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Issues Arising in Coercive Population Control Claims:

Survey of Board of Immigration Appeals and Federal
Court Decisions

by Lisa de Cardona and Dee Brooks

Thousands of aliens from China have filed applications seeking asylum based on the amended definition of “refugee” as set forth in section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42).¹ More specifically, applicants allege past persecution or fear future persecution based on China’s coercive population control program.² This article identifies the myriad issues relating to these family planning claims and surveys the positions of the Board of Immigration Appeals and the United States Circuit Courts of Appeal. This is by no means an exhaustive examination of these issues, and is only intended to provide a starting point for an analysis of these claims.

Spousal or Partner Eligibility

After almost a decade, during which time the issue seemed settled, the question of whether a spouse or partner is automatically eligible to qualify for refugee status under the amended definition of section 101(a)(42) of the Act has been thrown in flux. In *Matter of S-L-L-*, 24 I&N Dec.1 (BIA 2006), a case remanded to the Board from the Second Circuit, the Board reaffirmed *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), and held that a spouse of a person who has undergone a forced abortion or involuntary sterilization is eligible for asylum if married at the time of the coercive procedure. Upon return to the Second Circuit, in *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2^d Cir. 2007) (en banc), the Court, recognizing that this decision would create a split among the circuits, rejected the Board’s interpretation of section 101(a)(42) of the Act, holding that the statute is unambiguous and the refugee definition applies only to the “person” or individual who has undergone the coercive procedure and does not provide a spouse or part-

ner automatic eligibility for refugee status. In response to this case, the Attorney General has certified a case to himself from the Third Circuit to address the Board's interpretation of the amended refugee definition. *Matter of J-S-*, A95 476 611 (BIA Feb. 24, 2006) (unpublished) (referred to Attorney General Sept. 4, 2007). In view of the current split in the circuits and the Attorney General's certification, the effect of a marriage, and by consequence, a divorce, on the ability of a spouse or a partner to qualify for relief remains uncertain.³

Other Resistance

As a result of the uncertainty relating to whether spouses and partners can qualify for asylum, the question of whether a spouse or partner who has not personally suffered or fears a forcible abortion or involuntary sterilization can prove "other resistance" to the family planning policy has become more central. The Board defined "resistance" in *Matter of S-L-L-*, at 10, as "an act or instance of resisting" or "opposition." The Board held that "resistance" covers a wide range of circumstances, including "expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Id.* An applicant must demonstrate both "resistance" to the family planning program, and that he or she has suffered or fears persecution on account of that resistance. The Second Circuit upheld this approach in *Shi Liang Lin*, *supra*, which is consistent with the Seventh Circuit decision in *Hao Zhu v. Gonzales*, 465 F.3d 316 (7th Cir. 2006) (finding that the single beating suffered by the boyfriend, whose girlfriend had a forced abortion at the hands of family planning officials, on account of his resistance to China's family planning policies, was not sufficiently severe to constitute "past persecution").⁴ According to the Ninth Circuit, in *Li Bin Lin v. Gonzales*, 472 F.3d 1131, 1134 (9th Cir. 2007), in order to fit within the category of "other resistance to a coercive population program," an applicant must show that: (1) the government was enforcing a coercive population program at the time of the pertinent events; and (2) the applicant resisted the program. The Court held that the statute does not require examination of potential motivations, as long as the applicant demonstrates opposition to the population control program. *Id.* at 1135.

A determination of whether an act of resistance qualifies as persecution will vary depending on the facts of the case. Whether removal of an intrauterine device (IUD) amounts to "other resistance" to the coercive pop-

ulation control program is a question that has not been decided by the Board in a published decision, but the federal courts have opined that such acts could be considered "other resistance" and remanded to the Board to address the issue. *Feng Chai Yang v. U.S. Att'y Gen.*, 418 F.3d 1198, 1203 (11th Cir. 2005) (IUD twice removed and physical and verbal resistance demonstrated); *Xia J. Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004). The boundaries for what constitutes "persecution" continues to be in flux. A compulsory gynecological examination may give rise to a claim of "resistance" to the family planning policy and establish persecution.⁵ Similarly, whether the act of forcibly inserting an IUD or a forced injection qualify as "other resistance" has yet to be determined. *Yaoling Yu v. Gonzales*, __ F.3d __, 2007 WL 2509871 (1st Cir. Sept. 6, 2007) (forced IUD); *Feng Chai Yang v. U.S. Att'y Gen.*, 418 F.3d at 1203 (forced injection procedure); *see Ying Zheng v. Gonzales*, __ F.3d __, 2007 WL 2282731 (2^d Cir. Aug. 10, 2007) (remanding to the Board to address the issue of forced IUD insertion).⁶

Economic Harm

Another question concerns whether fines imposed for failure to comply with the family planning policy qualify an applicant for relief. Several circuits have found fines imposed by family planning officials to be insufficient to establish eligibility.⁷ In *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005), the Ninth Circuit found that the deliberate imposition of a substantial economic disadvantage could amount to persecution. However, the Court remanded for the Board to reconsider whether the economic deprivation suffered constitutes persecution.⁸

The issue of whether economic deprivation constitutes persecution has been examined by the Board in the context of determining what is meant by "forced" under section 101(a)(42) of the Act. In *Matter of T-Z-*, 24 I&N Dec. 163, 168 (BIA 2007), the Board held that an abortion is "forced" "when a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution." The term "forced" is not limited to physical harm or threats of such harm, but may include severe economic disadvantage or deprivation of liberty, food, housing, employment, or other essentials of life. *Id.* at 169. *See Yuqing Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007) (applying the Board's definition and concluding that the applicant had suffered past persecution for a "forced" abortion). *See also Zi Zhi Tang v. Gonzales*, 489 F.3d 987, 990 (9th Cir. 2007), quoting *Ding v.*

Ashcroft, 387 F.3d 1131, 1138-39 (9th Cir. 2004) (rejecting the definition of “force” as requiring that the victim demonstrate physical resistance and defining it as a “much broader concept, which includes compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint”).⁹ When faced with the question of whether the threat of a high payment or fine is equivalent to “force” the Seventh Circuit, in *Xiu Ling Chen v. Gonzales*, 489 F.3d 861 (7th Cir. 2007), remanded the case to the Board to decide: (1) what financial exactions normally are used in Fujian Province; and (2) how these financial exactions should be classified under the legal standard that separates inducement and encouragement, which are permitted, from “force” or persecution.¹⁰ Thus, issues involving “forced” family planning procedures and an applicant’s eligibility for asylum under section 101(a)(42) are still evolving.

Birth of Two Children

Numerous cases before the courts and the Board have raised the issue of whether the birth of two children constitutes a violation of the Chinese family planning laws and establishes eligibility for asylum. The Board has addressed this issue in three contexts: on direct appeal in *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007) and *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007); in a timely motion to reopen in *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006); and in an untimely motion to reopen in *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007). In these cases the Board considered whether, given the applicable burden of proof, the applicant had established the local family planning policy, whether there had been a violation of the policy due to the birth of foreign or native-born children, the punishment for such violation, and whether it reached the level of persecution. In each case the Board scrutinized the evidence presented to support the claim of a well-founded fear of future persecution due to the birth of two children in the United States, in China, or a combination of native and foreign-born children, and, in each instance, found the evidence insufficient to meet the requisite burden of proof. See *Yan Song Wang v. Keisler*, ___ F.3d ___, 2007 WL 2727706 (7th Cir. Sept. 20, 2007) (relying on *Matters of J-W-S-*, and *J-H-S-*, and upholding the Board’s determination that the husband and wife applicants failed to meet their burden of proof to show they would be singled out for persecution due to the birth of a second foreign-born child, noting that the applicants had not provided evidence that the policy is implemented through physical force or other means that would amount to persecution).

In addition, an untimely motion to reopen to apply or reapply for asylum due to the birth of children in the United States requires the applicant to meet a “heavy burden” of proving “changed country conditions” or “changed circumstances arising in the country of nationality” to overcome the time and number limitations to reopening. *Matter of S-Y-G-*, *supra*, at 252. The Board and the courts have held that the birth of children in the United States is a change in personal circumstances, not a change in country conditions, and does not satisfy the exception to the time and number limitations on reopening. See, e.g., *Chang Hua He v. Gonzales*, ___ F.3d ___, 2007 WL 2472546 (9th Cir. Sept. 4, 2007). Thus, the applicant must submit material evidence showing changed “circumstances” or “country conditions” in China since the date of the previous hearing in order to merit reopening.¹¹ Prior adverse credibility findings, the birth of United States citizen children after the issuance of a final order of removal, and an alien’s receipt of a “bag and baggage” letter may affect the discretionary determination to reopen. The issue of whether a late or successive asylum application may be filed due to changed personal circumstances in lieu of satisfying the changed circumstances or country conditions exception to an untimely motion to reopen has yet to be addressed by the Board in a published decision. The Seventh Circuit, however, has determined that, in seeking to reopen proceedings after a final administrative order of removal, the applicant must meet the exception to the time and number limitations set forth in section 240(c)(7)(ii) of the Act in order to merit reopening; and there is no conflict with section 208(a)(2)(D) of the Act, the provision that allows a belated asylum application to be filed on the basis of changed personal circumstances. *Cheng Chen v. Gonzales*, ___ F.3d ___, 2007 WL 2389766 (7th Cir. Aug. 23, 2007). This issue was addressed in dicta by the Second and Eleventh Circuits: *Jian Guan v. BIA*, 345 F.3d 47, 49 (2^d Cir. 2003); *Yaner Li v. U.S. Att’y Gen.*, 488 F.3d 1371, 1376-77 (11th Cir. 2007).

Evidence

In the adjudication of these family planning claims the authentication of foreign records and the ability of the Board to take administrative notice of official reports are additional issues which concern the federal courts.¹³ The necessity of authenticating evidence is still an open issue. The First Circuit has stated that, due to State Department reports of fabrication and fraud of Chinese documents, it is proper to require some type of authentication of official records. *Xiang Xing Gao v. Gonzales*, 467 F.3d 33

(1st Cir. 2006); *Mei Guan Lin v. Ashcroft*, 371 F.3d 18 (1st Cir. 2004). However, “[b]y its plain terms, the regulation applies only to foreign official records and not to all documents emanating from foreign sources.” *Xue Deng Jiang v. Gonzales*, 474 F.3d 25, 29 (1st Cir. 2007). The Second Circuit has not addressed whether the Board may require strict compliance with 8 C.F.R. § 287.6 (2007) for foreign documents. *Qin Wen Zheng v. Gonzales*, ___ F.3d ___, 2007 WL 2458419 (2^d Cir. Aug. 31, 2007). Moreover, several courts have stated that failure to comply with the regulation requiring certification of foreign official records does not result in a per se exclusion of documentary evidence; rather, the applicant should be permitted to prove a document’s authenticity by other means.¹⁴ Finally, the courts disagree with the extent of the Board’s authority to take administrative notice of facts in official reports pursuant to 8 C.F.R. § 1003.1(d)(3)(iv), when those facts are dispositive, without first giving notice and an opportunity to respond to the applicant. There is a split in the circuits as to whether the ability to file a motion to reopen cures the lack of notice.¹⁵

In sum, while a number of issues have been decided, there are several outstanding questions regarding the interpretation of the amended definition of “refugee” as it applies to China’s coercive family planning policies, and which will require guidance by the Board and the courts.

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1. A “refugee” is defined as one “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [a] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social, or political opinion.” In 1996 Congress broadened the definition to state: “For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.” Section 601(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3009-689 (codified as amended at section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42)).

2. The applicant may also seek withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the United Nations Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c)-18. The issues addressed in this article may also apply to these claims.

3. Compare *Junshao Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006); *Kui Rong Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (spouses in traditional marriages qualify for asylum); cf. *Hui Zhuang v. Gonzales*, 471 F.3d 884 (8th Cir. 2006); *Hong Zhang Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006) (stating the Court was unaware of any authority that expands the doctrine to cover a former spouse’s involuntary sterilization, even if the sterilization was performed while the couple was married) with *Junshao Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (finding the fact that the alien’s wife remarried after he left China insufficient to rebut the well-founded fear presumption based on his former wife’s forced abortion).

4. *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2^d Cir. 2007) (finding that a request through the appropriate family planning channels for permission to have a child, combined with the subsequent abortion performed on the alien’s girlfriend, does not constitute “resistance to a coercive population program”); *Ru-Jian Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (finding that merely impregnating one’s girlfriend is not an act of resistance).

5. Compare *Yun Yan Huang v. U.S. Att’y Gen.*, 429 F.3d 1002 (11th Cir. 2005) (holding that young female required to undergo an intrusive and painful gynecological examination combined with her 20-day detention for refusing to attend the next examination did not establish persecution on account of “other resistance”) with *Xu Ming Li v. Ashcroft*, 356 F.3d 1153, 1158-60 (9th Cir. 2004) (en banc) (finding that unmarried female’s vocal opposition to family planning policy, physically invasive and traumatic forced pregnancy exam, and threats of future abortions or sterilization on account of her opposition demonstrated “other resistance”).

6. See *Qiao Hua Li v. Gonzales*, 405 F.3d 171, 179 (4th Cir. 2005) (fine and single IUD insertion did not amount to past persecution, but stating, in dicta, that it may find that the “compulsory insertion and required usage of an IUD constitutes ‘persecution’”); *Yahong Zheng v. Gonzales*, 409 F.3d 804 (7th Cir. 2005) (remanded to address three forcible IUD insertions and IUD removals); *Xuan Wang v. Ashcroft*, 341 F.3d 1015, 1018 (9th Cir. 2003) (woman established past persecution also feared involuntary sterilization and imprisonment for removing IUD).

7. See *Mei Guan Lin v. Ashcroft*, 371 F.3d 18, 21 (1st Cir. 2004); *Qiao Hua Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005); *Yun Jian Zhang v. Gonzales*, ___ F.3d ___, 2007 WL 2177951 (7th Cir. July 31, 2007); *Hui Zhuang v. Gonzales*, 471 F.3d 884 (8th Cir. 2006); *Feng Chai Yang v. U.S. Att’y Gen.*, 418 F.3d 1198 (11th Cir. 2005).

8. See *Zen Hua Li v. Att’y Gen. of United States*, 400 F.3d 157 (3^d Cir. 2005) (the court does not address the “resistance” requirement, but

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS for AUGUST 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeal in cases reviewing Board decisions in August 2007 was 12.4%, compared to last month's 20.6%. The chart below provides the results from each circuit for August 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	5	5	0	0.0
2nd	142	120	22	15.5
3rd	24	23	1	4.2
4th	12	11	1	8.3
5th	9	8	1	11.1
6th	6	6	0	0.0
7th	10	8	2	20.0
8th	9	9	0	0.0
9th	211	182	29	13.7
10th	3	3	0	0.0
11th	19	19	0	0.0
All:	450	394	56	12.4

The Second and Ninth Circuits together issued nearly 80% of the decisions and over 90% of the reversals for the month. The reversal rate was down in nearly all circuits for the month with five circuits issuing no reversals.

Ninth Circuit reversals covered a wide range of issues. Only two decisions found fault with credibility findings. Other asylum-related issues included level of harm for past persecution in the case of a child; the persecutor bar; discretionary denial of asylum, standards for finding an asylum claim frivolous, and Convention Against Torture issues. Several cases in the motion to reopen context were remanded with instructions to address issues, arguments, or facts that had not been fully addressed by the Immigration Judge or the Board. The theme of the month appeared to be limits on retroactive application of the law, with three decisions addressing retroactivity. One decision held that the IIRIRA repeal of suspension of deportation could not be retroactively applied to a lawful permanent resident who sought naturalization 18 months

rather finds severe economic disadvantage for failure to comply with coercive population control program constitutes persecution on account of political opinion).

9. *See also Xuan Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (abortion compelled under threat of wage reduction, job loss, and unreasonably high fines was a "forced abortion").

10. In addition, the Seventh Circuit ordered the Board to consider the evidence now before it as a result of *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2^d Cir. 2006) [published as *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007)], and *Jin Xiu Chen v. Gonzales*, 468 F.3d 109 (2^d Cir. 2006). This instruction raises a question of whether, and if so, how much deference should be accorded a subsequent decision of the Second Circuit, *Xiao Xing Ni v. Gonzales*, 494 F.3d 260 (2^d Cir. 2007), which concluded that evidence not originally submitted to the Board should not be considered, as well as the corollary issue of the Board's authority to take administrative notice of official documents, such as State Department reports, without giving the applicant an opportunity to respond.

11. *But cf. Yaner Li v. U.S. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007) (finding, prior to the issuance of the Board's precedent in *S-Y-G-*, that the Board abused its discretion in denying the untimely motion and erroneously determined that Li failed to establish a policy of persecuting women with two foreign-born children, as opposed to native children, and had erroneously assumed that Li's alleged persecutors would make a similar distinction). The Court supported its decision in *Li* by referring to the consular information sheet and to *Tian Ming Lin v. U.S. Dep't of Justice*, 468 F.3d 167, 168 (2^d Cir. 2006), modified, 473 F.3d 48 (2^d Cir. 2007) (rejecting the distinction in the light of evidence presented by applicant in *Shou Yung Guo*, 463 F.3d 109); and *Tu Kai Yang v. Gonzales*, 427 F.3d 1117, 1119-23 (8th Cir. 2005) (rejecting the distinction when undermined by applicant's evidence). However, in view of *Xiao Xing Ni v. Gonzales*, 494 F.3d 260 (2^d Cir. 2007), the Eleventh Circuit's reliance on *Ting Ming Lin* may be questionable.

12. *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007) (Board is not inclined to favorably exercise discretion when Immigration Judge has issued a negative credibility finding); *Fong Chen v. U.S. Dep't of Justice*, 490 F.3d 180 (2^d Cir. 2007) (remanding to address the effect of the birth of children after a final order of removal); *Qian Gao v. Gonzales*, 481 F.3d 173, 176 (2^d Cir. 2007) (applying fugitive disenfranchisement doctrine to deny petition for review).

13. In *Xiao Xing Ni v. Gonzales*, 494 F.3d 260 (2^d Cir. 2007), the Second Circuit held that it will not ordinarily exercise its power to remand cases to the Board to consider documentary evidence that was not in the administrative record before the Board. The case arose in the context of taking judicial notice of documents in other cases (*i.e.*, the *Guo* (*Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2^d Cir. 2006)) and *Chen* (*Jin Xiu Chen v. U.S. Dep't of Justice*, 468 F.3d 109 (2^d Cir. 2006)) remands in two children cases).

The Postman Always Rings Twice? Recent Developments on the Issue of Notice and Delivery

By Edward R. Grant

Whether you prefer the Lana Turner (1946) or Jessica Lange (1981) version (one may substitute John Garfield vs. Jack Nicholson), you may recall not only that the postman does not ring twice, but that there is no postman at all. Nor was there in the James Cain novella (banned in Boston when released in 1932) on which these films were based. But the ephemeral letter carrier is a prominent character in a long series of immigration decisions on the question of “adequate notice” of a hearing, an already-substantial line of cases recently augmented by several published circuit court decisions.

The question of whether proper notice of the charges (Notice to Appear or “NTA”) and hearing date (Notice of Hearing or “NOH”) has been provided to an alien is one of fundamental due process. Without such notice, an alien is not able to defend the charges against him, nor know where and when he will be able to do so. Coupled with these concerns is the high and increasing incidence of “no shows” in immigration hearings – 39 percent of all matters decided by Immigration Judges in FY 2006 involved aliens who failed to appear. A full 60 percent of non-detained aliens fail to appear, almost twice the percentage from FY 2003.¹

A small percentage of these aliens – more in some courts than others – seek to reopen the orders entered against them *in absentia*. Resolving such motions is burdensome, not merely because of the volume, but because of the complexity of the legal standards that have evolved in recent years. For example, by removing (in 1996) the previous requirement that charging documents and hearing notices be sent by certified mail, Congress left open a number of issues regarding notice that have occupied EOIR adjudicators and the federal courts ever since. The Board in *Matter of G-Y-R*, 23 I&N Dec 181 (BIA 2001), for example, held that an NTA sent by regular mail must be sent to an address that is current, and that mailing to an address submitted years earlier to the Immigration and Naturalization Service (now Department of Homeland Security) in an application for asylum or other benefits was not sufficient. All circuits save one have agreed with

before the IIRIRA effective date; a second held that, although the *Fleuti* doctrine was abrogated by IIRIRA, its abrogation was not retroactive as to an alien with a pre-IIRIRA guilty plea who had departed and then sought readmission to the United States; and, finally, a third decision held that the Attorney General’s decision in *Matter of Y-L-*, 23 I & N 270 (A.G. 2002), creating a strong presumption that a drug trafficking crime is a “particularly serious crime,” could not be applied retroactively to an alien who plead guilty to the offense prior to the change in law.

The Second Circuit reversals also involved a wide range of issues. Nearly half of the reversals found fault with the adverse credibility determination in asylum cases. Several other decisions involved improper administrative notice of changed country conditions without affording the parties an opportunity to address the new developments.

The chart below shows numbers of decisions for January through August of 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	74	52	22	29.7
8th	63	50	13	20.6
2nd	840	684	156	18.6
9th	1680	1408	272	16.2
6th	82	69	13	15.9
3rd	229	205	24	10.5
10th	49	45	4	8.2
11th	214	198	16	7.5
5th	135	125	10	7.4
4th	128	119	9	7.0
1st	42	40	2	4.8
All:	3086	2601	485	15.3

Last year at this point (January through August 2006) we had a total of 3831 decisions with 669 reversals for a 17.5 % overall reversal rate.

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this position; the Eleventh Circuit has held that it is the alien's duty to keep the immigration agency advised of a current address. *Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258 (11th Cir. 2002).

More difficult questions arise when the record shows that the notice was sent to a correct address, but the alien claims not to have received it. *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995), held that a "strong presumption" of effective delivery existed when notices were sent by certified mail, and that "substantial and probative evidence" – including supporting documents from the Postal Service – were required to rebut the presumption. Now that regular mail is customarily used, especially for notices of hearing, the circuit courts have almost unanimously rejected the "strong presumption" standard, and permitted aliens to assert non-receipt under a lesser evidentiary standard.²

The latest Court to join this trend is the First Circuit. *Kozak v. Gonzales*, ___F.3d ___, 2007 WL 2685205 (1st Cir. Sept. 14, 2007). The alien in *Kozak* claimed that he did not receive a NOH that was sent by regular mail; the Board affirmed the Immigration Judge's denial of his motion to reopen, citing the lack of "substantial and probative evidence" to rebut the presumption of effective delivery. The First Circuit noted that the key issue to address under the post-IIRIRA standard is not whether a notice has been properly mailed, but whether it has been received. Noting that the type of rebuttal evidence available in the case of certified mail (such as tracking history) does not exist when regular mail is used, the Court concluded that the *Grijalva* standard is "unworkable." "It would be inconsistent with the INA," the Court noted, "to require an alien to prove non-receipt with evidence that is unobtainable in the ordinary course." *Id.* at *3.

The Court did not fix a standard to be applied in such cases, leaving that to the Board. It suggested that an affidavit of non-receipt may be the only evidence available to an alien to substantiate a claim of non-delivery, but that such evidence need not be accepted in every case, acknowledging that a "bare, self-serving, uncorroborated" denial of receipt is "weak evidence." *Id.* (quoting from *Joshi v. Ashcroft*, 389 F.3d 732, 735 (7th Cir. 2004)). However, such an affidavit may be coupled with other evidence, such as diligence on the part of the alien in checking on the status of proceedings, to substantiate a claim of non-receipt.

A more "hands-on" approach was taken recently by the Ninth Circuit in *Sembiring v. Gonzales*, ___ F.3d ___, 2007 WL 2406863 (9th Cir. July 13, 2007), involving an alien who claimed not to have received a "reset" NOH (served by mail) advancing the hearing date six days from that stated in the NTA (which had been served in person). The alien appeared on the date originally set in the NTA, only to find that an in absentia order had been entered on the reset date. The alien alleged that a court clerk advised her to write a letter to the Immigration Judge explaining the circumstances. She attached a brief letter to a pro se motion to reopen filed days later. The Immigration Judge denied the motion, stating that the "reset" notice had been sent to the correct address, and that the respondent submitted no affidavit claiming difficulty in the receipt or delivery of her mail. The Board affirmed, again citing the lack of an affidavit.

In reversing, the Ninth Circuit held that the Immigration Judge and Board too strictly construed its ruling in *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002). *Salta* held that in cases where notice is provided by regular mail the "strong presumption of effective mail service" that attached to service by certified mail did not apply. Rather, a "weaker presumption" applied, and less evidence would be required to overcome it. *Salta* stated that where a party has initiated contact with immigration authorities (such as by applying for asylum), appears at an earlier hearing, and has no motive to avoid the hearing, "a sworn affidavit . . . that neither she nor a responsible party residing at her address received the notice should ordinarily be sufficient to rebut the presumption of delivery..." *Id.* at 1079. This appears similar to the standard recently suggested (but not dictated) by the First Circuit in *Kozak*.

The alien in *Sembiring* did not file the affidavit as suggested in *Salta*, but the Court held, for four reasons, that such an affidavit was not a requirement to rebut the "weaker presumption." First, the *Salta* inquiry is "a practical one under which many forms of evidence are relevant." Second, the regulations governing motions to reopen in absentia proceedings do not require such an affidavit. Third, the pro se status of this alien required that her pleadings be "liberally construed." Finally, the liberty interests at stake – an alien would otherwise be removed without the opportunity for hearing on her claim for asylum – militate against an affidavit requirement that would "elevate form over substance." *Sembiring, supra* at *7.

What emerges from the circuit decisions is a very flexible evidentiary standard giving a significant benefit of the doubt to the alien, and capable of further evolution depending on the circuit's appraisal of the evidence. Even evidence of delivery such as the inclusion of an envelope may not be enough – the Ninth Circuit commented that the photocopied envelope in the *Sembiring* record did not include the alien's address. (Whether this can be accounted for by the fact that such notices are sent in window envelopes, and the envelope in question was copied before insertion of the notice, is of course unknowable.)

Finally, while it is an alien's burden to provide an accurate address to immigration authorities, the burden to ensure that an address is properly and fully stated is likely to fall on the government. In *Peralta-Cabrera v. Gonzales*, ___ F.3d ___, 2007 WL 2566034 (7th Cir. Sept 7, 2007), an alien was released from custody to the care of an acquaintance, and that person's address was given as the point of contact. Subsequent notices addressed in the name of the alien to the host's address were returned as undeliverable. Postal Service regulations required a name-address "match" before mail could be delivered, thus requiring that the notice be mailed to the alien "in care of" his host. The alien had not registered his name with the post office at his friend's address, and the government had not addressed the notice to the alien "in care of" the friend. The Court held that since the government knew the alien was staying with the friend, it was the government's duty to know how to properly address an envelope in accordance with Postal Service requirements.

Two other recent cases address the issue of postal non-receipt from a different perspective – claims that a decision of the Board has not been received, thus frustrating the alien's ability to file a timely petition for review. In *Chen v. U.S. Att'y Gen.*, ___ F.3d ___, 2007 WL 2593775 (2^d Cir. Sept. 11, 2007), the Second Circuit declined to extend the standards applicable to assessing receipt of a mailed NTA or NOH to a mailed decision of the Board. The Board had denied the alien's motion to reissue the decision, concluding that the alien's affidavit of non-receipt was insufficient to overcome the evidence in the record – a properly addressed cover letter on Board letterhead. The Circuit drew a distinction between the legal requirements regarding notice of a hearing – which it concluded require evidence of receipt of the notice – and those governing the service of decisions, which require evidence of proper service.

The Ninth Circuit in *Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007), remanded a similar decision to the Board, finding that the Board did not sufficiently consider the affidavits of the alien and his counsel that they never received the decision dismissing their appeal. The Court declined to state whether the Board must consider the affidavits sufficient to overcome the evidence of service (cover letter) contained in the record, but it did include this telling request: "It would be helpful to the court if on remand the BIA would specifically address what procedures or processes exist to assure that petitioners are notified of the BIA's decisions, including assuring that decisions are actually mailed, and how petitioners can inform themselves of the status of pending decisions." *Id.* at 1173.

So, while we can presume that the postman delivers a Notice to Appear or a Notice of Hearing, that presumption is subject in most circuits to an unfixated constellation of rebuttal evidence. Moreover, that evidence must be given individual consideration in each case in which it arises. It's not exactly the sort of stuff that makes for a film noir – but finding the correct solution may be just as complex.

Edward R. Grant is a Board Member with the Board of Immigration Appeals.

1. Office of Planning and Analysis, U. S. Department of Justice, FY 2006 Statistical Year Book. H1-H3 (2007).

2. See *Silva-Carvalho Lopes v. Gonzales*, 468 F.3d 81 (2^d Cir. 2006)(a presumption of receipt attaches to a piece of mail that is properly addressed and sent according to normal office procedures; Board exceeded its discretion in dismissing alien's appeal without considering all of the circumstantial evidence he proffered to rebut that presumption); *Nibagwire v. Gonzales*, 450 F.3d 152 (4th Cir. 2006)(Board erred by applying the delivery presumption for certified mail and by holding alien to the evidentiary standard for rebutting the delivery presumption for certified mail, where notice to appear was sent to the alien by regular mail); *Terezov v. Gonzales*, 480 F.3d 558 (7th Cir. 2007)(record lacks substantial evidence to support finding that the Notice to Appear was sent to the last address provided; all corroborating evidence submitted by an alien regarding claim of lack of proper notice must be considered, even if inconclusive evidence); *Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004)(alien's sworn statement is enough to rebut the presumption of delivery created by court records that it sent alien notice by regular mail, and alien is entitled to evidentiary hearing on the matter).

RECENT COURT DECISIONS

Second Circuit

Xu Sheng Gao v. U.S. Att’y Gen., ___ F.3d ___, 2007 WL 2471746 (2^d Cir. Sept. 4, 2007). The petitioner, a native and citizen of China, sought asylum, withholding of removal, and protection under the Convention Against Torture. The Immigration Judge denied relief finding the petitioner was a persecutor of others based upon his position as the chief officer of the Qingdao City Culture Management Bureau which was responsible for inspecting booksellers and could refer booksellers to the Public Security Bureau. The Board affirmed. The Second Circuit reversed, holding that the petitioner’s association with an enterprise that engages in persecution was insufficient to trigger the persecutor bar. There was no evidence that the petitioner actually assisted in persecution and he had no direct influence or control over arrests leading to persecution. The Court adopted the First Circuit’s view that the persecutor bar requires some level of culpable knowledge that the consequences of one’s actions would assist in acts of persecution. *See Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20-22 (1st Cir. 2007).

Dulal-Whiteway v. U.S. Dept. of Homeland Sec., ___ F.3d ___, 2007 WL 2712941 (2^d Cir., September 19, 2007). An Immigration Judge found, and the Board affirmed, that the petitioner was removable on the grounds that his conviction for making false statements in connection with the acquisition of a firearm, in violation of 18 U.S.C. § 922(a)(6), was a firearm offense rendering him removable under section 237(a)(2)(C) of the Act, and that his conviction for fraud in connection with unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(2), was an aggravated felony. The Court affirmed the finding that Dulal is removable for the firearm offense, but reversed the aggravated felony finding. The Court found that it was improper for the Immigration Judge and the Board to have relied upon a restitution order and pre-sentence report to determine that Dulal was convicted of an offense “involv[ing] fraud or deceit in which the loss to the victim or victims exceeds \$10,000,” 8 U.S.C. § 1101(a)(43)(M)(i).

The Court discussed but did not decide what a divisible statute looks like. The Court also held that in determining whether an alien is removable based on a conviction for an offense set forth in the Act, courts may rely only upon information appearing in the record of conviction that would be permissible under the approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990)

and *Shepard v. United States*, 544 U.S. 13, 17 (2005), in the sentencing context. For convictions following a trial, courts may rely only upon facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions. For convictions following a plea, the Board may rely only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript. The Court concluded that the “necessarily pleaded” requirement links the record of conviction inquiry to the divisibility inquiry: once it is determined that a criminal statute is divisible, because one or more of its elements can be satisfied both by conduct that is removable and by conduct that is not, consultation of the record of conviction to determine which type of conduct represents the basis of the conviction is appropriate.

Nguyen v. Chertoff, ___ F.3d ___, 2007 WL 2682230 (2nd Cir. Sept. 13, 2007). The petitioner, a native and citizen of Vietnam, was convicted of the rape of a five-year-old child in 1989. He was found removable for having committed a crime involving moral turpitude, but the state sentencing judge issued a judicial recommendation against deportation (“JRAD”). Subsequently, Congress repealed the JRAD statute and expanded the definition of aggravated felony to include the rape or sexual abuse of a minor. The new definition made the petitioner’s conviction an aggravated felony. In 2003, an Immigration Judge concluded the JRAD did not preclude the petitioner’s deportation as an aggravated felon. The Board affirmed. The Second Circuit reversed, finding that Congress placed no limit on the retroactive definition of aggravated felony for removability purposes, but also did not exclude the JRAD statute definition of aggravated felony, and thus the JRAD effectively shielded the petitioner from removal.

Third Circuit

Luciana v. Attorney General, ___ F.3d ___, 2007 WL 2696865 (3^d Cir. Sept. 17, 2007). The petitioner, a native and citizen of Indonesia, requested asylum, withholding of removal, and protection under the CAT based on her being an ethnic Chinese and Christian. The Immigration Judge denied the asylum application as untimely. The Immigration Judge denied all other relief, finding the petitioner not credible and her asylum claim frivolous. The Board affirmed. The Third Circuit found the application not frivolous as a matter of law, since the falsehood

on which the Immigration Judge based the determination was not material. The false statement lacked the capacity to influence the decision of the Immigration Judge once her asylum application had been found time-barred and was thus not material.

Fourth Circuit

William v. Gonzales, __ F.3d __, 2007 WL 2494763 (4th Cir. Sept. 6, 2007). The Court held that 8 C.F.R. 1003.2(d) which states that a motion to reopen “shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States” conflicts with section 240(c)(7)(A) of the Act which provides that an alien “may file one motion to reopen proceedings.” The Court found that the statute “unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.” The motion in this case was untimely and the court remanded for a determination whether it met any of the exceptions for untimely motions.

Seventh Circuit

Binrashed v. Gonzales, __ F.3d __, 2007 WL 2685148 (7th Cir. Sept. 14, 2007). The alien, a Yemeni national, received asylum fraudulently representing himself to be a citizen of Somalia. After his conviction on misdemeanor charges of obstructing an officer, he was placed in removal proceedings. An Immigration Judge denied his requests for withholding of removal and relief under the CAT, concluding that the alien did not suffer past persecution or establish a clear probability of future persecution. The court found that the Board neglected critical evidence in the record – Yemen officials threatened to arrest him in place of his father, corroborating evidence in the country condition reports, and the alien’s father currently being wanted by the government. The court vacated the Board’s decision and remanded.

Ninth Circuit

Miguel-Miguel v. Gonzales, __ F.3d __, 2007 WL 2429377 (9th Cir. Aug. 29, 2007). The Court held that the Board erred in applying retroactively the heightened standard in *Matter of Y-L-*, 23 I&N Dec. 270 (AG 2002), for determining whether a drug trafficking offense is a particularly serious crime, when the guilty plea was entered prior to issuance of *Matter of Y-L-*. The Court remanded for application of the *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), standard applicable at the time the guilty plea was entered.

This case addresses retroactivity of agency rules, including adjudicative rules, with reference to *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) and application of the following factors identified in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982): (1) is the issue one of first impression; (2) does the new rule represent an abrupt departure from prior practice or merely fill a void; (3) to what extent was there reliance of parties on the old standard; (4) degree of burden retroactive application poses; and (5) statutory interest in applying new rule despite reliance of party on the old standard. The Court found that only the last factor favored the government’s view that *Matter of Y-L-* should apply to guilty pleas entered prior to *Y-L-*, and that overall the factors tilted in favor of nonretroactive application of *Y-L-*.

Navarro-Lopez v. Gonzales, __ F.3d __, 2007 WL 2713211 (9th Cir. Sept. 19, 2007). The Court, reversing the Immigration Judge and the Board, found that the alien’s conviction under California Penal Code section 32 for accessory after the fact was not a conviction for a crime involving moral turpitude. The Court found that a crime involving moral turpitude must be a crime that (1) is vile, base or depraved and (2) violates societal moral standards. Accessory after the fact is not, categorically, vile, base or depraved.

BIA PRECEDENT DECISIONS

In *Matter of A-K-*, 24 I&N Dec. (BIA 2007), the Board considered whether an alien may establish eligibility for asylum or withholding of removal based solely on a fear that his or her daughter will be harmed by being forced to undergo female genital mutilation (FGM) upon return to the alien’s home country. The respondent is a native and citizen of Senegal and feared that his two United States citizen daughters would be forced to undergo FGM if he were returned. The Immigration Judge granted withholding, and the Board reversed.

The Board first distinguished authority from the United States Court of Appeals for the Sixth Circuit which found that an alien was eligible for asylum due to the fear of FGM to a child, because the children in that case were not citizens of the United States. The Board also found that FGM is common only in certain areas of Senegal and the government is working to eradicate it. The Board further noted that acts of persecution against family members do not serve to establish a risk of future persecution to the applicant absent a pattern of persecution tied to the respondent, or some indication that a political

opinion would be imputed to the alien upon return. Derivative asylum is reserved for spouses or children of applicants; it is the applicant who must establish eligibility. The Immigration and Nationality Act does not provide for derivative withholding. Finally, the Board found no evidence that the respondent would be subject to persecution based on a social group of fathers who oppose FGM to their children, or due to a political opinion.

In *Matter of Shah*, 24 I&N Dec. 282 (BIA 2007), the Board addressed an attorney discipline matter. In this case, the attorney was found by an Administrative Law Judge from the Department of Labor to have willfully misrepresented a material fact on a Labor Condition Application (LCA) filed with the Department of Labor. The Board found that a practitioner can be subject to discipline even though the misrepresentation was first made to another agency. The Petition for Nonimmigrant Worker (Form I-129), which is adjudicated by the United States Customs and Immigration Service (USCIS), is supported by the LCA. By presenting the improperly obtained LCA to USCIS, the respondent knowingly and willfully misled USCIS.

In *Matter of S-K*, 24 I&N Dec. 289 (A.G. 2007), the Attorney General remanded to the Board a case involving the application of the asylum bar for providing material support to a terrorist organization, in this case the Chin National Front in Burma. The Immigration Judge had found, and the Board affirmed, that the Chin National Front was a terrorist organization, and the alien had engaged in terrorist activity, and was barred from asylum despite establishing a well-founded fear of persecution in Burma. See sections 212(a)(3)(B)(i)(I) and (B)(iv)(VI) of the act. The Attorney General had certified the case due to the Secretary of Homeland Security's designation of the Chin National Front as an exception to the bar. On remand, the Board is to determine what further proceedings are necessary.

In *Matter of Krivonos*, 24 I&N Dec. 292 (BIA 2007), the Board addressed the reinstatement provision in an attorney discipline case. The attorney was expelled from practice before EOIR and the Department of Homeland Security as a result of a conviction for immigration-related fraud. He was reinstated to practice in New York and moved for reinstatement before the Board and the Immigration Courts. The Board denied the respondent's motion for reinstatement because the respondent had not demonstrated by clear, unequivocal, and convincing evi-

dence that he possesses the moral and professional qualifications required to appear before EOIR, and that his reinstatement will not be detrimental to the administration of justice. 8 C.F.R. § 1003.107(b)(1). The Board found that the nature of the crime was serious, struck at the heart of the country's immigration laws, and denied the motion.

In *Matter of Jean-Joseph*, 24 I&N Dec. 294 (BIA 2007), another reinstatement case, the Board denied the respondent's motion to reinstate because the respondent had practiced before the Immigration Court while under a suspension order. The practitioner had been suspended from the practice of law by the Supreme Court of Florida for 60 days, and the Board suspended the respondent from the practice of law before EOIR. The respondent was reinstated by the Florida Bar. During the period the respondent was suspended before the Immigration Courts, the respondent appeared at least five times before the Immigration Court. The Board suspended the respondent for 120 days.

In *Matter of A-T*, 24 I&N Dec. 296 (BIA 2007), the Board considered whether a past experience with female genital mutilation (FGM) is a continuing harm. The respondent, a native and citizen of Mali, underwent FGM when she was a young girl and is opposed to the practice. The Immigration Judge found, and the Board affirmed, that the respondent was ineligible for asylum due to the one-year bar. The Board held that assuming the respondent suffered past persecution on account of a social group, "any presumption of future FGM persecution is ... rebutted by the fundamental change in respondent's situation arising from the reprehensible, but one-time infliction of FGM upon her." *Id.* at 299. The Board distinguished *Matter of Y-T-L*, 23 I&N Dec. 601 (BIA 2003) which found forced sterilization to be continuing persecution. The Board found that *Matter of Y-T-L* was a departure from the ordinarily applicable principles in asylum and withholding of removal that those who have experienced past persecution but have no well-founded fear of future persecution may only obtain refugee status if they demonstrate compelling reasons for being unwilling to return to their country arising out of the severity of the past persecution, or they face a reasonable possibility of some other harm. To treat sterilization due to China's coercive population control policies any other way would have been to frustrate the purpose of the provision enacted by Congress. FGM, in contrast, has not been specifically identified as a basis for asylum within the definition

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of refugee. Finally, the Board noted that the regulations do not provide for a discretionary grant of withholding. The respondent also asserted that her father has arranged a marriage for her in Mali, and she fears the consequences of refusing to comply. The Board found the respondent ineligible for asylum on this basis because arranged marriages are not considered per se persecution. The respondent did not present any specific evidence of harm from her family, and relocation was a reasonable alternative.

In *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), the Board considered whether the amount of loss to the victim, which must exceed \$10,000 for an aggravated felony offense involving “fraud or deceit” under section 101(a)(43)(M)(i) of the Act, can be found by reference to evidence outside the “record of conviction,” or whether the categorical and modified categorical approaches restrict inquiry solely to record of conviction information. In this case, the respondent was convicted of mail fraud, conspiracy to commit mail fraud, healthcare fraud and false statements under 18 U.S.C. §§ 1341 and 341. The statute contains no specific loss amounts, nor do the plea agreements or indictment, but there was a restitution order and a pre-sentence report in the record that provided some evidence of the loss. The Board found that the categorical and modified categorical approaches are not applicable in determining loss to the victim because loss to the victim is not intended to describe an element of the crime. It is a fact about the impact of an alien’s convicted conduct that Congress employed as a means of excluding from the scope of the aggravated felony definition some minor offenses. When a removal charge depends upon both elements leading to a conviction and nonelement facts, the nonelement facts may be determined by means of evidence beyond the record of conviction.

The record of conviction can be dispositive on the question of loss, but it will depend upon what information is available and will generally only assist if the record shows the alien admitted the amount of loss during criminal proceedings. Sentencing factors (such as restitution orders) may offer some evidence, but the burden of proof required must be scrutinized as some states only require a preponderance of the evidence standard, which is a lesser standard than the clear and convincing evidence required to establish removability. Immigration Judges may consider other reliable evidence, including witness testimony, bearing on the loss to the victim. In this case, the Immigration Judge had not considered evidence outside the record of conviction, and the case was remanded.

DEPARTMENT OF JUSTICE

8 CFR Parts 1003 and 1240

Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge

AGENCY: Executive Office for Immigration Review,
ACTION: Final rule.

SUMMARY: This rule revises the Attorney General’s regulations relating to the delegation of authority to the Director of the Executive Office for Immigration Review (EOIR) and the Chief Immigration Judge with respect to the adjudicatory process. These rules are intended to improve the management of EOIR.

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

ACTION: Notice of final action regarding technical and conforming amendments to federal sentencing guidelines effective November 1, 2007.

SUMMARY: On May 1, 2007, the Commission submitted to Congress amendments to the federal sentencing guidelines and published these amendments in the Federal Register on May 21, 2007. See 72 FR 28558. The Commission has made technical and conforming amendments, set forth in this notice, to commentary provisions related to those amendments.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 212, 214, 248, 274a and 299

New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status

AGENCY: U.S. Citizenship and Immigration Services,
SUMMARY: This interim rule amends Department of Homeland Security regulations to establish the requirements and procedures for aliens seeking U nonimmigrant status. The U nonimmigrant classification is available to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. The purpose of the U nonimmigrant classification is to strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons, while offering protection to alien crime victims in keeping with the humanitarian interests of the United States.

This interim rule outlines the eligibility and application requirements for the U nonimmigrant classification and

the benefits and limitations relating to those granted U nonimmigrant status. This interim rule also amends existing regulations to include U nonimmigrants among the nonimmigrant status holders able to seek a waiver of documentary requirements to gain admission to the United States, and to permit nonimmigrants to change status to that of a U nonimmigrant where applicable. This rule also establishes a filing fee for U nonimmigrant petitions. Aliens who have been granted interim relief from USCIS are encouraged to file for U nonimmigrant status within 180 days of the effective date of this interim rule. USCIS will no longer issue interim relief upon the effective date of this rule; however, if the alien has properly filed a petition for U nonimmigrant status, but USCIS has not yet adjudicated that petition, interim relief will be extended until USCIS completes its adjudication of the petition. DATES: Effective date. October 17, 2007.

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
Automatic Extension of Employment Authorization and Related Documentation for Liberians Provided Deferred Enforced Departure

SUMMARY: This notice announces an 18-month automatic extension of employment authorization and Employment Authorization Documents for Liberians (and persons without nationality who last habitually resided in Liberia) who have been provided Deferred Enforced Departure (DED) in accordance with the Memorandum from President George W. Bush, to Secretary of Homeland Security, Michael Chertoff, dated September 12, 2007. In addition, this notice informs the affected Liberians and their employers, or prospective employers, that a copy of this notice presented in conjunction with an Employment Authorization Document (EAD) expiring on September 30, 2007, that was previously issued to the person as a beneficiary of Temporary Protected Status (TPS), may be accepted as evidence of a covered individual's continued employment authorization through March 31, 2009. This notice further informs Liberians covered by DED and their employers how they may determine which EADs are automatically extended. Finally, this notice provides instructions for those Liberians who have been provided DED and who would like to apply for permission to travel outside the United States during the 18-month DED period.

DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 103 and 214
New Classification for Victims of Criminal Activity; Eli-

gibility for "U" Nonimmigrant Status; Correction
AGENCY: U.S. Citizenship and Immigration Services,
ACTION: Interim rule; correction.

SUMMARY: This document contains corrections to the interim rule published in the Federal Register on September 17, 2007. The rule established the requirements and procedures for aliens seeking U nonimmigrant status. A review of the interim rule after publication identified erroneous references to filing fees for Form I-918, "Petition for U Nonimmigrant Status," and Form I-918, Supplement A.

SUPPLEMENTARY INFORMATION:

Need for Correction: On September 17, 2007, U.S. Citizenship and Immigration Services (USCIS) published an interim rule at 72 FR 53014 establishing the requirements and procedures for aliens seeking U nonimmigrant status. The SUMMARY and SUPPLEMENTARY INFORMATION sections of the interim rule made contradictory statements regarding whether there is a filing fee for Form I-918, "Petition for U Nonimmigrant Status," and Form I-918, Supplement A. The regulation text itself contained an amendment to 8 CFR 103.7(b)(1) and language in new 8 CFR 214.14(c) reflecting that USCIS would charge a filing fee for Form I-918 and Form I-918, Supplement A. As correctly stated in the Supplementary Information (page 53031, third column, paragraph D.), USCIS will charge no fee for Forms I-918 and I-918, Supplement A, but will charge the established fee for biometric services for each person ages 14 through 79 inclusive with each U nonimmigrant status petition.

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