



# Immigration Law Advisor

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## The Real Deal on REAL ID – An Update on Implementation

by Kathleen M. Reilly

When the REAL ID Act was debated and passed in 2005, some of its asylum-related provisions stirred controversy and suggested much higher scrutiny of asylum claims. See section 101(a)(3) of the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 231, 303 (effective May 11, 2005) (codified at section 208(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)). Opponents called the asylum-related provisions therein a “tragedy for asylum seekers.”<sup>1</sup> On the other hand, proponents described the asylum provisions as intended to amend the Immigration and Nationality Act (“Act”) to “prevent terrorists from abusing the asylum laws of the United States.” See H.R. Rep. No. 109-72 at 1.

In the short term, the effect on the rate of new asylum applications and grants cannot be quantified. But from a legal perspective, no radical change in substantive asylum law has yet come forth. Rather, the REAL ID Act’s amendments to the Act’s asylum and withholding of removal provisions were intended mainly to codify many of the Board’s standards for assessing an asylum applicant’s credibility and corroborative evidence. Similarly, the REAL ID Act’s provisions on adjudicating claims involving “mixed motives” on the part of a persecutor generally do not alter existing Board precedent on this issue. One notable exception to the REAL ID Act’s relatively low impact on substantive precedent is that the amendments directly modify the standards adopted in some federal courts for assessing and adjudicating issues involving credibility, corroboration, and motive. The Conference Report specifically noted concern over inconsistent standards that had evolved among the Board and federal courts, leading to “different results . . . in similar cases.” See H.R. Rep. No. 109-72 at 161. The following is a summary of the major Board and federal cases to apply the REAL ID Act’s asylum-related provisions, from the time of enactment of the REAL ID Act (May 11, 2005) through February 24, 2008.

## 1. Effective Date

The relevant effective date provision of the REAL ID Act provided that the changes now codified in section 208(b)(1)(B) “take effect on the date of enactment of [the legislation, May 11, 2005] and shall apply to applications for asylum, withholding or other relief from removal *made on or after such date*.” In addition, the Conference Report goes into greater detail by saying that the provisions “would not apply by statute to asylum applications *filed before the date of enactment . . .*” H.R. Rep. No. 109-72 at 168.

On November 2, 2006, the Board interpreted the effective date provision in *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006), to hold that the provisions regarding credibility determinations in the REAL ID Act only apply to applications for asylum, withholding of removal, and other relief that were initially filed on or after May 11, 2005, the legislation’s effective date, whether that application was filed with a Department of Homeland Security (“DHS”) asylum officer or an Immigration Judge. The Seventh Circuit has found that the provisions relating to corroboration included in section 101(a) of the REAL ID Act, i.e., the burden of proof provisions stating that an Immigration Judge may require an otherwise credible applicant to provide corroborating evidence in support of his claim, unless it cannot reasonably be obtained, also expressly apply only to asylum applications made after enactment of the REAL ID Act. *Tandia v. Gonzales*, 487 F.3d 1048, 1055 (7<sup>th</sup> Cir. 2007).<sup>2</sup>

## 2. Burden of Proof

The REAL ID Act codified the widely-held and uncontroversial legal tenet that the burden of proof in asylum cases is on the applicant. This approach specifically endorsed the Board’s decision in *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988). See H.R. Rep. No. 109-72 at 162. While credible testimony alone may be sufficient to meet an applicant’s burden of proof, the REAL ID Act amendments clarify that the applicant has the burden to “satisf[y] the trier of fact that [his or her] testimony is credible.” See section 101(a)(3)(B)(ii) of the REAL ID Act. This, of course, is not a new burden; however, the express requirement that an asylum applicant prove his or her credibility is new and may emerge as a future basis underlying Immigration Judges’ adverse credibility determinations. This provision may have particular applicability to a situation where an applicant’s testimony

is vague and lacking detail due to, e.g., a professed difficulty in remembering dates or details, but where there are no obvious major inconsistencies or discrepancies. The issue may be whether the record lacks credible testimony because the applicant failed to meet his or her burden of *demonstrating* credibility.

In terms of what evidence will satisfy an applicant’s burden of proof, section 101 of the REAL ID Act also provides fact-finders with substantive guidance on credibility determinations and corroborative evidence. For example, the Act, as amended by section 101(a)(3)(B)(iii) of REAL ID, now provides a list of factors that may be considered as part of a “totality of the circumstances” test for determining an applicant’s or a witness’ credibility.

## 3. Credibility

Getting to the substance of the REAL ID Act provisions pertaining to credibility, the Act now provides that

considering *the totality of the circumstances*, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witnesses account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal *consistency* of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant’s claim*, or any other relevant factor.

See § 101(a)(3)(B)(iii) of the REAL ID Act (emphasis added).

There is no presumption of credibility, but if no adverse credibility determination is made by a trier of fact, the applicant enjoys a rebuttable presumption of credibility on appeal. *Id.* At least one federal court has

indicated that such a presumption would be required at the administrative appeal level but not by a federal appellate court. *See Kho v. Keisler*, 505 F.3d 50, 56 (1<sup>st</sup> Cir. 2007).

The codification of this list of factors to be considered in assessing credibility raises a number of questions. First, why the need for the list? The conference report stated that the new standard was intended to address a conflict among the Ninth Circuit and other circuits and the Board. The main issue for lawmakers appeared to be that in some instances reviewing courts substituted their own interpretation of the evidence to find an applicant credible instead of exercising restraint and reversing credibility determinations only when the evidence “compels it.” *See* H.R. Rep. No. 109-72 at 167 (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n. 1 (1992)). Second, what does the “totality of the circumstances” mean? It means that no one factor should be considered in isolation and that credibility determinations should be “commonsense” and made in light of the total record and the applicant’s explanation as to discrepancies, inconsistencies, and implausibilities. H.R. Rep. No. 109-72 at 167. Third, must the trier of fact discuss each factor listed above? No, the Conference Report says that the trier of fact does not need to expressly state that he or she has considered each factor but should “describe those factors that form the basis” of his or her opinion. *Id.* Fourth, what role do demeanor-related observations play? The conference report endorsed two Ninth Circuit decisions related to demeanor—*Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9<sup>th</sup> Cir. 1985) and *Mendoza-Manimbao v. Ashcroft*, 329 F.3d 655 (9<sup>th</sup> Cir. 2003). The appropriate approach is to “rely on those aspect of demeanor that are indicative of truthfulness or deception”—including but not limited to “the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication.” H.R. Rep. No. 109-72 at 168 (quoting *Mendoza-Manimbao v. Ashcroft*, *supra* at 662).

In *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007), the Board considered the REAL ID Act amendments pertaining to credibility in a case involving an asylum application filed after the REAL ID Act’s effective date. The applicant was a native and citizen of China who entered the United States in August 2005. He claimed that he was persecuted on account of his Christian faith and hosting of home church events. In finding that the

respondent lacked credibility, the Immigration Judge relied on a host of factors, including inconsistencies between the respondent’s and his sister’s testimony, an inconsistent prior airport statement, and a major implausibility in that the respondent appeared not to know that the Bible was the book of Christian teachings. The Board noted in *Matter of J-Y-C-*, *supra*, that while some of the cited inconsistencies did not go to the “heart of the claim,” this no longer mattered, and that, under the totality of the circumstances “commonsense” approach, the Immigration Judge’s adverse credibility determination was not clearly erroneous. *J-Y-C-*, 24 I&N Dec. at 263-65.

To date, there has been little activity in the federal courts implementing the REAL ID Act’s credibility standards. While at least one published decision has applied the REAL ID Act’s credibility standards, several others have had occasion merely to discuss the potential impact of the changes. In *Chen v. U.S. Attorney Gen.*, 463 F.3d 1228 (11<sup>th</sup> Cir. 2006), a claim based on alleged persecution for practice of Falun Gong in China, the Court applied the “totality of the circumstances” test to find the applicant not credible, based in part upon inconsistencies between the applicant’s testimony and a prior credible fear interview. Although there were a number of inconsistencies not related to the credible fear interview, the reliance on such prior statements and the Court’s mention of the fact that the Immigration Judge had found that the applicant had not practiced Falun Gong since arriving in the United States, indicates the type of multi-pronged credibility determination that the REAL ID Act contemplates. Furthermore, the Court expressly rejected the applicant’s arguments that the inconsistencies relied upon by the Immigration Judge were “trivial” and noted that such an argument, standing alone, is foreclosed by the REAL ID Act’s amendments. *See Chen v. Attorney Gen.*, 463 F.3d at 1233.

As noted, other courts have predicted that the REAL ID Act will bring significant change to their jurisprudence on credibility determinations. The Ninth Circuit, in *Jibril v. Gonzales*, 423 F.3d 1129, 1138 n.1 (9<sup>th</sup> Cir. 2005), stated that in cases involving credibility determinations on asylum claims made after the REAL ID Act’s effective date, “only the most extraordinary circumstances will justify overturning an adverse credibility determination.” The Second Circuit, in *Chen v. U.S. Attorney Gen.*, 454 F.3d 103, 107 n.2 (2<sup>d</sup> Cir. 2006), predicted that the effect of the REAL ID Act amendments to the Act could be to “overrule” certain holdings of that

Court, including *Secaída-Rosales v. INS*, 331 F.3d 297 (2<sup>d</sup> Cir. 2003) (finding that adverse credibility determination must be “specific [and] cogent” and bear a “legitimate nexus” to the finding). This prediction is arguable given the Second Circuit’s later clarification that under *Secaída-Rosales* and follow-on cases, it would be appropriate to base an adverse credibility determination on matters that are “collateral” or “ancillary” to the claim if the “cumulative effect” is found to be significant by the fact-finder. See *Lin v. Gonzales*, 446 F.3d 395, 402 (2<sup>d</sup> Cir. 2006).

An interesting side issue has been raised in at least two federal appellate courts over whether the REAL ID Act’s discrediting of the Ninth Circuit’s “heart of the claim” requirement has “revived” the doctrine of “*falsus in uno, falsus in omnibus*,” meaning that even a minor inconsistency about, e.g., a birth date, could be used to discredit an applicant’s entire claim. The First Circuit, in a case in which the REAL ID Act did not apply, weighed in first, commenting that under the REAL ID Act, a fact-finder is “entitled to draw the *falsus in omnibus* inference based upon inaccuracies, inconsistencies, or falsehoods ‘without regard to whether they go to the heart of the applicant’s claim.’” See *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 23 n.6 (1<sup>st</sup> Cir. 2007) (quotations omitted). An alternative view is that of the Seventh Circuit, which, in a Judge Posner-authored decision, stated that if the REAL ID Act’s de-emphasis on the “heart of the claim” is “placed in context,” it is clear that a credibility determination based on a minor, isolated inconsistency that did not reflect on the credibility of the entire claim would not pass the “totality of the circumstances” test. See *Kadia v. Gonzales*, 501 F.3d 817, 821-22 (7<sup>th</sup> Cir. 2007) (disagreeing with *Castaneda-Castillo v. Gonzales, supra*).

#### 4. Corroboration & Judicial Review of Corroboration Findings

As to corroborative evidence, there were two types of changes included in the REAL ID Act provisions. The first set forth new standards on corroborative evidence that essentially codify the Board’s decision in *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997), holding that where corroboration is reasonably available, an alien should provide it or justify its absence in order to meet his or her overall burden of proof. See *Oyekunle v. Gonzales*, 498 F.3d 715, 717-18 (7<sup>th</sup> Cir. 2007) (REAL ID “codified” Board’s rule on corroboration). Like the REAL ID Act’s credibility/heart of claim-related amendments, this provision appears aimed to a certain extent at some Ninth

Circuit precedents, implicitly disapproving of *Lahda v. INS*, 215 F.3d 889 (9<sup>th</sup> Cir. 2000), which held that where an asylum applicant’s testimony is found credible, he need not submit corroborative evidence in order to establish eligibility for asylum. See *Oyekunle v. Gonzales, supra* (expressing agreement with *Ladha* approach, but noting that it did not survive REAL ID). Under the Act as amended, submission of available corroborative evidence is required when a fact-finder “determines that an applicant should provide corroborating evidence for otherwise credible testimony.” See H.R. Rep. No. 109-72 at 165-66. In such circumstances, the corroborative evidence must be provided unless the evidence is not reasonably available to the applicant. *Id.*

The second set of changes related to corroboration clarifies that under the Act as amended by section 101(e) of the REAL ID Act, “no court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.” See section 101(e) of the REAL ID Act; see also *Toure v. Attorney Gen.*, 443 F.3d 310 (3<sup>d</sup> Cir. 2006); *Shkabari v. Gonzales*, 427 F.3d 324, 331 n.2 (6<sup>th</sup> Cir. 2005); *Tandia v. Gonzales*, 487 F.3d 1048, 1055 (7<sup>th</sup> Cir. 2007); *Tun v. INS*, 445 F.3d 554, 563 (2<sup>d</sup> Cir. 2006). Interpreting the clear terms of the REAL ID Act, several United States Courts of Appeals have already applied this new standard of review to Immigration Judge findings related to corroboration, holding that the provisions regarding appellate review of certain corroboration findings were effective on enactment—i.e., on May 11, 2005. *Toure v. Attorney Gen., supra*; *Chukwu v. Attorney Gen.*, 484 F.3d 185, 192 (3<sup>d</sup> Cir. 2007); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 536-37 n.8 (7<sup>th</sup> Cir. 2005). This effective date applies only to the standard of review applied to an Immigration Judge’s determination that corroborative evidence was available to an applicant and should have been provided.

Nevertheless, the Second, Third, and Seventh Circuits continue to apply their pre-REAL ID law in reviewing Immigration Judge determinations related to the availability of corroborating evidence, refusing to affirm a finding that corroborative evidence was available and should have been produced unless the Immigration Judge’s decision meets certain standards. These include requiring Immigration Judges to (1) identify the evidence that is missing and determine its relative availability (the Second Circuit in *Tun v. INS, supra* at 563-64), (2)

question an applicant as to the missing evidence (the Third Circuit in *Toure v. Attorney Gen.*, *supra* at 325), and (3) address the applicant's stated reasons for not providing any corroborating evidence and assess *the relevance* of the evidence to the claim (the Seventh Circuit in *Tandia v. Gonzales*, *supra* at 1055 and *Rodriguez Galicia v. Gonzales*, *supra* at 537-38).

## 5. Mixed Motives

The Board and the courts have long recognized that “[p]ersecutors may have differing motives for engaging in acts of persecution.” *Matter of S-P-*, 21 I&N Dec. 486, 498 (BIA1996). Although an alien bears the full burden of demonstrating that he or she is a “refugee” within the meaning of the Act, the Board’s rule has been that “an applicant does not bear the unreasonable burden of establishing the exact motivation of a ‘persecutor’ where different reasons for actions are possible.” *Matter of Fuentes*, *supra* at 662 (BIA 1988); *see also Matter of S-P-*, *supra* (applicant for asylum need not show “conclusively” that the persecution was in fact motivated on account of one of the five grounds protected under the Act). The Board has stated that an applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was or would be motivated in part by an actual or imputed protected ground. *Matter of S-P-*, *supra* at 494. Many federal courts have applied similar rules, requiring an applicant to show that harm was “motivated in meaningful part” by a protected ground, *see Girma v. INS*, 283 F.3d 664, 668 (5<sup>th</sup> Cir. 2002), or that the harm “stemmed from” a protected basis instead of an unprotected ground. *See Ambartsoumian v. Ashcroft*, 388 F.3d 85, 91 (3<sup>d</sup> Cir. 2004).

The Ninth Circuit’s rule on assessing motive was somewhat different than the rule discussed above, and was, accordingly, targeted for reform by lawmakers. In particular, the conference report states that the Ninth Circuit decisions in *Borja v. INS*, 175 F.3d 732 (9<sup>th</sup> Cir. 1999) and *Briones v. INS*, 175 F.3d 727 (9<sup>th</sup> Cir. 1999) “substantially undermined a proper analysis of mixed motive cases.” H.R. Rep. No. 109-71 at 163. In those cases, the Ninth Circuit held that the aliens had presented viable asylum claims based upon their fear of harm at the hands of the NPA, an armed rebel group operating in the Philippines. In both cases, the Ninth Circuit rejected the Board’s view that the persecutors were mainly motivated by either economic matters (in the *Borja* case) or a personal vendetta/retaliation (in *Briones*), and not

by any protected ground under the Act. In citing these (and other Ninth Circuit cases dealing with aliens’ claims that they have been improperly branded as terrorists in their homeland), the conferees suggested that instead of determining whether a protected ground had *any* role in the persecution, the adjudicator should properly inquire into the *centrality* of the protected ground, as compared to the other motives clearly at issue in those cases.

With the REAL ID Act, Congress acted to provide a “uniform standard for assessing motivation.” *See* H.R. Rep. 109-72, at 163. The Act now provides that an asylum applicant must “establish that race, religion, nationality, membership in a particular social group, or political opinion *was or will be at least one central reason* for persecuting the applicant.” *See* section 101(a)(3)(B)(i) of the REAL ID Act (emphasis added). The Board recently applied this standard to an asylum claim filed after the REAL ID Act’s effective date. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). In *Matter of J-B-N-*, *supra*, the Board found that the applicants (who were natives of Burundi but citizens of Rwanda) raised claims that were primarily related to a family-based land dispute in Rwanda, and that their nationality or actual or imputed political opinion was not a “central reason” for the fear of harm. The Board stated that a protected ground could not be only “incidental, tangential, superficial, or subordinate to” another reason for harm; rather, it must be a central reason for the alleged persecution of the respondent. *Id.* at 214. The Board also stated that the motivation of the persecutors *involves* questions of fact, and the burden can be met by testimonial evidence, and/or supporting documents and corroborative background evidence providing direct or circumstantial evidence of motive. *Id.*

The Board’s decision in *Matter of J-B-N-*, *supra*, expressly states that the REAL ID Act did not “radically alter” the Board’s prior standard for assessing mixed motive cases. *J-B-N- & S-M-*, 24 I&N Dec. at 214. That assessment was essentially borne out in *Abdel-Rahman v. Gonzales*, 493 F.3d 444 (4<sup>th</sup> Cir. 2007), a federal court case that followed a few weeks after the Board’s decision in *Matter of J-B-N-*, *supra*. Applying the REAL ID Act’s mixed motive standard to an asylum claim filed in June 2005, the Fourth Circuit found that under the new, “narrowed” standard, the applicant failed to show that his marriage to an American woman of Jewish descent reflected a basis for an imputed pro-Israeli political opinion that could lead to his persecution or torture in

Egypt. *Abdel-Rahman v. Gonzales, supra* at 453 n.12. Similarly, the Court found that although the applicant was granted relief under the Convention Against Torture due to the likelihood of harm arising from his desertion from the Egyptian army, he could not conflate the torture claim into an actionable claim for asylum or withholding of removal because there was no proven nexus between the harm and either his marriage or any imputed political opinion arising from the fact that he applied for asylum in the United States. *Id.* at 452-53. The Court essentially found that in that case, the nexus failed under either the pre-REAL ID mixed motive standard or the new “at least one central reason” standard.

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1. See Patrick Giantonio, Barre Montpelier Times Argus, May 22, 2005

2. There is at least one instance, in an unpublished and apparently unique decision, of a federal court applying REAL ID’s credibility provisions to a case where “the final order of removal was entered after . . . the effective date of the REAL ID Act.” See *Fssabaye v. U.S. Att’y Gen.*, 2008 WL 185713 at \*2 (11th Cir. Jan. 23, 2008).

Circuit	Total	Affirmed	Reversed	%
1st	8	8	0	0.0
2nd	87	70	17	19.5
3rd	41	37	4	9.8
4th	14	14	0	0.0
5th	17	16	1	5.9
6th	12	10	2	16.7
7th	6	3	3	50.0
8th	4	4	0	0.0
9th	174	144	30	17.2
10th	4	4	0	0.0
11th	18	15	3	16.7
<b>All:</b>	<b>385</b>	<b>325</b>	<b>60</b>	<b>15.6</b>

The Ninth Circuit reversed in 30 of 174 cases (17.2%). Only eight of these reversals involved the merits of an asylum application. Of these, six found fault with the adverse credibility determination, one with level of harm for past persecution, and another with the well-founded fear determination. Six cases involving motions to reopen in absentia orders of removal were remanded for another look at the question of proper notice of the hearing. Nine reversals involved criminal law issues including the aggravated felony determination (3); crimes involving moral turpitude (3); retroactive application of the section 237(a)(2)(E) ground (2); and a 212(c) denial. The court also remanded a case in which the Board did not respond to a due process argument and another in which voluntary departure was not addressed.

The Second Circuit reversed in 17 of its 87 cases (19.5%). In contrast to the Ninth Circuit, most of the Second Circuit reversals involved the merits of an asylum claim and covered a wide range of issues including credibility (2); level of harm for past persecution (3); particular social group (1); reasonableness of relocation (1); pattern and practice of persecution (2); corroboration requirements (1); changed country conditions analysis (1); and, frivolousness (1). In many of these cases the Court remanded with a request that the Board more fully address the issue. Only one reversal involved a motion to reopen. There was also one reversal on the statutory counterpart issue for 212(c) eligibility and no reversals involving criminal law issues.

Outside the Second and Ninth circuits, all the other circuits courts combined decided 124 cases and reversed in 13 (about 10%). The Third Circuit’s reversals included an adverse credibility determination, a remand to further

## FEDERAL COURT ACTIVITY

### CIRCUIT COURT DECISIONS FOR JANUARY 2008

*by John Guendelsberger*

The United States Courts of Appeals issued 385 decisions in January 2008 in cases appealed from the Board. The courts affirmed the Board in 325 cases and reversed or remanded 60 for an overall reversal rate of 15.6%. The Second and Ninth Circuits together issued 68% of all the decisions and 78% of the reversals. There were no reversals from the First, Fourth, Eighth and Tenth Circuits. The highest reversal rate was from the Seventh Circuit (50% of 6 decisions). The overall reversal rate for January 2008 was 15.6 % compared to 15.3% for all of calendar year 2007.

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

consider denial of a motion to reissue a Board decision, and a remand to address an issue regarding past persecution raised on appeal but not addressed in the Board's decision.

The Eleventh Circuit reversals included a Colombian case in which the Court found that the level of harm amounted to past persecution, a motion to reopen in which the Board failed to address whether new material evidence had been presented, and a motion to reopen an in absentia order of removal based on exceptional circumstances where a person posing as an attorney told the alien he need not appear.

The Seventh Circuit reversed the adverse credibility determination in two cases and, remanded another case for further consideration whether a drug trafficking conviction was a particularly serious crime. The Sixth Circuit reversals involved nexus in a whistle blower case and the Board's authority to consider a late appeal.

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## A Pudding With No Theme?: Circuits Rule on a Potpourri of Issues

*by Edward R. Grant*

Winston Churchill once declined a rather ornate dessert, on grounds that "this pudding has no theme." The same might be said of the past month's immigration rulings from the federal circuit courts of appeals: the ingredients are present for serious jurisprudential gustation, but do the flavors mingle into something memorable? Knowing that circuit court case law, like dessert, is a matter of taste, I leave the answer to the reader.

**Adjustment of Status:** Immigration courts have grappled for several years with the interplay between the illegal presence inadmissibility provisions of section 212(a)(9)(c)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(c)(I), and section 245(i) of the Act, 8 U.S.C. § 1255(i), allowing aliens who entered the United States illegally to apply (subject to certain filing deadlines), for adjustment of status. It appears that this period of grappling is now coming to an end, and aliens so inadmissible will not be eligible for a section 245(i) waiver.

The Board held in 2006 that an alien inadmissible under sub-clause (II) of section 212(a)(9)(C)(i) – for having entered the United States illegally *after* being deported or removed – is barred from a waiver of inadmissibility. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). In that decision, the Board also expressed disagreement with rulings of the Ninth and Tenth Circuits holding that an alien inadmissible under sub-clause (I) of that section – for having resided unlawfully in the United States for more than a year – is nevertheless eligible for a waiver under section 245(i). See 23 I&N Dec. at 873; *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10<sup>th</sup> Cir. 2005); *Acosta v. Gonzales*, 439 F.3d 550 (9<sup>th</sup> Cir. 2006); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004).

The Second Circuit recently joined five other circuits in holding that an alien inadmissible under sub-clause (II) cannot apply for adjustment of status. *Delgado v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 323234 at \*5 (2<sup>d</sup> Cir. Feb. 7, 2008) (citing rulings from First, Sixth, Seventh, Eighth, and Ninth Circuits). See also *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1163 (10<sup>th</sup> Cir. 2004) (noting interplay between sub-clause (II) and the reinstatement provisions of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5)). The Court also noted that the Ninth Circuit had overruled *Perez-Gonzalez*, and applied *Chevron* deference to the Board's intervening ruling in *Torres-Garcia*. See *Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007). *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Having outlined this chain of rulings, the Second Circuit, without significant comment, joined the prevailing trend. While not all circuits have spoken – and relatively few have spoken with regard to sub-clause (I) cases – the fate of potential 245(i) applicants with a 212(a)(9)(C)(i) problem seems settled.

**Coercive Family Planning:** The Fourth Circuit, in *Lin v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 444393 (4<sup>th</sup> Cir. Feb. 20, 2008), instructed the Board on remand to address whether the respondent, a female from Fujian province, was "persecuted" when inserted with an intra-uterine device, against her will, after the birth of her first child, and subject to continued monitoring and reporting requirements. She violated those directives, had the IUD removed, and eventually gave birth to her second child, a boy. As a result, she also stated a fear of being sterilized.

The Board did not affirm the Immigration Judge's adverse credibility determination, instead finding: (1) that due to its temporary nature, the non-voluntary insertion of an IUD did not constitute "persecution" under the amended definition of "refugee" in the Immigration and Nationality Act, and (2) that the respondent did not have a reasonable fear of future persecution because she had been able to live in China for a period of time after the birth of her second child, and was able to obtain travel permission without difficulty.

The Fourth Circuit dismissed the second of these findings in a footnote, concluding that the respondent's fear of sterilization is "objectively reasonable." *Id.* at \*4. But it did not resolve the case on that basis, instead remanding for the Board to consider whether the involuntary insertion of an IUD, as part of a continuing program of monitoring to ensure compliance with birth control mandates, constituted persecution. The Court noted that while it had previously held that a single insertion of an IUD did not rise to the level of persecution, the facts here presented a different issue. *See Li v. Gonzales*, 405 F.3d 171 (4<sup>th</sup> Cir. 2005). As a possible incentive for the Board to issue a published decision on the question of IUD insertion as persecution, the Court concluded that such a decision would "no doubt[]" be accorded *Chevron* deference. *Lin*, 2008 WL 444393 at \*6.

Notably, the Court observed at the outset of its analysis that Fujian Province is a place "where the [one-child] policy has been enforced with special vigor." *Id.* at \*4. While most country conditions reports (including evidence cited by the Fourth Circuit) describe Fujian as effectively having a *two-child* policy, the Court's observation is a reminder of the level of intrusion and sanctions employed to compel compliance with that policy. The Court's reading of the country conditions information undoubtedly influenced its ultimate conclusion that, in the context of the overall enforcement scheme, the forcible insertion of an IUD may, indeed, constitute persecution.

**Failures to Appear:** A series of decisions in the last month demonstrate the continued vitality of litigation over *in absentia* removal orders, and the propensity for mixed results depending on the particular facts of the given case.

The first issue, visited afresh by the Ninth Circuit, is what constitutes a "failure to appear" that must be excused, if at all, by lack of notice or exceptional

circumstances under section 240(b)(5)(C) of the Act, 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). *Perez v. Mukasey*, \_\_ F3d \_\_, 2008 WL 383265 (9<sup>th</sup> Cir. Feb. 14, 2008). Mr. Perez's hearing was scheduled for 9:00 am. He did not appear at that time, although his lawyer did. Eventually, his lawyer left the courthouse. His client showed up at 11:00 am, just as the Immigration Judge was leaving the bench. A motion to reopen, claiming exceptional circumstances due to car failure, was denied.

The Ninth Circuit held that both the Immigration Judge and the Board abused discretion by finding that the alien had "failed to appear" – since the Immigration Judge was still on the bench, the Judge was therefore available to hear the case. Responding to a dissenting opinion, the majority stated that a rule requiring the respondent to appear at the time appointed, or else forfeit his right to a hearing, would be "unduly harsh." *Id.* at n6. The Court thus expanded its earlier holding in *Jerezano v. INS*, 169 F.3d 613 (9<sup>th</sup> Cir. 1999) (20-minute delay in arrival not "failure to appear") to any situation where the respondent arrives late for his hearing, but while the Immigration Judge is still in the courtroom.

While not addressing the issue of "exceptional circumstances," the Court clearly tipped its hand on the issue, noting that a car's engine failure is not a "foreseeable" event such as heavy traffic or difficulty parking. *See Sharma v. INS*, 89 F.3d 545, 547 (9<sup>th</sup> Cir. 1996) (traffic and parking difficulties do not excuse failure to appear). In cases arising in the Ninth Circuit, therefore, it would not be prudent to assume that *Sharma* will support a finding that *mechanical* difficulties do not constitute exceptional circumstances.

Assuming a failure to appear is established, the *in absentia* issue frequently hinges on the issue of notice. Two decisions from the Second and Seventh Circuits illustrate the differences that arise depending on the form of service of the notice of hearing.

The Seventh Circuit held that an alien who had been personally served by the former Immigration and Naturalization Service with an Order to Show Cause, but then failed to pick up certified mail from the Immigration Court containing notice of the date and time of his hearing, failed to establish lack of notice that would warrant reopening of his *in absentia* deportation order. *Derezinski v. Mukasey*, \_\_ F3d \_\_, 2008 WL 441756 (7<sup>th</sup>

Cir. Feb. 20, 2008). The Court found that the Order to Show Cause contained sufficient warning to the alien that he would receive notice of his hearing date, and that his affidavit claiming not to have received the certified mail notices was insufficient to overcome the evidence of attempted delivery contained in the letters returned to the Immigration Court by the postal service.

Not content to let a straightforward issue pass without further comment, the Court made two suggestions. First, that notices sent by certified mail also be “backed up” with notices sent by regular mail – which do not require someone to be home to receive and sign for the mail, or someone to go to the post office to pick them up. Second, that charging documents always include the date and time of hearing:

But the immigration authorities could save themselves some headaches by including the date, time, and place of the hearing in the order to show cause. The only obstacle is bureaucratic, but what greater obstacle is there to efficiency than bureaucracy? The order to show cause is issued by the Department of Homeland Security, but the notice of hearing is issued by the Immigration Court, which is part of the Justice Department. The Department of Homeland Security does not know the hearing schedule of the immigration judges, so it can't put the information required to be included in the notice in the order to show cause. The solution would require a degree of cooperation between separate cabinet-level departments that would doubtless be difficult to forge.

*Derezinski*, 2008 WL 441756 at \*4.

The Second Circuit, in *Lopes v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 451148 (2<sup>d</sup> Cir. Feb. 21, 2008), held that in cases involving a claim of non-receipt of a Notice to Appear that was served by *regular* mail, it would follow the standard set forth in *Sembiring v. Gonzales*, 499 F.3d 981 (9<sup>th</sup> Cir. 2007). *Sembiring* held that where regular mail is used, there cannot be a “strong” presumption of proper delivery, as there is in the case of certified mail, that requires independent, third-party evidence to overcome. *Cf. Matter of Grijalva*, 21 I&N Dec. 27 (1995) (presumption of delivery by certified mail in deportation proceedings pursuant to former section 242B

of the Act). Instead, where an alien had appeared at earlier immigration proceedings, had no motive to avoid the immigration proceedings, and in fact had initiated proceedings to obtain an immigration benefit, a statement or affidavit by the petitioner stating that he or she had not received notice should ordinarily suffice to overcome the presumption of receipt. *Sembiring*, 499 F.3d at 986-88.

The Second Circuit agreed, citing the “reduced reliability” of regular mail, and the difficulty of securing a “paper trail” to determine if delivery was, in fact, attempted to the correct address. *Lopes*, 2008 WL 451148 at \*3. The alien in *Lopes* had a pending application for employment-based adjustment of status at the time the Notice to Appear was sent, and thus, the Court concluded, had no incentive to evade the hearing, and every incentive to appear. This was sufficient, coupled with an affidavit of non-receipt, to rebut the “weaker” presumption of regular mail delivery.

*Lopes*, while significant in its adoption of the *Sembiring* standard, is an incremental development. The clear majority of circuits have adopted the “weaker presumption” approach. *See Lopes*, 2008 WL 451148 at \*2; *The Postman Always Rings Twice*, Immigration Law Advisor, September 2007. It seems that the *Sembiring* standard, or something close to it, will be the approach to test whether that weak presumption has, in fact, been rebutted.

**Ineffective Assistance of Counsel:** Perhaps more significant, at least in its tenor, is the Second Circuit's ruling in *Aris v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 441800 (2<sup>d</sup> Cir. Feb. 20, 2008), holding that the Immigration Judge and the Board erred in dismissing, for lack of due diligence, an alien's motion to reopen an *in absentia* deportation order entered in 1995. The Court held that the Board must consider the alien's “new” evidence of ineffective assistance of counsel, presented for the first time in his 2005 motion to reopen – a motion prompted by the alien's arrest on the outstanding deportation order.

The alien in question was convicted of a drug offense in 1991 and placed in proceedings in 1994. At a master calendar hearing in 1994, he was directed to file an application for section 212(c) relief by a given date, and given a new hearing date of May 2, 1995. The application was never filed, and the respondent did not appear for the hearing, prompting the issuance of an *in absentia* order.

A motion to reopen that order was denied in late 1995, and the Board dismissed an appeal from denial of that motion in 1996.

After his arrest in 2005, the alien filed a second motion to reopen, making a series of what the Second Circuit described as “factually erroneous” contentions. *Id.* at \*2. (Based on review of the decisions on that motion, it appears that the motions contended that the respondent had received written notice of the hearing date, but that it was not in the form of the actual Notice of Hearing issued by the Immigration Court.) This second motion was denied, and an appeal from that denial dismissed. Finally, in 2006, the respondent filed a third motion to reopen based on *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), this time with the Board, which “finally explained for the first time,” as the Second Circuit stated, the real reason for the alien’s failure to appear: he had called his lawyer’s office on May 2, 1995 (the hearing date), and was told by a paralegal that there was no hearing listed for him on that date. *Aris*, 2008 WL 441800 at \*3. The Board dismissed this latest motion.

The Second Circuit held that it was an abuse of discretion for the Board not to address, specifically, the new factual contentions raised for the first time in the third motion. The Court noted that Board precedent holds that erroneous advice from counsel regarding a hearing date can constitute “exceptional circumstances,” excusing a failure to appear. *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996). While accepting at face value the claims presented in the respondent’s third motion, the Court did not address (presumably leaving it to be addressed on remand) the question of whether the alien exercised “due diligence” in presenting his claim of ineffective assistance of counsel, and thus merited equitable tolling of the time restrictions on his motion. See *Iavorski v. INS*, 232 F.3d 124, 134 (2<sup>d</sup> Cir. 2000); *Cekic v. INS*, 435 F.3d 167 (2<sup>d</sup> Cir. 2006) (two-year delay in bringing claim showed lack of diligence; equitable tolling not applied). The Court noted, however, that the alien had lived in the United States for 10 years after his deportation order in the “mistaken belief” that his immigration problems had been resolved. *Aris*, 2008 WL 441800 at \*2. The decision also does not address the central issue of whether the alien ever had adequate notice of the May 2, 1995, hearing, which seems to have been the pivotal issue in the prior motions filed in the case, the issue having been resolved against the alien.

The driving force behind the Second Circuit’s ruling appears to have been the equities in the case: the alien was, in its view, both a strong candidate for relief under section 212(c), and a victim of lawyers who had provided positive assurance that he had a right to remain in the United States. The other underlying theme is found in the first sentence of the opinion – “[w]ith disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country” – and in the Court’s citation to a recent law review article on the topic, written by the opinion’s author. See Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 8 (2008).

While not overturning the Second Circuit’s own limitations on the doctrine of “equitable tolling” – notably, the requirements of demonstrating both prejudice and due diligence – *Aris* seems to state clearly that there is no inherent time limit on an alien finally getting the “correct” level of representation (in this case, as *Aris* notes, in the form of pro bono services from the Wall Street firm). *Aris* is hardly the first evidence that the circuit courts – particularly the high-volume Second and Ninth Circuits – are deeply aware of the problem of inadequate representation. But it is also true that as Article III courts, they have somewhat more independence to address the problem, and will employ those tools to do so.

In another significant ruling, the Second Circuit held that the Board must address, in the first instance, whether ineffective assistance of counsel can toll the April 30, 2001, filing deadline for an alien to be eligible for adjustment of status under section 245(i) of the Act. *Piranej v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 398866 (2<sup>d</sup> Cir. Feb. 15, 2008). The alien contended that his former lawyer, hired to represent him in removal proceedings, had advised him not to marry his fiancée; they married regardless in March 2001, and the lawyer failed to return phone calls from the alien asking what he should do next. Only in July 2002, well after the deadline, did the lawyer advise Mr. Piranej that a visa petition should have been filed by April 30, 2001.

In the meantime, the denial of the alien’s asylum application was affirmed by the Board in 2003, and the Board, on a 2-1 vote, denied the alien’s motion to reopen based on *Lozada*, finding that the alien had not established that he had an agreement with the attorney to represent him in the immigrant visa matter.

The Second Circuit reversed, finding that the alien's relationship with his former counsel may have been in the form of a "general retainer agreement" on all pertinent immigration matters, not, as the attorney alleged in his response to the complaint against him, limited to the issues of removability and asylum in immigration court. *Id.* at \*1. The Court found that the Board had not sufficiently addressed this issue in light of the requirements of *Matter of Lozada*. The Court also directed that the Board, if it were to find ineffective assistance, address whether that finding could toll the statutory deadline for section 245(i) eligibility.

#### Motions to Reopen – Pending Visa Petitions:

Two significant rulings from the Second and Ninth Circuits will further shape the contours of a vibrant part of the Immigration Judge and Board dockets: motions to reopen to pursue adjustment of status based on a pending visa petition.

Regulatory amendments adopted in 2006 appeared to have settled the critical question of whether an "arriving alien" can pursue adjustment of status in a removal proceeding: such aliens could pursue adjustment before the Department of Homeland Security, but Immigration Judges and the Board had no jurisdiction over such applications. *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. 27585 (May 12, 2006) (codified in part at 8 C.F.R. 1245.1, 1245.2). Subsequent to this regulation, Immigration Judges and the Board have generally denied motions to reopen filed by arriving aliens based on their claimed eligibility for adjustment, on grounds that they would lack jurisdiction over the adjustment application.

However, in *Kalilu v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 383267 (9<sup>th</sup> Cir., Feb. 14, 2008), the Ninth Circuit held that the Board abused its discretion in denying such a motion because that action would deprive the alien of his opportunity, established by regulation, to adjust. "The opportunity that the Interim Rule affords for an arriving alien in removal proceedings to establish his eligibility for adjustment of status based on a *bona fide* marriage is rendered worthless when the Board, as it purports to do in the present case, denies a motion to reopen (or continue) that is sought in order to provide time for [DHS] to adjudicate a pending petition. . . . If an alien is

removed [pursuant to a pending removal order] he is no longer eligible for adjustment of status." *Id.* at \*1. The Court also interpreted the Board's decision in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002) to state a general policy of "favorably exercising its discretion to grant motions to reopen on the basis of an unadjudicated I-130 petition." *Kalilu*, 2008 WL 383267 at \*2. (The Court also remanded the issue of the alien's frivolous asylum application to the Board for reconsideration under *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007)).

*Kalilu* directs the Board on remand to reconsider its exercise of discretion, and suggests that the motion to reopen be construed as a "motion to continue," to give DHS time to rule on adjustment of status. *Id.* at FN5. The suggestion is a bit imprecise – there is no basis to "continue" a closed removal proceeding. One option to comply with the Court's ruling is to grant a motion to reopen in such cases, and then grant a continuance (or, perhaps, administrative closure) pending the DHS resolution of adjustment. For now, only Immigration Judges in the Ninth Circuit will face this procedural dilemma. However, given the prevalence of adjustment-based motions to reopen, there seems little doubt that this issue will crop up in other circuits which, as in so many other matters, will have to decide whether to follow the lead of the Ninth.

While purporting to describe the "general policy" expressed in *Matter of Velarde*, the Ninth Circuit in *Kalilu* did acknowledge the *Velarde* conditions of timeliness, non-redundancy, compliance with voluntary departure, clear and convincing evidence, and lack of DHS opposition to the motion. *Velarde*, 23 I&N Dec. at 256. The Second Circuit recently pronounced on the last of these conditions – lack of DHS opposition – holding that the Board could not rely "solely" on such opposition to deny a motion to reopen. *Melnitsenko v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 339344 (2<sup>d</sup> Cir. Feb. 6, 2008). The alien in question had been apprehended at a DHS checkpoint 100 miles from the Canadian border, admitted to being a visa overstay, and after being placed in removal proceedings, challenged the legality of the checkpoint and refused to further testify. The Board upheld the removal order (a ruling affirmed by the Second Circuit), and denied her motion to remand for consideration of adjustment of status based on a pending visa petition. The Board's order stated in part that given the DHS's opposition to the motion – based on the alien's refusal to testify during her removal hearings – the motion "must" be denied.

The Second Circuit found this an abuse of discretion because it effectively gives the DHS veto power over the Board's exercise of discretion to grant an otherwise-worthy motion to reopen. The Court clarified what it saw as an ambiguity in *Verlarde*, declaring that the filing of a DHS opposition, while a factor to be weighed in the exercise of discretion, cannot be dispositive on the issue of discretion. The Court implicitly criticized the DHS's objection in this case for being premised on an issue not relevant to the bona fides of the alien's marriage, and stated that decisions to deny motions to reopen must thoroughly examine not just the fact, but the basis, of a DHS opposition, as well as other discretionary factors: "[T]he BIA must, in accordance with its duties in adjudicating motions to reopen, provide sufficient explanation for its decisions in order to provide this Court a meaningful opportunity to review those decisions." *Melnitsenko*, 2008 WL 339344 at \*8.

As was said of *Kalilu*, so might also be said of *Melnitsenko*: while the ruling is limited to the Second Circuit, the underlying issue of whether an alien should have "one opportunity" to present evidence of the bona fides of a potentially qualifying marriage is likely to gain a sympathetic hearing in other quarters. *Id.* at \*7. *Cf. Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9<sup>th</sup> Cir. 2003); *Silva-Rengifo v. Att'y Gen.*, 473 F.3d 58, 69 (3<sup>d</sup> Cir. 2007); *Subhan v. Ashcroft*, 383 F.3d 591 (7<sup>th</sup> Cir. 2004). If that opportunity is to be denied, a full explanation must be provided. Perhaps that is not a theme sufficient for Churchillian tastes, but for Immigration Judges and Board Members, it seems to be what is on the menu.

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

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## RECENT COURT DECISIONS

### *Second Circuit*

*Melnitsenko v. Mukasey*, \_\_ F.3d \_\_, 2008 WL 339344 (2<sup>d</sup> Cir. Feb. 6, 2008): The Court granted petitioner's motion to reopen based upon an unapproved I-130 petition. The Board had denied the motion based solely upon petitioner's failure to satisfy the fifth prong of *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002), requiring that the motion not be opposed by the Department of Homeland Security (DHS). Noting that it was unclear that such requirement was meant to be dispositive, the Court held that nevertheless, reliance on this requirement

was inappropriate in the absence of a rational explanation as to why DHS opposition should constitute a basis for denying the motion.

*Piranej v. Mukasey*, \_\_ F.3d \_\_, 2008 WL 398866 (2<sup>d</sup> Cir. Feb. 15, 2008): The Court granted petitioner's appeal from the Board's denial of his motion to reopen based upon ineffective assistance of counsel. Although prior counsel had represented the petitioner in regard to an asylum application in removal proceedings, counsel had advised petitioner against marrying a US citizen in 1999. The petitioner subsequently did marry, but was unable to contact prior counsel until after the April 30, 2001, deadline to be eligible for adjustment of status. The Court remanded with instructions that the Board remand the case to an Immigration Judge for additional fact finding to determine whether the petitioner had entered into a general retainer agreement with his prior counsel. If so, the Board is then to determine whether such a relationship could give rise to a claim under *Matter of Lozada*.

*Walcott v. Chertoff*, \_\_ F.3d \_\_, 2008 WL 425792 (2<sup>d</sup> Cir. Feb. 19, 2008): The Court granted petitioner's appeal from the Board's decision that the respondent was not eligible for relief under former section 212(c) of the Act based upon a March 1996 conviction where the petitioner did not plead guilty but was convicted after trial, and where his appeal of the criminal conviction caused the conviction to become final for immigration purposes in July 1996, after the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") effective date. The Court held that retroactive application of AEDPA would be improper if the petitioner relied on the availability of 212(c) relief in deciding to appeal his criminal conviction; otherwise, he could have foregone such appeal and immediately filed his waiver application. The Court remanded to the Board with instructions to remand to an Immigration Judge for further fact finding to determine if petitioner can make an individualized showing of reliance on his continuing eligibility for 212(c) relief.

### *Fourth Circuit*

*Lin v. Mukasey*, \_\_ F.3d \_\_, 2008 WL 444393 (4<sup>th</sup> Cir. Feb. 20, 2008): The Fourth Circuit granted the petition of an asylum applicant from the People's Republic of China claiming past persecution based on the forced insertion and continued usage of an intrauterine device. Noting that the Board had not addressed the Immigration Judge's negative credibility finding, the Court adopted the policy

of other circuits in presuming the applicant to be credible. Next, the Court held that it would be overreaching its jurisdiction in ruling on whether a forcible insertion and continued usage of an IUD constituted past persecution where the Board had yet to issue a precedent opinion on this issue. Accordingly, the matter was remanded.

*Saintha v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 383806 (4<sup>th</sup> Cir. Feb. 14, 2008): The petitioner, a native of Haiti, who was granted lawful permanent resident status as a refugee, but was later convicted of an aggravated felony, sought judicial review of a Board order, which reversed an immigration judge's decision that he was entitled to deferral of removal under the CAT, but upheld the decision that he was ineligible for adjustment of status. In his petition, the alien contended that, with respect to the finding that he was ineligible for deferral of removal under the CAT, the BIA erred in finding insufficient evidence that the Haitian government would likely acquiesce in his torture. The alien also argued that in rejecting his § 1159 claim, the BIA erred in interpreting the statutory requirements. The court found that judicial review of the alien's CAT claim was precluded under the REAL ID Act. Although the alien tried to characterize his challenge to this ruling as raising a reviewable legal question, the court found that the alien actually sought review of the agency's factual determination. Thus, because the alien was removable by reason of an aggravated felony conviction, § 1152(a)(2)(C) precluded judicial review of his CAT claim. With respect to the alien's disagreement with the BIA as to its interpretation of the requirements for adjustment of status and a waiver of inadmissibility under § 1159, the court found that the BIA's interpretation was entitled to Chevron deference because the BIA's interpretation was based on a permissible construction of the statute. The court dismissed the portion of the alien's petition requesting relief under the CAT for lack of jurisdiction and otherwise denied the petition for review.

#### *Eight Circuit*

*Solis v. Muckasey*, \_\_\_ F.3d \_\_\_, 2008 WL 341456 (8<sup>th</sup> Cir. Feb. 8, 2008): The court held that the petitioner's claim that the IJ and Board deprived him of due process is without merit. His argument that the police report of his 1992 drug arrest was inadmissible hearsay is inapposite; even hearsay would be admissible since the traditional rules of evidence do not apply in immigration proceedings. Moreover, there is no basis to doubt the accuracy of the police report since the alien pled guilty to the drug charges and has never before disputed the police report's veracity.

#### *Ninth Circuit*

*Grigoryan v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 307455 (9<sup>th</sup> Cir. Feb. 5, 2008): The Court granted respondent's petition and remanded for further proceedings, finding that the respondent was entitled to reopening due to ineffective assistance of prior counsel. The Court held that the Board had abused its discretion by failing to presume prejudice from former counsel's actions in filing a boilerplate appeal brief with the Board, and instead required the respondent to demonstrate that she suffered prejudice.

*Placensia-Ayala v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 323406 (9<sup>th</sup> Cir. Feb. 7, 2008): The 9<sup>th</sup> Circuit held that failing to register as a sex offender in violation of Nevada state law is not a crime involving moral turpitude, reversing the decision of the Board. The Court held that the applicable state statute, Nev. Rev.Stat. 179D.550, contains no state of mind requirement. Accordingly, a conviction under such strict liability statute lacks the requirements of willfulness or evil intent required for a finding of moral turpitude, as one could be convicted for simply forgetting to register for a few days, or even for mailing the registration to the wrong address.

#### *Tenth Circuit*

*Ismail v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 466251 (10<sup>th</sup> Cir. Feb. 22, 2008): The Tenth Circuit affirmed the Board's dismissal of the respondent's appeal. The Court rejected the respondent's argument that the Immigration Judge erred in basing his adverse credibility finding on his omitting two incidents of torture from his asylum application. The Court rejected a rigid rule that false statements and omissions relating to "incidental" matters may not undermine credibility, holding that the significance of an omission must be determined by the context. The Court thus found the circumstances of this case to "readily support an adverse credibility finding."

### BIA PRECEDENT DECISIONS

**I**n *Matter of Anifowoshe*, 24 I&N Dec. 442 (BIA 2008), the Board held that section 101(b)(1)(E)(ii) of the Act, 8 U.S.C. § 1101(b)(1)(E)(ii), does not require that an unmarried child aged 16 or 17 be adopted with or after a younger sibling in order to be considered a child. In this case, the petitioner adopted the beneficiary on May 1, 2002, when the beneficiary was 17. On May 29, 2003, the petitioner adopted the beneficiary's natural siblings, who were then under 16 years of age. The Field

Office director denied the petition, finding that section 101(b)(1)(E)(ii) required that an adopted child who is under the age of 18 may be considered a child if the child is adopted with or after a natural sibling who is also considered a child under the Act, but not before. The Board found that the plain language of 101(b)(1)(E)(ii) does not require siblings to be adopted in any particular order. A 1999 memorandum from the Immigration and Naturalization Service construing the provision is not binding on the Board. Furthermore, while the title of the public law adding section 101(b)(1)(E)(ii) supports the Department of Homeland Security's interpretation, the title cannot limit the plain meaning of text. The purpose of the public law was to preserve family unity, a purpose that is not frustrated by this interpretation.

In *Matter of Kelly*, 24 I&N Dec. 446 (BIA 2008), the Board provided guidance regarding Immigration Judge oral decisions that include attachments. The Board indicated that particular care should be used to insure a complete record.

In *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008), the Board found that when evaluating an application for asylum, an Immigration Judge must make a specific finding as to past persecution, and then apply the burden of proof and presumptions specified in 8 C.F.R. § 1208.13(b). In this case, the Immigration Judge found that the Kenyan native and citizen had demonstrated past persecution, but denied the respondent's application for asylum because he found that the respondent could safely relocate to another part of Kenya. The Board adopted the Immigration Judge's past persecution finding, but found that the Immigration Judge did not explicitly apply the presumption and failed to shift the burden of proof to the DHS to prove by a preponderance of the evidence that the respondent can avoid future persecution by relocating to another part of Kenya, and that it would be reasonable for him to do so.

In *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008), the Board found that a State misdemeanor offense of conspiracy to distribute marijuana is an aggravated felony under section 101(a)(43)(B) of the Act where its elements correspond to the elements of the Federal offense of conspiracy to distribute an indeterminate quantity of marijuana under 21 U.S.C. § 841(a)(1), (b)(1)(D). The respondent was convicted in January 2007 of conspiracy to distribute a controlled dangerous

substance (marijuana) in violation of Maryland law. The respondent argued that his marijuana distribution conviction is not a federal felony because the Controlled Substances Act (CSA) includes an offense, 21 U.S.C. § 841(b)(4), that treats an offender who distributes a small amount of marijuana for no remuneration as though he committed simple possession, and the conviction record does not indicate whether there was remuneration one way or the other. The Board explained that under the categorical approach as described in *Lopez v. Gonzales*, 127 S.Ct. 625 (BIA 2007), "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Id.* at 631. The elements are those facts that must be proven beyond a reasonable doubt, and mitigating factors that decrease the penalty do not need to be proven beyond a reasonable doubt. Therefore, the respondent's state offense must correspond not to the federal offense which carries the lowest penalty, but rather to the offense which may be proved to a jury upon the fewest facts. 21 U.S.C. 841(b)(1)(D) (felony distribution) is the baseline provision because it states a complete crime upon the fewest facts. Section 841(b)(4) defines a mitigating exception to the 5-year statutory maximum. Further, the defendant bears the burden of proving the additional facts - the smaller amount for no remuneration which, in this case, he did not do.

In *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008), the Board considered whether costs and assessments imposed following a plea in a criminal proceeding constitute "punishment" such that an alien has suffered a "conviction" within the meaning of section 101(a)(48)(A) of the Act. The respondent pled nolo contendere on February 26, 2007, to possession of a controlled substance in violation of the Florida Statutes. Adjudication of guilt was stayed and withheld, the sentence was suspended, and costs were assessed against him. The Immigration Judge found that costs are not a form of punishment, penalty or restraint. In sustaining the DHS's appeal, the Board found that the State of Florida characterizes costs and fines as punishment, as have a majority of Federal courts. Courts have distinguished between civil monetary penalties and costs, surcharges and fines imposed in the criminal context. The Board noted that by way of analogy, restitution is a form of punishment rather than simply a civil penalty. The Board found that the respondent had suffered a conviction within the meaning of section 101(a)(48)(A), reinstated proceedings and remanded the record to the Immigration Judge.

## REGULATORY UPDATE

### DEPARTMENT OF STATE

22 CFR Part 42

#### **Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended**

**ACTION:** Final rule.

**SUMMARY:** This rule revises the photo requirement as part of the application process for a Diversity Immigrant Visa, to require that the photo be in color. Color photographs enhance facial recognition and reduce the opportunity for fraud.

**DATES:** This rule is effective February 11, 2008.

### DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

8 CFR Part 274

19 CFR Part 162

#### **Administrative Process for Seizures and Forfeitures Under the Immigration and Nationality Act and Other Authorities**

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

**SUMMARY:** This interim rule amends Department of Homeland Security regulations, to consolidate the procedures for administrative seizure and forfeiture process. The interim rule also permits earlier consideration of petitions for the remission of seized assets in cases that would otherwise be brought under the procedures in title 8 of the Code of Federal Regulations. The interim rule also makes technical and conforming changes to update the regulations.

**DATES:** This interim rule is effective February 19, 2008. Written comments must be submitted on or before April 21, 2008.

### DEPARTMENT OF STATE

[Public Notice 6102]

#### **In the Matter of the Amended Designations of Salafist Group for Call and Combat a.k.a. GSPC a.k.a. Le Groupe Salafiste Pour La Predication Et Le Combat a.k.a. Salafist Group for Preaching and Combat, 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 Salafist Group for Call and Combat, has changed its name to al-Qa'ida in the Islamic Maghreb, a.k.a. AQIM, a.k.a. Tanzim al-Qa'ida fi Bilad al-Maghrib al-Islamiya, 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(b) of the INA (8 U.S.C. 1189(b)), and further amend the 2001 designation of that organization pursuant to Section 1(b) of E.O. 13224, to include the following new names: al-Qa'ida in the Islamic Maghreb a.k.a. AQIM a.k.a. Tanzim al-Qa'ida fi Bilad al-Maghrib al-Islamiya Consistent with the determination in section 10 of Executive Order 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.

Dated: February 4, 2008.

Condoleezza Rice,

Secretary of State, Department of State.

#### **Presidential Determination No. 2008–10 Jan 29, 2008 Unexpected Urgent Refugee and Migration Needs Related to Africa and the Middle East**

#### **Memorandum for the Secretary of State**

By the authority vested in me by the Constitution and the laws of the United States, including sections 2 and 4(a)(1) of the Migration and Refugee Assistance Act of 1962 (the "Act"), as amended (22 U.S.C. 2601 and 2603), and section 301 of title 3, United States Code: (1) I hereby determine, pursuant to 2(c)(1) of the Act, that it is important to the national interest to furnish assistance under the Act in an amount not to exceed \$32 million from the United States Emergency Refugee and Migration Assistance Fund for the purpose of meeting unexpected and urgent refugee and migration needs, including by contributions to international, governmental, and nongovernmental organizations and payment of administrative expenses of

the Bureau of Population, Refugees, and Migration of the Department of State, related to humanitarian needs in Africa and in the West Bank and Gaza; and (2) the functions of the President in relation to this memorandum under 2(d) of the Act, and of establishing terms and conditions under section 2(c)(1) of the Act, are assigned to you. You are authorized and directed to publish this memorandum in the Federal Register.

George W. Bush

THE WHITE HOUSE,

Washington, January 29, 2008.

**DEPARTMENT OF HOMELAND SECURITY**

8 CFR Parts 270, 274a, and 280

**DEPARTMENT OF JUSTICE**

28 CFR Part 68

**Executive Office for Immigration Review**

8 CFR Part 1274a

[EOIR Docket No. 165F; A.G. Order No. 2944–2008]

**Inflation Adjustment for Civil Monetary Penalties Under Sections 274A, 274B, and 274C of the Immigration and Nationality Act**

ACTION: Final rules.

SUMMARY: As required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the Department of Homeland Security and the Department of Justice are publishing these rules adjusting for inflation the civil monetary penalties assessed or enforced by those two Departments under sections 274A, 274B, and 274C of the Immigration and Nationality Act (INA). The adjusted civil money penalties are calculated according to the specific formula laid out by law, and will be effective for violations occurring on or after the effective date of these rules.

DATES: These rules are effective March 27, 2008.

**DEPARTMENT OF STATE**

22 CFR Part 42

**Visas: Documentation of immigrants Under the Immigration and Nationality Act, as Amended**

ACTION: Final Rule.

SUMMARY: This rule revises the procedure for notifying the beneficiary of an immigrant visa petition of the termination of the immigrant visa registration because of the failure of the beneficiary to pursue the application within a specified time, by providing that such notification will be made by National Visa Center directly to the beneficiary.

DATES: This rule is effective February 29, 2008.

**ADDENDUM:**

**Equitable Tolling of Motions Deadlines - A Survey of Circuit Court Decisions (Vol. 1 No. 8)**

**August 2007**

*by Karen Fletcher Torstenson*

Since publication of the above article, the following decisions relevant to this topic have been published.

**First Circuit** - The Court in *Guerrero-Santana v. Gonzales*, 499 F.3d 90 (1<sup>st</sup> Cir. 2007) found that, even if the doctrine of equitable tolling applies to excuse late filings based on ineffective assistance of counsel, it should be used sparingly and not in this case, where the respondent did not act with due diligence. “The [respondent] has failed to explain how his previous counsels’ shortcomings caused this failure to comply with the temporal deadline.” *Id.* at 93.

**Second Circuit** - In *Wang v. Board of Immigration Appeals*, 508 F.3d 710 (2<sup>d</sup> Cir. 2007), the Court held that the Board did not abuse its discretion in refusing to equitably toll the period for filing a motion to reopen premised on ineffective assistance of disbarred counsel. The motion to reopen was filed 4 years after the Board’s final order denying asylum. The Court stated that claims of ineffective assistance of counsel may provide a sufficient basis for equitable tolling of the 90-day period if the movant shows that his due process rights were violated by the conduct of counsel, and that the movant exercised due diligence in pursuing the case during the period he seeks to toll. The Court continued:

We write to clarify that there is no magic period of time-no per se rule-for equitable tolling premised on ineffective assistance of counsel. Rather, the nature of the analysis in each case is a two-step inquiry that first evaluates reasonableness under the circumstances-namely, whether and when the ineffective assistance was, or should have been, discovered by a reasonable person in the situation. Then, petitioner bears the burden of proving that he has exercised due diligence in the period between discovering the ineffectiveness of his representation and filing the motion to reopen. Both steps of the inquiry are tailored

to the specific facts of the case. Accordingly, there is no period of time which we can say is per se unreasonable, and, therefore, disqualifies a petitioner from equitable tolling- or, for that matter, any period of time that is per se reasonable.

*Id.* at 715 (citations omitted).

In this case, waiting 8 months after receipt of documents through FOIA to file the motion to reopen did not evidence diligence.

**Seventh Circuit** - In *Gaberov v. Mukasey*, \_\_\_ F.3d \_\_\_, 2008 WL 426403 (7<sup>th</sup> Cir. Feb. 19, 2008), the Court found that equitable tolling of the motions period was warranted despite the motion being filed 4 years late. The respondent argued that he did not receive a copy of the Board's final order in his case, but received a decision relating to another individual, and the Court found that he acted with diligence.

**Ninth Circuit** - The Court in *Ghahremani v. Gonzales*, 498 F.3d 993 (9<sup>th</sup> Cir. 2007) found that the time period for filing a motion was equitably tolled. The Court reiterated its holdings on equitable tolling:

We recognize equitable tolling of deadlines ... during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error. Equitable tolling is available where despite all due diligence, the party invoking the doctrine is unable to obtain vital information bearing on the existence of the claim. The party's ignorance of the necessary information must have been caused by circumstances beyond the party's control. Moreover, the limitations period is tolled until the petitioner definitively learns of counsel's defectiveness.

*Id.* at 999-1000 (citations omitted).

*Karen Fletcher Torstenson is an Attorney Advisor with the Board of Immigration Appeals.*

## ADDENDUM: Calculating "Loss to Victim or Victims" ... (Vol.1, No. 4). April 2007

by *Ellen Liebowitz*

The United States Court of Appeals for the Seventh Circuit has recently addressed the issue of calculating loss to a victim or victims under section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M). In *Eke v. Mukasey*, 512 F.3d 372 (7<sup>th</sup> 2008), the petitioner was convicted under Illinois law of conspiracy to violate the state's identity theft statute, and of the substantive crime of identity theft. The Court employed "the modified categorical approach" to evaluate the issue of loss. It found that the charging documents and the record of conviction established that the petitioner pled guilty to using and to conspiring to use someone else's identifying information to obtain credit, money, goods etc., in an amount exceeding \$10,000, and that this satisfied the loss requirement of section 101(a)(43)(M). The court explained that because the conviction for conspiracy was enough by itself to justify looking at the amount of loss the petitioner intended to inflict, it did not need to decide whether section 101(a)(43)(M) standing alone referred to actual loss or to intended loss. In reaching this conclusion, the court considered that section 101(a)(43)(U) of the Act (an attempt or conspiracy to commit an aggravated felony offense), was directly implicated due to the nature of the criminal charges.

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