U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 12, No. 2 February 2008

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Second Circuit "disturbed" by frequency of ineffective representation of attorneys retained by aliens

"With disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country," said the Second Circuit in reversing the BIA's denial of a motion to reopen in *Aris v. Mukasey*, __F.3d__441800 (2d Cir. 2008). The court said that it thought it was "self evident" that "a lawyer who misadvises his client concerning the date of an immigration hearing and then fails to inform the client of the deportation order entered in absentia (or the ramification thereof) has provided ineffective assistance of counsel." Such misadvice, added the court, can constitute ineffective assistance of counsel "even where it is supplied by a paralegal providing scheduling information" as happened in this case.

The petitioner, a native of Jamaica, was 12 years old when he entered the United States in 1983 as an LPR. Following a 1991 conviction for unlawful possession of cocaine, the INS sought his removal as an alien who had been convicted of a controlled substance violation. In April 1994, petitioner, with retained a counsel, conceded deportability, but was granted until the end of business that day to apply for § 212(c) relief. The 212(c) application was not filed.

Petitioner did not show up at the continued hearing held on May 2, 1995. He later stated that he called his attorney's office and was told by a paralegal told him that there were no hearings scheduled for that day. Petitioner did not appear at the scheduled hearing. Apparently, the paralegal subsequently

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DAVID J. KLINE SELECTED DIRECTOR OF OIL'S DISTRICT COURT LITIGATION

David J. Kline, OIL's former Principal Deputy Director, has been selected to fill a new director position created within the Office of Immigration Litigation. In this role, Mr. Kline will oversee and coordinate OIL's litigation in the district courts. In making the announcement, Jeffrey Bucholz, the Acting Assistant Attorney General for the Civil Division, stated in a congratulatory message to the Division's employees, that "this additional director position was created in light of OIL's rapid expansion in recent years, both in terms of caseload and staff, as well as OIL's renewed focus on immigration-related district court litigation."

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POLICY REQUIRING COURT ORDER FOR USE OF SEDATION IN AID OF REMOVAL

The United States Immigration and Customs Enforcement ("ICE"), Department of Homeland Security, is charged with executing final removal orders issued against aliens unlawfully in the United States. *See* INA § 241(a)(1), 8 U.S.C. § 1231(a)(1); 8 C.F.R. § 241.33. Aliens subject to a final order of removal and in the custody of ICE sometimes attempt to interfere with their removal by making threats, offering physical resistance, or engaging in other unruly conduct.

A resisting alien who engages in threatening or violent behavior violates the law and poses a serious danger to the public, government personnel, and himself. *See* INA § 243(a)(1), 8 U.S.C. § 1253(a)(1). Sedation of a resisting alien for transit to his home country is an option ICE may pursue to enforce the INA and effectuate the removal of aliens.

The INA authorizes ICE to employ contract medical personnel from the Division of Immigration Health Services, U.S. Public Health Service, Department of Health and Human Services, to administer appropriate care during the removal process to an alien who "requires personal care because of [his] mental or physical condition." INA § 241 (f), 8 U.S.C. § 1231(f).

The statute and regulations do not directly address the situation when sedatives may be administered involuntarily on an alien who is not mentally or physically impaired. As a matter of ICE policy, sedatives may only be administered on a mentally healthy alien who resists, or is likely to resist, his removal pursuant to a court order. There are no exceptions to this policy. Emergency or exigent circumstances are not grounds for departing from the policy.

On January 9, 2008, ICE issued a memorandum setting forth an amended policy governing medical escorts for detainees who are removed from the United States by ICE pursuant to its duties under the INA. The memo is reprinted here in its entirety.

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ICE memorandum re amended medical escort policy

Memorandum To:
Assistant Directors
Deputy Assistant Directors
Field Office Directors

From: John P. Torres,
Director, Office of Detention and Removal Operations, ICE

Re: Amended Medical Escort Policy

This memorandum amends the June 21, 2007 Medical Escort Policy governing medical escorts for detainees who are removed from the U.S. by U.S. Immigration and Customs Enforcement (ICE).

Effective immediately, Detention and Removal Operations (DRO) Field offices may no longer request a medical escort from the Division of Immigration Health Services (DIHS) in order to administer involuntary sedation to facilitate an alien's removal unless the Government has obtained an order authorizing sedation from a Federal District Court. DIHS may only involuntarily sedate an alien to facilitate removal where the Government has obtained a court order as provided above. There are no exceptions to this policy. Emergency or exigent circumstances are not grounds for departures from this policy.

In seeking authorization to involuntarily sedate an alien for purposes or removal, the Government will ask the court to find that involuntary administration of the particular drug(s) to the particular alien is both necessary to effectuate removal and medically appropriate. In support of its application for a court order, the Government will offer evidence that the alien has a history of exercising physical resistance to being removed, or that the alien presents, or will likely present, a danger to himself or herself or to others during the removal process. The Government will also present evidence from a medical doctor that administration of the particular drug(s) to the specific alien is medically appropriate. In such a proceeding the Government will recommend that the court appoint counsel for the alien, where the alien is not represented by counsel or is unable to retain counsel.

> DIHS may only involuntarily sedate an alien to facilitate removal where the Government has obtained a court order as provided above. There are no exceptions to this policy.

The Field Office must first request approval from the Detention Management Division's Unit Chief for DIHS to pursue a court order requesting authorization for involuntary sedation. The Field Office shall also coordinate with its corresponding Office of Chief Counsel and local United States Attorney's Office in applying for court authorization.

This policy applies whenever the Government seeks to remove an alien by aircraft whether on a commercial, charter, JPATS, or other flight. This policy does not apply to aliens whose medication is administered pursuant to a previously prescribed course of therapeutic treatment.

Asylum litigation update

Emerging issues regarding the past-persecution presumption

The past-persecution presumption can be overlooked or misunderstood in asylum adjudications, court decisions, and briefing. There are four emerging issues that require special attention: 1) Whose persecution triggers the presumption (the applicant's persecution or someone else's)? 2) Does the presumption apply only to the original claim of persecution? 3) Is the Board's theory of "continuous" persecution limited to past sterilization or does it include other types of harm like past FGM? 4) Must an immigration judge decide the issue of past persecution before deciding the question of future persecution? This article discusses the first and second issues. Next month's article will discuss the third and fourth issues. In the meantime, if you have an alien claiming that the immigration judge erred in failing to apply the presumption – or in finding that it was rebutted by changed conditions – you may have one or more of these emerging issues that need special attention and briefing.

Legal Standards

Asylum is available at the discretion of the Attorney General if he determines that the applicant qualifies as a "refugee" within the meaning of the INA. 8 U.S.C. § 1158(b)(1). The INA defines "refugee" as a person who is unable or unwilling to return to his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). While someone may qualify for asylum based on either past or future persecution, the Attorney General ordinarily will not grant asylum as a matter of discretion unless the applicant also has a well-founded fear of future persecution on account of one of the qualifying grounds. 8 C.F.R. § 1208.13(b)(1); *Marquez v. INS*, 105 F.3d 374 (7th Cir. 1997). This is because asylum is primarily protection against future persecution and is not a remedy for past harm. *Marquez*, 105 F.3d at 379; *Matter of N-M-A-*, I & N Dec. 312 (BIA 1998). There are two ways an applicant may establish a "well-founded fear" of future persecution. The applicant may show past persecution on account of a qualifying ground, which triggers the past-persecution presumption. Or the applicant may show a "well-founded fear" based on future individualized persecution or a pattern and practice of persecution of similarly situated persons. 8 C.F.R. § 1208.13(b).

The Past Persecution Presumption And Expanded Rebuttal

The past-persecution regulation provides that an alien who has established past persecution is presumed to have a "well-founded fear" of future persecution. 8 C.F.R. § 1208.13(b)(1); *Marquez*, 105 F.3d at 379; *Matter of N-M-A, supra.* The DHS may rebut this presumption by showing a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of [future] persecution." 8 C.F.R. § 1208.13(b)(1)(i)(A). Prior to January 2001, the only kind of evidence that could rebut the past persecution presumption was evidence of changed country conditions. *See* 8 C.F.R. § 208.1(b)(1)(i) (1999). Effective January 2001, however, the DHS may rebut the presumption by showing a "fundamental change in circumstances," which refers to either to changed country conditions, or to a change in the applicant's "personal circumstances." *Ixtlilco-Morales v. Keisler,* 507 F.3d 651, 655 (8th Cir. 2007*), quoting* 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000). The DHS may also rebut the presumption by showing that the applicant could reasonably relocate elsewhere to avoid a risk of future persecution. 8 C.F.R. § 1208.13(b)(1)(i)(B).

■ **Briefing Tip:** Rebuttal by changed personal circumstances and by reasonable relocation were added in 2001 and can be overlooked by courts or aliens' attorneys when they are summarizing the law. Be sure that you include them in your statement of the governing law, where appropriate.

Issue 1: Whose persecution triggers the presumption?

Answer: The presumption is triggered by persecution of the applicant – not someone else.

Under the regulations, asylum and withholding of removal are applicant-specific. This means that the applicant must establish that the persecution is specific to and directed at him or her. The regulations state that the applicant must prove that *"he or she* has suffered past persecution or . . . has a well-founded fear of future persecution." 8 C.F.R. 1208.13(b), (b)(1) and (2)(i)(A) (emphasis added). A "well-founded fear" is defined in terms of the fear of the applicant. 8 C.F.R. § 1208.13(b)(2)(i)(A)-(C). The past-persecution presumption arises if the applicant establishes that "he or she has suffered persecution in the past." 8 C.F.R. § 1208.13(b)(1). The presumption may be rebutted by showing "a fundamental change," 8 C.F.R. § 1208.13(b)(1)(i)(A), in the applicant's "personal circumstances" or in country conditions. 65 Fed. Reg. at 76,127. The presumption may also be rebutted by showing that "the applicant" could avoid future persecution by relocating to another part of his or her country. 8 C.F.R. § 1208.13(b)(1)(i)(B). Similarly, to be eligible for withholding of removal, "the applicant" must prove that " *his or her life* or freedom would be threatened," meaning it is

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Past persecution presumption

more likely than not that "*he or she* would be persecuted." 8 C.F.R. § 1208.16(b)(1) and (2) (emphases added). If "the applicant" is found to have experienced past persecution, there is a presumption of a future threat to life or freedom. 8 C.F.R. § 1208.16(b) (1)(i)(A)-(B). As in asylum cases, this presumption can be rebutted if there is either "a fundamental change in circumstances" or "[t]he applicant" could relocate elsewhere in his or her country to avoid future persecution. *Id*

■ **Briefing Tips:** If an alien argues past persecution triggering the presumption, make sure he or she is not trying to conflate (lump together) past actions or harms directed at others (such as friend or family members). Harms directed at others on account of their race, religion, et cetera does not ordinarily qualify as persecution of the applicant on account of "his or her" race, religion, or other qualifying ground and cannot trigger the presumption. *See generally* 8 C.F.R. 1208.13(b)(1) (providing that the past-persecution presumption arises if the applicant establishes that "*he or she* has suffered persecution in the past") (emphasis added).

Aliens' attorneys commonly lump together harms toward different persons and for different motives trying to establish cumulative conduct rising to the level of past "persecution." This is inconsistent with the plain language of the regulations quoted above. *See generally Mihalev v. Ashcroft,* 388 F.3d 722 (9th Cir. 2004) (holding that a past arrest that was not on account of the alleged protected ground could not be cumulatively considered in assessing "persecution"). If you have such a case, argue that under the regulations, asylum and withholding are applicant-specific, meaning the applicant must prove that "he or she" was persecuted in the past on account of a protected ground – not someone else – in order to trigger the presumption.

Issue 2: Does the past-persecution presumption apply to claims of past and future persecution that are different from one another?

Answer: No. The presumption only applies to future persecution by the same persecutor and for the same motive that was the basis of the past persecution claim.

The rationale for the past persecution presumption is that "the 'past serves as an evidentiary proxy for the future.'" *Matter of N-M-A-* at 318 (quoting *Marquez v. INS*, 105 F.3d 374, 379 (7th Cir. 1997)); *id.*, citing Guy S. Goodwin-Gill, *The Refugee in International Law* 23 (1983 (the "applicant for refugee status. . . is adducing a future speculative risk as the basis for a claim to protection"). The past persecution presumption "is based on the possibility that a persecutor, once having shown an interest in harming the applicant, might seek to harm the applicant again should the applicant be forced to return within the persecutor's reach." *Id.* at 317-18. "Because it is foreseeable that a persecutor would continue to be interested in one of his victims of persecution, the regulation removes the burden from the applicant to show that he may suffer persecution again at the hands of his past persecutor . . [and] once the applicant has shown that he has suffered past persecution on account of a protected ground, the record must reflect that the applicant no longer has a well-founded fear of persecution from his past persecutor." *Id*. "Accordingly, if the record reflects that country conditions relating to the past persecution have changed to such an extent that the applicant no longer has a well-founded fear of harm from his original source of persecution, the evidentiary presumption is extinguished, and the burden returns to the applicant to establish his well-founded fear of persecution from any new source." *Id*.

In 2000, the Attorney General amended the past persecution regulation to clarify that it applies *only* to the original claim of persecution (*i.e.*, the original persecutor and the original motive). *See* 8 C.F.R. §§ 1208.13(b) (1) and 1208.16(b)(1)(i) (stating that the past-persecution presumption applies only to a "fear of persecution on the basis of the original claim"); *id*. ("[i]f the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing [a well-founded] fear. . . ."); 65 Fed. Reg. 76,127 (preamble explaining that the "presumption raised by a finding of past persecution applies only to fear of future persecution based on the original persecution and not to a fear of persecution from a new source unrelated to the past persecution."). This means that if an alien claims past and future persecution by different persecutors, or for different motives, the past persecution presumption does not apply. *See* 8 C.F.R. §§ 1208.13 (b)(1) and 1208.16(b)(1)(i) (presumption limited to "fear of persecution on the basis of the original claim" and does not apply to "future persecution . . . unrelated to the past persecution).

■ **Briefing Tip**: Review your case carefully. If the alien is claiming past and future persecution by different persecutors (for example, by different governments or different entities), or past and future persecution for different motives (for example, past persecution on account of religion and future persecution on account of political opinion), you should argue: 1) the past-persecution presumption does not apply because the claim of future persecution is not based on the original past persecution claim, and 2) the alien has overlooked the plain language of the regulation which precludes the application of the presumption to a fear of persecution from a new source, unrelated to the past persecution.

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If you have questions about a past-persecution presumption issue in our case contact Margaret Perry for advice or samples.

Board of Immigration Appeals Decisions

In February 2008, the Board of Immigration Appeals issued three precedent decisions, all addressing narrow issues that significantly affect some litigation.

IJ Finding of Past Persecution

In *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008), the Board addressed the absence of a specific finding regarding past persecution where the merits of an application of asylum is at issue. The Board noted that if the applicant established past persecution on account of a particular statutorily enumerated ground by a particular persecutor, there is a regulatory presumption of a well-founded fear of persecution in the future on that same grounds by the same persecutor. If so, the burden shifts to the Department of Homeland Security to prove by a preponderance of the evidence that there are changed country conditions affecting that future persecution, or that the applicant could avoid that future persecution by relocating, and that relocation would be reasonable to do so under all of the circumstances. Because the regulations set forth varying burdens of proof depending on whether an applicant suffered past persecution, and particularly in light of the regulatory limits on the power of the Board to make findings of fact, the Board directed that when evaluating an application for asylum, an immigration judge must make a specific finding that the applicant has or has not suffered past persecution based on a statutorily enumerated ground. The decision did not further define the meaning of "specific finding," or indicate whether the rule asserted would be applied to decisions of immigration judges entered prior to the decision.

Aggravated Felony

In *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008), the Board addressed the issue of when a State law misdemeanor drug offense qualifies as an "aggravated felony" under INA § 101 (a)(43)(B). The Board held that Congress intended for "aggravated felony" to be a term of art that need not be a felony under the State law of conviction. Absent controlling precedent to the contrary, the only issue is whether the conviction was for a state offense whose elements include the elements of a felony punishable under the Federal Controlled Substances Act. The Board therefore held that the Maryland State misdemeanor crime of conspiracy to distribute a controlled dangerous substance (marijuana) qualifies as an "aggravated felony" under INA § 101 (a)(43)(B), where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana, as defined by 21 U.S.C. §§ 841 (a)(1), 841(b)(1)(D), and 846. The Board found that although an exception in Federal law would permit distribution of an undefined "small amount of marijuana for no remuneration" to be subject to a misdemeanor punishment, the offense categorically met the elements of a felony under the Controlled Substances Act, and therefore qualifies as an aggravated felony.

Deferred Adjudication

In *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008), the Board again addressed the issue of whether a criminal proceeding which ends in a deferred adjudication is a "conviction" within the meaning of the INA § 101 (a)(48)(A)(ii), 8 U.S.C. § 1101(a)(48) (A)(ii), which requires only that a judge order "some form of punishment, penalty or restraint on the alien's liberty to be imposed." Adjudication of Cabrera's offense was deferred and later dismissed, subject to payment of "costs" and "surcharges," under Florida law, which does not characterize such adjudication as a conviction, and does not treat costs or surcharges as punitive. Initially, the Board held that the issue of whether an alien has been convicted for purposes of INA § 101(a)(48)(A) is a question of law, or a mixed question of law and fact, as to which the Board exercises de novo review. The Board then held that the meaning of "punishment" or "penalty" under INA § 101(a)(48)(A) (ii) is not dependent on the characterization of proceedings under State law. The Board found that the imposition of costs and surcharges in the criminal sentencing context constitutes a form of "punishment" or "penalty" for purposes of establishing that an alien has suffered a "conviction" within the meaning of INA § 101(a)(48)(A).

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Immigration Courts Practice Manual

David Neal, EOIR's Chief Immigration Judge has announced the release of a practice manual for the parties who appear before the Immigration Courts.

"This directive arose out of the public's desire for greater uniformity in Immigration Court procedures and a call for the Immigration Courts to implement their 'best practices' nationwide, said Judge Neal.

The Practice Manual is a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice before the Immigration Courts. The requirements set forth in this manual are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case.

The Immigration Court Practice Manual will be effective on April 1, 2008. Beginning on that date, Immigration Judges' Local Operating Procedures will no longer be used, and parties will be expected to follow the Practice Manual.

The Manual is available on the EOIR website at: ww.usdoj.gov/eoir.

FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

On January 7, 2008, the Supreme Court heard oral arguments in ***Dada v. Mukasey***, No. 06-1181, an unpublished Fifth Circuit decision. The question presented is:

> Does the filing of a motion to reopen removal proceedings automatically toll the period within which an alien must depart the United States under an order granting voluntary departure?

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Jurisdiction — Sua Sponte Reopening

In *Tamenut v. Gonzales*, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case. On March 11, 2008, the en banc court in a per curiam opinion held that the court lacked jurisdiction to review the denial of a *sua sponte* reopening. *See* 2008 WL 637617 (8th Cir. March 11, 2008).

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Constitution — Denial of 212(c) Relief Violates Equal Protection Clause

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of b§ 212(c) relief violated equal protection. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

On February 25, 2008, the Ninth Circuit vacated its prior order as entered without jurisdiction and denied the petition for rehearing en banc as moot.

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Constitution — Ineffective Assistance of Counsel, REAL ID Act

On December 14, 2007, the Ninth Circuit denied the government's petition for rehearing en banc in ***Singh v. Gonzales****,* 499 F.3d 969, 980 (9th Cir. 2007). The questions raised are: Does the district court have jurisdiction over an ineffective assistance of counsel claim that counsel failed to file timely petition for review, or does 8 USC §§ 1252(a)(5) & (b)(9) preclude district court jurisdiction? Is there a Fifth Amendment constitutional due process right to effective counsel in immigration removal proceedings? The government is considering whether to seek certiorari.

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Visas — "Immediate Relative"

The government has filed an appeal in ***Robinson v. Secretary DHS***, No. 07-2977 (3d Cir.). The question raised is whether the spouse of a United States citizen qualifies as an "immediate relative" as defined in INA § 101(b)(2)(A)(I) when the citizen dies after the filing of an I-130 visa petition but before the petition was adjudicated and before the couple had not been married for two years.

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Criminal Alien — Conviction Modified Categorical Approach

The government has filed a petition for rehearing en banc in *U.S. v. Snellenberger*, 480 F.3d 1187 (9th Cir. 2007). The question is whether a minute order can be considered under the modified categorical approach

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Convention Against Torture Definition of "Torture"

On December 7, 2007, the Third Circuit granted *sua sponte* rehearing en banc in ***Pierre v. Attorney General***, No. 06-2496, a case transferred pursuant to the REAL ID Act from the District of New Jersey. On January 29, 2008, the government filed a brief responding to the following questions from the court: (1) does CAT require that the torturer specifically intend to inflict severe physical or mental pain or suffering, or is willful blindness considered and treated as specific intent? (2) is lack of prison medical facilities or resources to care for severely physically impaired or diseased prisoner to be considered and treated as tantamount to torture when the warden or jailer has no specific intent to inflict severe physical or mental pain or suffering? (3) is a statute, regulation, or other authority available to afford a remedy or humanitarian relief to severely impaired or diseased persons who will be imprisoned in the country of removal?

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Removal — Blake issue

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

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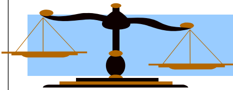

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That Extortion Attempts Do Not Constitute Persecution On Account Of A Protected Ground

In *Chikkeur v. Mukasey*, __ F.3d __, 2008 WL 250178 (1st Cir. Jan. 31, 2008) (Torruella, Lynch, *Lipez*), the First Circuit affirmed the denial of asylum to a married couple from Algeria. The court held that substantial evidence supported finding that alleged extortion by members of a radical Islamist group was not linked to applicants' imputed political opinion or membership in a particular social group. The petitioners had entered the United States in June 1996, as visitors and did not depart when their six-month visa expired. The principal petitioner operated a successful retail business in his native city of Oran. He claimed that two men belonging to the FIS, a radical Islamist group, visited his shop, shoved him to the ground, and took cash from the store's register. The men demanded that he hand over a much more substantial sum of money within thirty days. Over the next three weeks, petitioner's wife received three phone calls from men threatening to kill her husband and his family if he did not pay the FIS. Petitioner resolved not to pay the FIS, and decided instead to leave Algeria. The court held that "nothing in the record compelled the conclusion that [petitioner] was targeted for anything other than economic motives."

The court also found that the BIA properly denied petitioner's motion to reopen based on his claim that his brother was killed by his alleged persecutors, where there was no basis to conclude that this occurred because of a protected ground rather than because of his refusal to submit to extortion.

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■ First Circuit Upholds Adverse Credibility Finding And Concludes That Transcription And Translation Errors Did Not Deprive Petitioner Of Due Process

In *Teng v. Mukasey*, __F.3d__, 2008 WL 384232 (1st Cir. Feb. 14, 2008) (*Boudin*, Torruella, Stahl), the First Circuit affirmed the adverse credibility finding, where his demeanor and inconsistent testimony called his veracity into question. The petitioner, a citizen of Cambodia, claimed persecution on account of his participation in a government-opposition group which eventually entered a power-sharing arrangement. The court noted in particular that the petitioner made no effort to clarify his story or provide corroborating evidence that might have bolstered his claim.

> **"Procedural due process protects a right to a fundamentally fair proceeding; but few proceedings are perfect and one can have real errors . . . without automatically violating the Constitution."**

The court also held that the translation of the proceedings did not deprive petitioner of due process, because the record included only a modest number of "indiscernibles," which did not make a dispositive difference in the outcome. Finally, errors in the transcription of proceedings did not deprive petitioner of due process because the ellipses did not prevent the reader from understanding his testimony. "Procedural due process protects a right to a fundamentally fair proceeding; but few proceedings are perfect and one can have real errors, including ones that adversely affect a party's interests, without automatically violating the Constitution," said the court

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■ First Circuit Finds Jurisdiction Over Application Of 8 C.F.R. § 208.4(a)(2)(ii) To The Timeliness Of An Asylum Application But Upholds Denial On The Merits

In *Jorgji v. Mukasey*, 514 F.3d 53 (1st Cir. 2008) (*Boudin*, Campbell, Stahl), the First Circuit, after finding that it had jurisdiction to address the issue, construed 8 C.F.R. § 208.4(a)(2)(ii) to hold that an asylum application was timely where it was mailed one year and one day after entry, where the last day of the one year fell on a Sunday. The court reasoned that it had jurisdiction to address the timeliness of the asylum application because "the facts are undisputed; and whether the application was timely filed depends solely on how the regulations are read - obviously a question of law."

Further, the court found it unnecessary to extend deference to the government's position because the BIA bypassed the issue of timeliness. Regarding the government's position, however, the court rejected the argument that it lacked jurisdiction pursuant to 8 U.S.C. § 1158(a)(3) to address the "factual findings" of the immigration judge regarding timeliness, admonishing that "[t]he government, an institutional litigant with a stake in consistent administration of the statute, ought to have more sense than to make such an argument" as there was no "dispute about when *in fact* the applications were mailed or received." Finding jurisdiction over the matter, the court then found that the literal language of 8 C.F.R. § 208.4(a)(2)(ii) excluded weekends and holidays from the calculation of the filing date of an asylum application and that while "policy may support another outcome. . . the possible policy argument in favor of the government is not made in the government brief."

The court ultimately upheld, however, the agency's "no well-

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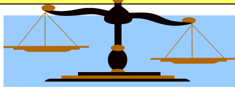

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founded fear" finding where the Albanian alien's claim rested upon harassment due to her support for the Orthodox Church and incidents occurring to her father and her father-in-law based on their political activities in the 1960-1970s. Lastly, the court held that the alien's due process rights were not violated when the immigration judge interrupted testimony during the hearing for efficiency, without restricting the alien's ability to present evidence.

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■ **First Circuit Affirms Adverse Credibility Finding In Cambodian Asylum Claim**

In *Hem v. Mukasey*, 514 F.3d 67 (1st Cir. 2008) (Lynch, Selya, *Lipez*), the First Circuit upheld the agency's adverse credibility determination, concluding that it provided "specific, cogent, and supportable explanations" for the ruling. The court reasoned that "where eligibility for asylum is based on the applicant's testimony alone, an adverse credibility determination 'will usually doom her application.'" Petitioners, citizens of Cambodia, claimed the Hun Sen political party persecuted them for their involvement with the Sam Rainsy political party. However, petitioners' testimony showed a lack of knowledge regarding the Sam Rainsy party and inconsistently related events of their alleged persecution. Further, petitioners could not explain why lead petitioner had to assume a false identity to enter the U.S. while the other petitioner did not.

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SECOND CIRCUIT

■ **Second Circuit Holds That Alien Who Is Inadmissible Under INA § 212 (a)(9)(C)(i)(II) Is Ineligible For 245(i) Adjustment Of Status**

In *Delgado v. Mukasey*, __ F.3d __, 2008 WL 323234 (2d Cir. Feb. 7, 2008) (*Miner*, Pooler (J. Meskill passed away before oral argument)), the Second Circuit held that the special adjustment provision under INA § 245(i) does not cure inadmissibility under INA § 212(a)(9)(C)(i)(II), and that, under 8 C.F.R. § 212.2, a retroactive waiver of this ground of inadmissibility is not available to alien whose removal order had been reinstated.

The petitioner sought to enter the United States fraudulently by presenting herself as a returning resident. She was placed in expedited removal and returned to Equador. She subsequently reentered the United States without inspection and later married a United States citizen. Petitioner's husband subsequently filed a visa petition and petitioner filed an application for adjustment and an application for a waiver of inadmissibility. USCIS denied the adjustment and the fraud waiver application finding that inadmissibility under INA § 212(a)(9)(C)(i)(II) could not be waived. On the same date as the denials, petitioner's prior order of removal was reinstated.

An alien who is inadmissible under § 212(a)(9)(C)(i)(II), as a result of having reentered the U.S. illegally after having been removed, is ineligible for adjustment under § 245(i).

On appeal, petitioner contended that she was entitled to an adjudication of the merits of her adjustment application because she had filed it before the removal order had been reinstated. She also claimed that she was eligible for a waiver. The court, following the majority of circuits that have addressed the issue, held that an alien who is inadmissible under § 212(a)(9)(C)(i)(II), as a result of having reentered the U.S. illegally after having been removed, is ineligible for adjustment under § 245 (i).

The court also deferred to the BIA's decision *in Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), and held that 8 C.F.R. § 212.2 does not operate as a waiver of inadmissibility under INA § 212(a)(9). The court also held that waivers for aliens found inadmissible under § 212(a)(9)(C)(i)(II) are limited to those seeking admission more than 10 years after the date of the alien's last departure from the United States. The court expressly declined to adopt the contrary holding of the Ninth Circuit in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

The court further held that although an application for adjustment of status was on file with USCIS, it had no effect on the authority of the Attorney General to reinstate the prior order of removal under 8 U.S.C. § 1231(a)(5) and, as a result, the alien was ineligible for any relief under the immigration statutes.

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■ **Second Circuit Remands Case For BIA To Consider The Applicability Of The Frivolousness Statute To A Withdrawn Asylum Application.**

In *Zheng v. Mukasey*, 514 F.3d 176 (2d Cir. 2008) (*Feinberg*, Sotomayor, Wesley), the Second Circuit held that the BIA erred by failing to consider antecedent issues concerning the applicability of the frivolousness statute to an asylum application that is filed and then withdrawn before a decision on its merits. At the first IJ hearing petitioner filed an asylum application after being warned of the consequences of filing a frivolous application. However, when at a calendar hearing, she withdrew her asylum application and filed a new one seeking withholding of removal under CAT on the grounds that the snakehead to whom she owed money would harm her if she returned to China, and that Chinese officials would jail and torture her for illegally entering the United

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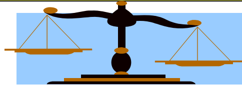

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States. Even though the IJ found favorable the fact that petitioner had withdrawn her first application, he nonetheless concluded that he lacked discretion under the statute and implementing regulations to avoid a frivolousness finding. He also concluded that petitioner's withdrawal of her false application had no effect on the applicability of the frivolousness bar. Accordingly because petitioner had deliberately made a materially false asylum application after receiving adequate notice, he entered a frivolousness finding. The BIA affirmed without opinion.

The Second Circuit found that petitioner's initial petition unquestionably contained deliberately fabricated material elements and that she had received the safeguards described in the BIA's decision in *Matter of Y-L*. Nevertheless, the court decided to remand the case to the BIA to consider antecedent issues concerning the applicability of the frivolousness statute to an asylum application that is filed and then withdrawn before a decision on its merits. "Specifically," the court said, "we invite the BIA to consider the following questions: (1) Is the IJ's authority to "determine[ ] that an alien has knowingly made a frivolous application for asylum" limited to circumstances in which the IJ makes "a final determination on such application"? 8 U.S.C. § 1158(d)(6). (2) Does an IJ retain any discretion under 8 U.S.C. § 1158(d)(6) to decline to make a frivolousness finding even if she finds that the statutory and regulatory conditions for frivolousness have been met?"

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■ Second Circuit Holds That Lighter Presumption Of Receipt Applies Where Notice Of Hearing Is Sent By Regular Mail

In *Lopes v. Mukasey*, __F.3d__, 2008 WL 451148 (2d Cir. Feb. 21, 2008) (Winter, *Straub*, Sotomayor), the Second Circuit held, following a remand, that the BIA erred by applying the stringent presumption of receipt set out in *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995), as that case involved notices sent by certified mail. Petitioner, who had sought to reopen and rescind an in absentia order of removal, claimed that he never received notice of his removal hearing. In support of his claim he filed an affidavit stating that he had not received the notice. The BIA denied reopening citing to *Grijalva*. On appeal, the court found that the BIA had properly applied a rebuttable presumption but remanded the case because the BIA had failed to consider all the evidence. *See Lopes v. Gonzales*, 468 F.3d 81 (2d Cir. 2006). On remand the BIA again dismissed petitioner's appeal.

> **"We now join our sister circuits in holding that the burden of proof to overcome the slight presumption of receipt in the context of regular mail is significantly lower than the burden set forth in *Grijalva*."**

The court noted that following its first remand, the court had indicated that although some presumption of receipt applies to an NTA served by regular mail, that presumption is less stringent than that imposed by *Grijalva*. The court also noted that the BIA had made no mention of this new Second Circuit law and the law of other circuits calling for a less stringent, rebuttable presumption of receipt.

The court then adopted the Ninth circuit approach which concluded that where a petitioner had appeared at earlier immigration proceedings, had no motive to avoid the immigration proceedings, and in fact had initiated proceedings to obtain an immigration benefit, a statement or affidavit by the petitioner stating that he or she had not received notice should ordinarily suffice to overcome the presumption of receipt. Accordingly, said the court "we now join our sister circuits in holding that the burden of proof to overcome the slight presumption of receipt in the context of regular mail is significantly lower than the burden set forth in *Grijalva*. Specifically, we think that the presumption of receipt in regular mail cases does no more than to shift a tie-breaking burden of proof to the alien claiming non-receipt." While suggesting that this lesser standard had been met in this case, the court remanded to the BIA to apply the less stringent standard in the first instance with respect to petitioner's motion to reopen his in absentia removal proceedings.

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■ Second Circuit Deems Adverse Credibility Finding Sufficiently Explicit Because It Contains Expressed Doubts

In *Zaman v. Mukasey*, 514 F.3d 233 (2d Cir. 2008) (Straub, Hall, Haight) (*per curiam*), the Second Circuit held that the IJ made a sufficiently explicit credibility finding by expressing his doubts concerning the Pakistani alien's credibility. While noting the "atypically short oral decision" of the immigration judge, the court found that pursuant to *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000), an explicit adverse credibility decision had been made because the immigration judge stated that he had "grave doubts" regarding petitioner's credibility and found petitioner's explanations "patently impossible." The court added that "while the Board's order does not explicitly tell us whether the IJ made an adverse credibility determination, neither does it indicate that the IJ's decision was anything else."

The court then affirmed the adverse credibility determination based upon the immigration judge's finding that petitioner had submitted a fraudulent Pakistan People's Party card. The court noted that subsequent to briefing, the court had issued *Niang v. Mu-*

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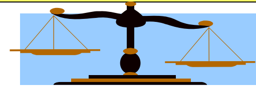

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kasey, 511 F.3d 138 (2d Cir. 2007), holding that an otherwise credible asylum applicant cannot solely be found incredible based upon an immigration judge's speculative determination that submitted documents were inauthentic, but found petitioner's case distinguishable because the immigration judge's reasoning was not "problematic" and because the immigration judge had not explicitly found petitioner "otherwise credible."

Finally, the court expressed concern whether the other two grounds for the adverse credibility finding - that the asylum application was "skeletal at best" and that the alien waited several years to apply for asylum - were proper bases, but ultimately upheld the determination.

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THIRD CIRCUIT

■ Middle District Of Pennsylvania Holds That Termination Of Convention Against Torture Deferral Based On Diplomatic Assurances Without A Hearing Violates FARRA And Due Process

In *Khouzam v. Hogan*, __ F. Supp.2d __, 2008 WL 98545 (M.D. Pa. Jan. 10, 2008) (*Vanaskie*), the district court for the Middle District of Pennsylvania held that the Government may not terminate an alien's grant of deferral of removal under the Convention Against Torture based on the receipt of diplomatic assurances, unless it first provides the alien with a hearing before an impartial adjudicator. However, the court found that the termination of deferral of removal based on receipt of assurances, even from a country with a history of using torture, was not *per se* improper.

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SIXTH CIRCUIT

■ Sixth Circuit Holds That Chief Immigration Judge Is Empowered To Preside Over Removal Proceedings

In *Demjanjuk v. Mukasey*, __ F.3d __, 2008 WL 238448 (6th Cir. Jan. 30, 2008) (*Rogers*, Sutton, Bertelsman (by designation)), the Sixth Circuit held that former Chief Immigration Judge Michael Creppy was empowered to preside over the removal proceeding because he was an immigration judge as that term is statutorily defined.

The Sixth Circuit held that aliens who are inadmissible under INA § 212(a)(9)(C), are ineligible for adjustment of status under INA § 245(i).

Petitioner argued that 8 C.F.R § 1003.10 did not grant removal authority to Creppy, since this section does not specifically mention the position of CIJ. "Because any reasonable person would assume that the position of Chief Immigration Judge is a mere subcategory of immigration judge, the absence of any mention of the CIJ in § 1003.10 is not significant," said the court. The term "Chief" did not change the basic meaning of the words "Immigration Judge."

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■ Sixth Circuit Holds That Aliens Who Illegally Re-enter The United States After Committing Previous Immigration Violations Are Ineligible For Adjustment Of Status

In *Ramirez-Canales v. Mukasey*, __F.3d__, 2008 WL 507987 (6th Cir. Feb. 27, 2008) (*Martin*, Gibbons, Sutton), the court held that aliens who are inadmissible under INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C), are ineligible for adjustment of status under INA § 245(i), 8 U.S.C. § 1255(i).

In this consolidated appeal, two petitioners who had unlawfully entered the United States, married U.S. citizens and then sought to adjust their status under INA § 245(i)the special adjustment provision. The first petitioner was under an order of voluntary departure when the I-130 was approved. However, because the VD period expired six days after the I-130 approval, petitioner was unable to have his case heard. He timely departed but then reentered illegally a week later. The second petitioner had the I-130 pending when he returned to Mexico and subsequently reentered unlawfully. After being placed in removal proceedings, the I-130 was approved. The IJ and subsequently the BIA found that petitioners were not eligible for § 245(i) adjustment because they were found inadmissible under INA § 212(a)(9)(C) as reentering aliens, who prior to reentry, had been unlawfully present in the U.S. for more than one year. The BIA followed *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), where it had held that § 245(i) adjustment is not available to aliens who are inadmissible under § 212(a)(9)(C), because unlike the § 212(a)(6) inadmissibility ground, the former "applies only to that subset of aliens who are recidivists," namely those who depart after accruing unlawful presence and thereafter reenter unlawfully. Thus, under *Briones*, so long an alien enters illegally only one, he is not inadmissible and may apply for § 245(i) adjustment.

In an issue of first impression, the Sixth Circuit accorded *Chevron* deference to the BIA's interpretation. "We cannot say that the Board's conclusions were unreasonable in light of its careful and well-supported arguments," said the court. However the

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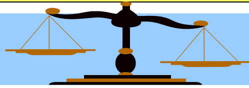

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court had some concerns about whether the BIA had the authority to grant *nunc pro tunc* adjustment of status to the petitioner who could not get his adjustment case heard before he departed voluntarily. The court noted that there was some support in prior BIA's decisions to exercise *nunc pro tunc* authority in such a case, but that it wasn't clear whether such authority existed. Accordingly, the court remanded the case of the first petitioner for the BIA to consider this issue.

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SEVENTH CIRCUIT

■ Seventh Circuit Reaffirms Holding That Aliens Deportable For The Aggravated Felony Of Sexual Abuse Of A Minor Are Ineligible For 212(c) Relief

In *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008) (Flaum, *Manion*, Kanne), the Seventh Circuit reaffirmed its decision in *Valere v. Gonzales*, 463 F.3d 757 (7th Cir. 2007), holding that aliens deportable for the aggravated felony of sexual abuse of a minor are not eligible for § 212(c) relief under the comparable grounds test. The court held that *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and 8 C.F.R. § 1212.3(f) did not have an impermissible retroactive effect, and that the denial of § 212(c) relief did not violate *INS v. St. Cyr*, 533 U.S. 289 (2001). The court also rejected the aliens' equal protection claims and declined to adopt the Second Circuit's approach in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), concluding that reliance on an alien's conduct, rather than the ground of deportability charged, would further expand § 212(c) "beyond its expressed coverage."

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■ Seventh Circuit Grants EAJA Fees In Asylum Case

In *Tchemkou v. Mukasey*, __F.3d__, 2008 WL 465957 (7th Cir. Feb. 22, 2008) (*Ripple*, Rovner, Sykes), the Seventh Circuit granted attorneys fees in the amount of $41,716.84 and fees of $1,179.94. The petitioner, a citizen of Cameroon, had been denied asylum, withholding, and CAT protection. The Seventh Circuit reversed that decision finding that petitioner had shown past persecution, future persecution, and likelihood of torture. *See Tchemkou v. Mukase*, 495 F.3d 785 (7th Cir. 2007).

> **"We have rejected a 'compartmentalized' approach to persecution and repeatedly have held that the BIA must look at the record 'as a whole' in determining whether persecution has occurred."**

The court held that the government had failed to demonstrate that its position was substantially justified because the BIA had failed to analyze the various claims of abuse in the aggregate. "We have rejected a 'compartmentalized' approach to persecution and repeatedly have held that the BIA must look at the record 'as a whole' in determining whether persecution has occurred," said the court. The court also rejected the government's argument that the amount of the award requested was exorbitant and rejected the view that a competent attorney should be able to prepare a brief in an asylum case in one week.

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■ Seventh Circuit Remands Case Regarding Whether Battery Of A Police Officer Without Bodily Injury Constitutes A Crime Involving Moral Turpitude.

In *Garcia-Meza v. Attorney General*, __F.3d__, 2008 WL 299075 (7th Cir. Feb. 5, 2008) (Easterbrook, Flaum, *Williams*), the Seventh Circuit concluded that the BIA mistakenly thought that the Illinois statute for aggravated battery of a police officer required as an element that the officer sustain bodily injury. The petitioner, an LPR, had pleaded guilty in 2002 to an "aggravated battery of a peace officer" under Illinois law.

The court remanded the case for the BIA to determine whether an assault or battery on a police officer without bodily harm or other violence, or the intent to cause harm or use violence, should not be considered a crime of moral turpitude. In so doing, the court noted that it was an open question in the Seventh Circuit whether to accord *Chevron*-style deference to the BIA's conclusion that a violation of a particular state statute amounts to a crime involving moral turpitude. However, the court advised the BIA to consult the decisions that have considered this subject in other contexts.

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NINTH CIRCUIT

■ Ninth Circuit Amends Opinion Remanding An Asylum Claim And Finding The BIA Abused Its Discretion When It Failed To Presume Prejudice Resulting From Prior Counsel's Ineffective Assistance

In *Grigoryan v. Mukasey*, __F.3d__, 2008 WL 307455 (9th Cir. Feb. 5, 2008) (Pregerson, Reinhardt, Tashima) (*per curiam*), the Ninth Circuit substituted an amended opinion for its November 19, 2007 opinion. In the withdrawn opinion the court had concluded petitioner was presumptively prejudiced by her attorney's boilerplate brief and held that substantial evidence supported the

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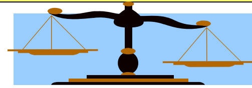

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agency's decision as to no past persecution on account of a protected ground. The court concluded that remand was still necessary because the agency failed to address record evidence suggesting possible future persecution.

In the amended opinion, the court again held that petitioner was entitled to a presumption of prejudice. "When a petitioner is entirely deprived of an appellate procedure due to ineffective assistance of counsel, prejudice is presumed," said the court. "This presumption may arise from counsel's failure to file a timely notice of appeal or petition for review, his failure to file a brief to the BIA or this court, or his filing of a boilerplate brief." The court noted that the presumption is not rebutted if the alien demonstrates "plausible grounds for relief" on her underlying claim. The court then held that due to petitioner's testimony and a transcription error, petitioner had set forth plausible grounds for past persecution, stating in a footnote that a more permissive standard of review is applicable than the substantial evidence standard when prejudice is presumed.

"When a petitioner is entirely deprived of an appellate procedure due to ineffective assistance of counsel, prejudice is presumed."

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■ Ninth Circuit Upholds Adverse Credibility Determination And Rules That The BIA Properly Exercised Discretion In Reducing IJ's Grant Of 90 Days In Which To Voluntary Depart

In *Rivera v. Mukasey*, 508 F.3d 1271 (9th Cir. 2007) (*Beezer*, Trott, Graber), the Ninth Circuit upheld an adverse credibility determination based on inconsistencies between the alien's testimony in her initial 1997 hearing and a 2004 hearing. The court noted that petitioner's 1997 hearing culminated in a BIA remand due to counsel's ineffective assistance in preparing her for the hearing, but concluded that "the basis of the remand did not call into question the reliability of [petitioner's] testimony or the reliability of the transcript." The court explained that "the reliability of earlier testimony at a subsequent hearing will depend upon the circumstances of the case," opining that a petitioner who had an inadequate translation in a prior hearing might be able to preclude the use of that testimony.

The court also ruled that the BIA properly exercised its discretion to reduce the petitioner's time for voluntary departure from the 90 days granted by the immigration judge (which the court said was improperly granted) to 30 days, within the 60 days permitted by statute. The court rejected petitioner's reliance on *Matter of A-M-*, 23 I&N Dec.737 (BIA 2005), because "*A-M-*'s holding was expressly limited to cases in which the IJ granted a period of voluntary departure within a 60-day limit." The court then, in what the concurrence labeled dicta, opined that "the ability to delay finality over an issue such as voluntary departure illustrates an institutional failing in these asylum cases. By petitioning the Ninth Circuit for review, an undocumented alien greatly extends an illegitimate stay in the United States of America." The court continued "[p]ractically speaking, [] unopposed stays are granted as a matter of course . . . [i]n this practice, the Ninth Circuit is failing to undertake the appropriate analysis required by our precedent." "Whether borne out of the perceived efficiency of such summary grants or out of compassion for the petitioners, the policy may be at least partly responsible for the enormous backlog of immigration cases in our circuit," the court said.

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■ Ninth Circuit Holds That A Conviction Under CPC § 475(c) Does Not Categorically Constitute A Crime "Relating To" Forgery

In *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008) (Gibson, *Berzon*, Bea), the Ninth Circuit held that petitioner's conviction under California Penal Code § 475(c), for endorsing checks that she had no right to, did not categorically constitute a crime "relating to" forgery pursuant to 8 U.S.C. § 1101(a)(43)(R). Citing two unpublished cases, the court concluded that California applied § 475 (c) and its phrase "whether real or fictitious" to the possession of certain real, unaltered instruments with the intent to defraud - but not forge - and extended the scope of that provision beyond the generic definition of forgery. The court, citing *Gonzales v. Duenas-Alvarez*, __U.S.__, 127 S. Ct. 815, 822 (2007), explained that the use of unpublished cases in this context was warranted because the cases displayed "a realistic probability" that "the state would apply its statute to conduct that falls outside the generic definition of forgery." The court, then turning to the modified categorical approach, held that the record did not sufficiently demonstrate that the alien was convicted of the elements of the generic definition of forgery.

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■ Ninth Circuit Holds That Fourth Degree Assault Under Washington Law Is Not A Crime Of Violence

In *Suazo Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008) (Clifton, *McKeown*, Schwarzer), the Ninth Circuit held that an alien's conviction for fourth degree domestic violence assault under Washington law was not a "crime of violence." The court held that fourth degree assault is not cate-

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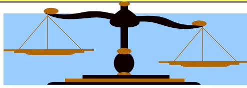

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gorically a "crime of violence" because Washington common-law defines fourth degree assault as including non-consensual offensive touching, which is conduct that is not a crime of violence pursuant to *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

Turning next to the modified categorical approach, the court held that the record did not demonstrate that the alien's conviction was based on an attempt to inflict bodily injury on another person with unlawful force as opposed to offensive touching.

The Ninth Circuit held that an alien's conviction for fourth degree domestic violence assault under Washington law was not a "crime of violence."

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■ Ninth Circuit Upholds Agency's Interpretation Of 8 C.F.R. § 241.1 Regarding "Maintenance Of Previously Accorded Status"

In *L.A. Closeout, Inc. v. DHS*, 513 F.3d 940 (9th Cir.2008) (Pregerson, Noonan, Trott) (*per curiam*), the Ninth Circuit affirmed the district court's grant of summary judgment to the government and upheld the denial of the alien's application for adjustment of status from a B-2 tourist visa to an H-1B visa for specialty workers for failure to maintain previously accorded status for the six-month period between expiration of the alien's tourist visa and the time when an H-1B visa would become available.

USCIS had denied petitioner's application for adjustment of status because in an internal memorandum it had construed 8 C.F.R. § 248.1 to mean that applicants for adjustment of status must be "in status" not just until their H-1B visa application is filed, but until the date the H-1B visa becomes operative. Petitioner challenged USCIS's construction of 8 C.F.R. § 248.1 as a violation of the APA's notice and comment requirements. The court rejected the challenge, finding that the internal memorandum was an "interpretative rule," rather than a legislative rule, as the memorandum did not create new law, rights, or obligations. The court explained that the "internal memorandum [] simply provided the agency's construction of the regulation in a particular factual circumstance [and] [a]s such, notice and comment procedures were not required."

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■ Ninth Circuit Holds That Felony Hit And Run Is Not Categorically A Crime Involving Moral Turpitude

In *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (Berzon, *Ikuta*, Singleton), the Ninth Circuit held that felony hit and run under California Vehicle Code § 20001(a) is not categorically a crime involving moral turpitude because, reading the statute "literally, a driver in an accident resulting in injury who stops and provides identification, but fails to provide a vehicle registration number, has violated the statute," and such a failure "is not base, vile and depraved; nor does it necessarily evidence any willfulness or evil intent."

The court noted the Supreme Court's warning in *Gonzales v. Duenas-Alvarez*, __U.S.__, 127 S. Ct. 815, 822 (2007), that a court should not "conjure up some scenario, however improbable whereby a defendant might be convicted under the statute in question even though he did not commit an act encompassed by the federal definition," but found that "where, as here, the statute plainly and specifically criminalizes conduct outside the contours of the federal definition, we do not engage in judicial prestidigitation by concluding that the statute 'creates a crime outside the generic definition of a listed crime.'" Further, the court found that California had not issued a binding interpretation of California Vehicle Code § 20001(a) that narrowed the definition of the statute. The court then determined that the modified categorical approach did not alter its analysis.

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■ Manufacturing, Selling, And Possessing For Sale Counterfeit Marks Is A Crime Involving Moral Turpitude

In *Tall v. Mukasey* __F.3d__, 2008 WL 509219 (9th Cir. Feb. 27, 2008) (*Silverman*, McKeown, Tallman), the Ninth Circuit held that a conviction for manufacturing, selling, and possessing for sale counterfeit marks, in violation of California Penal Code § 350(a), is a crime involving moral turpitude. The court reasoned that under the categorical approach, "[t]he commission of the crime necessarily defrauds the owner of the mark, or an innocent purchaser of the counterfeit items, or both." The court rejected petitioner's due process claim that he did not get a full and fair hearing in immigration court because he failed to exhaust that claim by not raising it to the BIA. Even though petitioner had raised a due process claim before the BIA regarding the use of uncertified evidence, the court found that petitioner "did not give the BIA an opportunity to consider and remedy the particular procedural errors he raises now."

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■ Ninth Circuit Vacates A Prior Order As Entered Without Jurisdiction And Denies As Moot Rehearing En Banc Concerning 212(c) Retroactivity)

In *Cordes v. Mukasey,* __F.3d__,

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Summaries Of Recent Federal Court Decisions

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2008 WL 482838) (9th Cir. Feb. 25, 2008) (Noonan, Rymer, Ferguson), the Ninth Circuit held that it had lacked jurisdiction when it had previously entered its panel decision in this case (421 F.3d 889) in August, 2005. At that time the court was unaware that in June of 2005, the BIA had *sua sponte* reopened the case and remanded it to the Immigration Judge for entry of a new decision, consistent with *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004) (holding that the BIA lacked authority to issue final orders of removal).

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ELEVENTH CIRCUIT

■ A Thirty-Six Hour Detention And Single Beating Is Insufficient To Support Refugee Status

In *Djonda v. Attorney General*, 514 F.3d 1168 (11th Cir. 2008) (Black, *Pryor*, Limbaugh), the Eleventh Circuit, *sua sponte* reconsidered an earlier unpublished order and substituted a published decision affirming the denial of asylum to an applicant from Togo.

The petitioner entered the U.S. as a student in 2003 and shortly thereafter affirmatively applied for asylum. When that application was denied he was placed in removal proceeding for failure to maintain his student status, and he renewed his asylum claim. Petitioner testified that he had been detained for 36 hours and beaten by Togolese police for participating in a political rally in support of the opposition group *Union des Forces de Changement*. Medical records state that he suffered scratches and muscle bruises. A year later, petitioner received a summons to appear at a police station, where he believed he would be detained indefinitely and possibly killed. Petitioner fled Togo rather than appear at the police station. The BIA ultimately found that petitioner had testified credibly but concluded, however, that he had not suffered past persecution because his detention was brief and he only suffered minor scratches and bruises. With respect to petitioner's fear of future persecution, the BIA concluded that, although the 2003 Country Report said Union members are frequently arrested and petitioner established he would likely face arrest or detention upon his return, his treatment was not likely to rise to the level of persecution because Union members are typically released within days.

The court held that this evidence did not compel a finding of past persecution or well-founded fear of persecution on account of a protected ground. In particular the court observed that a reasonable factfinder could find that petitioner would be persecuted if returned to Togo. However, it added, "when reviewing for substantial evidence, we do not ask whether the evidence presented by an applicant might support a claim for relief; instead, we ask whether the record compels us to reverse the finding to the contrary. 8 U.S.C. § 1252(b)(4)(B). Although the record evidence suggests that [petitioner] will be detained upon his return, it does not compel the conclusion that [he] has a well-founded fear that his treatment will rise to the level of persecution.

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■ Eleventh Circuit Holds That Armed Guard Of Women Forced To Undergo Abortions Assisted In Persecution

In *Chen v. Mukasey*, 513 F.3d 1255 (11th Cir. 2008) (Anderson, *Black*, Hill), the Eleventh Circuit affirmed the BIA conclusion that the petitioner's actions working as a armed guard, preventing pregnant women who violated China's coercive family planning policy from escaping confinement until their scheduled abortions, amounted to assistance in persecution, rendering the alien ineligible for asylum and withholding of removal.

In so holding, the court recognized that determining the level of conduct necessary to constitute "assistance in persecution" was a matter of first impression for the court. But citing decisions from the Eighth, Ninth, and Second Circuits, the court held that determining assistance in persecution "is a particularized, fact-specific inquire into whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution." Applying this language to the case at bar, the court found that petitioner's actions preventing the escape of victims of China's family planning laws constituted assistance in persecution. The court explained that "detention of an individual - when the act of detention itself is not the persecution at issue - is often an essential predicate to performing the act of persecution. Those who perform the detention - whether by the use of force, threat of force, or expression of authority meant to dominate and control - are assisting in the underlying persecution."

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Kline new OIL Director

(Continued from page 1)
Mr. Kline joined the Department as an Honors Graduate in 1974 and worked in the Criminal Division's General Crimes Section where he later became Senior Legal Advisor. He began working at OIL as a trial attorney in June 1985. He was promoted to Assistant Director in 1986, to Deputy Director in 1996, and to Principal and Trial Deputy Director in 2000. He received a Presidential Rank Award for Meritorious Service in 2007.

Mr. Kline received his undergraduate degree from Rutgers College in 1971 and his law degree *cum laude* from Rutgers, Camden, School of Law.

Second Circuit criticizes quality of aliens' representation

(Continued from page 1)

telephoned the immigration court and learned that there was a hearing scheduled and tried to obtain an adjournment. By then a removal order had been entered in absentia. Petitioner was not notified by his counsel about the missed hearing and the in *absentia order*.

Subsequently, petitioner was sent a bag & baggage letter which he brought to the law firm's attention. The attorney who had previously represented him had left the law firm, but a new lawyer filed a motion to reopen and an affidavit indicating that the date of petitioner's hearing had not been noted on the firm calendar but not mentioning that petitioner had relied on the paralegal's advice. The IJ denied the motion to reopen and subsequently the BIA dismissed that appeal.

Ten years after petitioner had been ordered deported, on June 1, 2005, ICE executed the outstanding arrest warrant and detained him for removal. Petitioner, in the interim, had filed an application for naturalization in 2004. Following his arrest, petitioner obtained new counsel who apparently filed "a number of factually erroneous and legally flawed submissions" on his behalf. Petitioner then obtained the assistance of a fourth counsel who moved to reopen the removal proceedings, rescind the order in absentia, and remand the case to the immigration court. The motion also raised the ineffective assistance of counsel claim and explained petitioner's failure to appear at the scheduled hearing. The BIA denied the motion stating that it had already addressed petitioner's failure to appear in a prior ruling.

The Second Circuit preliminarily held that "a lawyer's inaccurate advice to his client concerning an immigration hearing date can constitute 'exceptional' circumstances excusing an alien failure to appear at a deportation hearing, and meriting the reopening of an in absentia order." The court then held that the BIA had abused its discretion because it had not articulated in its denial petitioner's new evidence of ineffective assistance of counsel. The court found that the BIA had departed from its own precedent in *Matter of Grijalva-Barrera* 21 I&N Dec. 472 (BIA 1996), concerning when ineffectiveness of counsel can constitute exceptional circumstances to reopen an in absentia order. In that case the BIA reopened an *in absentia* order where an employee of the alien's prior attorney had called to inform him that there had been a continuance and that he should not appear at the immigration court. The Second Circuit found that the logic of *Grijalva-Barrera* "applies with equal force where the communication at issue involves the incorrect – and uncorrected – advice of a paralegal speaking of behalf of an attorney as to the scheduling of an immigration hearing."

The court also noted that although aliens do not have a specific right to counsel, the Fifth Amendment requires the proceedings to comport with due process. "Due process concerns may arise when retained counsel provides representation in an immigration proceeding that falls far short of professional duties as to 'impinge upon the fundamental fairness of the hearing,'" said the court. However, because here the attorney conduct ran afoul of *Grijalva-Barrrera*, the court found it unnecessary to "pursue the issue of due process."

By Francesco Isgro, OIL

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OIL Advanced Immigration Advocacy Seminar

OIL recently held its first Advanced Immigration Advocacy Seminar at the National Advocacy Center, in Columbia, S.C. Forty attorneys, including attorneys from OIL, Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services, and AUSAs attended the four-day seminar

The seminar consisted of class lectures, motion-writing and brief writing work, writing critiques, oral arguments, and argument critiques. All the students participate in a mock oral argument before one of the four Federal Court of Appeals Judges who participated at the seminar.

Seated L to R: Jerome Farris (9th Cir.), Alice Batchelder (6th Cir.), Michael Kanne (7th Cir.), and Jerome Holmes (10th Cir.); standing Thom Hussey.

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CONTRIBUTION TO THE OIL IMMIGRATION LITIGATION BULLETIN ARE WELCOMED

INSIDE OIL

The **Candeaux, McIntyre & Pettinato** Productions, presented the First Annual OIL Oscars Party on February 22, 2008. **Frank Fraser**, assisted by **Mary Jane Candeaux** and Jennifer **Lightbody**, presented the following awards:

1) Best Set Decoration– Office: **Karen Stewart**

2) Best Costume Design: **Donald Keener**

3) Best Theatrics in an OIL Meeting: **Francesco Isgro**

4) Best Mustache: **Mike Lindemann**

5) Best Entourage: **Kurt Larson**

6) Best "War Story" from an Oral Argument: **Andy MacLachlan**

7) Best Interview Story: **Stacy Paddack**

8) Best Exchange in Immigration Court related to use of the Facilities: **Julie Iversen**

9) Lifetime Achievement Award: **Marshall Tamor Golding**

10) Best Director: **Thom Hussey**

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

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

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

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

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