



# Immigration Law Advisor

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## In Limbo: Continued Detention Review for Specially Dangerous Aliens by Ilissa Gould

The alien present in the Immigration Court in Baltimore, Maryland, in the spring of 2007 entered the United States in 1980 as a parolee from Cuba. In 1984, he was convicted in Florida for the offence of robbery with a firearm and was incarcerated. He was placed into immigration proceedings, and a final order of exclusion was entered against him in 1991. Yet he has been in government custody since 1995 as, after he was ordered excluded and deported, Cuba refused to take him back. In general, resident aliens who have been ordered removed and who are held in custody by the Department of Homeland Security (DHS) beyond the 90-day removal period due to the government's inability to remove them, may bring habeas corpus petitions seeking release, as will be discussed *infra*. Why was this alien still in detention in 2007?

While this alien's history was complex due to his nationality, he was still in detention in 2007 because the government put him into proceedings known as continued detention review proceedings.<sup>1</sup> Following medical examinations that were conducted in connection with these proceedings, the alien was diagnosed as suffering from paranoid schizophrenia. According to a doctor's report and the alien's criminal records, during the commission of the armed robbery in Florida, he twice threatened to kill his victim. What is more, he confessed to hearing voices urging him to "commit homicide." He told the psychologist who examined him that he believes he is the son of God, and that prostitutes, drug dealers, and Jesse Jackson are evil. He also refused to take anti-psychotic medications. The psychologist concluded that the alien was "psychotic and grossly impaired" and that "[t]here are no conditions of release that would ensure the safety of the public as per the intensity of the [alien's] delusional system, auditory hallucinations consistent with these delusions, lack of behaviour controls, and non-compliance with anti-psychotic medication." Not surprisingly, both DHS and the Immigration Judge considered the alien to be a danger to both himself and to others.<sup>2</sup>

This article will examine the authority under which the government can detain aliens, such as the one described above, who are deemed to be dangerous to themselves and others. It will also examine continued detention review proceedings, and how the circuit courts have addressed cases similar to the one described above.

**241(a)(6) of the Act, *Zadvydas v. Davis*,  
and *Clark v. Martinez***

In general, Section 241(a)(6) of the Act, provides that:

[A]n alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . .

Section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6).

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court considered section 241(a)(6) of the Act and the question of whether this “statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien’s removal.” *Id.* at 682 (emphasis in original).<sup>3</sup> In general, after a final removal order is entered, an alien ordered removed is held in custody during a 90-day removal period. *See* section 241(a)(2) of the Act, 8 U.S.C. § 1231 (a)(2). If the alien is not removed in those 90 days, the post-removal-period detention statute authorizes further detention or supervised release, subject to administrative review. *See* section 241(a)(3) of the Act. In *Zadvydas*, the Court held that habeas corpus proceedings under 28 U.S.C. § 2241 “remain available as a forum for statutory and constitutional challenges to post-removal-period detention.” *Id.* at 688. The *Zadvydas* Court further held that indefinite detention in the post-removal period is not permitted. Rather, the Court stated that, based on the “conclusion that indefinite detention of [aliens who were admitted to the

United States but subsequently ordered removed] would raise serious constitutional concerns, we construe in [8 U.S.C. § 1231(a)(6)] to contain an implicit ‘reasonable time’ limitation, the application of which is subject to federal-court review.” *Id.* at 682. Further, the Court designated six months as the “presumptively reasonable period of detention” following the entry of a removal order. *Id.* at 701. The Court stated that, following this six-month span, “once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.” *Id.*

The holding in *Zadvydas* was further extended by the Supreme Court in *Clark v. Martinez*, 543 U.S. 371 (2005). There, the Court specified that the implicit “reasonable time” limitation for detention under section 241(a)(6) of the Act applies to “alien[s] ordered removed who [are] inadmissible under [8 U.S.C. § 1182],” as well as to the category covered in *Zadvydas* - aliens who were admitted to the United States but were subsequently ordered removed. *Clark*, 543 U.S. at 377 (internal citation omitted). The Court further clarified that, as in *Zadvydas*, the “presumptive detention period” is six months in length. *Id.* at 386.

**8 C.F.R. § 241.14(f), Reasonable Cause Hearings, and Continued Detention Review Merits Hearings**

In 2002, following *Zadvydas*, regulations were published at 8 C.F.R. § 241.14(f) which provided a procedure for detaining aliens, under the authority of section 241(a)(6) of the Act, whose removal is not reasonably foreseeable but who are deemed to pose a special danger to the public.<sup>4</sup> These proceedings are known as continued detention review proceedings. The hearings which took place in Baltimore in 2007 were conducted under these regulations.

In brief, 8 C.F.R. § 241.14(f) provides the standard for determining whether an alien may be subject to continued detention on the basis of being “specially dangerous.”<sup>5</sup> In particular, 8 C.F.R. § 241.14 provides that DHS:

shall continue to detain an alien if the release of the alien would pose a special danger to the public because: (i) [t]he alien has previously committed one

or more crimes of violence as defined in 18 U.S.C. 16; (ii) [d]ue to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and (iii) [n]o conditions of release can reasonably be expected to ensure the safety of the public.

8 C.F.R. § 241.14(f)(1).

These proceedings commence with a determination by DHS that continued detention is required. Also, the proceedings are divided into two phases: (1) reasonable cause hearings and (2) continued detention review merits hearings.

In the initial phase, an alien who is detained and has been ordered removed may request that DHS determine, under 8 C.F.R. § 241.13, whether there is a significant likelihood of removal in the reasonably foreseeable future. If there is, DHS may continue to detain the alien. If this likelihood does not exist, the alien must be released unless based on a medical and physical evaluation DHS determines that the alien should not be released because he would pose a “special danger” to the public under 8 C.F.R. § 241.14(f)(1). *See* 8 C.F.R. § 241.14(f)(1)-(3). DHS arranges for the evaluation, which must be performed by a physician employed or designated by the Public Health Service. As was done in the Baltimore case, the report shall include recommendations pertaining to whether the alien is likely to engage in acts of violence in the future due to a mental condition or personality disorder. 8 C.F.R. § 241.14(f)(3).

If DHS finds the alien poses a special danger, his case is referred to an Immigration Judge for a reasonable cause hearing. This brief hearing is to determine whether DHS’s evidence is sufficient to establish “reasonable cause” to proceed with a continued detention review merits hearing or whether the alien should be released from DHS custody. *See* 8 C.F.R. § 241.14(h).

If the Immigration Judge finds that DHS has met its burden of showing reasonable cause to go forward with a continued detention review merits hearing, the alien is notified and the merits hearing is scheduled. However, if the Immigration Judge finds that DHS has not met its burden, the proceedings are dismissed and the alien is

released under conditions determined by DHS (though DHS may appeal to the BIA within two business days of the Immigration Judge’s order). *See id.*

In the continued detention review merits hearing, which must be held promptly, DHS has the burden of proving, “by clear and convincing evidence, that the alien should remain in custody because the alien’s release would pose a special danger to the public, under [8 C.F.R. § 241.14(f)(1)].” 8 C.F.R. § 241.14(i)(1). “[A]ny oral or written statement that is material and relevant to this determination” is admissible, and the alien has a reasonable opportunity to examine evidence against him, to present evidence and witnesses on his own behalf, and to cross-examine witnesses presented by DHS. *Id.* *See also* Operating Policies and Procedures Memorandum 01-03: *available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm01/OPPM01-03.pdf>*. In addition, the alien has the right “to cross-examine the author of any medical or mental health reports used as a basis for” DHS’s determination that the alien’s release would pose a special danger to the public. 8 C.F.R. § 241.14(g)(3)(iv).

In deciding whether the alien should remain in custody, 8 C.F.R. § 241.14(i)(2) provides that:

[T]he immigration judge shall consider the following non-exclusive list of factors: (i) [t]he alien’s prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence; (ii) [t]he alien’s previous history of recidivism, if any, upon release from either [immigration] or criminal custody; (iii) [t]he substantiality of [DHS’s] evidence regarding the alien’s current mental condition or personality disorder; (iv) [t]he likelihood that the alien will engage in acts of violence in the future; and (v) [t]he nature and seriousness of the danger to the public posed by the alien’s release.

8 C.F.R. § 241.14(i)(2)(i)-(v)(2008).

If the Immigration Judge finds that DHS has met its burden, the Immigration Judge shall order the continued detention of the alien. Otherwise, the proceedings are dismissed and the alien is released under conditions determined by DHS. Either party may

appeal the Immigration Judge's final order. 8 C.F.R. § 241.14(i)(3)-(4).

There is one obvious problem with continued detention. That is, when does it end? If an alien's home country refuses to take him back, and he suffers from a serious, life-long mental illness, is he to stay in DHS custody permanently?

The regulations do provide for periodic review of continued detention. After an alien's continued detention is ordered by an Immigration Judge, the alien may periodically request that DHS review the continued detention order. However, such requests may not be made earlier than six months after the most recent decision of an Immigration Judge or the Board. In order to win release from detention, the alien must show that due to a "material change in circumstances," his release "would no longer pose a special danger to the public." 8 C.F.R. § 241.14(k)(4). If DHS does not release the alien, he may file a motion with the Immigration Judge to set aside the prior determination, and the alien's burden is the same—that, due to a material change in circumstances, his release would no longer pose a special danger to the public. If the Immigration Judge grants the motion, a new merits hearing is held. If it is denied, the alien may appeal to the BIA. 8 C.F.R. § 241.14(k)(6).

Ultimately, there are no regulations limiting how long an alien may be held in continued DHS custody, so long as he is still considered a special danger to the public.

### Case Law

While most Circuit Courts have not yet applied the principles of *Zadvydas* and *Clark* to aliens detained following the proceedings described above, there are two noteworthy decisions, one from the Ninth Circuit and one from the Fifth.

The first case to apply the general principle promulgated in *Zadvydas*—that constitutional necessity mandates a reasonable time limit to an alien's detention when removal is not foreseeable—came out of the Ninth Circuit. In *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004), the alien entered the United States as a lawful permanent resident from Vietnam. He was convicted of assault, harassment, and third-degree rape, and when he was finished serving a state sentence, he was taken into

custody by DHS. He was ordered removed, but the government was unable to remove him to Vietnam. Thai filed a habeas petition in U.S. District Court challenging his continuing detention under *Zadvydas*. That court concluded that, due to the reasonable time limitation in *Zadvydas*, Thai could not be detained as his removal was not foreseeable. However, the government appealed and simultaneously initiated continued detention proceedings against Thai, citing a belief that his release would pose a danger to the community. Following the continued detention proceedings, the Immigration Judge ordered Thai's continued detention on these grounds. *See id.* at 792-93.

On appeal to the Ninth Circuit from the granting of the habeas petition, while the government acknowledged that the reasonable period for Thai's removal had expired, the government also argued that *Zadvydas* "contains an exception to the presumptive six-month rule for particularly dangerous individuals where there are circumstances, such as mental illness, that help to create the danger." *Id.* at 794 (internal citation omitted).<sup>7</sup> The government specifically argued that the regulations in 8 C.F.R. § 241.14 were "promulgated in light of this exception." *Id.*

The Ninth Circuit disagreed. First, the Court held that 8 U.S.C. § 1231(a)(6), combined with the Supreme Court's holding in *Zadvydas*, precluded Thai's ongoing detention. *Id.* at 798. Then the Ninth Circuit went further, and concluded that *Zadvydas* did not create any exceptions to the six-month rule, even in cases where there are aggravating circumstances such as mental illnesses. The Ninth Circuit stated that:

It is beyond dispute that a federal regulation cannot empower the Government to do what a federal statute prohibits it from doing. When such a conflict occurs, it is the statute's meaning that must control. Because the Government may not detain Thai under § 1231 (a)(6), the § 241.14(f) regulations, which were enacted under the authority of that statute, cannot authorize Thai's continued and potentially indefinite detention.

*Id.*, at 798-99 (internal citations omitted).

The Fifth Circuit also considered continuing detention in *Tran v. Mukasey*, 515 F.3d 478 (5th Cir.

2008). Tran was a lawful permanent resident, originally from Vietnam. He was convicted of firearm possession and assault and battery against his wife in 1984. Tran spent two years confined in a mental hospital, where he was diagnosed with a mental illness. He was then transferred to a halfway house, where he spent six months. The day after his release, he murdered his wife in front of their small child. Tran pled guilty to manslaughter and was subsequently sentenced to eighteen to twenty years in prison. Before he completed his sentence, DHS placed Tran in custody and initiated removal proceedings, based on his conviction for a crime of violence. He was ordered removed to France and, in the alternative, Vietnam, and did not appeal. However, both countries refused to accept him, and thus he remained in DHS custody. Tran subsequently sought release from DHS custody following the *Zadvydas* decision. DHS then initiated continued detention proceedings. Tran was evaluated by mental health professionals, and DHS ultimately issued a Decision to Continue Custody after finding that Tran's mental illness would likely cause him to commit further acts of violence in the future. *See id.* at 480.

The Immigration Judge who heard Tran's case found that DHS had failed to demonstrate that his mental illness made him a danger to the public. However, on appeal, the Board vacated the Immigration Judge's ruling. Tran subsequently filed a petition for writ of habeas corpus, arguing that his continued detention was contrary to the Supreme Court's holding in *Zadvydas* because his removal was not reasonably foreseeable. The government did not argue this fact, nor did it dispute that Tran had been held beyond the six-month period. Instead, the government made the same argument it made in *Thai* that *Zadvydas* left open an exception for the continued detention of dangerous and mentally ill individuals. The U.S. District Court granted Thai's habeas petition, after which the government appealed to the Fifth Circuit. *Id.* at 480-81.

The Fifth Circuit came to the same conclusion as the Ninth Circuit, and cited the Ninth Circuit's *Thai* opinion in its ruling, that the Supreme Court did not create in *Zadvydas* an exception to "its general rule for aliens with harm threatening mental illness." *Id.* at 483 (internal citation omitted). Additionally, based on the Supreme Court's ruling in *Clark*—that the statutory text of 8 U.S.C. § 1231(a)(6) and the holding in *Zadvydas* applied equally to all aliens included in the statute—the Fifth Circuit concluded that the "presumptive six-month

period established in *Zadvydas* is applicable to all categories of aliens covered by the statute." *Id.* at 484. That is, the courts must treat mentally ill and non-mentally ill inadmissible or removable aliens equally. Additionally, while the Fifth Circuit indicated that it was sympathetic to the government's arguments about public safety and welfare, it instructed the DHS to take those concerns to Congress, rather than the courts. *Id.* at 485.

## Conclusion

Following *Zadvydas*, regulations were created under 8 C.F.R. § 241.14(f)(2002) to address the continued detention of aliens whose removal is not reasonably foreseeable and who are deemed to pose a danger to the public, including those who suffer from serious mental illness. However, the continued detention review procedures created by those regulations have been invalidated by the Fifth and Ninth Circuits. In other circuits, the appropriate treatment for mentally ill aliens whose removal is not foreseeable, such as the alien in Baltimore, remains an open question.

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1. There is an unresolved issue as to whether Cubans who arrived in the U.S. during the Mariel Boatlift are subject to continued detention review. *See* 8 C.F.R. §§ 241.13(b)(3)(i) and 241.14(a)(1). This issue, however, is beyond the scope of this article, which will focus on continued detention review proceedings themselves. The alien in this case was placed in continued detention review proceedings following the Supreme Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), which will be discussed *infra*.

2. As noted in the text, the hearings in this case took place at the Baltimore Immigration Court in the spring of 2007. The above summary is based on the Immigration Judge's order in the case. The author, who is an Attorney Advisor at the Baltimore Immigration Court, assisted the Immigration Judge in this matter.

3. The Supreme Court has considered continuing detention, or civil commitment, in other, non-immigration contexts. The most salient cases are those that deal with the ongoing commitment of sexual predators after the prison sentence is completed. *See*, for example, *Kansas v. Hendricks*, 521 U.S. 346 (1997), in which the defendant was committed to the custody of the Secretary of Social and Rehabilitation Services based on a jury finding that he was a sexually violent predator under the Kansas Sexually Violent Predator Act, which requires one to have a mental abnormality or a condition predisposing one to commit sexually violent offenses "in a degree constituting such person a menace to the health and safety of others."

4. The corresponding EOIR regulations are found at 8 C.F.R. § 1241.14(f).

5. The new Immigration Court Practice Manual outlines the appropriate regulations regarding continued detention review in Chapter 9.4. The discussion of continued detention proceedings in this section is based on the summary in the Practice Manual. For additional information about continued detention review, see

Operating Policies and Procedures Memorandum 01-03 *available at* <http://www.usdoj.gov/eoir/efoia/ocij/oppm01/OPPM01-03.pdf>.

6. The government also made arguments relating to possible exceptions on terrorism/national security grounds, which the Ninth Circuit concluded were not relevant to Thai's case, and which are outside the scope of this article. *Id.* at 795-96.

## FEDERAL COURT ACTIVITY

### CIRCUIT COURT DECISIONS FOR APRIL 2008

*by John Guendelsberger*

The United States Courts of Appeals issued 378 decisions in April 2008 in cases appealed from the Board. The courts affirmed the Board in 325 cases and reversed or remanded in 53 for an overall reversal rate of 14% compared to last month's 13.5%. There were no reversals from the First, Fifth, Sixth, Eighth and Tenth Circuits.

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

| Circuit | Total | Affirmed | Reversed | %    |
|---------|-------|----------|----------|------|
| 1st     | 6     | 6        | 0        | 0.0  |
| 2nd     | 108   | 93       | 15       | 13.9 |
| 3rd     | 64    | 57       | 7        | 10.9 |
| 4th     | 19    | 18       | 1        | 5.3  |
| 5th     | 11    | 11       | 0        | 0.0  |
| 6th     | 8     | 8        | 0        | 0.0  |
| 7th     | 8     | 6        | 2        | 25.0 |
| 8th     | 6     | 6        | 0        | 0.0  |
| 9th     | 123   | 97       | 26       | 21.1 |
| 10th    | 7     | 7        | 0        | 0.0  |
| 11th    | 18    | 16       | 2        | 11.1 |
| All:    | 378   | 325      | 53       | 14.0 |

Ninth Circuit production was down considerably this month with only 123 total decisions. Of the 26 reversals or remands, ten involved the credibility determination in asylum claims. There were also reversals for error in the nexus determination (3 cases), level of harm for past persecution (2 cases), failure to shift the burden of proof of changed country conditions to the

government after finding past persecution, and the Board's failure to address an argument that the 1-year filing bar was excused by a showing of extraordinary circumstances. Several other decisions were remanded to address aspects of the appeal which the Court found were overlooked or not fully addressed by the Board.

The Second Circuit reversed or remanded in 15 of its 108 cases (13.9%). Most of the reversals involved asylum and covered a wide range of issues. There was only one reversal of an adverse credibility determination. Other reversals or remands involved the level of harm for past persecution, nexus, analysis regarding relocation possibilities, insufficient reasoning regarding the extraordinary circumstances exception to the 1-year filing bar, Board error in assessing the record in the first instance to find no "other resistance," a remand for an explicit ruling on credibility, and a remand to address issues related to forced IUD insertion.

The Third Circuit had a productive month more than doubling its usual output and reversing the Board in 7 of its 64 decisions (10.9%). The Third Circuit reversed an adverse credibility determination, and two decisions involving corroboration requirements for burden of proof. The Court also reversed the Board for making findings on issues not covered in the Immigration Judge's decision and remanded in another case in which the Board failed to address an aspect of an asylum claim relating to birth of a second child in the United States.

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

| Circuit | Total Cases | Affirmed | Reversed | % Reversed |
|---------|-------------|----------|----------|------------|
| 7th     | 32          | 23       | 9        | 28.1%      |
| 9th     | 672         | 563      | 109      | 16.2%      |
| 2nd     | 483         | 407      | 76       | 15.7%      |
| 6th     | 34          | 29       | 5        | 14.7%      |
| 3rd     | 170         | 153      | 17       | 10.0%      |
| 11th    | 71          | 64       | 7        | 9.9%       |
| 5th     | 48          | 46       | 2        | 4.2%       |
| 4th     | 54          | 52       | 2        | 3.7%       |
| 10th    | 21          | 21       | 0        | 0.0%       |
| 8th     | 25          | 25       | 0        | 0.0%       |
| 1st     | 33          | 33       | 0        | 0.0%       |
| All :   | 1643        | 1416     | 227      | 13.8%      |

At this point last year we had the same number of reversals (227), but more total decisions (1868) so that our overall reversal rate was slightly lower at 12.2%.

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

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### Sex and the Circuits: Back, and on the Big Screen

by Edward R. Grant

Amid the admonitions to “Get Carried Away” at a theater near you come May 30, 2008, is the predictable spate of articles examining the meaning of the *Sex and the City* phenomenon. Was the HBO and (sanitized) TBS-rerun series just a piece of eye-candy fantasy? Or did it speak more deeply to the dreams of women of a certain generation?<sup>1</sup>

One thing *SATC* did *not* do was to explore the most common obsession of most Manhattanites: work. Take lawyer Miranda Hobbes, for example. Her life, at least pre-motherhood, was neither nasty, brutish, nor short, and her apparent work ethic as an attorney was right up there with that of Maynard G. Krebs.<sup>2</sup> To be sure, Miranda and the rest of the *SATC* posse were often shown *at* work, but very infrequently *doing* work, or even talking about it. (The same, of course, goes for the show’s equally Krebsian cast of male characters.)

Well, perhaps our fictional Portia could spend a few hours in the library untangling the knots recently

woven by a series of Circuit court decisions, most but not all from the Ninth Circuit, regarding the immigration consequences of sexual offenses. Within the past several months, new precedents have been set on a host of issues, and a recently vacate-and-grant-rehearing order from the Ninth Circuit promises more to come. These recent developments point to a genuine dilemma: As *Law & Order SVU* hourly reminds us, sexual offenses are considered “particularly heinous.” However, the statutes covering such crimes are also purposely broad in scope, designed to cast a wide net over sex offenders. In addition, “sexual abuse” and “moral turpitude” are non-traditional offenses with uncertain contours. Mix this brew with the dictates of the “categorical approach,” and you get a discussion a bit more substantive than the cocktail chit-chat on *SATC*.

### Sex in Ninth Circuit: Redrawing the Boundaries of “Sexual Abuse” and “Moral Turpitude?”

The immigration consequences of sexual offenses have been discussed previously in these pages. See *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007)(statutory rape of minor under 16 when perpetrator is 21 or older is not categorically a crime involving moral turpitude – discussed in Vol. 1, No. 11 of *ILA*); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008) (failure to register as a sex offender not a CIMT – Vol. 2, No. 3); *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008)(remanding for BIA to determine if “endangering welfare of child” offense is divisible, covering sexual as well as non-sexual offenses – Vol. 2, No. 3). A number of recent decisions, however, have further affected the legal landscape for this most lamentable category of offenses.

The Ninth Circuit has, not surprisingly, continued to lead the way, narrowing the range of sex-related offenses that are “categorically” grounds for removal. *Rebilas v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 2066579 (9th Cir., May 16, 2008), *amending Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007) held that an Arizona conviction for “attempted public sexual indecency to a minor” did not constitute sexual abuse of a minor, and thus was not an aggravated felony. The Court noted that under the statute, the minor victim “does not need to be touched, nor does the minor even need to be aware of the offender’s conduct. The minor simply needs to be present.” *Id.* at \*2. Relying on earlier precedent that “abuse” is commonly understood to mean physical or psychological harm, the Court found this

critical element lacking. *Id.*, see *U.S. v. Baza-Martinez*, 464 F.3d 1010, 1012-16 (9th Cir. 2006).

The Court also voted to rehear en banc the panel decision in *Estrada-Espinoza v. Gonzales*, 498 F.3d 933 (9th Cir. 2007), which found that a conviction for statutory rape constitutes sexual abuse of a minor. See *Estrada-Espinoza v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 1959490 (9th Cir. May 6, 2008). The original panel decision was remarkable because two members of the panel concurred, stating that if they were not bound by circuit precedent, they would reconsider and overrule it. *Estrada-Espinoza*, 498 F.3d at 936; *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006) (California statute making unlawful sexual intercourse with a person under 18 and three years younger than the defendant is sexual abuse of a minor). The concurring opinion noted – as did the majority – that the sexual relations between the alien and his minor girlfriend was consensual, was apparently blessed by the couple’s parents, and resulted in a child being raised jointly by them. *Id.* at 934, 938. The opinion stated that *Afridi* conflicts with *U.S. v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006), holding that a Tennessee statute prohibiting any form of sexual penetration on a minor under 18 by a person four years older did not constitute sexual abuse of a minor. The *Lopez* Court stated “consensual sexual penetration of an individual between the ages of 17 and 18 by a 22 year old does not necessarily involve” physical misuse, injury, or assault). *Id.* at 1207. It is not overly speculative to conclude that in light of *Quintero-Salazar* (statutory rape is not a CIMT), *Afridi* is in danger of being overruled by the en banc decision in *Estrada-Espinoza*.

If so, the decision will continue a trend illustrated by yet another recent Ninth Circuit ruling, that a misdemeanor conviction for “annoyance or molestation” of a child under 18 years of age was not categorically a crime involving moral turpitude. *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008). The alien was convicted under section 647.6(a) of the California Penal Code, which, under state court interpretations required an *actus reus*<sup>3</sup> of engaging in conduct “that a normal person would unhesitatingly be irritated by,” and a *mens rea*<sup>4</sup> of having been “motivated by an unnatural or abnormal sexual interest in the victim.” *Id.* at 1000-1 (quoting *People v. Lopez*, 965 P.2d 713 (1998)). The majority, speaking through the opinion of Judge William Fletcher, stated that both of these requirements can be satisfied “fairly easily.” *Id.* at 1001. California cases have found the *actus reus* requirement satisfied by conduct such as touching

or even photographing fully clothed children. Similarly, the opinion found the *mens rea* requirement is “not very demanding,” not requiring for example, a specific intent to commit a crime against the child. *Id.* at 1001. Looking to California case law, the Court concluded that “an 18-year-old man’s sexual interest in a girl one day short of her eighteenth birthday, manifested only by annoying behavior such as photographing nonsexual parts of her fully clothed body, could support a conviction under §647.6(a).” *Id.* at 1004.

*Nicanor-Romero* reflected earlier case law, principally *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004), holding that a conviction under §647.6(a) does not constitute “sexual abuse of a minor,” and thus is not an aggravated felony. *Pallares-Galan*, 359 F.3d at 1102-1103. In this emerging line of cases, factors such as “unnatural or abnormal sexual interest” are not sufficient to establish that a crime is turpitudinous or involves “sexual abuse.” *Nicanor-Romero* pointed out that such “abnormal” interest can be established “by the mere fact that the subject of the interest was underage” – and further noted that such interest would be considered “natural and normal” if directed at a person older than 18. *Nicanor-Romero*, 523 F.3d at 1001. Judge Bybee, in dissent, criticized this rationale as begging the question – the California courts, by his reading, have made clear that § 647.6(a) punishes those who have an unnatural or abnormal sexual interest in a child and have acted that interest out in some objectively offensive way. *Id.* at 1020.

While *Nicanor-Romero* was pending, the Supreme Court held that a finding that a criminal statute is overbroad, and thus does not meet a “categorical” federal definition of the offense, must be based on a “realistic possibility, not a theoretical possibility,” that state courts would so extend the statute. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). Applying the *Duenas-Alvarez* standard to § 647.6(a), Judge Fletcher chose to highlight the unpublished California appellate decision of *People v. Villareal*, No. B16161735, 2003 WL 21153430 (Cal. Ct. App., May 20, 2003). In that case, a 13-year-old girl walking to soccer practice was accosted by a stranger in a pickup who asked her name, and asked if she had ever gone to see “the flag,” a floral arrangement in town known as a “make-out point.” When she said “yes,” the man made a remark about “seeing stars” that the girl found inappropriately sexual. He then turned around his truck, followed her, and twice offered her a ride. She refused, ran

away, and told her mother, who happened to be a police officer. Based on this conduct, the defendant's felony probation for another offense was revoked. The court of appeal, affirming the revocation of probation, found the defendant's statement that the victim was a "cute girl" sufficient to establish that he acted out of sexual interest. (The opinion in *Villareal* is printed as an appendix to Judge Fletcher's opinion.)

Judge Fletcher did not dispute that the defendant's actions violated the "annoy or molest" statute. He did, however, conclude that they were not morally turpitudinous because they did not constitute "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Nicanor-Romero*, 523 F.3d at 997, quoting *Matter of Short*, 20 I&N Dec. 136, 139 (1989).

Judge Bybee's dissent strenuously objected to this conclusion, charging Judge Fletcher with a "sterile" presentation of the facts in *Villareal*. Notably, Judge Pregerson also demurred: while agreeing with his partner in the majority that § 647.6(a) covers too broad a scope of conduct to be a categorical CIMT, he stated: "I am firmly convinced that Villareal's actions constituted a [CIMT]." *Nicanor-Romero*, 523 F.3d at 1011.

One additional matter is worth note: Judge Fletcher's *dicta* indicating the Ninth Circuit's discomfort with *Duenas-Alvarez*. See *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc) (discussed in *ILA*, Vol. 2, No. 3, at 10-11). *Duenas-Alvarez* held that the potential for "aiding and abetting" liability in section 10851 of the California Vehicle Code was no bar to classification of that crime as a "theft offense," and thus an aggravated felony under the Immigration and Nationality Act. In *Vidal*, a 9-6 en banc panel found that section 10851 could be applied to accessories as well as principals, and that *this* factor barred its classification as a "theft" offense.

In *Nicanor-Romero*, the majority raised two questions regarding the *Duenas-Alvarez* "realistic possibility" standard. First, who has the burden on this point? Judge Fletcher recognized that *Duenas-Alvarez* "could be read to suggest that it was incumbent on the petitioner to make this showing." *Id.* at 1004-5. But to Judge Fletcher, this potentially alters the burden of proof to prove removability, from the government to the

alien. (Another view might be that the Supreme Court's language was in response to *judicial* reasoning which seeks to establish over-breadth by engaging in theoretical speculation regarding the potential reach of a criminal statute.)

Second, Judge Fletcher raises the question of what type of evidence may be used to satisfy the "realistic probability" requirement. One answer is given by *Nicanor-Romero*: determining how state appellate courts have applied and interpreted the statute, as a means of establishing which conduct is likely to fall in, or out, of the statute's boundaries. There seemed to be little dispute among the three judges in *Nicanor-Romero* that this is the appropriate methodology and, it appears to be one commonly employed in Immigration Courts and BIA decisions. See also *Rebilas*, 2008 WL 2066579 at \*2 ("Rather than speculate about what conduct Arizona prosecutes under this statute, we examine Arizona cases . . . to see if any of these convictions were based on conduct that would not violate the federal generic crime.").

*Nicanor-Romero*, then, continues two significant trends in Ninth Circuit jurisprudence: (a) curtailing the classification of sexual offenses involving minors as "categorical" CIMTs or aggravated felonies; and (b) preserving, in the wake of *Duenas-Alvarez*, its particular approach to the classification of potentially deportable offenses, an approach which focuses on the potential scope of broadly-drafted criminal statutes.

### Sex in Other Circuits: A More Measured Approach

While a global survey of circuit law on this subject is beyond our sitcom-length scope, recent developments in circuits outside the Ninth illustrate a different approach to application of the categorical approach to sexual offenses.

We start, though, with a Fifth Circuit decision that adopted an approach close to that of the Ninth Circuit in recently holding that a Minnesota conviction for "unlawful sexual conduct" did not constitute a "crime of violence" under the U.S. Sentencing Guidelines. *U.S. v. Rosas-Pulido*, \_\_ F.3d \_\_, 2008 WL 1903779 (5th Cir. May 1, 2008). The defendant had been convicted under that portion of the Minnesota law covering the use of "force or coercion to accomplish the sexual contact." *Id.* at \*2. Since the Sentencing Guidelines define as a "crime of violence" those offenses with the elements of use,

attempted use, or threatened use of physical force, and also specifically include “forcible sexual offenses,” it might appear obvious that *Rosas-Pulido*’s crime was, in fact, a “crime of violence.”

The Fifth Circuit acknowledged this logic, but then, relying upon a 22-year-old Minnesota Supreme Court ruling, concluded that the statute in question could be applied to circumstances that did not constitute a crime of violence. In that case, a 14-year-old had accosted a classmate, grabbing and pinching her breast hard enough to cause pain. The Minnesota court found that a sufficient use of force to sustain a finding of guilt under the unlawful sexual conduct statute. See *Matter of Welfare of D.L.K.* 381 N.W.2d 435 (Minn. 1986). Based on this single case, the Fifth Circuit concluded that, despite the elements of “force” or “coercion,” the Minnesota statute did not describe a “forcible sexual offense,” and did not have “as an element the use, attempted use, or threatened use of force against another.” *Rosas-Pulido*, 2008 WL 1903779 at \*4.

The Court’s analysis is another reminder that in determining a “categorical match,” it may not be sufficient to look merely at the language of the statute. The Minnesota statute, looking simply at its elements, appeared to describe a crime of violence. However, the interpretation of those elements in state case law (at least in one case) indicated an extension to conduct that was not “forcible” as that term is commonly understood. This in turn called into question whether a genuine “categorical match” existed between the state offense and the generic federal law description. There was no indication, of course, that insulting juvenile assaults are commonly prosecuted under this statute, or that *Rosas-Pulido*’s crime was of such offensive, but marginally violent character. (The Fifth Circuit excluded consideration of the facts stated in a police report, which might have indicated the nature of the offense, noting that such reports are not admissible in evidence in a criminal trial.) Under this strict application of the categorical approach, however, the one exceptional case was enough to create a categorical “mis-match.”

In another recent case, the Fifth Circuit had a far easier time finding that the Texas offense of indecency with a minor – essentially defined as sexual contact with a victim age 16 or younger by someone at least three years older than the victim – amounts to “sexual abuse of a minor.” So classified, the offense met one of the alternate definitions of “crime of violence” in the Sentencing

Guidelines. *U.S. v. Najera-Najera*, \_\_\_F.3d \_\_\_, 2008 WL 615910 (5th Cir. Mar. 7, 2008). The Court did not discuss the hypothetical applications of the statute, as, for example, to the case of a 16 ½ year-old having consensual sex with her 19 ½ year-old boyfriend. Rather, the Court found dispositive its prior holding that the indecent exposure provision of the same Texas statute constituted sexual abuse of a minor. *U.S. v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000).

The Fourth Circuit recently adopted a similar straightforward approach in holding that a defendant’s conviction for attempted felony child molestation (age threshold under 14) constitutes sexual abuse of a minor under the Guidelines. *U.S. v. Diaz-Ibarra*, 522 F.3d 343, (4th Cir. 2008). The Fourth Circuit specifically rejected the defendant’s argument that to constitute “sexual abuse,” an offense must have as an element some degree of physical or psychological harm to the victim. “The clear focus of the phrase is on the *intent* of the abuser – sexual gratification – not on the *effect* on the abused . . . [T]he misuse of the child for sexual purposes completes the abusive act.” *Diaz-Ibarra*, 522 F.3d at 350-51. The Court rejected the contrary conclusion of the Ninth Circuit in *U.S. v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006) (North Carolina statute prohibiting “taking indecent liberties” with a minor covers range of conduct too broad to be categorically “sexual abuse of a minor”). *Baza-Martinez* seems to be an early harbinger of the standard reflected in the more recent Ninth Circuit cases discussed here: whether the issue is “moral turpitude,” or “sexual abuse,” the Ninth Circuit will examine the *act* as well as the *intent* as part of its categorical approach to sex offenses. The Fourth Circuit suggested – not without basis – that this new standard is a rejection of that adopted by the Ninth Circuit when it found that California’s statute prohibiting “lewd and lascivious conduct” upon a minor under the age of 14 does constitute sexual abuse of a minor. *U.S. v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999).

The uniqueness of the Ninth Circuit’s approach can be illustrated by contrasting its decisions regarding solicitation of sex from a minor with similar cases from the Seventh Circuit. As noted, *Pallares-Gomez*, the precursor to *Nicanor-Romero*, held that California’s “annoy or molest” statute did not constitute sexual abuse of a minor. The Court noted that the provision would cover “mere solicitation of a sexual act, if objectively annoying.” *Pallares-Galan*, 359 F.3d at 1101. The Court posited a young man or young woman asking for sex in an

annoying manner from a 17-year-old girl; that improper motivation, it concluded, was not sufficient to constitute “abuse.” *Id.* at 1102.

The Seventh Circuit has taken a quite different tack, holding in two cases that offenses of solicitation of sex involving a minor constitute aggravated felonies, even where there was no possibility that a minor suffered any physical or psychological harm from the solicitation. *See Sharashidze v. Gonzales*, 480 F.3d 566 (7th Cir. 2007) (solicitation made by note and hand gestures to child’s mother); *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7th Cir. 2005) (solicitation made over Internet to law enforcement agent posing as a minor). Even in that circuit, however, the *solicitation is not abuse* card did find one prominent supporter. *Gattem v. Gonzales*, 412 F.3d 758, 768 (7th Cir. 2005) (Posner, J., dissenting) (citing statistics that “millions” of underage girls engage in sex, such solicitations must be “common,” and “reclassification” of misdemeanor solicitation offense as an aggravated felony lacks rational basis.) The majority in *Gattem* responded to the dissent by noting the “inherent risk of exploitation that soliciting a minor presents.” *Id.* at 768. *But see Xiong v. I.N.S.*, 173 F.3d 601 (7th Cir. 1999) (Wisconsin statutory rape offense not a “crime of violence” when offense involved consensual sex between 18-year-old and 15-year-old girlfriend; remanded issue of whether offense constituted “sexual abuse of a minor”).

### Conclusion

This brief survey regarding sexual offenses raises more questions than it answers. Perhaps the en banc decision in *Estrada-Espinoza* will further resolve some of these questions in the Ninth Circuit. But that resolution will not terminate the following inquiries: in analyzing sexual offenses, particularly those involving child victims, does the *conduct* as opposed to the intent or state of mind (which is presumed to manifest some abnormal or aberrant desire) need to rise above a certain minimum for the crime to be classified as “abusive” or “turpitudinous?” Or is the established fact of sexual interest in a minor sufficient? Furthermore, in the wake of *Duenas-Alvarez*, does a single state prosecution, affirmed on appeal, prove a “realistic possibility” that a statute can be applied in an “overbroad” manner so as to defeat a “categorical match?” Finally, in light of earlier discussions involving the “modified categorical approach,” what evidence in a record of conviction will be sufficient to establish, in

the absence of a “categorical match,” that the particular offense at issue does constitute a CIMT or sexual abuse of a minor.

Maybe this movie will be the last we see of the *SATC* girls. But in the world of the categorical approach, one can guarantee that the sequels will be just about endless.

*Edward R. Grant has been since January 1998 a Member of the Board of Immigration Appeals.*

1. *See, e.g., Ashley Sayeau, Where We Got By Walking In Their Manolos*, Washington Post, May 18, 2008 (Outlook Section).
2. *See The Many Loves of Dobie Gillis*.
3. Sometimes called the external element or the objective element of a crime. It is the Latin term for the “guilty act”.
4. The Latin term for “guilty mind”

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## RECENT COURT DECISIONS

### *Supreme Court:*

*Yang v. Mukasey*, \_\_\_ S. Ct. \_\_\_, 2008 WL 2002046 (Mem)(May 12, 2008): The Court denied the petition for certiorari. The petitioner sought review from a decision of the Eleventh Circuit’s holding that the Board’s decision not to extend asylum to a male applicant whose unmarried partner was subject to a forced abortion in China was reasonable.

### Circuit Courts

#### *First Circuit*

*Pulisir v. Mukasey*, \_\_\_ F. 3d \_\_\_, 2008 WL 1868435 (1st Cir. Apr. 29, 2008): The First Circuit dismissed the respondent’s appeal from the BIA’s denial of his application for withholding of removal from Indonesia. The Court found no due process violation where the Immigration Judge had prevented the respondent from testifying about general country conditions in Indonesia in light of his eleven year absence from that country. The Court noted that the Immigration Judge had allowed testimony about events specific to the respondent’s family, but drew the line at general country condition testimony. The Court also found the failure of the Immigration Judge and the Board to make a specific finding regarding whether past persecution was established not to be fatal where an implicit finding could be inferred. The Court

also rejected the respondent's argument that persecution may be established by a showing of lesser harm where more general country condition evinces a bleaker picture. The Court held that "contextual considerations, standing alone, do not convert disagreeable events into acts of persecution."

#### *Second Circuit*

*Dedji v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 1969644 (2d Cir. May 8, 2008): The Second Circuit remanded where an Immigration Judge refused to admit the respondent's supporting documents because they were filed late pursuant to local rules. Respondent's counsel had explained that the late filing was due to a fire in counsel's office. The Immigration Judge subsequently denied the respondent's asylum claim, due in part to the absence of corroborating evidence. The Court expressed concern where an Immigration Judge's strict adherence to established deadlines prevented a respondent from presenting his case. The Court held that an Immigration Judge has broad discretion to deviate from deadlines established by local rules, where good cause had been shown for the failure to meet the deadline, and where enforcement of the deadline carries a likelihood of substantial prejudice to the respondent.

*Ali v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 1914266 (2d Cir. May 2, 2008): The Second Circuit reversed the Board's dismissal of respondent's appeal on the grounds that respondent had waived such right when his counsel accepted the Immigration Judge's decision as final. The Court held that the "shorthand" language used by the Immigration Judge in simply asking whether counsel accepted the decision as final was inadequate to fully apprise the respondent of his right to appeal or to effectuate a knowing waiver of such right.

*Kulwinder Singh v. U. S. Department of Homeland Security*, \_\_\_ F.3d \_\_\_, 2008 WL 2003769 (2d Cir., May 12, 2008): The Court found that the DHS submitted sufficient evidence to show that the petitioner was convicted under New York Penal Law § 120.05(1), a provision which he did not dispute was a CIMT. Specifically, the Court upheld the Immigration Judge's consideration of the following documents together to show which specific subsection of the criminal statute was involved – the (1) "Conditions of Probation"; (2) the "Certificate of Disposition"; and (3) the "rap sheets." The Court also found that the Immigration Judge did not exceed his allowable discretion in denying the petitioner's request for a continuance so that he could

continue to pursue a FOIA request regarding his entry into the United States in 1992 (the petitioner wanted to pursue cancellation of removal). The Court considered, among other things, that the petitioner admitted that he used a false name and discarded his passport before his 1992 arrival; that he discarded whatever paperwork he received from immigration officials upon arrival in 1992; and that the proceedings had already been prolonged.

#### *Fourth Circuit*

*Afanwi v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 2082149 (4th Cir., May 19, 2008): The Fourth Circuit dismissed the appeal from the BIA's denial of a motion to reopen based on a claim of ineffective assistance of counsel. The respondent had missed the deadline for judicial review from the Board's decision where counsel had neglected to check his mailbox until the appeal period had lapsed. The Court upheld the Board's dismissal for lack of jurisdiction due to late filing, holding that an attorney's failure to monitor his mailbox is not an issue over which the Board has jurisdiction. Furthermore, the Court dismissed the respondent's claim that he was deprived of due process by his counsel's negligence, and held that a retained counsel's ineffectiveness in a removal hearing cannot deprive a respondent of his Fifth Amendment right to a fundamentally fair hearing.

#### *Seventh Circuit*

*Atunnise v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 1883909 (7th Cir. Apr. 30, 2008): The Seventh Circuit reversed the Board's denial of the respondent's motion to reconsider on the grounds that the respondent had waived her right to apply for a waiver of inadmissibility under section §212(d)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(3), by not applying for such relief earlier. The need for such waiver resulted from a determination that the respondent obtained her K visa through fraud where she checked the box marked "no" to answer multiple, unrelated questions on her consular visa application, where separate answers were required but not allowed by the form. The Court found that the Immigration Judge had failed to advise the respondent of the availability of such waiver, and citing a lack of legal authority, rejected the government's appellate argument that such waiver needed to be applied for at the U.S. Consulate abroad.

#### *Ninth Circuit*

*Fakhry v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 1931262 (9th Cir. May 5, 2008): The Ninth Circuit granted the

respondent's appeal in part and remanded, finding that the Immigration Judge applied an incorrect legal standard in denying the asylum application as time barred. The respondent had claimed that his late filing was warranted because of changed circumstances in Senegal, his home country. The Immigration Judge stated that conditions had changed, but found that the exception would not excuse the three year delay in filing because the respondent had subjectively feared persecution from the time of his arrival in the U.S. and had come to this country with the specific intent to apply for asylum. The Court held

that a subjective fear of persecution and a subjective intent to apply for asylum are two distinct states of mind, as the former alone may not suffice to establish asylum eligibility where not supported by objective country conditions. The Court also found that the Immigration Judge erred in determining that the respondent did not meet his burden because he could reasonably relocate, where the respondent feared government persecution, as the regulations create a presumption of countrywide fear which the government did not rebut.

## AG/BIA PRECEDENT DECISIONS

In *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), the Attorney General found that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is not per se entitled to refugee status under section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(2000). As a result, *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) have been overruled. The Attorney General directed that the Board and Immigration Judges cease to apply the per se rule of spousal eligibility articulated in *C-Y-Z-* and *S-L-L-*, and instead engage in a case-by-case assessment of whether an applicant claiming asylum based on China's coercive population control (CPC) policies who has not physically undergone a forced abortion or sterilization procedure can demonstrate that he or she qualifies as a refugee on account of persecution for "failure or refusal" to undergo such a procedure or for "other resistance" to a CPC program, or he or she has a well-founded fear of being forced to undergo an abortion or involuntary sterilization or for the above reasons, or any other grounds cognizable under the Act. *Matter of J-S-*, at 537-8.

The Attorney General stated that the decision applies to all cases pending now before asylum officers, Immigration Judges, the Board or pending on judicial review, and cases in which a motion to reconsider is filed within 30 days of a final decision. It would also apply to cases reopened for reasons unrelated to the reasoning of this opinion. According to the Attorney General, this decision should not be considered a "fundamental change in circumstances" that would allow the Department of Homeland Security (DHS) to terminate existing final grants of asylum under 8 C.F.R. § 208.24(b)(1). *Id.* at 537 n.10. The decision shall not serve as the sole basis for reopening cases where a final grant of asylum or

withholding of removal has been made if the time for seeking reconsideration or judicial review has expired or has been exhausted.

In this case, the respondent's wife was forced to have an IUD inserted. After three requests to have additional children were denied, the respondent came to the United States. The respondent and his wife were threatened with sterilization if they had another child. Agreeing with the majority opinion in *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc), the Attorney General started with the words of the provision, finding that the ordinary or natural meaning of section 101(a)(42)'s reference to involuntary sterilization and abortion refers only to persons who have themselves undergone forced sterilization or abortion. The Attorney General found further support for this reading in that the Act separately provided for derivative asylum claims of spouses and in the provision requiring each alien to establish his or her own eligibility. Sections 208(b)(1)(B)(i) and (3)(A) of the Act, 8 U.S.C. § 1158(b)(1)(B)(i) and (3)(A).

In addressing the Board's argument that section 101(a)(42) does not expressly exclude spouses and is therefore ambiguous, the Attorney General noted that the circuits that have adopted the Board's view have done so with the limitation that the Board's interpretation must be accorded deference if the Board's interpretation was not unambiguously foreclosed by the statutory text. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). The Attorney General is not so limited. The Attorney General was not influenced by the long standing nature of the policy and that courts have deferred to the Board's interpretation. *See, e.g., Chen Lin-Jian v. Gonzales*, 489 F.3d 182 (4th Cir. 2007); *Junshao Zhang v. Gonzales*, 434 F.3d 993 (7th

Cir. 2006); *Wang He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003). The Attorney General also rejected the Board's reasoning in *Matter of S-L-L*, *supra*, that the nexus and level of harm is assumed in all cases where the asylum seeker is married to a person who was forced to undergo an abortion due to the history of the provision. This, the Board reasoned further, was due to the concept of a family entity. The Attorney General found that as some spouses may not oppose coercive population control policies and there will rarely be evidence regarding this issue. Furthermore, unless Immigration Judges presume that the Chinese Government is aware of a family dispute over submitting to the procedure, it is difficult to understand the Board's conclusion that the Chinese Government's use of such procedures should be understood to punish the couple only in those cases where there is joint opposition. The Attorney General concluded with a discussion of policy arguments based on legislative history raised by the respondent and *amici*, ultimately finding that none were persuasive. The Attorney General vacated the Board's and the Immigration Judge's decision and remanded the case for consideration of whether the respondent resisted China's CPC program, suffered or has a well-founded fear that he will suffer persecution, and can show that such persecution is on account of his resistance to the CPC program. The Attorney General also vacated the Immigration Judge's finding that forced insertion of an IUD is not sterilization, noting that this question is presently before the Board on remand from the Second Circuit.

In *Matter of A-S-B*, 24 I&N Dec. 493 (BIA 2008), an Immigration Judge granted asylum, finding that the respondent had not demonstrated past persecution but had met his burden to prove a well-founded fear of future persecution by the military in Guatemala. The Board agreed that there was no past persecution but reversed the Immigration Judge's finding of a well-founded fear. The Ninth Circuit Court of Appeals granted the government's unopposed motion to remand for the Board to explain its statement that the issue of whether the alien met his burden of proof to show a "well-founded" fear of persecution was a question of law warranting a *de novo* review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii)(2008).

The Board, considering the guidance provided in the Supplementary Information to the procedural reform regulation, explained that it should defer to the factual findings of an Immigration Judge, unless clearly erroneous, but retains independent judgment and discretion,

subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. The decision also explains that to determine whether established facts are sufficient to meet a legal standard, such as a "well-founded fear," the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record.

In *Matter of V-K*, 24 I&N Dec. 500 (BIA 2008), an Immigration Judge granted deferral of removal to the respondent, a Ukrainian, based on Jewish nationality. The Board reversed the grant of deferral, finding no clear probability of future persecution. The Third Circuit Court of Appeals granted the government's unopposed motion to remand for clarification of whether the Board had authority to reverse the Immigration Judge's finding. The Board found it had *de novo* review authority over an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured upon return to his native country, because the question relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met. The Board also clarified that while it reviewed an Immigration Judge's factual rulings for clear error, a prediction of the probability of future torture, although it may be derived in part from "facts," is not the sort of determination limited by the clearly erroneous standard. The Board noted that the fact that the Immigration Judge's prediction derived from his acceptance of an expert witness's testimony does not affect its nature as a prediction relating to whether an ultimate legal standard has been met.

In *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), the Board considered the term "crime of child abuse" under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i)(2000). At issue was whether the respondent's 2001 Washington State conviction for assault in the fourth degree constituted a removable offense of child abuse. The Immigration Judge found that it was.

The Board defined the term based upon a survey of Federal statutes defining child abuse, and extrapolated the following definition: "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." *Id* at

512. This definition is not limited to offenses committed by a parent or someone in *loco parentis*. The Board found, however, that the crime must be established categorically, and the inquiry is confined to the elements of the offense. In this case the assault statute did not have as an element that the victim was a child. Assuming the statute is divisible, the evidence relied upon by the Immigration Judge, the restitution order and no contact order, did not establish that the alien was convicted of abusing a child because neither need be proven by clear and convincing evidence. While the respondent originally pleaded to a charge that identified his victim as a child, the State prosecutor removed all traces of the victim's juvenile status from the amended information and then interposed the expurgated, back-dated charge into the conviction record. The Board sustained the appeal and terminated proceedings.

## REGULATORY UPDATE

73 Fed. Reg. 26340

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 248

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule affects certain Canadian and Mexican citizens who seek temporary entry as professionals to the United States pursuant to the TN classification, as established by the North American Free Trade Agreement (NAFTA or Agreement). TN nonimmigrants are Canadian or Mexican citizens who obtain temporary entry into the United States as business persons to engage in business activities at a professional level. This rule proposes to increase the maximum allowable period of admission for TN nonimmigrants from one year to three years, and allow otherwise eligible TN nonimmigrants to be granted an extension of stay in increments of up to three years instead of the current maximum of one year. TD nonimmigrants ("NAFTA Dependent") are the spouses and unmarried minor children of TN nonimmigrants. TD nonimmigrants who would otherwise be eligible for TD nonimmigrant status would be eligible to be admitted and seek extensions for the same period of time as the TN principal. The purpose of this narrow change is to remove certain administrative requirements on TN nonimmigrants and U.S. employers and U.S. entities, thereby making this nonimmigrant classification more attractive to eligible professionals and their U.S. employers. The rule also

proposes to remove filing location requirements from the TN regulations and instead provides that such locations will be prescribed by form instructions in order to provide more flexibility in program administration, as well as making certain technical modifications to eliminate outdated references to prior requirements. Finally, this rule proposes to revise the text of 8 CFR 214.1(a)(2) and (c)(1) and 8 CFR 248.3 by replacing the outdated term "TC" (the previous classification given to Canadian workers under the 1989 Canada-United States Free Trade Agreement) with "TN."

**DATES:** Written comments must be submitted on or before June 9, 2008.

73 Fed. Reg. 26924

UNITED STATES SENTENCING COMMISSION

### **Sentencing Guidelines for United States Courts**

**ACTION:** Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2008.

**SUMMARY:** Pursuant to its authority under 28 U.S.C. § 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. This notice sets forth the amendments and the reason for each amendment.

**DATES:** The Commission has specified an effective date of November 1, 2008, for the amendments set forth in this notice.

73 Fed. Reg. 30623

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

### **Submission of Revised Form I-821, Application for Temporary Protected Status**

**ACTION:** Notice.

**SUMMARY:** This Notice announces that effective June 27, 2008 only Form I-821, Application for Temporary Protected Status with a revision date of October 17, 2007, will be accepted for filing applications for Temporary Protected Status (TPS). The Form I-821, with the October 17, 2007, revision date can be found on the USCIS Web site at <http://www.uscis.gov>. Accordingly, beginning on June 27, 2008, if you are a national of a country currently designated for Temporary Protected Status (TPS) (or an alien with no nationality who last habitually resided in a country currently designated for TPS), you must submit your application for initial registration or re-registration using the Form I-821 with the October 17, 2007, revision

date. Individuals who have already filed for the most recent TPS registration or re-registration periods effective for their specific countries do not need to submit this revised Form I-821 until the next reregistration period for their country's TPS designation.

DATES: This Notice is effective June 27, 2008. After June 27, 2008, only Form I-821 with the October 17, 2007, revision date will be accepted by USCIS.

73 Fed. Reg. 30443  
DEPARTMENT OF STATE

In the Matter of the Amended Designations of Islamic Jihad Group (IJG), a.k.a. Jama'at al-Jihad, a.k.a. the Libyan Society, a.k.a. the Kazakh Jama'at, a.k.a. the Jamaat Mojahedin, a.k.a. Jamiyat, a.k.a. Jamiat al-Jihad al-Islami, a.k.a. Dzhamaat Modzhakhedov, a.k.a. Islamic Jihad Group of Uzbekistan, a.k.a. al-Djihad al-Islami as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act and Pursuant to Section 1(b) of Executive Order 13224. Based upon a review of the administrative record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I have concluded that there is a sufficient factual basis to find that the Islamic Jihad Group is now known as Islamic Jihad Union (IJU), a.k.a. Islomiy Jihod Ittihodi, and that the relevant circumstances described in Section 219(a)(1) of the Immigration and Nationality Act, as amended (the "INA") (8 U.S.C. 1189(a)(1)), and in Section 1(b) of Executive Order 13224, as amended ("E.O. 13224"), still exist with respect to that organization. Therefore, I hereby further amend the designation of that organization as a foreign terrorist organization, pursuant to Section 219(a)(4)(B) of the INA (8 U.S.C. 1189(a)(4)(B)), and further amend the 2005 designation of that organization pursuant to Section 1(b) of E.O. 13224, to include the following new names: Islamic Jihad Union (IJU), a.k.a. Islomiy Jihod Ittihodi, a.k.a. Ittihad al-Jihad al-Islami. Consistent with the determination in section 10 of E.O. 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

Condoleezza Rice,  
Secretary of State, Department of State.

## Update - Calculating "Loss to Victim or Victims" under section 101(a)(43)(M)(i) of the Immigration and Nationality Act

The United States Court of Appeals for the Third Circuit has recently addressed the issue of calculating loss to a victim or victims under section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i). In *Nijhawan v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 1914756 (3d Cir., May 2, 2008), the petitioner was convicted in federal court of several crimes, including conspiracy to commit bank fraud, mail fraud, and wire fraud. Relying on prior decisions, the Court found that it was not limited to the categorical/modified categorical approach in determining the amount of loss because the loss requirement was a "qualifier" rather than an element of the crime. Here the evidence considered together, including the indictment, judgment of conviction, and sentencing stipulation, were sufficiently tethered to the convicted conduct to provide clear and convincing evidence of a loss exceeding \$10,000. This case includes a good survey of "loss" cases, and contains a lengthy dissent arguing that the Court should retain the Act's conviction requirement for the loss element.

*For the original article Calculating "Loss to the Victim or Victims"..., see the Immigration Law Advisor Vol 1 No 4. Additional updates can be found in Vol. 1 No. 6, Vol. 1 No. 11, Vol 2 No. 1, Vol.2 No. 3, and Vol 2 No.4.*

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