



# Immigration Law Advisor

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## New Developments on the Terrorism-Related Inadmissibility Ground Exemptions

by Lisa Yu

A previous article from the April 2008 Immigration Law Advisor (“ILA”)<sup>1</sup> outlined the legal framework for analyzing cases in which an alien may have engaged in terrorist activity in the form of giving material support for the commission of a terrorist activity, to a terrorist organization, or to an individual who has committed or plans to commit a terrorist activity. Since that article was published, the Secretary of the Department of Homeland Security (“DHS”) announced an additional exercise of his discretionary authority not to apply certain terrorism-related inadmissibility provisions.<sup>2</sup> The DHS also announced the implementation of the Secretary’s exercise of exemption authority for certain terrorism-related inadmissibility grounds for cases with administratively final orders of removal.<sup>3</sup> This article will summarize where the April 2008 article left off and will present the new developments on the exemptions under section 212(d)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(3)(B).

### Summary of the April 2008 Immigration Law Advisor Article

The article explored what it means to give material support<sup>4</sup> to a designated or undesignated terrorist organization<sup>5</sup> and reviewed the Board’s decisions in *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008),<sup>6</sup> on whether mens rea or organizational purpose and goals should be considered in assessing whether one has run afoul of the material support bar. The article also outlined the section 212(d)(3)(B) exemption authority, which, at the time of its publication, had been exercised by Secretary of the Department of Homeland Security Michael Chertoff four times to make material support exemptions available for certain categories of people.<sup>7</sup>

In addition, the article laid out the framework and terms of the Consolidated Appropriations Act, Public Law 110-161, 121 Stat. 1844 (2007) (“CAA”).<sup>8</sup> The CAA was enacted on December 26, 2007, and

it expanded the discretionary authority of the Secretaries of State and Homeland Security to exempt from inadmissibility certain categories of terrorism-related activities and associations beyond material support.<sup>9</sup> Section 691(b) of the CAA also contained an “automatic relief” provision stipulating that 10 named groups are not to be considered “terrorist organizations” for activities occurring before the CAA enactment date.<sup>10</sup> Even after enactment of the CAA, there remain several categories of aliens for whom an exemption still cannot be granted under the Act.<sup>11</sup>

### **Exemption Jurisdiction**

The Secretary of Homeland Security has delegated to the United States Citizenship and Immigration Services (“USCIS”) the authority to adjudicate exemptions for the eligible section 212(a)(3)(B) inadmissibility grounds. The Executive Office for Immigration Review (“EOIR”) has no jurisdiction to consider or adjudicate such exemptions.<sup>12</sup>

### **New Developments**

#### *Additional Exercise of Authority*

While the CAA expanded the Secretary’s discretionary authority significantly to cover a much broader range of activities, the Secretary must exercise this authority, often through a regulation or memorandum, before the exemptions are actually available. Since enactment of the CAA, the Secretary has only further exercised his authority to not apply (i.e., to grant exemptions for) some of the section 212(a)(3)(B) inadmissibility provisions once, in June 2008.<sup>13</sup> This most recent exercise of authority stated that most of the terrorism-related inadmissibility grounds do not apply with respect to activities involving the 10 groups named in section 691(b) of the CAA, if certain conditions are met. Therefore, it went further than section 691(b) of the CAA, which merely stated that these groups “shall not be considered to be . . . terrorist organization[s] on the basis of any act or event occurring before the date of enactment of this section.”<sup>14</sup>

#### *New Procedure for Cases with an Administratively Final Order*

On October 23, 2008, following interagency discussions, DHS issued a Fact Sheet announcing its procedure for handling cases that may be considered for an exemption afforded by section 212(d)(3)(B) in which there

is an administratively final order of removal.<sup>15</sup> Previously, USCIS had been adjudicating the available exemptions for cases not in removal proceedings, which were, until the Secretary’s exercise of authority in June 2008, all in reference to material support.<sup>16</sup> Therefore, qualifying applicants who were found eligible for the immigration benefit but for the “material support bar” would be considered for an exemption by USCIS, which could then either deny or grant the exemption. If it was the latter, the alien could then be granted relief, notwithstanding the existence of the bar. However, without a procedure in place for DHS to handle cases in EOIR’s jurisdiction, the Board and Immigration Judges have been unable to apply an exemption granted by DHS to such terrorism-related inadmissibility ground activities. Therefore, the bar remained and aliens in removal proceedings before EOIR who might benefit from the exemptions could not be granted the immigration benefit or relief sought.

The new DHS procedures apply to cases involving nondetained aliens in which there is an administratively final order of removal issued on or after September 8, 2008, as well as cases involving detained aliens with an administratively final order of removal. Cases involving these aliens, where the alien has been found ineligible for the benefit or relief solely due to a bar for which the Secretary of DHS has exercised his exemption authority, will be considered for an exemption by USCIS. Immigration and Customs Enforcement (“ICE”) will refer cases that meet these two criteria to USCIS, which will then adjudicate the exemption.<sup>17</sup> At the time of referral to USCIS, ICE will also notify the alien that his case is being considered for an exemption. If USCIS grants the exemption, ICE and the alien will join in a motion to reopen before EOIR, and the appropriate adjudicator at EOIR will apply the exemption granted by DHS under section 212(d)(3)(B) to the case in rendering a decision. Once cases that are now pending before EOIR receive an administratively final order, the case will go through this process to be considered for an exemption by USCIS. They will then be back before EOIR for consideration of the final grant of relief, assuming that DHS has granted the exemption.

### **Effect on EOIR**

The role of EOIR in light of this new procedure remains limited. Exemptions are still being adjudicated solely by USCIS and the decision to grant or deny an exemption cannot be appealed. However, the record of proceedings developed before EOIR, and the resolution

of issues by Immigration Judges and the Board, will assist in the ultimate adjudication of the exemption authority. As USCIS will only consider for an exemption cases in which the *sole* obstacle to a grant of relief is one of the section 212(a)(3)(B) grounds for which an exemption is currently available, it is very important that the record be developed fully. If the record is not clear, it is possible that the parties will be required to request reopening to develop the record further before the exemption can be considered.

### Future Developments

It is likely that there will be additional categories of terrorism-related inadmissibility ground activities that will be eligible for an exemption from DHS. A USCIS memorandum from March 2008 announced a hold of its cases in response to enactment of the CAA and its broad exemption authority.<sup>18</sup> The memorandum identifies categories of cases to be put on hold at USCIS, as they may one day benefit from additional exemptions.<sup>19</sup> For EOIR, this means that in the future there may be a broader category of cases being affected by DHS procedures. Since these cases are supposed to be on hold at USCIS, there should not be many that are currently within EOIR's jurisdiction.

While the October 23, 2008, Fact Sheet from USCIS addresses the procedure for nondetained cases with a final order issued *on or after* September 8, 2008, EOIR is still awaiting further information from DHS on how it intends to handle nondetained cases with a final order issued *before* that date. Presumably it would similarly involve EOIR in its role of developing the record in response to the parties' requests, followed by the USCIS adjudication of the exemption, and in considering granting relief where USCIS has granted an exemption. However, only time will tell what form such procedures would take or how they would affect EOIR.

### Conclusion

One Federal judge lamented Congress's definition of "terrorist activity" that "sweeps in not only the big guy, but also the little guy who poses no risk to anyone."<sup>20</sup> The former Acting Deputy Director of USCIS, Jonathan Scharfen, has recognized the need for more "logical, common-sense" rules for deciding cases that have perhaps been wrongly decided as a result of the "very, very broad" definition of terrorism.<sup>21</sup> Sympathetic cases in which otherwise deserving applicants have been barred

from relief for having provided material support to a terrorist organization have drawn much criticism to these broad security provisions.<sup>22</sup> Congress and immigration authorities have been taking a piecemeal approach to remedying this situation, and the policies outlined here are the latest of those pieces.

*Lisa Yu is a Presidential Management Fellow who was on rotation with the Board of Immigration Appeals.*

<sup>1</sup> Linda Alberty, *Affording Material Support to a Terrorist Organization – A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught between a Rock and a Hard Place*, Immigration Law Advisor, Vol. 2, No. 4 (Apr. 2008).

<sup>2</sup> Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34,770-77 (June 18, 2008) (effective June 3, 2008).

<sup>3</sup> Fact Sheet, Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal (Oct. 23, 2008), available at [http://eoirweb/library/geninfo/internalwork/topical/terrorism/DHS\\_FACT\\_SHEET\\_Exemption\\_Authority\\_1008.pdf](http://eoirweb/library/geninfo/internalwork/topical/terrorism/DHS_FACT_SHEET_Exemption_Authority_1008.pdf)

<sup>4</sup> Under section 212(a)(3)(B)(iv)(VI) of the Act, the term "engage in terrorist activity" means

to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

<sup>5</sup> Section 212(a)(3)(B)(vi) of the Act has three categories or "tiers" of terrorist organizations.

Tier I: Foreign Terrorist Organizations ("FTO"s) designated by the Secretary of State pursuant to section 219 of the Act, 8 U.S.C. § 1189. See section 212(a)(3)(B)(vi)(I) of the Act. The Taliban was designated as a Tier I terrorist organization for immigration purposes by section 691(d) of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, 121 Stat. 1844, 2365 ("CAA").

Tier II: Organizations otherwise designated by the Secretary of State as a terrorist organization (published on the Terrorist Exclusion List ("TEL")), after finding that the organization "engages in terrorist activity" as described in sections 212(a)(3)(B)(iv)(I)-(VI) of the Act. See section 212(a)(3)(B)(vi)(II) of the Act.

Tier III: Undesignated terrorist organizations consisting of a group of two or more individuals, whether organized or not, which engages in, or has a

subgroup that “engage[s] in terrorist activity” as described in sections 212(a)(3)(B)(iv)(I)-(VI) of the Act. See section 212(a)(3)(B)(vi)(II) of the Act. Both the FTO and TEL lists are updated regularly. For more information, the lists can be found on the website of the State Department’s Office of the Coordinator for Counterterrorism, available at <http://www.state.gov/sct/list/>.

<sup>6</sup> *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008) (granting relief in light of the enactment of the CAA, which declared that the Chin National Front is one of several groups not to be considered a terrorist organization for purposes of section 212(a)(3)(B) of the Act); *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006); see also *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007).

<sup>7</sup> Until June 2008, the Secretary had exercised his authority not to apply the material support inadmissibility provision with respect to the following aliens: (1) those who had given material support under duress to a Tier III terrorist organization, (2) those who had given material support under duress to the FARC, AUC or ELN (three separate designated terrorist organizations), and (3) those who had given material support to 1 of 10 specifically named groups, regardless of whether that material support was provided while under duress. See Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9954-58 (Mar. 6, 2007) (effective Feb. 20, 2007); Exercise of Authority Under Section 212(d)(3)(B)(I) of the Immigration and Nationality Act, 72 Fed. Reg. 9958 (Mar. 6, 2007) (effective Feb. 26, 2007); Exercise of Authority Under Section 212(d)(3)(B)(I) of the Immigration and Nationality Act, 72 Fed. Reg. 26,138-39 (May 8, 2007) (effective Apr. 27, 2007).

<sup>8</sup> CAA § 691, 121 Stat. at 2364-66.

<sup>9</sup> CAA § 691(a), 121 Stat. at 2364-65. Section 691(a) of the CAA made the exemption authority available for members of Tier III terrorist organizations; to aliens who engaged in terrorist activity or association so long as it was not on behalf of a Tier I or Tier II terrorist group; to aliens who engaged in a terrorist activity or association on behalf of a Tier I or Tier II terrorist group but did so under duress or without mens rea; and to spouses and children inadmissible under section 212(a)(3)(B)(ii) for lack of knowledge of the relevant relative’s terrorist-related activity or for renouncing the activity.

<sup>10</sup> CAA § 691(b), 121 Stat. at 2365. The 10 named groups that benefitted from the CAA’s “automatic relief” provision as well as from the Secretary’s June 2008 exercise of authority are: Karen National Union/Karen National Liberation Army (“KNU/KNLA”); Chin National Front/Chin National Army (“CNF/CNA”); Chin National League for Democracy (“CNLD”); Kayan New Land Party (“KNLP”); Arakan Liberation Party (“ALP”); Tibetan Mustangs; Cuban Alzados; Karenni National Progressive Party (“KNPP”); and groups affiliated with the Hmong and Montagnards. See also *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008). On July 1, 2008, Congress added the African National Congress to the previously named groups. See Pub. L. No. 110-257, 122 Stat. 2426 (2008).

<sup>11</sup> Pursuant to section 212(d)(3)(B)(i) of the Act, as amended by section 691(a) of the CAA, an exemption cannot be granted to the following classes of aliens under the Act:

- (1) aliens for whom there are reasonable grounds to believe that they are engaged in (present activities) or likely to engage in (future activities) terrorist activity (section 212(a)(3)(B)(i)(II));
- (2) members of Tier I and Tier II terrorist organizations (section 212(a)(3)(B)(i)(V));
- (3) representatives of Tier I and Tier II terrorist organizations (section 212(a)(3)(B)(i)(IV)(aa));
- (4) aliens who voluntarily and knowingly engaged in terrorist activity on behalf of a Tier I or Tier II group (section 212(a)(3)(B)(i)(I), as defined by section 212(a)(3)(B)(iv));
- (5) aliens who voluntarily and knowingly endorsed or espoused terrorist activity or persuaded others to do so on behalf of a Tier I or Tier II group (section 212(a)(3)(B)(i)(VII));
- (6) aliens who voluntarily and knowingly received military-type training from a Tier I or II terrorist organization (section 212(a)(3)(B)(i)(VIII));

- (7) a group that has engaged in terrorist activity against the United States or another democratic country;
- (8) a group that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.

<sup>12</sup> *Matter of S-K-*, 23 I&N at 941 (“Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals.”). See also REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, §§ 103(b), 104, 119 Stat. 231, 302, 307-09.

<sup>13</sup> Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34,770-77 (June 18, 2008) (effective June 3, 2008); see also Fact Sheet, Department of Homeland Security Exercise of Authority to Exempt Persons Associated with 10 Named Groups From Most Terrorist-Related Inadmissibility Grounds of the Immigration Law (Nov. 25, 2008), available at [http://eoirweb/library/geninfo/internalwork/topical/terrorism/DHS\\_Fact\\_SheetCAA\\_exemptions%2011\\_08.pdf](http://eoirweb/library/geninfo/internalwork/topical/terrorism/DHS_Fact_SheetCAA_exemptions%2011_08.pdf)

<sup>14</sup> The only section 212(a)(3)(B) ground not included is section 212(a)(3)(B)(i)(II), reasonable grounds to believe that an alien is engaged in or is likely to engage after entry in terrorist activity.

<sup>15</sup> See Fact Sheet, *supra* note 3.

<sup>16</sup> See Memorandum from Michael L. Aytes, Acting Deputy Director., DHS, USCIS, to USCIS officials (July 28, 2008), available at [http://eoirweb/library/geninfo/internalwork/topical/terrorism/memo\\_28\\_july\\_08.pdf](http://eoirweb/library/geninfo/internalwork/topical/terrorism/memo_28_july_08.pdf)

<sup>17</sup> If the alien is detained, the ICE Office of Detention and Removal Operations will serve a Notice of Referral that provides notice to the alien that within 7 days he must request a stay of removal if he wishes to be considered for the exemption.

<sup>18</sup> See Memorandum from Jonathan Scharfen, Deputy Director., DHS, USCIS, to USCIS officials (Mar. 26, 2008), (regarding withholding of adjudication and review of prior denials of certain categories of cases involving association with, or provision of material support to, certain terrorist organizations or other groups), available at [http://eoirweb/library/geninfo/internalwork/topical/terrorism/memo\\_withholding\\_26Mar08.pdf](http://eoirweb/library/geninfo/internalwork/topical/terrorism/memo_withholding_26Mar08.pdf)

<sup>19</sup> USCIS has placed on hold the following categories of aliens for which exemptions are not yet available (and the only ground for referral or denial is a terrorist-related inadmissibility provision): (1) an alien associated with 1 of the 10 named groups benefitted by the CAA who would remain inadmissible despite the CAA’s “automatic relief” provision; (2) an alien who is inadmissible under the Act’s terrorism provision based on activity associated with a Tier III group not under duress; (3) an alien who is inadmissible under the terrorism-related provisions of the Act, other than material support, based on any activity or association with a Tier I, II, or III Group that was under duress; (4) a voluntary provider of medical care to any Tier I, II, or III organizations, to their members, or to individuals who have engaged in terrorist activity; and (5) an alien who is inadmissible as the spouse or child of aliens described above, whether or not the aliens have applied for an immigration benefit.

<sup>20</sup> *McAllister v. Att’y Gen. of U.S.*, 444 F.3d 178, 191 (3d Cir. 2006) (Barry, J., concurring).

<sup>21</sup> Karen De Young, *U.S. to Stop Green Card Denials for Dissidents*, Wash. Post, Mar. 27, 2008 at A1, available at <http://www.washingtonpost.com>.

<sup>22</sup> Elizabeth Dwoskin, *Freedom Fighter or Terrorist? The U.S. Can’t Decide About Bangladeshi Immigrant Sachin Karmakar*, Village Voice, Nov. 12, 2008, available at <http://www.villagevoice.com/content/printVersion/735624> (criticizing the slow pace with which the Department of Homeland Security has moved to remedy the fallout of the sweeping definitions of “terrorism” and “undesigned terrorist organization”).

## FEDERAL COURT ACTIVITY

### CIRCUIT COURT DECISIONS FOR NOVEMBER 2008

*by John Guendelsberger*

The United States Courts of Appeals issued 399 decisions in November 2008 in cases appealed from the Board. The courts affirmed the Board in 359 cases and reversed or remanded in 40 for an overall reversal rate of 10% compared to last month's 6.4%.

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

Circuit	Total	Affirmed	Reversed	%
1st	2	2	0	0.0
2nd	65	58	7	10.8
3rd	25	21	4	16.0
4th	7	6	1	14.3
5th	14	14	0	0.0
6th	5	4	1	20.0
7th	6	5	1	16.7
8th	3	2	1	33.3
9th	247	224	23	10.6
10th	2	2	0	0.0
11th	23	21	2	8.7
<b>All:</b>	<b>399</b>	<b>359</b>	<b>40</b>	<b>10.0</b>

The total number of decisions was up considerably in November after a slow October. Most of the increase was due to activity in the Ninth Circuit which issued over 60% of all decisions and over half of all reversals. There were no reversals or remands in the First, Fifth and Tenth Circuits.

About half of the Ninth Circuit reversals or remands came in asylum cases. Of these, only two involved an adverse credibility determination. Other Ninth Circuit reversals in asylum cases included three denied for lack of nexus and two involving the level of harm for past persecution. Issues in other cases included firm resettlement, legal error in applying the 1-year filing deadline, a faulty frivolous filing determination, and erroneous preclusion of expert witness testimony. The court also reversed or remanded several denials of motions to reopen, one based on ineffective assistance of counsel

and two others based on failure of the Board to address evidence proffered or issues raised in the motion. There were only two reversals on criminal removal grounds, one finding that a conviction for leaving the scene of an accident was not a crime involving moral turpitude and the other finding that the offense in question was not an aggravated felony under the "sexual abuse of a minor" category.

The seven Second Circuit reversals included two decisions finding fault with an adverse credibility determination, one rejecting a finding of no nexus, and another involving erroneous application of the 1-year filing deadline for asylum. The court also remanded in one case involving a motion to reopen an in absentia order of removal based on lack of notice and reversed in a case which clarified the Second Circuit's position on when a recidivist drug possession conviction can be an aggravated felony

The four Third Circuit reversals included a case in which the Board overturned an Immigration Judge grant of asylum without sufficient explanation, another in which the court was uncertain whether the correct regulatory standard for well-founded fear had been applied and two motions to reopen in which the Board had not considered some of the proffered evidence of changed country conditions.

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

Circuit	Total	Affirmed	Reversed	%
9th	1792	1493	299	16.7
7th	102	85	17	16.7
6th	83	72	11	13.3
2nd	1020	896	124	12.2
8th	67	61	6	9.0
3rd	410	374	36	8.8
11th	195	178	17	8.7
10th	50	47	3	6.0
1st	87	83	4	4.6
5th	136	131	5	3.7
4th	132	128	4	3.0
<b>All:</b>	<b>4074</b>	<b>3548</b>	<b>526</b>	<b>12.9</b>

By way of comparison, at this point in calendar year 2007 there were 681 reversals or remands out of 4535 total decisions (15.0%). In calendar year 2006 there were 864 reversals or remands out of 4838 total decisions (17.9%).

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

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## Cases of the Year: Ranking The Top 20 Federal Immigration Decisions of 2008

*by Edward R. Grant*

It is that time of year again: the Season of Lists. Shopping lists, card lists, party lists, resolution lists, and the ubiquitous “Top 10” and “Top 20” lists for everything from movies to Jessica Simpson “wardrobe malfunctions.” And, do not forget, the lists of blessings, large and small, for which we are genuinely grateful. Somewhere in that “list of lists,” there surely is room for one more: the most significant immigration decisions issued in 2008 by the Federal Circuit Courts of Appeals.

Taking a page from most tallies of this sort, including the vaunted Bowl Championship Series rankings, the criteria for selection are utterly and completely arbitrary, in the sole discretion of the author, and subject to no appeal or judicial review of any sort. Some cases were chosen because of their impact on large numbers of cases facing Immigration Judges and the Board. Others made the list because of their public notoriety, and still others, though more obscure, due to their creativity. Finally, some are here on “style points” alone.

The specific numerical rankings are the most arbitrary aspect of all. But if a case made it to any spot on this list, its author, panel members, attorneys, and assorted hangers-on should be eternally grateful.

Finally, there will be no play-off, although the prospect of dueling en banc panels trying to explain their respective circuit’s interpretation of the “modified

categorical approach” would undoubtedly entice sports fans across the nation.

**#20: *Badasa v. Mukasey***, 540 F.3d 909 (8th Cir. 2008): “No Wikipedia.” At issue was the identity of the asylum applicant, who proffered a *laissez-passer* travel document as evidence of both her identity and Ethiopian nationality. The Immigration Judge relied in part upon an entry in Wikipedia to find that a *laissez-passer* is a “one-off” travel document issued by a government solely based on the representations made by the applicant, which thus does not establish identity or nationality in the manner of a passport or national identity document. The Board affirmed, commenting that the Immigration Judge should not have relied on the Wikipedia entry, but that other evidence in the record was sufficient to support the Immigration Judge’s conclusion that the respondent had not established her identity.

The normally restrained Eighth Circuit piled on a bit, citing some of the multiple disclaimers regarding how Wikipedia articles “migrate,” during the process of posting and reposting, from initial unbalanced accounts to more nuanced and “consensus” approaches. It also faulted the Board for not identifying the other specific reasons for upholding the Immigration Judge, once the Wikipedia entry was discounted. The money quote, taken from an article by R. Jason Richards, is as follows: “Since when did a Web site that any Internet surfer can edit become an authoritative source by which law students could write passing papers, experts could provide credible testimony, lawyers could craft legal arguments, and judges could issue precedents?” *Badasa*, 540 F.3d at 910. Fair point; however, given that all of our major law reviews are refereed and edited by persons who do not yet possess a law degree, this might be a stone best left uncast. Also, a Wikipedia article defining a *laissez-passer* seems less prone to manipulation than, say, one assigning blame for the quagmire that was the Punic Wars (the Carthaginian blogger’s lobby, alas, never having fully recovered after Hannibal’s defeat in the Battle of Zama).

So, stick to *Webster’s* and the *Encyclopædia Britannica Encyclopedian*. After all, someone has got to keep those dinosaurs in business.

**#19: *Parussimova v. Mukasey***, 533 F.3d 1128 (9th Cir. 2008): “Bye-Bye *Borja*.” One of the most significant changes wrought by the REAL ID Act in the

adjudication of asylum claims is its specification that, in so-called “mixed-motive” cases, at least “one central reason” for the alleged act of persecution must be tied to one of the five grounds enumerated in the definition of “refugee” in the Immigration and Nationality Act. Section 208(b)(1)(B)(i) of the Act, 8 U.S.C. § 1158(b)(1)(B)(i). In the Ninth Circuit particularly, “mixed motive” cases required only that the applicant “produce evidence *from which it is reasonable to believe* that the harm was motivated, *at least in part*, by an actual or implied protected ground.” *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) (emphasis added). The alleged persecutory acts in *Borja* involved extortion by communist rebels, but the Ninth Circuit found that the applicant’s resistance to such extortion could have been interpreted by the rebels as an act of opposition to their political goals, thus providing the required “nexus” to a protected ground.

*Parussimova* explicitly recognized that *Borja* and its progeny have been superseded by the REAL ID Act.

[T]he plain meaning of the phrase ‘one central reason’ indicates that the REAL ID Act places a more onerous burden on the asylum applicant than the ‘at least in part’ standard we previously applied. A central reason—one that is ‘primary,’ ‘essential,’ or ‘principal’—represents more than a mere ‘part’ of a persecutor’s motivation.

*Parussimova*, 533 F.3d at 1134.

*Parussimova* is candid about the breadth of the “at least in part” standard, acknowledging that it covered situations where the persecutory motive (tied to one of the five grounds) was not a “cause” of the harm. *Id.* Under the “one central reason” standard, the persecutory motive must be a “cause” of the harm, although not necessarily the only cause. The court found that the applicant, who was assaulted on the street and called a “Russian pig,” did not establish that her ethnicity was a cause of the attack, and it thus affirmed the denial of asylum.

**#18: *Martinez v. Mukasey***, 519 F.3d 532 (5th Cir. 2008): “Some LPRs Are More Equal Than Others.” Congress in 1996 amended the Act to prohibit an alien who has “previously been admitted to the United States as an alien lawfully admitted for permanent residence” and who was subsequently convicted of an aggravated felony

from being eligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). The Fifth Circuit, in *Martinez*, held that this prohibition does not apply to an alien who was first admitted to the United States in another status and then *adjusted* to lawful permanent resident status. The court found that it owed no deference to the Board’s construction of the section 212(h) language to include those whose “admission” to LPR status came through the process of adjustment of status, as opposed to physical admission into the United States. The plain language, it declared, limited the prohibition only to those in the latter category, leaving those who adjusted status and then committed an aggravated felony to seek to adjust again, and to apply for a section 212(h) waiver.

The “plain language” inquiry engaged in *Martinez* might have been a trifle narrow, as the “status” that one “adjusts” to is that of “an alien lawfully admitted for permanent residence,” and an applicant for such adjustment must prove that he or she is “admissible” to the United States. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a). Perhaps for this reason, *Martinez* is the only circuit court decision to have taken this position.

**#17: *Bustamante v. Mukasey***, 531 F.3d 1059 (9th Cir. 2008). “No Judicial Review of Visa Denials, Except . . .” *Bustamante* does not break substantial new ground, but it responds to an old issue raised in a new guise. The visa petitioner here claimed that her constitutional rights were violated when her husband’s visa application was denied by a consular officer who “had reason to believe” that the beneficiary was a drug trafficker. The petitioner also alleged that she and her husband were assured that if he became an informant, the visa problems “would go away.”

The court reiterated the doctrine of nonreviewability of consular visa decisions, with the narrow exception for cases where a visa denial implicated the constitutional rights of American citizens. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). While acknowledging that the petitioner had a valid constitutional interest at stake, the court found that no violation of that interest had been alleged, because the petitioner did not claim that the consular officer did not, in fact, genuinely believe that her husband was a drug trafficker. In the absence of an allegation that the visa had been denied in bad faith (such as for reasons other than those stated in the notice of denial), no constitutional violation could be found.

Claims of improper denial of visas sometimes wend their way into removal proceedings. *Bustamante*, while dealing specifically with the jurisdictional limits of Federal courts, is a reminder of the general nonreviewability of those decisions.

**## 16 & 15: *Arteaga v. Mukasey***, 511 F.3d 940 (9th Cir. 2007), and ***Santos-Lemus v. Mukasey***, 542 F.3d 738 (9th Cir. 2008). “Gangs and Gang Victims, Not Particular Social Groups.” *Arteaga* makes it onto the 2008 list, as it was issued too late for inclusion on a 2007 list. It reached the conclusion that a violent criminal gang should not be conferred the status of a “particular social group” for purposes of asylum and refugee law. Money quotes:

Moreover, even if we focus our inquiry not on Arteaga’s tattoos, but on his unique and shared experience as a gang member, this characteristic is materially at war with those we have concluded are innate for purposes of membership in a social group. Arteaga’s “shared past experience” includes violent criminal activity. We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft. Following in the analytical footsteps of President Lincoln, calling a street gang a “social group” as meant by our humane and accommodating law does not make it so. In fact, the outlaw group to which the petitioner belongs is best described as an “antisocial group” . . . . In light of the Ninth Circuit’s definition and the manifest purpose of the statute, we would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to “human dignity” that he should not be forced to forsake the association.

*Arteaga*, 511 F.3d at 945-46 (citations omitted).

*Santos-Lemus* presented a less obvious question: whether those who resist gang violence and intimidation

should be regarded as a particular social group. Just 5 weeks prior to the Ninth Circuit’s decision, the Board answered that question in the negative. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 (BIA 2008); *see also Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2007). *Santos-Lemus* affirmed the Board’s analysis, concluding that the proposed social group covers a “sweeping demographic division . . . too broad and diverse to qualify as a particular social group.” *Santos-Lemus*, 542 F.3d at 746.

At the beginning of 2008, claims based on gangs and gang victims as particular social groups were among the most pressing unresolved questions facing Immigration Judges. If nothing else, 2008 saw those questions largely resolved.

**## 14 and 13: *Alsol v. Mukasey*** 548 F.3d 207 (2d Cir 2008), and ***Fernandez v. Mukasey***, 544 F.3d 862 (7th Cir. 2008). “Two Possessions Do Not An Aggravated Felony Make – Or Do They?” In the wake of *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (state drug offense must be prosecutable as a felony under the Federal Controlled Substances Act to qualify as an aggravated felony), Immigration Judges and the Board have had to consider whether those convicted of multiple State drug possession offenses should be classified as aggravated felons on the basis that *Federal* law permits the prosecution of such recidivists as felons. The Board resolved the issue in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), (holding that such aliens are aggravated felons only if they were *prosecuted as recidivists*—not merely if they were convicted of a second possession offense). The Board noted that in several circuits, including the Second, the contrary “two-possession” rule seemed to apply, and that rule would be followed in those circuits. *See United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002).

The Seventh Circuit, in *Fernandez*, disputed the Board’s rationale in *Carachuri-Rosendo* and held that those convicted of a second possession offense should be treated as aggravated felons for purposes of immigration law. The court had previously reached the same result in a criminal case. *United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007); *reh’g denied*, 513 F.3d 776 (7th Cir. 2008). However, the Second Circuit in *Alsol*, as well as the Sixth Circuit in *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), disagreed and concurred with the reasoning in *Carachuri-Rosendo* that to truly correspond to the felony offense of recidivist possession under the Federal Controlled Substances Act, the defendant’s status as a prior

drug offender must have been admitted or determined by the court or jury. *See Alsol*, 548 F.3d at 209.

Thus far, the First, Second, Third, and Sixth Circuits have adopted the approach taken in *Carachuri-Rosendo*; the Fifth, Seventh, and Eleventh Circuits have held that a second possession offense alone is sufficient to correspond to recidivist possession under the CSA. The past year brought this issue closer to resolution, at least at the level of individual circuits, but more ferment, and more decisions, are likely in the future.

# 12. *Kalilu v. Mukasey*, 548 F.3d 1215 (9th Cir. 2008), *amending and superseding* 516 F.3d 777 (9th Cir. 2008): “Continue or Stay While USCIS Decides the Visa Petition.” The long and tortuous history of jurisdiction over applications for adjustment of status filed by “arriving aliens” is too complex to review here. The very title of the latest regulatory notice on the subject is a hint. *See* Eligibility of Arriving Aliens in Removal Proceedings To Apply for Adjustment of Status and Jurisdiction To Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585 (May 12, 2006) (Interim Rule) (codified in part at 8 C.F.R. §§ 1245.1 and 1245.2). As reported in volume 2, issue 2 of the Immigration Law Advisor (“ILA”), the Ninth Circuit held in *Kalilu* that the Board abused its discretion in denying a motion to reopen filed by an arriving alien who was seeking adjustment of status. The court’s recently amended decision clarifies that Immigration Judges have the authority to either continue or stay removal proceedings until such time as U.S. Citizenship and Immigration Services has adjudicated the underlying visa petition and application for adjustment of status. *Kalilu*, 548 F.3d. at 1221 n.5. Thus, the court concluded, it was an abuse of discretion for the Board to refuse to reopen such a case on the sole ground that the Immigration Judge lacks jurisdiction over the adjustment application.

This issue likely has many miles to go before it sleeps. USCIS sometimes (wrongly) takes the position that it lacks jurisdiction to adjudicate a visa petition in the case of an alien who is the subject of a final order of removal. *Kalilu*, despite any analytical flaws, does remove that potential obstacle to the adjudication of the petition. However, it also creates a potential conundrum down the road: when the application for adjustment is adjudicated by USCIS, how will the agency treat the alien’s “unlawful presence” in light of the fact that removal proceedings have

been reopened? And if USCIS denies adjustment of status, how will the case return to the docket of the Immigration Judge for issuance of a new order of removal?

#11: *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008): “No DHS Veto Over *Velarde* Motions.” As reported in volume 2, issue 2 of the ILA, the Second Circuit found that denying an otherwise approvable motion under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), based solely on the fifth “*Velarde* factor”—DHS opposition—is an abuse of discretion. While DHS’s opposition is a factor that can be taken into account in the exercise of discretion, it should not be treated as a “veto” over the motion. Recently, the Ninth Circuit followed the decision of the Second Circuit (as well as a 2007 decision of the Sixth Circuit) in nixing the DHS “veto.” *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008); *Sarr v. Gonzales*, 485 F.3d 354 (6th Cir. 2007).

#10: *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008): “Violation of Protection Order Is Deportable Offense.” Section 237(a)(2)(E)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(E)(ii), renders an alien deportable for, inter alia, violating “the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.” Due to the wording of the provision, questions of deportability based on an alien’s violation of a protective order can be perplexing. The Ninth Circuit provided some clarity in *Alanis-Alvarado*. California’s legislative scheme to prevent and punish domestic violence is complex because, like similar schemes in other states, it attempts to cover a wide range of conduct. Not surprisingly then, the court found that a criminal violation of California Penal Code section 273.6, prohibiting any intentional or knowing violation of a protective order, cannot be defined as a “categorical” deportable offense.

The court then examined the statutory provision which was used to authorize the protective order in question:

The court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls . . . , destroying

personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.

Cal. Fam. Code § 6320.

Based on this language, the court concluded that every portion of a protective order issued under those statutes “involved protection against credible threats of violence, repeated harassment, or bodily injury.” The court noted that section 237(a)(2)(E)(ii) of the Act, 8 U.S.C. § 1127(a)(2)(E)(ii), does not require that the alien actually have engaged in violent, threatening, or harassing behavior, only that he have violated those terms of a protective order designed to protect against such activity. *Alanis-Alvarado*, 541 F.3d at 971. Thus, in analyzing a deportation charge under this provision, it is critical to examine the authority under which the protective order was issued. If it is clear that this authority was to prevent violent, threatening, or harassing behavior, then violation of the order is likely sufficient to sustain the charge.

**#9 *Shao v. Mukasey***, 546 F.3d 138 (2d Cir. 2008): “Board Affirmed on ‘Two USC Child’ Asylum Applications.” Based on the sheer volume of cases it will impact, the Second Circuit’s decision in this case, a consolidation of three separate petitions for review, including two from published Board precedents, could be considered the most significant circuit court decision of 2008. However, *Shao* did not break new ground, as it specifically affirmed the Board’s decisions in *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), and *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007). The respective decisions defy summation in this space. This point, however, seems paramount: despite the longevity and pervasiveness of China’s coercive family planning policy, the Board has required applicants seeking asylum on account of that policy (particularly in the case of children born in the United States, where there has been no prior harm inflicted in China) to make an individualized showing that, in their locality, there is a reasonable possibility that they would be subject to a coerced sterilization. The Second Circuit has now deferred to that approach in a series of decisions. In so doing, it has affirmed the Board’s reliance on country reports and other

evidence from U.S. Government sources, concluding that while economic pressure and other sanctions may lead applicants to choose to be sterilized, evidence of actual forced or coerced sterilization in the present environment is anecdotal, not systematic.

**#8: *Yuen Jin v. Mukasey***, 538 F.3d 143 (2d Cir. 2008). “No Successive Asylum Applications.” Closely related to the outcome in *Shao* was the decision in *Yuen Jin*, affirming that the Board’s interpretation of the Act to prohibit a “successive” asylum application in the absence of a timely or otherwise authorized motion to reopen is reasonable. See *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007). This is fast becoming the dominant position in the circuits. *Zhang v. Mukasey*, 543 F.3d 851 (6th Cir. 2008); *Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008); *Zheng v. Mukasey*, 509 F.3d 869 (8th Cir. 2007); *Cheng Chen v. Gonzales*, 498 F.3d 758 (7th Cir. 2007).

**#7: *Bah v. Mukasey***, 529 F.3d 99 (2d Cir. 2008). “FGM Is Continuing Persecution.” This widely noted decision, clearly one of the most significant of 2008, was discussed in volume 2, issue 9 of the ILA and must of course be read in conjunction with the decision of the Attorney General in *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008), also discussed in the same issue. While both decisions resolve the question whether the infliction of female genital mutilation constitutes “continuing” persecution to the victim, both cases leave open, and remand for further proceedings on, the question of “nexus”—which, if any, of the five grounds enumerated in the definition of “refugee” are implicated by the infliction of this heinous act. The Board will thus return to issues first addressed in the landmark decision of *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

**#6: *Pierre v. Attorney General of U.S.***, 528 F.3d 180 (3d Cir. 2008): “CAT Requires Specific Intent To Inflict Severe Pain or Suffering.” One of the most vexing questions in resolving claims for protection under the Convention Against Torture is the issue of intent; specifically, whether it is sufficient to establish a likelihood that an actor will have the specific intent to engage in activity that results in the infliction of severe pain or suffering, or whether an applicant must prove that the actor specifically intends that result to occur. In two cases involving Haitians potentially subject to detention as criminal deportees, two panels of the Third Circuit reached apparently contradictory results. *Lavira*

*v. Attorney General of U.S.*, 478 F.3d 158, 170 (3d Cir. 2007), held that where severe pain is the “only plausible consequence” of an applicant’s detention, given the deplorable conditions in Haitian prisons, the applicant was not required to demonstrate that such harm was specifically intended by the jailers. Rather, “willful blindness” or “deliberate indifference” might be sufficient as evidence of that intent. In order to reach this result, the panel in *Lavira* was compelled to distinguish the circuit precedent in *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), which had endorsed the “specific intent” analysis set forth by the Board in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). *Lavira* did so in two ways: first, on the facts, noting that the applicant’s status as HIV-positive, and an amputee, subjected him to potentially greater harm under the deplorable conditions in Haitian prisons; and second, on the law, concluding that the endorsement of the “specific intent to torture” requirement in *Auguste* did not preclude evidence of a mental state such as “wilful blindness” from being considered as evidence of that intent. *Lavira* concluded that the Immigration Judge and the Board had failed to address these issues fully and remanded the case without making a finding that the applicant was eligible for CAT relief.

*Pierre* resolved the apparent intra-circuit conflict, overruling *Lavira* and pointedly holding that evidence of “wilful blindness” is not sufficient to meet the intent requirement. Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result. Mere knowledge that a result is substantially certain to follow from one’s actions is not sufficient to form the specific intent to torture. Knowledge that pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent. *Pierre*, 528 F.3d at 189. The court further held that “wilful blindness” can establish *knowledge* on the part of authorities that severe pain and suffering may occur, but is not sufficient to establish specific intent.

*Id.* at 190.

Judge Rendell—the author of *Lavira*—concurred in the result but not the reasoning of the en banc majority. Its focus, he argued, was too narrow, because the proper inquiry is not whether the actor intends to inflict “pain for pain’s sake,” but rather whether the actor specifically intends to do a prohibited act with “knowledge *or* desire that it will cause a certain result.” *Pierre*, 528 F.3d at 192 (Rendell, J., concurring) (emphasis added). This standard, he contended, is more consistent with the law regarding “specific intent” crimes—for example, under Third Circuit jury instructions, a defendant need not necessarily intend a particular result to occur as long as the evidence establishes that his actions were “practically certain” to cause a particular result. *Id.* He also cited, at length, a December 2004 memorandum from the Deputy Attorney General regarding prohibitions on the use of torture in interrogations. That memo recognized the inconsistency in judicial interpretations of “specific intent,” but it indicated that acts of torture could not be excused on grounds that the actor did not specifically intend the consequences of his actions: “In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.” *Id.* at 194.

Further developments on this issue are sure to follow.

**## 5 and 4: *Casas-Castrillon v. Dep’t of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008).** “Prolonged Detention Requires a Chance To Be Heard.” An opening paragraph in *Casas-Castrillon* neatly summarizes the dilemma faced by nearly all adjudicators who must consider issues of immigration detention and bond: “The statutory scheme governing the detention of aliens in removal proceedings is not static; rather, the Attorney General’s authority over an alien’s detention shifts as the alien moves through different phases of administrative and judicial review. This makes the task of determining where an alien falls within this scheme particularly difficult for a reviewing court, because the Attorney General’s authority over the alien can present a moving target.” *Casas-Castrillon*, 535 F.3d at 945-46.

The facts in *Casas-Castrillon*, if not entirely typical, are nevertheless recognizable to those who have had well-

aged matters on their “merits” and “bond” dockets—often simultaneously. In a nutshell, the lawful permanent resident was convicted twice of burglary of a vehicle under California law, once in 1993 and again in 2000. The legal issues—whether this offense constitutes a crime involving moral turpitude, and whether the 1993 conviction “stops the clock” for purposes of cancellation of removal—wound their way through the Immigration Court, the Board, the Federal district court, and the Ninth Circuit for 7 years, during which time Casas-Castrillon remained in detention pursuant to the mandatory custody provision of section 236(c) of the Act, 8 U.S.C. § 1226(c). Eventually, the Ninth Circuit granted the respondent’s petition for review, and “resolved” the matter—by remanding it to the Board for further consideration of the CIMT issue in light of intervening circuit precedent. The Ninth Circuit then turned to Casas-Castrillon’s appeal from a District Judge’s denial of his petition for habeas corpus on the issue of detention.

Once the petition for review was granted, the court ruled, the provisions of section 241(a) of the Act, 8 U.S.C. § 1231(a), regarding detention during and beyond the “removal period” (post-dating the entry of a final order of removal) no longer applied. *Casas-Castrillon*, 535 F.3d at 948. The “choice,” then was whether Casas-Castrillon was subject to mandatory detention under section 236(c)—as one still charged as having committed two CIMTs—or whether his detention should be governed by the discretionary authority in section 236(a) of the Act, with an opportunity for detention review and a bond hearing.

Section 236(c) is not applicable, the court concluded, because that authority is implicitly limited in duration. Citing *DeMore v. Kim*, 538 U.S. 510 (2003), the court emphasized that this provision is designed to cover the duration of removal proceedings, and the expected short duration between the entry of a final order of removal and deportation of the criminal alien. “Because neither [section 241(a)] nor [section 236(c)] governs the prolonged detention of aliens awaiting judicial review of their removal orders, we conclude that Casas’ detention was authorized during this period under the Attorney General’s general, discretionary detention authority under [section 236(a)].” *Casas-Castrillon*, 535 F.3d at 948. Section 236(c), the court concluded, applies only through the completion of removal proceedings; the period in which a petition for review is pending is best considered

as part of the process of determining whether the removal order will, in fact, be executed. *Id.* (citing *Prieto-Romero*, 534 F.3d at 1062). Long-term detention of an alien in this position would raise serious constitutional concerns; however, the court concluded that those concerns need not be addressed because there is no evidence that Congress intended that section 236(c) be applied indefinitely to prevent such aliens from having a bond hearing before an Immigration Judge. “Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be ‘constitutionally doubtful,’ we hold that [section 236(a)] must be construed as *requiring* the Attorney General to provide the alien with such a hearing.” *Casas-Castrillon*, 535 F.3d at 951. Because the record was ambiguous regarding what type of detention review, if any, that Casas-Castrillon had received, the court remanded the record.

*Prieto-Romero* involved an alleged aggravated felon who, because of the date of his conviction, was not subject to section 236(c) and was thus provided a bond redetermination hearing before an Immigration Judge. He was ordered removed, and that decision was affirmed by the Board. He filed a petition for review, and then a petition for habeas corpus, contending in the petition that his continued detention during the resolution of the petition for review was unconstitutional. Key to his argument was that the circuit granted him a stay of removal while his petition for review was pending.

The Government contended that once the removal proceedings were complete, the alien could be detained under the “removal period” authority of section 241(a). The court rejected this argument, noting that under the Act, the “removal period” does not commence until the court of appeals has lifted its stay of removal, or has denied the petition for review. Section 241(a)(1)(B) of the Act. While a petition for review does not of itself affect the running of the “removal period,” the court concluded that the issuance of stay of removal does have that effect. It found the Board’s contrary ruling to be invalid in light of plain statutory language. Detention authority, it then held, reverts to the discretionary provisions of section 236(a) of the act, 8 U.S.C. § 1226(a).

On the merits of his claims, however, *Prieto-Romero* lost. The court found that his was not a case of indefinite detention such as that addressed in *Zadvydas v. Davis*, 533 U.S. 678 (2001): he was capable of

being removed, and in the event his petition for review was denied, such removal (to Mexico) was clearly a foreseeable possibility. It noted that section 236(a) of the Act provides clear authority to detain aliens in Prieto-Romero's circumstances, and that the bond redetermination process in this case gave the alien an adequate opportunity to challenge his continued detention. Finally, it declined, on jurisdictional grounds, to review the alien's claim that the amount of bond was excessively high.

**#3: *United States v. Snellenberger*, 548 F.3d 699, (9th Cir 2008) (en banc).** "Minute Orders Are Okay." This decision, reported in volume 2, issue 10, held that a minute order reflecting a plea of guilty to a specific offense described in a criminal information or indictment can be used to satisfy the "modified categorical approach" under the dictates of *Shepard v. United States*, 544 U.S. 13 (2005). As we noted at the time, the specific ruling in *Snellenberger* is narrow—merely clarifying that minute orders issued in accordance with statutory mandates are akin to the specific types of conviction documents listed in *Shepard*. However, the potential implications are broader, particularly in the Ninth Circuit, where there appears to be an intra-circuit split on some aspects of this question. See ILA, Vol. 2 No. 4 (April 2008) at 11, 14-15; *Penuliar v. Mukasey*, 523 F.3d 968 (9th Cir 2008), *amended and superseded*, 528 F.3d 603 (9th Cir 2008); *Arteaga v. Mukasey*, 511 F.3d 940, 947-48 (9th Cir. 2007); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007); *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc). *Snellenberger*, for all of its significance, is not the last word on the subject.

**#2: *Poole v. Mukasey*, 522 F.3d 259 (2d Cir. 2008).** "Bending the Rules on Derivative Citizenship?" The "legislative supremacy" of Congress in matters of immigration and naturalization is nowhere more visible than on questions of citizenship: when it is acquired at birth; when it is derived after birth; and when it is to be conferred through the process of naturalization. Courts have been more active on questions of when citizenship can be lost or forfeited, *see, e.g., Afroyim v. Rusk*, 387 U.S. 253 (1967) (statute expatriating citizen who voted in foreign foreign election violates Fourteenth Amendment), but have generally rejected constitutional challenges to the established legislative criteria for acquiring or deriving citizenship. *See Tuan Ahn Nguyen v. INS*, 533 U.S. 53, 70-71 (2001) (rejecting equal protection challenge to citizenship acquisition provisions in section 309(a)(4) of

the Act, 8 U.S.C. § 1409(a)(4)); *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003) (upholding constitutionality of former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3)); *Grant v. U.S. Dep't of Homeland Security*, 534 F.3d 102 (2d Cir. 2008) (rejecting challenge to former section 322(a) of the Act, 8 U.S.C. § 1433(a)).

*Poole* represents a potential departure from this pattern—not by finding a legislative standard for derivation of citizenship to be unconstitutional, but by requiring the Board to consider "in its discretion" whether any relief can be provided to an alien who, but for administrative delay in the processing of his mother's application for naturalization, would have derived citizenship by the age of 18. The alien's mother applied for naturalization when the alien was 16 years and 9 months old. Her application was granted exactly 2 years later—at which time the alien had turned 18 and thus was not eligible to derive citizenship under former section 321(a) of the Act, 8 U.S.C. § 1432. The alien was convicted years later of several serious offenses and charged as an aggravated felon. The charges were sustained, his claim to citizenship was denied, and his removal was ordered to Guyana. *Poole*, 522 F.3d at 261-62.

The Second Circuit found that under these circumstances, some relief ought to be available, but it was far less clear on precisely what form that relief should take—or even if such relief could benefit this particular alien.

However, there might be some basis for relieving Poole of the requirement that his mother was naturalized prior to his eighteenth birthday. She applied for citizenship when he was 16. The record provides no indication why the Government took two years to process her application. A more expeditious processing, if completed within two years, would have provided Poole with derivative citizenship. . . .

In the pending case, the IJ dismissed Poole's derivative citizenship claim by stating, "This court does not believe that the respondent has derived citizenship through parentage for the reasons indicated." No reason is provided,

but perhaps the IJ was referring to his earlier statement that an estoppel against the Government was not available because the INS had not engaged in affirmative misconduct in processing the mother's application. On appeal, the BIA gave no consideration to the claim for derivative citizenship.

If the equities of the situation are relevant, they appear to favor the exercise of discretion in Poole's favor, despite his criminal offenses. His mother's application was filed two years before his eighteenth birthday; the INS, alerted to the date when he would turn eighteen, had an opportunity to complete its review in time for him to acquire derivative citizenship; he has three children, aged nineteen, fourteen, and ten, all of whom are citizens residing in this country; and both his parents are citizens residing in this country.

Under all the circumstances, we will remand the case to the BIA for consideration of what relief, if any, might be accorded to Poole with respect to his claim for derivative citizenship. Even if the BIA determines that relief is not available for Poole, the Government might wish to consider the advisability of instituting some procedure whereby the citizenship applications of parents with minor children born abroad are sorted by the children's ages and a priority is given to processing the applications of parents whose children are nearing eighteen at the time of the application.

*Poole*, 522 F.3d at 265-66.

It is difficult to determine exactly what has been decided here. The Second Circuit has not held that aliens in Poole's position *must* be granted citizenship, even if their parent did not naturalize before they turned 18. In fact, it is not clear that the court believed that Poole *could* be granted citizenship—only that the issue, or some other form of relief, must be considered on remand. The

delay here also may not have played as large a factor as the decision indicates—while Poole's mother was presumptively eligible for naturalization, her application would have had to have been processed within 15 months of filing in order for her son to derive citizenship. Since this all took place in 1982 and 1984, it is difficult to know whether case backlogs may have played a factor. However, those readers with, ahem, a long institutional memory might not be surprised that the INS of that era did not process the application in a more timely manner.

Whether *Poole* is a “one-off” case or triggers further case law, or even legislative development, remains to be seen. But its holding that the equitable factors must be considered in applying the concrete legislative requirements for deriving citizenship merits its high placement on the 2008 list.

**#1: *Abebe v. Mukasey***, 548 F.3d 787 (9th Cir. 2008) (en banc). “*Now They Tell Us*.” The Dracula-like qualities of former section 212(c) of the Act, 8 U.S.C. § 1182(c), have been previously noted. See ILA, Vol. 2 No. 3 (March 2008), at 9-10. Now, in what may only be described as a stunning turn of jurisprudence, the Ninth Circuit has held that one of the fundamental tenets of “212(c) law”—that, under principles of equal protection, the section 212(c) waiver must be available as relief from deportability, as well as inadmissibility—was invalid ab initio.

*Abebe* constitutes a classic case of “be careful what you argue for.” A prior panel decision held that the alien, in removal proceedings, was not eligible for section 212(c) relief because his aggravated felony ground of deportation—sexual abuse of a minor—was not “substantially identical” to a comparable ground of inadmissibility. *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007), *vacated sub nom. Abebe v. Mukasey*, 514 F.3d 909 (9th Cir. 2008). See *Komarenko v. INS*, 35 F.3d 432, 434-35 (9th Cir. 1994) (adopting “substantially identical” rule; alien convicted of firearms charge not eligible for relief). The alien sought en banc rehearing, arguing that the “no comparable ground/substantially identical” rule could not be squared with the Ninth Circuit's older precedent of *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). *Tapia-Acuna* followed the lead of the Second Circuit in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), holding that equal protection required the extension of section 212(c) eligibility to aliens in

deportation as well as exclusion proceedings, provided the aliens would have been eligible for such relief had they departed the United States and then attempted to reenter. Both circuits found that it was “irrational” for Congress to give an advantage to aliens outside the United States that is not equally available to similarly situated aliens *within* the United States.

The en banc court never reached the issue whether *Tapia-Acuna* required reversal of *Komarenko*. Rather, it shot its arrow directly at the heart of *Tapia-Acuna* itself—and *Francis*.

We are not convinced that *Francis* and *Tapia-Acuna* accorded sufficient deference to this complex legislative scheme, and therefore reconsider this question, as we are authorized to do en banc. We note at the outset that the statute doesn’t discriminate against a discrete and insular minority or trench on any fundamental rights, and therefore we apply a standard of bare rationality. Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens.

Our task, therefore, is to determine, not whether the statutory scheme makes sense to us, but whether we can conceive of a rational reason Congress may have had in adopting it. We can: Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to “create[ ] an incentive for deportable aliens to leave the country.” *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir.1999) (quoting *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir.1998)); see *DeSousa v. Reno*, 190 F.3d 175, 185 (3d Cir.1999). A deportable alien who wishes to obtain section 212(c) relief will know that he can’t obtain such relief so long as he remains in the United States;

if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens. See *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1153 (10th Cir.1999), *abrogated in part by INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Saving scarce resources that would otherwise be paid for by taxpayers is certainly a legitimate congressional objective.

*Abebe*, 548 F.3d at 790-91 (some citations omitted).

Having found a rational objective for limiting section 212(c) relief to inadmissible aliens, the court overruled *Tapia-Acuna*, rejected the remainder of the alien’s constitutional arguments, and held that he was not eligible for section 212(c) relief. This is hardly the result anticipated when the initial petition for rehearing was filed, or when that petition was granted and the panel decision in *Abebe* vacated. The court’s judgment was rendered in an unsigned per curiam decision, joined by 6 of the 11 judges on the panel. Three judges concurred in the result, finding no constitutional error in the panel decision in *Abebe*, but disagreeing with the decision to overrule *Tapia-Acuna*. Two judges, Thomas and Pregerson, dissented, stating that the “comparable ground” rule violates equal protection, and that the majority erred in overruling “60 years of precedent,” as well as the Attorney General’s regulations regarding section 212(c) relief.

Left undisturbed, *Abebe* works a sea change in law and practice in the Ninth Circuit, but one that will apply to a diminishing number of cases. The petitioner before the circuit may seek the extraordinary avenue of en banc review by the entire “bench” of active circuit judges or file a petition for certiorari. Whether the full circuit, or the Supreme Court, would grant review in a case involving a form of relief that was repealed over a dozen years ago is anyone’s guess. But until toppled, *Abebe* lays undisputed claim as the most significant circuit court immigration decision of 2008.

*Edward R. Grant is a frustrated sports writer appointed to the Board of Immigration Appeals in January 1998.*

## RECENT COURT DECISIONS

### *First Circuit*

*Munoz-Monsalve v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 5193707 (1st Cir. Dec. 12, 2008): The First Circuit dismissed the appeal of an asylum seeker challenging the Immigration Judge's denial of his application on three grounds. First, the court denied his argument that the Immigration Judge violated his due process rights by failing to order an evaluation of his mental competency. The court noted that the respondent was represented by counsel, failed to raise the issue before the Immigration Judge, and found no support in the transcript for the respondent's contention that his incompetency was obvious. The court also found no due process violation was caused by the fact that a master calendar hearing was missing from the transcript of hearing. Lastly, the court upheld the Immigration Judge's adverse credibility finding.

### *Second Circuit*

*Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008): The Second Circuit granted the petition of an asylum applicant from Kazakhstan challenging the Board's decision denying his claim. The respondent feared persecution from Kazakh nationalists on account of his Uyghur ethnicity. The court found no evidence that the Board applied a "mixed motive" analysis in determining that the nationalists were motivated by extortion and not ethnic animosity. The court further found that the Board failed to consider evidence that the Kazakh Government condoned the actions of the nationalists. The case was thus remanded to the Board.

*Huarcaya v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 5191771 (2d Cir. Dec. 12, 2008): The court upheld the Board's decision, affirming an Immigration Judge's determination that the respondent was not eligible for adjustment of status. The respondent argued that his adjustment application (based on an approved I-130 filed by his second wife) was "grandfathered" for section 245(i) purposes by the pre-April 30, 2001, filing of an earlier visa petition by his first wife. The Board agreed with the Immigration Judge's determination that the first I-130 did not meet the regulatory requirement for grandfathering that it be approvable when filed. The Board further relied on *Matter of Riero*, 24 I&N Dec. 267 (BIA 2007), issued after the Immigration Judge's decision. The court found *Riero* to be reasonable, and further found *Chevron* deference unnecessary where the agency was interpreting its own regulation, as opposed to a statute.

*Mora v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 5220296 (2d Cir. Dec. 16, 2008): The court dismissed the appeal from the Board's order, affirming the Immigration Judge's finding that the respondent was not eligible for adjustment of status. The court afforded *Chevron* deference to the Board precedent decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), holding that aliens inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I) (i.e., for entering or attempting to enter the U.S. unlawfully after accruing more than 1 year of unlawful presence) were precluded from adjusting their status.

### *Fifth Circuit*

*De Hoyos v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 5120768 (5th Cir. Dec. 8, 2008): The Fifth Circuit dismissed the appeal of the Board's decision affirming an Immigration Judge's order of removal. In 2001, the respondent had been granted cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), following a possession of marijuana conviction. In 2004, he was convicted of a theft offense and placed into removal proceedings. He applied for adjustment of status and a 212(h) waiver but was found ineligible based on his marijuana conviction. The court upheld the determination of the Immigration Judge and the Board that the earlier conviction was not erased by the grant of cancellation of removal and could be relied on to find the respondent otherwise inadmissible.

### *Eighth Circuit*

*Dukuly v. Mukasey*, \_\_\_F.3d\_\_\_, 2008 WL 5351911 (8th Cir. Dec. 24, 2008): Petition for review of a Board decision upholding an Immigration Judge's denial of an adjustment of status for a Liberian citizen is dismissed where: 1) adjustment of status is a discretionary decision committed to the Attorney General; 2) the circuit court lacks jurisdiction to review such a decision; and 3) petitioner failed to show fundamental unfairness or procedural irregularities that prejudiced his case.

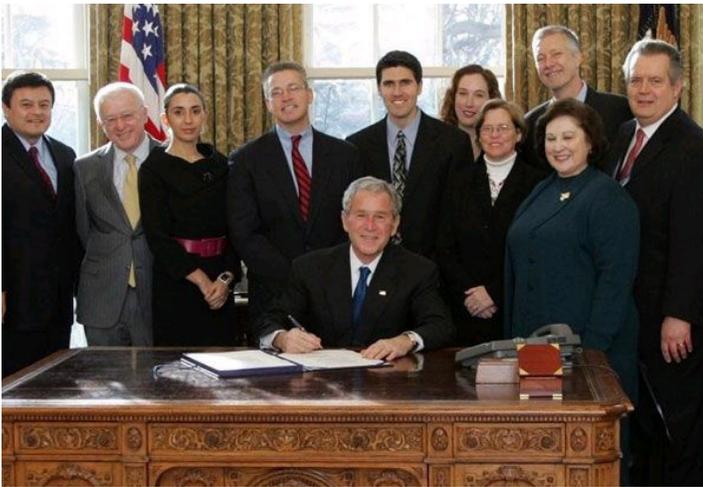
### *Ninth Circuit*

*Aguilera-Montero v. Mukasey*, 548 F.3d 1248, (9th Cir. 2008): The Ninth Circuit dismissed an appeal from the Board's decision, upholding an Immigration Judge's finding that the respondent was inadmissible under section 212 of the Act, 8 U.S.C. § 1182, as a controlled substance violator. The respondent's argument that he could not be found inadmissible on such ground in light of a full and unconditional pardon of the crime granted by the Governor of Washington was dismissed by both the Immigration Judge and Board. The court agreed,

distinguishing between the statute relating to deportability under section 237 of the Act, 8 U.S.C § 1227, which includes a waiver for pardons, and section 212, which contains no comparable waiver provision.

*Valencia v. Mukasey*, 548 F.3d 1261, (9th Cir. 2008): The Ninth Circuit denied an appeal challenging the Board's decision that an Immigration Judge only has a duty to inform a respondent of eligibility for relief where an "apparent eligibility" for such relief is reasonably reflected in the circumstances of the case, or where the respondent expresses a fear of harm if returned to a country to which removal is possible. The court found no due process violation, agreeing with the Fifth Circuit that to require Immigration Judges to inform aliens of eligibility where there is no apparent eligibility would invite the filing of meritless applications. The court also noted that nowhere in his appeal to the Board or petition to the court did the respondent ever suggest that a relief from removal was plausibly available to him.

## LEGISLATIVE UPDATE



President Bush signs the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 to aid in the fight against modern day slavery. White House Photo. Source: <http://www.state.gov/r/paleil/pix/b/113508.htm>

**U**n December 23, 2008, President Bush signed into law a bill that enhances measures to combat human trafficking. Department of Homeland Security Secretary Michael Chertoff and Immigration and Customs Enforcement Acting Assistant Secretary John Torres were among 16 federal agency and private organizational leaders in the Oval Office who witnessed the signing of H.R. 7311. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008)

authorizes appropriations for fiscal years 2008 through 2011 for the Trafficking Victims Protection Act of 2000. Of particular interest to EOIR, the law provides protections for unaccompanied alien children. The effective date is March 23, 2009, and it applies to all aliens in proceedings. The new law provides the following:

- Broadens the trafficking ground of inadmissibility at section 212(a)(2)(H)(i) and adds a removability ground for trafficking at section 237(a)(2)(F). Section 222(f).
- Requires that any unaccompanied alien child ("UAC"), with the exception of children from a contiguous country, shall be placed in removal proceedings and shall be eligible for voluntary departure under section 240B of the Act "at no cost to the child." Section 235(a)(2)(D)(ii).
- The Secretary of Health and Human Services is to cooperate with EOIR to ensure that *custodians* of UAC receive legal orientation presentations provided through EOIR's Legal Orientation Program (LOP). Section 235(c)(4).
- Allows aliens in special immigrant juvenile status to adjust status despite being inadmissible under section 212(a)(6)(A) (present without permission), (6)(C) (misrepresentation), (6)(D) (stowaway) and (9)(B) (aliens unlawfully present). Section 235(d)(3).
- Gives asylum officers initial jurisdiction over any asylum applications filed by a UAC. Section 235(d)(7).
- Mandates the implementation of regulations which take into account the specialized needs of UAC and that address both procedural and substantive aspects of handling their cases. Section 235(d)(8).
- Mandates training for all Federal personnel who have substantive contact with unaccompanied alien children. Section 235(e).

For more information on Trafficking in Humans, see the Topical Information page on the Virtual Law Library.

## REGULATORY UPDATE

**73 Fed Reg 75540 (2008)**

**DEPARTMENT OF HOMELAND SECURITY/U.S.  
Citizenship and Immigration Services  
8 CFR Parts 103, 212, 214, 245 and 299**

### **Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status**

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Department of Homeland Security is amending its regulations to permit aliens in lawful T or U nonimmigrant status to apply for adjustment of status to lawful permanent resident. T nonimmigrant status is available to aliens who are victims of a severe form of trafficking in persons and who are assisting law enforcement in the investigation or prosecution of the acts of trafficking. U nonimmigrant status is available to aliens who are victims of certain crimes and are being helpful to the investigation or prosecution of those crimes. This rule provides that family members of a principal T or U nonimmigrant granted or seeking adjustment of status may also apply for adjustment of status to lawful permanent resident. This rule also provides for adjustment of status or approval of an immigrant petition for certain family members of U applicants who were never admitted to the United States in U nonimmigrant status.

**DATES:** Effective date: This interim rule is effective January 12, 2009.

**73 Fed Reg 76039 (2008)**

**DEPARTMENT OF HOMELAND SECURITY/U.S.  
Citizenship and Immigration Services**

### **Automatic Extension of Employment Authorization Documentation for Salvadoran Temporary Protected Status Beneficiaries**

**ACTION:** Notice.

**SUMMARY:** On October 1, 2008, the Department of Homeland Security (DHS) published a Notice in the **Federal Register** extending the designation of El Salvador for Temporary Protected Status (TPS) through September 9, 2010. Beneficiaries of TPS for El Salvador are required to re-register and obtain new Employment Authorization Documents (EADs). Since USCIS will not be able to process and re-issue new EADs for all such beneficiaries by the March 9, 2009, expiration date, USCIS has decided

to automatically extend the validity of EADs issued to Salvadoran nationals (or aliens having no nationality who last habitually resided in El Salvador) until September 9, 2009. This Notice announces that extension and also explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

**DATES:** This notice is effective December 15, 2008. The automatic extension of EADs will begin on March 10, 2009, and will remain in effect until September 9, 2009.

**73 Fed Reg 76505 (2008)**

**DEPARTMENT OF HOMELAND SECURITY/U.S.  
Citizenship and Immigration Services  
8 CFR Part 274a**

### **Documents Acceptable for Employment Eligibility Verification**

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers for completion of the Form I-9, Employment Eligibility Verification. Under this interim rule, employers will no longer be able to accept expired documents to verify employment authorization on the Form I-9. This rule also adds a new document to the list of acceptable documents that evidence both identity and employment authorization and makes several technical corrections and updates. The purpose of this rule is to improve the integrity of the employment verification process so that individuals who are unauthorized to work are prevented from obtaining employment in the United States. A copy of the amended Form I-9 reflecting these and other form-related changes is being published as an attachment to this rule.<sup>1</sup>

**DATES:** Effective Date. This rule is effective February 2, 2009.

**73 Fed Reg 76914 (2008)**

**DEPARTMENT OF JUSTICE/ Executive Office for  
Immigration Review  
8 CFR Parts 1001, 1003, 1292**

### **Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances**

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts, in part, the proposed changes to the rules and procedures concerning the standards of representation and professional conduct for practitioners who appear before the Executive Office for Immigration Review (EOIR), which includes the immigration judges and the Board of Immigration Appeals (Board). It also clarifies who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges. Current regulations set forth who may represent individuals in proceedings before EOIR and also set forth the rules and procedures for imposing disciplinary sanctions against practitioners who engage in criminal, unethical, or unprofessional conduct, or in frivolous behavior before EOIR. The final rule increases the number of grounds for discipline, improves the clarity and uniformity of the existing rules, and incorporates miscellaneous technical and procedural changes. The changes herein are based upon the Attorney General's initiative for improving the adjudicatory processes for the immigration judges and the Board, as well as EOIR's operational experience in administering the disciplinary program since the current process was established in 2000.

**DATES:** Effective date: This rule is effective January 20, 2009.

### 73 Fed Reg 76927

#### DEPARTMENT OF JUSTICE/Executive Office for Immigration Review 8 CFR Parts 1240 and 1241

#### Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice is publishing this final rule to amend the regulations regarding voluntary departure. This rule adopts, without substantial change, the proposed rule under which a grant of voluntary departure is automatically withdrawn upon the filing of a motion to reopen or reconsider with the immigration judge or the Board of Immigration Appeals (Board) or a petition for review in a federal court of appeals. This final rule adopts, with some modification, the proposed rule under which an immigration judge will set a presumptive civil monetary penalty of \$3,000 if the alien fails to depart within the time allowed. However, this rule adopts only in part the proposals to amend the provisions

relating to the voluntary departure bond. Finally, this rule adopts the notice advisals in the proposed rule and incorporates additional notice requirements in light of public comments.

### 73 Fed Reg 77816 (2008)

#### DEPARTMENT OF HOMELAND SECURITY/U.S. Citizenship and Immigration Services Petitioner's Employment-Related or Fee-Related Notification

**ACTION:** Notice.

**SUMMARY:** This Notice announces the manner in which H-2B petitioners must notify U.S. Citizenship and Immigration Services regarding their employment of non-agricultural workers in H-2B nonimmigrant status or job placement fee information. These procedures are necessary to enable petitioners to comply with the notification requirements established by the Department of Homeland Security's regulations governing the H-2B nonimmigrant classification.

**DATES:** This Notice is effective January 18, 2009.

#### EOIR Immigration Law Advisor

**Juan P. Osuna, Chairman**  
*Board of Immigration Appeals*

**David L. Neal, Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Karen L. Drumond, Editor**  
(703) 605-1102  
*EOIR Law Library*

**Carolyn Elliot, Senior Legal Advisor**  
(703) 605-0273  
*Board of Immigration Appeals*

**Jean King, Senior Legal Advisor**  
(703) 605-1744  
*Board of Immigration Appeals*

**Jack Weil, Immigration Judge**  
(703) 305-1247  
*Office of the Chief Immigration Judge*

**Emmett D. Soper, Attorney Advisor**  
(703) 305-1723  
*Office of the Chief Immigration Judge*

Layout by Hasina Rahman, Kimberly Camp & Kathy Edwards