PRECEDENT DECISIONS

In *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009), *overruling in part Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), the Attorney General found that there was no constitutional right to counsel in removal proceedings and therefore no right to effective counsel under either the Fifth or Sixth Amendments. He held, however, that in the exercise of his discretion, an alien can file a motion to reopen removal proceedings where a lawyer's deficient performance likely changed the outcome of the removal proceeding. This type of claim is referred to as a "deficient performance of counsel" claim. *Id.* at 730. The Attorney General set out requirements that must be met for an alien to establish that reopening is warranted based on a lawyer's deficient performance. This administrative framework supersedes that set forth in *Matter of Lozada*, although it draws heavily from its approach.

First, to prevail on a deficient performance of counsel claim, an alien bears the burden of establishing three elements:

The alien must show that his lawyer's failings were "egregious." It is not enough to show an ordinary

mistake or to claim that a more compelling case could have been presented.

In cases where the alien moves to reopen beyond the statutory time limit (typically 90 days after the removal order is entered), the Board may toll the filing period only if the alien shows that he exercised due diligence in discovering and seeking to cure the alleged deficient performance. The Board should evaluate due diligence on a case-by-case basis, taking into account the circumstances of the case and the reasons offered for any delay, using a "reasonable person" standard.

An alien must establish prejudice arising from the lawyer's errors by showing that, but for the deficient performance, it is more likely than not that the alien would have been entitled to the ultimate relief he was seeking.

Second, the alien must submit a detailed affidavit setting forth his claim and explaining with specificity what his lawyer did or did not do, and why he was harmed as a result. Additionally, the alien must attach five documents to his motion, and if they are unavailable, the alien must explain why. If any document is missing rather than nonexistent, the alien must summarize the document's contents in his affidavit. These documents are:

A copy of the agreement, if any, with the lawyer whose performance is allegedly deficient. If there is no written agreement, the alien must specify in his affidavit what the lawyer agreed to do, including whether it included the particular step in the proceedings in which the deficient performance is alleged to have occurred.

A copy of a letter to former counsel setting forth the lawyer's deficient performance and a copy of the lawyer's response, if any. If the alien never received a response from the lawyer, the affidavit must note the date on which he mailed his letter and state whether he made any other efforts to notify the lawyer.

A completed and signed complaint addressed to the appropriate State bar or disciplinary authorities. There is no requirement that the complaint be actually filed. If the claim is against an accredited

representative, the alien must instead attach a complaint filed with EOIR disciplinary counsel. *See Compean*, 24 I&N Dec. at 737 n.10.

If the claim is that the former lawyer failed to submit something to the Immigration Judge or the Board, the alien must submit it with the motion. For example, if the claim is that an appellate brief was not filed, the alien must submit in substance and detail, if not in form, a copy of the brief that he alleges should have been filed. If the claim is that certain evidence was not submitted, that evidence must be provided either directly or in an affidavit (e.g., where testimony is involved). The alien must also explain in his affidavit whether he told his former lawyer about the evidence or testimony in question, and if not, why not.

Where an alien is represented by counsel in seeking reopening, the motion must contain a specifically worded statement from the attorney that he believes former counsel performed below minimal standards of professional competence.

The Attorney General also found that the Board's discretion to reopen on the basis of a lawyer's deficient performance is not limited to conduct that occurred during agency proceedings; reopening may occur based on conduct subsequent to the entry of a final order of removal.

Finally, the deficient performance claim established in *Compean* extends only to the conduct of a lawyer, an accredited representative, or a non-lawyer whom the alien reasonably, but erroneously, believed to be a lawyer and who was retained to represent the alien in proceedings.

The Board considered an attorney's request to set aside its suspension order in an attorney discipline case, *Matter of Rosenberg*, 24 I&N Dec. 744 (BIA 2009). The attorney is suspended from practice before the United States Court of Appeals for the Ninth Circuit, which led to the Board's suspension order. He argued that the Ninth Circuit did not make any findings about his practice before the Board, the Department of Homeland Security ("DHS"), or the Immigration Courts, that he is in good standing before the California State Bar, and that the order imposes hardships on his many clients. The regulations provide that an immediate suspension order may be set aside "[u]pon good cause shown . . . when it appears in

the interest of justice to do so." 8 C.F.R. § 1003.103(a)(2) (2008). The Board found that the attorney's claim did not establish good cause to set aside the suspension order, because his misconduct involved immigration cases, and, by regulation, his suspension before the Federal court rendered him ineligible to practice before the EOIR or DHS, regardless of his status before the California State Bar. The Board also found that it was not in the interest of justice to set aside its immediate suspension order where the attorney failed to object to the Ninth Circuit Appellate Commissioner's Report and Recommendation and he is therefore not likely to prevail on the merits of the attorney discipline case, given the heavy burden of proof under 8 C.F.R. § 1003.103(b)(2).

REGULATORY UPDATE

74 Fed. Reg. 2824 (2009)

DEPARTMENT OF HOMELAND SECURITY
Bureau of Customs and Border Protection
8 CFR Parts 100, 212, 214, 215, 233, and 235
19 CFR Parts 4 and 122

Establishing U.S. Ports of Entry in the Commonwealth of the Northern Mariana Islands (CNMI) and Implementing the Guam-CNMI Visa Waiver Program

ACTION: Interim final rule; solicitation of comments.
SUMMARY: Section 702 of the Consolidated Natural Resources Act of 2008 (CNRA) extends the immigration laws of the United States to the Commonwealth of the Northern Mariana Islands (CNMI) and provides for a visa waiver program for travel to Guam and the CNMI. This rule implements section 702 of the CNRA by amending U.S. Customs and Border Protection (CBP) regulations to replace the current Guam Visa Waiver Program with a new Guam-CNMI Visa Waiver Program. Accordingly, this interim final rule sets forth the requirements for nonimmigrant visitors who seek admission for business or pleasure and solely for entry into and stay on Guam or the CNMI without a visa for a period of authorized stay of no longer than forty-five days. In addition, this rule establishes six ports of entry in the CNMI in order to administer and enforce the Guam-CNMI Visa Waiver Program and to allow for immigration inspections in the CNMI, including arrival and departure controls, under the Immigration and Nationality Act (INA).

DATES: Effective Date: This interim final rule is effective January 16, 2009.

74 Fed. Reg. 2337 (2009)

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1274a

Reorganization of Regulations on Control of Employment of Aliens

ACTION: Interim rule with request for comments.

SUMMARY: The Homeland Security Act of 2002, as amended, transferred the functions of the former Immigration and Naturalization Service (INS) from the Department of Justice to the Department of Homeland Security (DHS); however, it retained within the Department of Justice the functions of the Executive Office for Immigration Review (EOIR), a separate agency within the Department of Justice. Because the existing regulations often intermingled the responsibilities of the former INS and EOIR, this transfer required a reorganization of title 8 of the Code of Federal Regulations (CFR) in February 2003, including the establishment of a new chapter V in 8 CFR pertaining to EOIR. As part of this reorganization, a number of regulations pertaining to the responsibilities of DHS intentionally were duplicated in the new chapter V because of shared responsibilities. The Department of Justice now has determined that most of the duplicated regulations in part 1274a pertain to functions that are DHS's responsibility and do not need to be reproduced in EOIR's regulations in chapter V. This interim rule, therefore, deletes unnecessary regulations in part 1274a and makes appropriate reference to the applicable DHS regulations.

DATES: Effective Date: This rule is effective January 15, 2009.

74 Fed. Reg. 912

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Change in Filing Location for EB-5-Related Petitions and Applications and Regional Center Proposals

ACTION: Notice.

SUMMARY: This Notice announces the requirement that petitions and applications related to the Alien

Entrepreneur (EB-5) immigrant classification, and Regional Center Proposals under the EB-5 Immigrant Investor Pilot Program, must be filed at the California Service Center (CSC). Currently, EB-5-related petitions and applications are filed at either the Texas Service Center (TSC) or the CSC, depending on where the alien's commercial enterprise is located. Regional center proposals are being submitted to the Chief of USCIS Service Centers at USCIS Headquarters. The change to one filing location for EB-5-related petitions, applications, and regional center proposals announced by this Notice is necessary to improve the efficiency in the processing of EB-5-related filings.

DATES: This Notice is effective January 26, 2009 for the filing of Forms I-526, I-829, and Forms I-485 based on an approved Form I-526. This Notice is effective January 26, 2009 for the filing of Regional Center Proposals under the Immigrant Investor Pilot Program.

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