



# Immigration Law Advisor

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## Treatment of Criminal Convictions in the Immigration Context

by Josh Adams

### INTRODUCTION

In the immigration context, criminal convictions can result in removability, inadmissibility, or ineligibility for relief. *See, e.g.*, sections 237(a)(2)(A)(iii) (making aggravated felons removable); section 212(a)(2)(C)(i) (making controlled-substance traffickers inadmissible); section 240A (precluding cancellation of removal for lawful permanent residents convicted of aggravated felonies) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(2)(C)(i), 1227 (a)(2)(A)(iii) and 1229a. In removal proceedings, the Department of Homeland Security (“DHS”) often produces uncontroverted evidence of criminal convictions. For a variety of reasons, however, aliens sometimes have good reason to dispute the immigration consequences of criminal convictions. This article begins by surveying statutory and judicial authority on what constitutes a “conviction” for immigration purposes and concludes by discussing evidentiary concerns, namely the burden of production and proof of purpose.

### IMMIGRATION AND NATIONALITY ACT

Section 322(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (“IIRIRA”) (codified at section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48)), added a definition of “conviction” to the Immigration and Nationality Act (INA or the Act):

(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty<sup>1</sup> to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

This provision is the starting point for any consideration of what constitutes a conviction for immigration purposes. The plain text of section 101(a) (48) of the act forecloses the arguments that a conviction does not exist where an alien pled nolo contendere rather than guilty or imposition of the sentence was delayed, suspended, or not executed.

### CONVICTIONS OF JUVENILES

The Board of Immigration Appeals held in *Matter of F-*, 4 I&N Dec. 726, 728 (BIA 1952), that adjudications of juvenile delinquency do not constitute convictions for immigration purposes. The policy basis for this rule is the fact that "juvenile delinquency adjudications are not criminal proceedings, but are adjudications that are civil in nature, wherein the applicable due process standard is fundamental fairness." *Matter of Devisons*, 22 I&N Dec. 1362, 1366 (BIA 2000) (footnote and citations omitted).

#### *Federal Juvenile Delinquency Act*

The Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 et seq., as amended by the Juvenile and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (effective Sept. 7, 1974), governs criminal proceedings brought against minors pursuant to Federal law. Under the Federal Juvenile Delinquency Act, no person under 16 years of age is subject to criminal prosecution for violation of Federal law unless he waives his right to

juvenile treatment. 18 U.S.C. § 5032. A person between 16 and 18 years of age may be prosecuted as an adult, upon motion of the prosecutor, if the potential punishment for the crime is more than 10 years' imprisonment, life imprisonment, or death. Thus, a juvenile delinquency proceeding brought against a minor alien pursuant to Federal law has no immigration consequences unless (1) the alien waived juvenile delinquent status and was prosecuted as an adult or (2) the alien was between 16 and 18 years of age, the crime carried an extremely serious penalty, and the Federal prosecutor successfully moved for adult treatment of the alien.

The Board has applied the standards of the Federal Juvenile Delinquency Act to crimes committed abroad by juvenile aliens. Thus, a crime committed by an alien not yet 16 years old has no immigration consequences, regardless of the convicting sovereign's treatment of the crime, unless the alien waived juvenile-delinquent treatment at the advice of counsel. *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 138-39 (BIA 1981). With respect to a crime committed abroad by an alien between the ages of 16 and 18, the Immigration Court must consider "the maximum punishment imposable for an equivalent crime described in the United States Code or, if an equivalent crime is not found there, in the District of Columbia Code." *Matter of De La Nues*, 18 I&N Dec. 140, 143 (BIA 1981). If the maximum punishment is less than 10 years' imprisonment, the crime has no immigration consequences. *Id.* If the punishment is death, life imprisonment, or imprisonment for more than 10 years, the crime has immigration consequences, unless the alien can demonstrate that he received juvenile delinquent treatment. *Id.* Imposition of a determinate sentence in the foreign jurisdiction, lasting into adulthood, implies that the foreign sovereign treated the alien as an adult, and the conviction has immigration consequences. *Id.* at 144-45.

#### *State Proceedings Against Juvenile Aliens*

With respect to the immigration consequences of State-law convictions of juveniles, the Federal Juvenile Delinquency Act does not apply. The United States Circuit Courts of Appeal for the First, Second, and Ninth have simply given effect to the decisions of State sovereigns to prosecute juveniles as criminal offenders or as juvenile delinquents. An alien juvenile prosecuted by the State sovereign as an adult suffers immigration consequences, but an alien juvenile treated by the State sovereign as a juvenile delinquent does not. *Savchuck v. Mukasey*,

518 F.3d 119, 122 (2d Cir. 2008); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 923 (9th Cir. 2007); *Vieira Garcia v. INS*, 239 F.3d 409, 413-14 (1st Cir. 2001).

#### VACATED AND EXPUNGED CONVICTIONS - *The Nearly Universal Rule*

The expungement of a record of conviction is “[t]he removal of a conviction (esp. for a first offense) from a person’s criminal record.” *Black’s Law Dictionary* 621 (8th ed. 2004). A vacatur is “[t]he act of annulling or setting aside [or a] rule or order by which a proceeding is vacated.” *Id.* at 1546. In the immigration context, the difference between a vacatur and an expungement involves intent. Criminal courts typically expunge convictions in order to rehabilitate offenders or, in the case of aliens, to prevent negative immigration consequences. Criminal courts typically vacate convictions because the convictions are substantively defective, for example a due process or the right to counsel violations at trial. Accordingly, this article uses the term “vacatur” to mean removal of a conviction because of substantive defects in the conviction and uses the term “expungement” to mean removal of a conviction to rehabilitate or to prevent immigration consequences. Some courts use the terms “vacatur” and “expungement” differently, however, and some courts use entirely different terms to express these concepts.

The Act is silent as to whether a criminal conviction that has been vacated or expunged has immigration consequences. The Attorney General, the Board, and, with one exception, the circuit courts of appeals have adopted the following rule:

[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a “conviction” within the meaning of section 101(a)(48)(A). If, however, a court vacates [or expunges] a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains “convicted” for immigration purposes.

*Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (footnote omitted); *Accord Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006); *Alim v. Gonzales*, 446 F.3d 1239, 1248-49 (11th Cir. 2006); *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. 2005); *Cruz-Garza v. Ashcroft*,

396 F.3d 1125, 1129 (10th Cir. 2005); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001); *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 713 (A.G. 2005). The Fifth Circuit, by contrast, has held that convictions vacated for *any* reason, including substantive defects, retain their immigration consequences. *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 291 (5th Cir. 2007).

#### *Exception for Controlled Substance Convictions*

In *Matter of Werk*, 16 I&N Dec. 234, 236 (BIA 1977), the Board held that a Federal controlled substance conviction expunged pursuant to a Federal rehabilitative statute, 21 U.S.C. § 844(b)(1), must not be given effect in the immigration context. In *Werk*, the Board also held that a State controlled substance conviction, expunged pursuant to state law, must also not be given effect if the alien would have qualified for an expungement under the Federal rehabilitative statute. *Id.*

Congress repealed 21 U.S.C. 844(b) in 1984 but reenacted a similar statute in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, title II, § 212(a)(2), 98 Stat. 1837, 2003 (effective Nov. 1, 1987) (codified at 18 U.S.C. § 3607). Under this statute, known as the Federal First Offender Act, a person convicted of a Federal controlled substance crime who has never previously been convicted of a controlled substance crime and who has never previously benefited from the Federal First Offender Act can have his conviction expunged. 18 U.S.C. § 3607(a). Over time, the Board continued to apply the *Werk* rule to State controlled substance convictions but placed a limitation on the rule’s benefits. Thus if a State rehabilitative statute covered a wider spectrum of offenders than the Federal First Offender Act, for example by benefiting controlled-substance traffickers, as well as possessors, the State rehabilitative statute had no effect for immigration purposes. *Matter of Deris*, 20 I&N Dec. 5, 11 (BIA 1989). The Ninth Circuit rejected the *Deris* limitation as “wholly irrational” in *Garberding v. INS*, 30 F.3d 1187, 1190 (9th Cir. 1994). The court held that an alien with an expunged controlled substance conviction qualifies for first-offender treatment, regardless of the breadth of the convicting state’s rehabilitative statute, so long as he could have qualified for Federal First Offender Act treatment if prosecuted under Federal law. *Id.* at 1191.

In *Matter of Roldan*, 22 I&N Dec. 512, 529 (BIA 1999), the Board, relying on Congress’s recently enacted definition of a “conviction” in section 101(a)(48) of

the Act, ceased to recognize State expungements of controlled-substance convictions. The Ninth Circuit declined to follow *Roldan* in *Lujan-Armendariz v. INS*, 222 F.3d 728, 749-50 (9th Cir. 2000). In doing so, the Ninth Circuit concluded that only if Congress had implicitly repealed the Federal First Offender Act by enacting the definition of a “conviction” in section 101(a) (48) of the Act could the result in *Roldan* be correct. *Id.* at 742. The Ninth Circuit found that Congress had not done so. *Id.* at 748. Thus, in the Ninth Circuit, but in no other circuit, the expungement of a first-time controlled substance conviction by a State rehabilitative statute must be given effect in the immigration context if the alien would have qualified for Federal First Offender Act treatment. *Elkins v. Comfort*, 392 F.3d 1159, 1163 (10th Cir. 2004) (disagreeing with *Lujan-Armendariz*); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004); *Acosta v. Ashcroft*, 341 F.3d 218, 226 (3d Cir. 2003); *Gill v. Ashcroft*, 335 F.3d 574, 579 (7th Cir. 2003); *Vasquez-Velezmore v. U.S. INS*, 281 F.3d 693, 697 (8th Cir. 2002).

The Ninth Circuit’s *Lujan-Armendariz* rule has an important limitation. A conviction is only considered expunged and therefore without immigration consequences if the conviction is actually expunged. *Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1292 (9th Cir. 2004). Eligibility for expungement does not nullify a controlled substance conviction for immigration purposes. *Id.* The practical effect of this limitation is to greatly reduce the class of aliens eligible to benefit from *Lujan-Armendariz*. This class is small because criminal aliens often go directly from State incarceration to immigration detention and removal proceedings. In most cases, these detained aliens do not have the time or the ability to complete the steps required for expungement prior to the conclusion of removal proceedings.

#### EVIDENTIARY CONCERNS - *Burden of Production*

Who has the burden of production with respect to the question whether a State court set aside a controlled substance conviction because of substantive defects in the conviction or rehabilitative reasons unrelated to the conviction itself? There is a circuit split. The Ninth Circuit placed the burden on the DHS in *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (finding that the DHS “failed to carry its burden of proof on the question of the reasons the state set aside [a] conviction” where the reasons for the set-aside were unclear). In a sparsely reasoned dictum, the Second Circuit intimated that the

burden is on the DHS. *Saleh v. Gonzales*, 495 F.3d 17, 20 n.4 (2d Cir. 2007).

But the First Circuit placed the burden on the alien. *Rumierz v. Gonzales*, 456 F.3d 31, 40 (1st Cir. 2006) (“[I]t was [the alien’s] burden to show that the vacating of [a state] conviction was based on a procedural or substantive invalidity . . .”). The Sixth Circuit also placed the burden on the alien. In *Sanusi v. Gonzales*, 474 F.3d 341, 347 (6th Cir. 2007), that court considered the effect of a State court’s writ of coram nobis for a conviction. The record before the Sixth Circuit was silent as to the writ’s legal basis. *Id.* The court inferred from the record’s silence that “the conviction was vacated for the sole purpose of relieving [the alien] from deportation” and concluded that the vacatur had no effect on the conviction’s immigration consequences. *Id.*<sup>2</sup>

#### *Proof of a Vacatur’s or Expungement’s Purpose*

Aside from the question of burden, how might a party to removal proceedings demonstrate to an Immigration Judge the reason for a vacatur or expungement? The DHS might show that a conviction was expunged for rehabilitative reasons by offering evidence that a Texas conviction was expunged pursuant to Texas Code of Criminal Procedure article 42.12 of the section 5. The Fifth Circuit has held that convictions expunged pursuant to this statute retain their immigration consequences because the Texas statute is rehabilitative. *Moosa v. INS*, 171 F.3d 994, 1010 (5th Cir. 1999). Evidence that a conviction was expunged pursuant to section 1210 of the California Penal Code or Arizona Revised Statutes section 13-907(A), would allow the Department to demonstrate the rehabilitative nature of an expungement, as the Ninth Circuit has found those two statutes to be rehabilitative. *Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 981 (9th Cir. 2006) (California)<sup>3</sup>; *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (Arizona).

An alien in the Sixth Circuit could show that his Canadian conviction was vacated for a substantive rather than a rehabilitative reason by offering evidence that a Canadian court vacated his conviction pursuant to section 24(1) of the Canadian Charter of Rights and Freedoms because, as the Six Circuit observed, a Canadian court may vacate a conviction pursuant to this charter only if a person’s “rights or freedoms, as guaranteed by [the] Charter, have been infringed or denied.” *Pickering v. Gonzales*, 465 F.3d 263, 268 (6th Cir. 2006) (quoting

section 24(1)). Similarly, an alien in the Seventh Circuit could show that his Illinois conviction was vacated for a substantive reason by offering evidence that an Illinois court vacated his conviction pursuant to 725 Illinois Compiled Statutes 5/122-1, a statute that “provides a remedy to state criminal defendants claiming substantial violations of their federal or state constitutional rights by allowing collateral attack on a judgment of conviction.” *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001). Finally, an alien in the Third Circuit could show that his New Jersey conviction was vacated for a substantive reason by offering evidence that a New Jersey court vacated his conviction upon a finding of ineffective assistance of counsel. *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. 2005).

### CONCLUSION

As the foregoing survey has demonstrated, what constitutes a “conviction” for immigration purposes is not always easy to determine. Complicating matters, this area of law may be subject to further development, as there are at least two circuit splits, described above in Parts II.A and II.B, and many circuits have not spoken at all on certain issues, such as the allocation of burden with respect to the purpose of vacatur and expungements. But careful analysis of Federal, State, International law and Judicial precedent allows jurists to correctly decide when to apply the immigration disabilities of criminal convictions.

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1. The “restraint on liberty” provision suggests the following hypothetical. What if an alien is indicted for a domestic-violence crime, adjudication of guilt is never imposed, and a court, either a criminal court or a family court, orders that the alien stay away from the alleged victim? There is an argument that the stay-away order, acting both as a punishment and as a restraint on liberty, makes the prosecution a conviction for immigration purposes.

2. Ironically, the Second Circuit had cited an earlier Sixth Circuit opinion for the proposition that the burden was on DHS. *Saleh v. Gonzales*, 495 F.3d 17, 20 n.4 (2d Cir. 2007) (“Although the Government bears the burden of proving, by clear and convincing evidence, that [the alien] is removable, see 8 U.S.C. § 1229a(c)(3)(A); . . . see also *Pickering v. Gonzales*, 465 F.3d 263, 268-69 (6th Cir. 2006), . . . [the alien] did not dispute before the IJ or the BIA or in his brief in this appeal that the California court amended the judgment of conviction to help him avoid immigration hardships, so we deem any argument to the contrary waived.”).

3. Here, the court found the petitioner was ineligible for relief under Lujan-Armendariz because he was ineligible for first offender treatment because the conviction at issue was his second drug offense. However, the court appeared to leave open the possibility that, in certain circumstances, a first drug offense that was expunged under section 1210 of the California Penal Code could be eliminated for immigration purposes under Lujan-Armendariz.

## FEDERAL COURT ACTIVITY

### CIRCUIT COURT DECISIONS FOR SEPTEMBER 2008

by John Guendelsberger

The United States Courts of Appeals issued 438 decisions in September 2008 in cases appealed from the Board. The courts affirmed the Board in 396 cases and reversed or remanded in 42 for an overall reversal rate of 9.6% compared to last month’s 16.5%.

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

Circuit	Total	Affirmed	Reversed	%
1st	11	9	2	18.2
2nd	102	97	5	4.9
3rd	21	19	2	9.5
4th	16	16	0	0.0
5th	18	17	1	5.6
6th	9	8	1	11.1
7th	11	10	1	9.1
8th	2	1	1	50.0
9th	233	208	25	10.7
10th	2	2	0	0.0
11th	13	9	4	30.8
All:	438	396	42	9.6

The Ninth Circuit accounted for over half of all the decisions and nearly 60% of reversals. Three of the Ninth Circuit reversals involved the credibility determination in an asylum claim. Other asylum issues included nexus (4 cases), past persecution, pattern and practice of persecution, burden of proof as to relocation possibilities, and the persecution of others bar. The Ninth Circuit reversed in two cases involving the hardship standard for cancellation of removal, finding in one that the wrong standard had been applied, and in the other that there was inadequate explanation as to why the “exceptional and extremely unusual” hardship was not met. In two other cases the court found insufficient reason for denying requested continuances. The other reversals involved a wide variety of issues on direct appeal or in motions to reopen.

The Second Circuit issued relatively few reversals this month. The only reversal in an asylum case involved a faulty nexus determination. Two other cases involved a request for a continuance and whether a late appeal to the Board should have been reissued. Notably, the court reversed *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007), and clarified its framework for applying the categorical and modified categorical approaches in assessing whether a conviction is an aggravated felony under the Immigration and Nationality Act.

The Eleventh Circuit reversed the Board's denial of motions to reopen based on changed country conditions in two cases involving family planning policy in China, and also remanded in a case involving a request for a continuance in the context of adjustment of status based on labor certification.

The chart below shows the combined results for the first nine months of 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	87	71	16	18.4
9th	1460	1193	267	18.3
6th	72	62	10	13.9
2nd	844	733	111	13.2
11th	154	139	15	9.7
3rd	357	328	29	8.1
10th	44	41	3	6.8
8th	62	58	4	6.4
1st	76	72	4	5.3
5th	109	104	5	4.6
4th	114	111	3	2.6
<b>All:</b>	<b>3379</b>	<b>2912</b>	<b>467</b>	<b>13.8</b>

By way of comparison, at this point in calendar year 2007 there were 524 reversals or remands out of 3361 total decisions (15.6%). In calendar year 2006 there were 732 reversals or remands out of 4107 total decisions (17.8%).

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## Through the Eye of the Needle: Immigration in the October 2008 Term

*by Edward R. Grant*

To steal a Biblical metaphor, it seems easier for a camel to pass through the eye of a needle than for litigants to obtain Supreme Court review of a contested issue in immigration law. Despite the mystery surrounding the process, the reasons for the Court to take an immigration case appear no different from its reasons for granting certiorari in other matters: to resolve a split in the circuits, to correct a clear error in interpretation of the law, or, less often, to revisit a question it has previously decided but which time and circumstances dictate a second look.

The immigration-related cases on the docket for the October 2008 Term of the Court confirm this pattern. The Court will address a fast-rising “circuit split” on the issue of whether a conviction for aggravated identity theft requires knowledge on the part of the defendant that the false identity he has assumed actually belongs to another. A second case will address, for the first time in three decades, whether the “persecutor bar” in immigration law applies to those who allegedly acted under duress in committing acts of persecution. The final case will decide whether a “domestic relationship” must be an *element* of the offense in order for the offense to be considered a crime of domestic violence.

The identity theft case will have little direct bearing on the decisions of Immigration Judges and the Board, but is significant nonetheless because of the increased use of identity theft statutes to prosecute aliens who unlawfully gained employment by assuming false identities. The remaining cases could have great significance on our work, potentially creating a defense of duress against a charge that an alien has engaged in persecution, and potentially narrowing the range of cases in which a domestic violence-related charge under section 237(a)(2)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E) can be sustained.

### Employment Document Fraud as Identity Theft: Who Knew?

Prosecutions of illegal immigrants for using identity documents belonging to another person has prompted, within the past year, a perfect 3-3 circuit split

on this issue: whether a conviction under the Federal aggravated identity theft statute, 18 U.S.C. § 1028A(a) (1), requires that the defendant *know* that the false identity documents belonged to another person, as opposed to being fabricated. See *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213 (4th Cir.), *cert. denied* \_\_U.S.\_\_, 127 S.Ct. 366 (2006) (*mens rea* of “knowingly” in statute modifies only transfer, possession, or use of stolen identification, and does not require that defendant know that identity belonged to a real person). *But see United States v. Godin*, 534 F.3d 51 (1st Cir. 2008); *United States v. Miranda-Lopez*, 532 F.3d 1034 (9th Cir. 2008); *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008) (“knowingly” *mens rea* requires that Government prove that ID belonged to someone else).

To resolve the circuit split, the Court chose an unpublished, *per curiam* Eighth Circuit decision—decided a month after, and relying entirely upon *Mendoza-Gonzalez*, *supra*. *United States v. Flores-Figueroa*, 274 Fed. Appx. 501 (8th Cir. 2008), *cert. granted*, \_\_U.S.\_\_, 2008 WL 2882195 (Oct. 20, 2008). The Eighth Circuit’s brief opinion tells us what we need to know in order to understand the issues before the Court:

In connection with his employment at L & M Steel Services, Inc., Flores, an illegal alien, used a fraudulent alien registration number and a fraudulent Social Security number. Both numbers belonged to other individuals. Flores pled guilty to two counts of misuse of immigration documents in violation of 18 U.S.C. §1546(a), and one count of entry without inspection under 8 U.S.C. § 1325(a). He pled not guilty to two counts of aggravated identity theft. At his bench trial, Flores argued that he could not be convicted because the Government did not prove that he knew that the identification he possessed belonged to other people, which he claims is required to convict him under 18 U.S.C. § 1028A(a)(1). After rejecting this argument and finding him guilty of two counts of aggravated identity theft, the district court sentenced Flores to 51 months’ imprisonment for the misuse of immigration documents

and entry without inspection offenses and a consecutive 24 months’ imprisonment for the aggravated identity theft offenses, resulting in a total sentence of 75 months’ imprisonment.

*U.S. v. Flores-Figueroa*, 274 Fed. Appx. at 501-02.

The facts in *Mendoza-Gonzalez* (which is the subject of a pending cert petition) were similar: the defendant there used a false identification to gain employment at the Swift & Company processing plant in Marshalltown, Iowa. The December 2006 raid on that plant gained national attention, and the aftermath not only has spotlighted the strategy of Federal authorities to prosecute the illegal aliens caught in such raids not only for using false immigration identity documents under 18 U.S.C. § 1546(a), but also for making false claims to citizenship and for aggravated identity theft. The identity theft statute states:

Whoever, during and in relation to any felony violation [enumeration omitted], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1). The Eighth Circuit concluded that since “knowingly” is an adverb, the fact that it was placed before the verbs “transfers, uses, or possesses” indicates that it was meant solely to modify those verbs, and not later language. *Mendoza-Gonzalez*, 520 F.3d at 915. “If Congress had wished to extend the knowledge requirement to the entire provisions, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification ‘known to belong to another actual person.’” *Id.* (quoting *United State v. Hurtado*, 508 F.3d at 609). The approach of the Fourth Circuit in *United State v. Montejo* was similar, if more didactic:

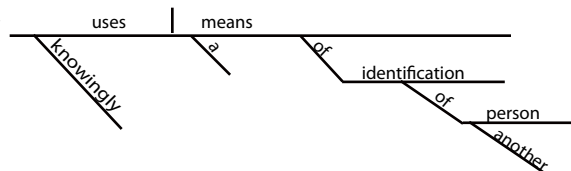
We begin with grammar. The word “knowingly” in this case is an adverb that modifies the verbs “transfer, possesses, [and] uses.” “Without lawful authority” is an adverbial phrase that also modifies these verbs. The direct object of these transitive

verbs is “a means of identification,” a nominal phrase that is further modified by the adjectival prepositional phrase “of another person.” Together, “transfers, possesses, or uses . . . a means of identification of another person forms a predicate.

We think that, as a matter of common usage, “knowingly” does not modify the entire lengthy predicate that follows it. Simply placing “knowingly” at the start of this long predicate does not transform it into a modifier of all the words that follow. Good usage requires that the limiting modifier, the adverb “knowingly,” be as close as possible to the words it modifies here, “transfers, possesses, or uses. *Funk, McMahan and Day, The Elements of Grammar for Writers, McMillan, 1991, Ch. 4.*”

*Montejo*, 442 F.3d at 215.

If you think the grammar lesson is through, think again. The District of Columbia Circuit, in *Villanueva-Sotelo*, buttressed its conclusion that the language of section 1028A(a)(1) is ambiguous by employing a device surely known to Justice Scalia, but perhaps not to his law clerks: the sentence diagram. *Villanueva-Sotelo*, 515 F.3d at 1238.



The D.C. Circuit conceded that, under technical proper usage, the word “knowingly” modifies only the verbs that immediately follow it. However, that “grammatical observation is beside the point” because statutory drafting and case law use the word “modify” more “loosely.” *Id.* The issue for statutory interpretation, the court concluded, is how *far* the modifier “knowingly” extends into the statute.

The D.C. Circuit, along with the First and Ninth Circuits, found that “knowingly” must extend at least as far as the phrase “means of identification.” In other words, one could not be prosecuted for “knowingly using . . . a means;” one could only be prosecuted, in a sensible world, for “knowingly using . . . a means of identification,”

i.e., for *knowing* that the “object” one has “knowingly used” is, in fact, a “means of identification.” The question then becomes whether “knowingly” also extends to the second prepositional phrase means “of another person,” or whether one must also know that the identity being represented by the false document or social security is that of another person. *Villanueva-Sotelo*, 515 F.3d at 1239. The D.C. Circuit conceded the Government’s argument (and that of the dissenting opinion) that “Congress knows how to draft a statute that unambiguously extends a *mens rea* requirement to various elements in the statutory text.” *Id.* However, it also found “at least equally plausible” the defendant’s argument that a criminal statute’s *mens rea* requirement extends to all elements of the offense, citing a general rule of construction included in the Model Penal Code § 2.02(4) (1985), as well as Federal case law where “knowingly” has been so extended. *Id.* at 1239-40; *accord Godin*, 534 F.3d at 57 (“[b]ecause we interpret a criminal statute and not an English textbook, we cannot say that the best or even most likely reading of § 1028A(a)(1) is to limit the adverb “knowingly” to the verbs it modifies); *Miranda-Lopez*, 532 F.3d at 1038 (limited application of “knowingly” is a plausible reading, but “we fail to see how either logic or grammar necessarily makes it the *only* plausible reading”).

With the exception of *Montejo*, all of the cases discussed here were decided within a span of 8 months, and within 11 months of the grant of certiorari. Few issues are teed up as quickly and comprehensively for Supreme Court review. The result will likely turn on the Court’s interpretation of its own precedents in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (prohibition on child pornography), and *Liparota v. United States*, 471 U.S. 419 (1985) (food stamp fraud), both of which extended the phrase “knowingly” to all elements of the statute. Judicial proponents of expanding “knowingly” to the element “of another person” in § 1028A(a)(1) point to these decisions as evidence that a purely “grammatical” rule is not the most plausible, or only plausible, mode of interpretation. However, as pointed out by the Eleventh Circuit in *Hurtado*, the Supreme Court stated in *X-Citement Video* that while the most “natural” reading of statute would be to limit “knowingly” to the verbs following it, doing so in that case would extend criminal liability to innocent parties—those who had no idea that the packages they were sending or receiving included child pornography. *Hurtado*, 508 F.3d at 609-10 (citing *X-Citement Video*, 513 U.S. at 68-69, 72). Similarly, “extending” the word “knowingly” in *Liparota* was



necessary to shield from liability those who, for example, received food stamps to which they were not entitled due to an error in mailing. *Liparota*, 471 U.S. at 425-27.

No one contends that “innocent” persons could be subject to liability under either reading of §1028A(a)(1). Individuals are not liable, of course, for using their *own* identification, and no one is liable unless the use of the false identity is in conjunction with another offense. Whether that distinction makes the difference will likely determine the outcome in *Flores-Figueroa*.

### The Persecutor Bar: Revisiting Fedorenko

Astute readers may recall our prior discussion of the “persecutor bar” to asylum and other forms of relief. See *Immigration Law Advisor*, Vol. 1, No. 8 (Aug. 2007). There, we discussed a number of recent decisions from the circuit courts focusing on the difficulty (particularly in claims arising from countries beset by severe civil conflicts) of drawing the line between who is and who is not a “persecutor” for purposes of sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act, 8 U.S.C §§ 158(b)(2)(A)(i) and 1231(b)(3)(B)(i). As stated, “[t]he statute that bars persecution has a smooth surface beneath which lie a series of rocks.” *Castenada-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007) (en banc) (to be barred as a “persecutor,” an asylum applicant must have “culpable knowledge” of the acts of persecution); see also *Xu Sheng Gao v. U.S. Att’y Gen.* 500 F.3d 93 (2d Cir. 2007) (concurring with First Circuit’s “culpable knowledge” requirement); *Im v. Mukasey*, 497 F.3d 990 (9th Cir. 2007) (Cambodian prison guard who led prisoners to interrogation not barred as persecutor), *opinion withdrawn*, 522 F.3d 966 (9th Cir. 2008); *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007) (Salvadoran officer’s “mere presence” at scene of massacre of six Jesuit priests not sufficient to invoke bar); *Miranda-Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006) (translator during interrogations of Shining Path guerrillas who were subject to beatings and electric shock barred as persecutor).

A new rock may now lurk below the surface. On March 17, the Supreme Court granted certiorari in *Negusie v. Gonzales*, 231 Fed. Appx. 325 (5th Cir. 2007), *cert. granted sub nom. Negusie v. Mukasey* 128 S.Ct. 1695 (2008). The petition for certiorari presented a single question: “whether [the persecutor bar] prohibits granting asylum to, and withholding of removal of, a refugee who

is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.” *Negusie v. Mukasey*, 2007 WL 302279 (Oct. 15, 2007) (Petition for Writ of Certiorari). In more succinct terms: is there a “duress exception” to the persecutor bar? One of the staples of jurisprudence in this area—that even threats of death do not exempt an alien from the persecutor bar—may now be a “jump ball.” See *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (no basis for claimed “involuntary assistance” exception to persecutor bar in Displaced Persons Act); *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) (“forced recruitment” into RUF in Sierra Leone does not exonerate asylum applicant who engaged in acts of persecution); *Maikovskis v. INS*, 773 F.2d 435, 445 (2d Cir. 1985) (police chief who, upon orders from Nazis, burned the village of Audrini to the ground barred as a persecutor under provisions of Holtzman Act even if Government did not prove he had “personal animus” toward the victims); *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984) (service under threat of death as Nazi camp guard does not preclude finding that alien “assisted” in persecution of Jews and thus is deportable and ineligible for relief under INA amendments made by the Holtzman Act).

Unlike the grant of certiorari in *Flores-Figueroa*, it is uncertain what prompted the Supreme Court to act in *Negusie*. One must assume the Court intends to review the sole question presented to it—and a review of the briefs, both from the parties and *amici*, confirms that the argument is limited to the issues of external duress, and whether an alleged persecutor must have a “personal animus” against those whom he allegedly persecuted. There is virtually no argument devoted to the issues of “culpable knowledge” addressed in *Castenada-Castillo* and *Gao*, or to the issues of proximity and responsibility addressed in *Doe*, *Miranda-Alvarado*, and *Im*. There is no citation to a single case where a Federal trial or appellate court has disagreed with the Board’s holdings, in the context of the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by*, Pub. L. No. 81-555, 64 Stat. 219 (1950) (“DPA”), the Holtzman Amendment, Pub. L. No. 95-549, 92 Stat. 2065 (1978), or the Refugee Act of 1980, Pub. L. 96-212, tit. I, §101(b), 94 Stat. 102 (1980), that there is no defense of “involuntariness” or “duress” to the various provisions in those acts barring persecutors from immigration benefits. Thus, in stark contrast to *Flores-Figueroa*, there is no “grist for the mill” from competing views of circuit courts to help predict, and perhaps to shape, the outcome in *Negusie*. All we have are the arguments of the parties.

At the bottom of the extant case law on the subject is the rejection by the Supreme Court and by the Board in their respective decisions in *Fedorenko* of the alien's "involuntariness" defense. The petitioner's task, therefore, is to "de-link" *Fedorenko* from the context of contemporary claims for asylum and the language of sections 208 and 241 of the Act. The petitioner is adopting three strategies to meet this task: (a) to point out alleged textual differences between the "persecutor bars" in the Displaced Persons Act of 1948 and the Refugee Act of 1980; (b) to argue that, unlike the Displaced Persons act, the Refugee Act was prospective in nature and not limited to egregious acts of persecution engaged in during World War II; and (c) to emphasize the different nature of contemporary conflicts, where being forced to engage in acts of persecution is itself frequently a form of harming and coercing civilian populations. Each point deserves brief consideration.

The alleged differences between the language in the DPA and the Refugee Act appear small. But if the Court were determined to declare that *Fedorenko* is limited to cases involving the DPA, those differences could be cited. The DPA barred from entry any alien who "assisted the enemy [during World War II] in persecuting civilian populations." The Refugee Act, while barring one who has "assisted" in persecution, makes no reference to the "enemy," and, the petitioner argues, also must be read in the context of accompanying words: "ordered, incited . . . or otherwise participated." According to the petitioner's reply brief, the structure of the DPA "makes clear" that its persecutor bar "focused on a very specific set of individuals—persons who collaborated with our country's enemies during wartime." *Negusie v. Mukasey*, 2008 WL 4264484 at \*11 (Sept. 15, 2008) (Petitioner's Reply Brief). Furthermore, because the DPA only covered persecution by the "enemy" during World War II, it "focuses exclusively on persons who engaged in persecution in connection with the worst crime against humanity ever perpetrated." *Id.* Elsewhere, the Petitioner presses the argument that the words such as "assist," "order," and "incite" must be interpreted as particular ways in which a person can "participate" in persecution—and that "persecution" requires an element of "moral offensiveness." Since it cannot be morally offensive to "assist" in acts of persecution only on pain of torture or death, the words must be interpreted to exempt acts taken under such duress. The petitioners appear to be arguing that negating a "duress" offense in the context of the DPA was acceptable because of the moral gravity of *any* cooperation, voluntary or not, with the persecution

of civilians by enemy forces. But outside that exceptional historical example, the moral opprobrium—and legal consequences—of being labeled a "persecutor" cannot only attach to those who act voluntarily.

The petitioner's second argument focuses on the contrast between the *purposes* of the Refugee Act, as opposed to those of the DPA, and the more complex realities of current conflicts where persecution is most likely to occur. The Refugee Act was intended to conform to treaty obligations that did not exist at the time of the DPA, and the petitioner contends that the United Nations High Commissioner for Refugees (whose office has filed an amicus brief on petitioner's behalf) would require that any exclusion from refugee status allow for the presentation of mitigating evidence, including duress. The historical context of the DPA—dealing with a "crime against humanity in a category of its own—differed greatly from that of the Refugee Act, which is designed to guide asylum policy with general principles capable of application across a broad range of conflicts and government repression. "Violent conflicts around the world today frequently involve civil wars that have as a hallmark coerced participation in armed conflict. . . . [T]he United Nations recognizes over thirty ongoing conflicts . . . in which more than a quarter million young people have been coerced into violent armed conflict." *Negusie v. Mukasey*, 2008 WL 2445504, at \*9 (June 16, 2008) (Petitioner's Brief).

The petitioner's third argument carries this point forward, using the circumstances of the *Negusie* case itself, and examples drawn from other world conflicts, to contend that an "absolute" bar to those who assist in persecution will defeat the intended purposes of the Refugee Act. *Negusie*, an Eritrean of mixed ancestry, was assigned as part of compulsory military service (after having been imprisoned for 2 years for allegedly evading combat, and otherwise persecuted on account of his Ethiopian ancestry) to guard a prison camp. Had he escaped and been caught, he would have been killed, as were two of his friends. He did not affirmatively injure prisoners but, in the course of his duties, forcibly exposed prisoners to extreme sun and heat, denied them water, and prevented them from taking showers or getting fresh air. He did not actively resist his orders but, on occasion, did provide favors to prisoners and was reprimanded for doing so. In order to escape this loathsome duty, he escaped and eventually entered the United States. The Ethiopian-Eritrean conflict is just one of many discussed

in the briefs of petitioner and his amici; special attention is given to the forced recruitment of “child soldiers” and the consequences for such “combatants” should they later seek asylum.

The Government’s arguments in response are simple: the Attorney General’s interpretation of the persecutor bar is reasonable because Congress did not include any exception or waiver based on duress, and the Attorney General and the Board have consistently addressed whether certain acts constitute “persecution” by looking solely to the acts of the alleged persecutor as opposed to the motivation. (The issue of “nexus,” of course, does require an examination of intent.) Precedents based on predecessor statutes such as the DPA and Holtzman Act are relevant because the conduct in question—persecution—is the same in each case, and in the case of the Holtzman Amendment, the language is virtually identical to that in sections 208 and 241 of the Act. As for factual comparisons to the World War II era, the government contends that there is no evidence that Congress intended to treat modern-day persecutors who claim they were “just following orders” any differently from those in the Nazi era who made similar claims. As to the impact of U.S. treaty obligations, the Government argues that the United States has broad latitude in determining how those obligations are to be carried out, and the fact that four countries (out of 150 state parties to the U.N. Refugee Convention) have adopted a “duress” exception to the persecutor bar does not compel the United States to accept such an exception.

*Negusie* is a difficult case to assess or predict, particularly in the absence of any “ferment” in the circuit courts suggesting that the *Fedorenko* rule should not apply in asylum cases. The habitually cautious Roberts Court seems an unlikely candidate to overturn the presumed applicability of *Fedorenko* without the issue having first been vetted by the courts of appeals; on the other hand, what else might explain its grant of certiorari in an unpublished case following a seemingly uncontroverted line of administrative and judicial precedent?

The answer—and a possible resolution by the Court—may lie in two factors: (1) apart from *Matter of Rodriguez-Mojano*, 19 I&N Dec. 811 (1988), the Board has not addressed the issue of “involuntariness” or “duress” in a published case involving the Refugee Act (as opposed to provisions of the DPA or the Holtzman Amendment); and (2) the issue of involuntariness was not

dispositive in *Rodriguez-Mojano*, which turned instead on whether the respondent’s actions as a combatant for guerrilla forces in El Salvador constituted “persecution.” The Board determined they were not, and concluded memorably that “[w]ere we to hold that practices such as attacking military bases, destroying property, or forcible recruiting constitute persecution, members of armed opposition groups throughout the world would be barred from seeking haven in this country. . . . We do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict.” *Id.* (Years later, of course, the enactment of the “terrorist bars” accomplished much of that result.)

In addition, while the alien in *Negusie* was represented before both the Immigration Judge and the Board (and received a grant of deferral of removal under the Convention Against Torture), he was pro se before the Fifth Circuit. Thus, the court had no opportunity to address anything approaching the full arguments now being presented—perhaps for the first time to any American tribunal—to the Supreme Court. If the Court concludes that it is *not* axiomatic that the rule in *Fedorenko* should apply to cases decided under the Refugee Act, it would likely not resolve the issue in full, but remand it for further consideration by the agency—in this case, the Board. Of the three options—affirmance, remand, or reversal and full adoption of a “duress” exception as urged by the petitioners—the first two seem by far most plausible.

Oral argument in *Negusie v. Mukasey* is set for November 5, the day after the election. Any clues to the potential outcome will be reported in our next column.

### **Must Domestic Relationship Be An Element?**

Federal law criminalizes the possession of firearms after having been convicted of a “misdemeanor crime of domestic violence” (“MCDV”). 18 U.S.C 922 § (g)(9). Federal law defines an MCDV as follows:

- an offense that-
- (i) is a misdemeanor under Federal or State law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in

common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. § 921(a)(33)(A). Nine circuits have held that the domestic relationship of the defendant to the victim need not be an element of the underlying state conviction in order to find that it is a crime of domestic violence. See *United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States v. Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States v. Barnes*, 295 F.3d 1354, 1358-61 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 218-21 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 619-21 (8th Cir. 1999). The Fourth Circuit, however, has rejected this view, holding that the domestic relationship must be an element of the offense. On this issue, the Supreme Court has granted certiorari and will hear oral argument on November 10. *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 128 S.Ct. 1702 (2008).

The issue, as in *Flores-Figueroa* is grammatical—albeit, thankfully, without the sentence diagramming. The majority of circuits have held that the use of the singular term “element” means that Congress intended only that the offense have “as an element” the use or attempted use of physical force, or the threatened use of a deadly weapon. These courts have found that the nature of the offense and the relationship of the perpetrator to the victim are “two conceptually different attributes.” *Hayes*, 482 F.3d at 761 (Williams, J., dissenting) (citing *Meade*, 175 F.3d at 218-19, and *Belless*, 338 F.3d at 1066 (use of force and relationship between the aggressor and the victim “are two very different things and thus would constitute two different elements”). The Fourth Circuit disagreed, citing the “longstanding grammatical rule of the last antecedent.” *Hayes*, 482 F.3d at 753. Applying this rule to the text, the court concluded that the phrase in subclause (ii) of the definition of MCDV beginning with “committed by” must be read to “modify” its last antecedent—that is, to modify the requirement that the offense have as an element “the use or attempted use of

physical force, or the threatened use of a deadly weapon.” *Id.* What is less clear in *Hayes* is why this “modification” requires that the relationship be an *element* of the offense. The court offers several examples of statutes where the phrase “as an element” precedes a disjunctive list of multiple elements—as is the case in the very provision under examination. But in those instances, the elements grouped in this fashion are closely related in context, not, as the *Hayes* dissent and other circuits have noted, concepts as disparate as the level of force and the relationship of aggressor to victim. Significantly, the majority of circuits have held not only that the “domestic” relationship need not be an element of the underlying offense, but also that the Government may prove the relationship, as part of its burden of proof in a prosecution under 18 U.S.C. § 922(g)(9), with evidence outside the record of conviction for the first offense. See, e.g., *Belless*, 338 F.3d at 1065-67. In other words, the “categorical” or “modified categorical” approach does not apply. Cf. *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) (distinguishing *Belless* and holding that only evidence in record of conviction can be used to prove domestic relationship).

*Hayes* could have a substantial impact on immigration jurisprudence. The touchstone decision on proving deportability under section 237(a)(2)(E)(i) of the Act holds only that the relationship of the aggressor to the victim must be proven from the record of conviction—not that the relationship has to be an element of the underlying offense. See *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); see also *Cisneros-Perez*, 465 F.3d at 392. For example, in *Cisneros-Perez*, the alien, after being charged with specific domestic violence offenses, pleaded down to simple battery—an offense that has no element regarding the relationship of the aggressor and victim. The offense was thus clearly not a “categorical” crime of domestic violence. Yet, the Ninth Circuit permitted an inquiry into whether the modified categorical test was satisfied and, over a dissent, concluded that references in the sentencing document to domestic violence counseling and a “stay away” order were not sufficient. The continued vitality of this approach in the Ninth Circuit may be questionable in light of *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (modified categorical approach never applies when “the crime of conviction is missing an element of the generic crime altogether”). However, the circuit has not addressed a domestic violence case since the issuance of *Navarro-Lopez*, and it is unclear whether, in light of its construction of the similar title 18 definition in *Belless*, it would consider the domestic relationship to

be an element of the “generic crime” referenced in section 237(a)(2)(E)(i) of the Act. *See also Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008) (defining generic offense of “child abuse”).

Were the Supreme Court to conclude in *Hayes* that a “misdemeanor crime of domestic violence” under title 18—the definition of which is very similar to that set forth in section 237(a)(2)(E)(i) of the Act—requires that the domestic relationship be an element of the offense, it would clearly call into question whether the “modified categorical approach” could ever be used to find that a conviction for a generic offense such as aggravated assault or battery could be the basis for a domestic violence charge under section 237(a)(2)(E)(i).

As noted, oral argument in *Hayes* is on November 10. A brief report will follow next month.

### EXTRA, EXTRA!

#### Ninth Circuit Modifies Evidentiary Rules Under Modified Categorical Approach

At press time, the United States Court of Appeals for the Ninth Circuit issued its anticipated decision in *United States v. Snellenberger*, \_\_F.3d\_\_, 2008 WL 4717190 (9th Cir. Oct. 28, 2008) (en banc). The holding is rather narrow: district courts may rely on clerk minute orders that conform to [established statutory procedures] in applying the modified categorical approach. *Id.*, *rev’g in part United States v. Diaz-Argueta*, 447 F.3d 1167, 1169 (9th Cir. 2006). In *Snellenberger*, the minute order indicated that the defendant had pled guilty to burglary of a dwelling under section 459 of the California Penal Code. The court rejected the defendant’s argument that since a minute order was not among those identified by the Supreme Court as acceptable in meeting the modified categorical approach, it could not be used. *See Shepard v. United States*, 544 U.S. 13, 16 (2005). The *Shepard* list was illustrative, not exclusive. The court further concluded that a minute order, properly prepared in accord with statutory mandates, should be treated as reliable as a transcript prepared by a court reporter.

The court did not have occasion to address the following vexing issue: When the record of conviction for an “over-inclusive” drug offense consists of a criminal indictment or information listing the controlled substance in question, plus a minute order indicating a guilty plea to

that count of the indictment, is this sufficient to establish the identity of the controlled substance for purposes of the modified categorical approach? However, by expressly including minute orders among those documents that can be relied upon under *Shepard*, and by concluding that the minute order at issue was sufficient to prove conviction for burglary of a dwelling, the court made it more likely that such a record of conviction will suffice.

*Board Member Edward R. Grant has served on the Board of Immigration Appeals since January 1998. He is grateful to research assistance from Elisabeth Yu, presidential management fellow.*

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## RECENT COURT DECISIONS

### First Circuit

*Kadri v. Mukasey*, \_\_F.3d\_\_, 2008 WL 4398717 (1st Cir. Sept. 30, 2008): The First Circuit remanded the Board’s decision denying asylum to an Indonesian physician who was unable to earn a living due to his sexual orientation. The Board had reversed a grant of asylum by the Immigration Judge, finding that the harm suffered did not rise to the level of economic persecution. The court found that the Board failed to adequately explain the legal standard for economic persecution, and, noting the Board’s subsequent decision in *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007), remanded with instruction for the Immigration Judge to evaluate the case under the *T-Z-* standard.

### Second Circuit

*Matadin v. Mukasey*, \_\_F.3d\_\_, 2008 WL 4489760 (2d Cir. Oct. 8, 2008): The Second Circuit vacated the Board’s decision, upholding the Immigration Judge’s finding that the respondent had abandoned her LPR status. The respondent had returned to Guyana for 30 months to care for her sick father. The court held that the Immigration Judge had committed legal error by placing the burden of proof on the respondent, stating that upon presentation of a colorable claim of returning LPR status, the burden is on the DHS to prove abandonment by clear, unequivocal, and convincing evidence.

*Jian Hui Shao v. Mukasey*, \_\_F.3d\_\_, 2008 WL 4531571 (2d Cir. Oct. 10, 2008): In a lengthy decision, the court dismissed the appeals of three asylum applicants with more than one child fearing persecution under China’s coercive family planning policy. The court upheld the Board’s

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determination that the statute could not be interpreted so as to include all Chinese nationals with more than one child as refugees. The court further upheld the Board's three-part test to determine which applicants possess a well-founded fear of such persecution, and further found that the Board did not ignore significant evidence or commit legal error in denying the respondent's applications.

### **Sixth Circuit**

*Yan Xia Zhang v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 4489268 (6th Cir. Oct. 8, 2008): The Sixth Circuit upheld the Board's denial of a motion to reopen to file a successive asylum application. The court agreed with the Second and Ninth Circuits in finding that a respondent must first succeed on a motion to reopen before filing a successive application. The court further upheld the Board's rejection of the respondent's motion to reopen in light of the negative credibility determination in the respondent's earlier asylum claim.

*Thap v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 4568361 (6th Cir. Oct. 15, 2008): The court dismissed the appeal of the respondent, whom the Board had ordered deported to Cambodia based on his robbery conviction. The court found that the respondent did not retain his refugee status after his adjustment to LPR status; he was therefore not precluded from deportation to Cambodia, nor eligible to readjust under section 209 of the Act. The court also found the California robbery conviction to be a crime of violence. Lastly, the court found that the respondent failed to establish eligibility for withholding of removal under present conditions in Cambodia.

### **Ninth Circuit**

*Delgado v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 4490613 (9th Cir. Oct. 8, 2008): The Ninth Circuit dismissed the respondent's appeal from the Board's decision barring him from asylum and withholding of removal based on his three DUI convictions. Regarding the designation of the DUI convictions as "particularly serious crimes," the court found in the withholding context that the designation by statute of certain crimes as "particularly serious" per se does not preclude the Attorney General from determining other crimes to be "particularly serious" on a case-by-case basis. The court further determined that it lacked jurisdiction to consider the "particularly serious crime" designation in the asylum context. The court lastly upheld the denial of the respondent's CAT claim.

In *Matter of M-W-F- & L-G-I*, 24 I&N Dec. 633 (BIA 2008), the Board considered whether the insertion of an intrauterine device ("IUD") pursuant to China's coercive population control policies falls within the definition of refugee in section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42). After the birth of her first child in 1990, respondent was fitted with an IUD. Her request to have it removed due to pain was denied. After a private doctor removed it, she was detained for 3 days. She was released after she agreed to have another one inserted.

The Board first noted that having to use an IUD is not equivalent to being forced to have an abortion or sterilization and is not a per se category of persecution. IUDs are a form of birth control, not a permanent loss of ability to have children. The respondent must therefore demonstrate that she was or will be persecuted for other resistance to China's family planning policy. The Board next found that removal of an IUD can constitute "resistance" to China's birth control policies, but persecution must still be shown. Whether insertion of an IUD rises to the level of persecution is fact specific. Being required to have an IUD inserted is intrusive, but it is temporary so it is not per se persecution. Routine implementation of China's family planning policies such as IUD insertion does not generally rise to the level of persecution, although IUD insertion could be persecutive if aggravating circumstances are present.

Furthermore, there must be a link between the harm and "other resistance." Is reinsertion of an IUD a standard procedure, or due to the person's resistance? In this case, the Board found that the respondent did not show that she resisted the initial birth control procedure, and the insertion was not done to punish her but was a routine part of the Government's family planning policy. Any discomfort the respondent experienced was not caused by the Government's desire to persecute her. The respondent's removal of the IUD and the subsequent detention do qualify as resistance to China's family planning policy, but the facts do not show that this detention and insertion rose to the level of persecution. The Board found that the respondent did not show that the insertion was due to other resistance.

In *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the Board considered whether it has jurisdiction over the respondent's motion to reopen filed after the respondent was removed, in light of the a decision from the United States Court of Appeals from the Ninth Circuit's in *Zi-Xing Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007) (holding that the "departure" regulation (8 CFR 1003.2(d)) is inapplicable in these circumstances because the alien was not "the subject of . . . removal proceedings" once proceedings have been concluded). The respondent was a lawful permanent resident who was convicted of possession of cocaine with intent to distribute in 1995, and was placed in removal proceedings as an aggravated felon. The Immigration Judge pretermitted a waiver under former section 212(c), and the Board affirmed in November 2000. DHS removed the respondent a month later. In July 2006, respondent filed a motion to *sua sponte* reopen. The Board denied the motion for lack of jurisdiction. The case was remanded by the United States Court of Appeals for the Fifth Circuit to consider *Lin*.

The Board rejected the reasoning in the *Lin* case as well as a subsequent decision, *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (regulation precluding aliens who had been removed from the United States from filing motions to reopen conflicted with governing statute and thus was invalid). Regarding the *Lin* decision, the Board reasoned that when the departure regulation is examined in context, it clearly applies to removed aliens because the filing of a motion to reopen presupposes that the administrative proceedings are closed and therefore cannot apply to motions filed by aliens in ongoing proceedings. Also, the Board has never had authority to entertain appeals when the alien departs, so *Lin's* interpretation renders the regulation superfluous. The "ambiguity" noted by the *Lin* court is as to a regulation, not a statute, and the agency's interpretation of its own regulations is entitled to a high degree of deference. The Board declined to follow *Lin* in any circuit, including the Ninth Circuit.

Addressing *William*, the Board recognized that the court found the departure regulation invalid on its face. Nevertheless, the Board explained that while, in codifying the regulations regarding motions, Congress did not distinguish between those who have departed and those who have not, the Act as a whole acknowledges the distinction. The whole point of proceedings is to effectuate removal, and once that happens, the alien's posture in immigration law is changed. An alien who

leaves is in a worse position than other aliens outside the United States due to inadmissibility grounds and other sanctions. The Board's inability to entertain motions filed by departed aliens is not just a matter of administrative convenience, it is an expression of the limits of EOIR's authority within the larger immigration bureaucracy, as border security and inspection and admission is delegated to the Department of Homeland Security. The Board cannot control the admittance or parole of removed aliens, and a removed alien cannot circumvent the admission and inspection regime by filing a motion to reopen. Congress did not codify the entire regulatory scheme for motions, but gave statutory weight to the time and number limits. Other provisions were left out. Lastly, the Board addressed the *William* court's reference to the "physical presence" requirement for the filing of motions by certain victims of domestic battery. A better understanding is that these provisions had a much narrower purpose and operate solely within the context of Congress' special rules for battered aliens.

In *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), the Board found that in order to be eligible for a waiver under section 237(a)(1)(H)(i) of the Act, 8 U.S.C. § 1227(a)(1)(H)(i), the qualifying relative must be living. The purpose of the provision is to promote family unity. Case law indicates that the relationship must exist, and the relative must reside in the United States.

## REGULATORY UPDATE

**73 Fed. Reg. 57, 128 (2008)**

### DEPARTMENT OF HOMELAND SECURITY

#### **Extension of the Designation of El Salvador for Temporary Protected**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS (DHS).

**ACTION:** Notice.

**SUMMARY:** This Notice announces that the Secretary of Homeland Security has extended the designation of El Salvador for temporary protected status (TPS) for 18 months, from its current expiration date of March 9, 2009 through September 9, 2010. This Notice also sets forth procedures necessary for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) with TPS to re-register with U.S. Citizenship and Immigration Services (USCIS).

Unlike the prior extension of TPS for El Salvador, this Notice does not automatically extend previously-issued employment authorization documents (EADs). Eligible TPS beneficiaries must apply to USCIS for extensions of their EADs, and pay the required application fee for such extensions, during the 90-day registration period. Re-registration is limited to persons who have previously registered with USCIS for TPS under the designation of El Salvador and whose applications have been granted by or remain pending with USCIS. Certain nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have not previously applied to USCIS for TPS may be eligible to apply under the late initial registration provisions.

**DATES:** The extension of the TPS designation of El Salvador is effective March 10, 2009, and will remain in effect through September 9, 2010. The 90-day re-registration period begins October 1, 2008, and will remain in effect until December 30, 2008. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 90-day re-registration period beginning on October 1, 2008.

See also;

**73 Fed. Reg. 57,133 (2008)**  
**Extension of the Designation of Honduras for Temporary Protected Status**

**73 Fed. Reg. 57,138 (2008)**  
**Extension of the Designation of Nicaragua for Temporary Protected Status**

**ACTION:** Notice.

**73 Fed. Reg. 58,023 (2008)**  
**DEPARTMENT OF HOMELAND SECURITY**  
**8 CFR Parts 100 and 212**

**Issuance of a Visa and Authorization for Temporary Admission Into the United States for Certain Nonimmigrant Aliens Infected With HIV**

**AGENCY:** Customs and Border Protection; DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations to provide, on a limited and categorical basis, a more streamlined process for nonimmigrant aliens infected with the human

immunodeficiency virus (HIV) to enter the United States as visitors on temporary visas (for business or pleasure) for up to 30 days. Nonimmigrant aliens who do not meet the specific requirements of the rule or who do not wish to consent to the conditions imposed by this rule may elect to seek admission under current procedures and obtain a case-by-case determination of their eligibility for a waiver of the nonimmigrant visa requirements concerning inadmissibility for aliens who are infected with HIV.

**DATES:** This rule is effective on October 6, 2008.

**73 Fed. Reg. 58,865 (2008)**  
**Presidential Determination No. 2008-29 of September 30, 2008**

**Fiscal Year 2009 Refugee Admissions Numbers And Authorizations of In-country Refugee Status Pursuant To Sections 207 And 101(A)(42), Respectively, of the Immigration And Nationality Act, And Determination Pursuant To Section 2(B)(2) of the Migration And Refugee Assistance Act, As Amended**

In accordance with section 207 of the Immigration and Nationality Act (the "Act") (8 U.S.C. 1157), as amended, and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions:

The admission of up to 80,000 refugees to the United States during Fiscal Year(FY) 2009 is justified by humanitarian concerns or is otherwise in the national interest; provided, however, that this number shall be understood as including persons admitted to the United States during FY 2009 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below. The ceiling shall be construed as a maximum not to be exceeded and not a minimum to be achieved. The 80,000 admissions numbers shall be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations; provided, however, that the number of admissions allocated to the East Asia region shall include persons admitted to the United States during FY 2009 with Federal refugee resettlement assistance under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, as contained in section 101(e) of Public Law 100-202 (Amerasian immigrants and their family members):

Africa .....	12,000
East Asia .....	19,000



Europe and Central Asia .....	2,500
Latin America/Caribbean .....	4,500
Near East/South Asia .....	37,000
Unallocated Reserve .....	5,000

**73 Fed. Reg. 60,935 (2008)**  
**Presidential Determination No. 2009–1 of October 3, 2008**

**Unexpected Urgent Humanitarian Needs Related to Pakistan, Afghanistan, and Georgia**

**73 Fed. Reg. 61332 (2008)**  
**DEPARTMENT OF HOMELAND SECURITY**  
**8 CFR Parts 214 and 248**

**Period of Admission and Extension of Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities—TN Nonimmigrants**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations to allow an increased period of admission and extension of stay for Canadian and Mexican citizens who seek temporary entry to the United States as professionals pursuant to the TN classification, as established by the North American Free Trade Agreement (NAFTA or Agreement). This final rule increases the maximum allowable period of admission for TN nonimmigrants from one year to three years, and allows otherwise eligible TN nonimmigrants to be granted an extension of stay in increments of up to three years instead of the current maximum of one year. In addition, this rule grants the same periods of admission or extension to TD nonimmigrants, the spouses and unmarried minor children of TN nonimmigrants to run concurrent. The rule also removes the mention of specific petition filing locations from the TN regulations and replaces the outdated term “TC” (the previous term given to Canadian workers under the 1989 Canada-United States Free Trade Agreement) with “TN.” This rule will reduce the administrative burden of the TN classification on USCIS, and will ease the entry of eligible professionals to the United States.

**DATES:** This final rule is effective October 16, 2008.

**73 Fed. Reg. 63,843 (2008)**  
**DEPARTMENT OF HOMELAND SECURITY**  
**8 CFR Part 274a**

**Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis**

**AGENCY:** U.S. Immigration and Customs Enforcement, DHS.

**ACTION:** Supplemental final rule.

**SUMMARY:** The Department of Homeland Security (DHS) is finalizing the Supplemental Proposed Rule published on March 26, 2008 and reaffirming regulations providing a “safe harbor” from liability under section 274A of the Immigration and Nationality Act for employers that follow certain procedures after receiving a notice—either a “no-match letter” from the Social Security Administration (SSA), or a “notice of suspect document” from DHS—that casts doubt on the employment eligibility of their employees. DHS is also correcting a typographical error in the rule text promulgated in August 2007.

**DATES:** This final rule is effective as of October 28, 2008.

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