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Fruit or Vegetable? Supreme Court To Decide if Tax Fraud is "Fraud" Under Section 101(a)(43)(M)(i) of the Act

by Edward R. Grant

The Glorious Fourth is anon and with it the third leg of the Grand Slam of the summer grilling season (Memorial, Father's, and Labor Days being the others). We are not going to venture into the great "Cookout vs. Barbecue" debate, much less the respective virtues of gas versus charcoal versus mesquite. But one summertime debate is a perennial, with two authoritative but diametrically opposed answers: Is the tomato on your burger a fruit? Or a vegetable?

Botanically, it is undoubtedly a fruit. But back when our National Pastime commemorated our nation's independence by scheduling doubleheaders, the Supreme Court unanimously sided with common usage over botanical correctness——declaring that for purposes of the Tariff Act of 1893, the staple ingredient of ketchup and salsa and pico de gallo (not to mention Bloody Marys) was, indeed, a vegetable and therefore subject to the duties owed for their importation. *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893). Thus, to the horror of botanists (and nutritionists) everywhere, ketchup was declared a "vegetable" in the 1980s, and in New Jersey, where the fruit is most deliciously grown, the tomato was declared in 2005 to be the Official State Vegetable. (For the record, teams in the National League and the American Association played seven doubleheaders on July 4, 1893.)

And, just to confuse your dinner table further, squash, cucumbers, and eggplant are all botanical "fruits." *Id.* Basically, when Mom said, "Eat your vegetables," she meant the bad green stuff, i.e., broccoli and spinach.

What does all this have to do with immigration? Apart from the fact that the tomato is an émigré from South America, it reminds us that in the Court's parsing of statutory language, many factors are at play. The latest evidence: the Court's grant of certiorari in *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010), *cert. granted in part*, 79 U.S.L.W. 3286 (U.S. May 23, 2011) (No. 10-577), 2011 WL 1936082.

The Ninth Circuit held in *Kawashima* that making a false statement on a tax return can constitute an aggravated felony under section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(M)(i); it rejected the petitioner's argument that the only Federal tax offense that can be classified as an aggravated felony is tax evasion under 18 U.S.C. § 7201, which is separately defined as an aggravated felony under section 101(a)(43)(M)(ii) of the Act. The Third Circuit previously accepted this argument, holding that the presence of subparagraph (M)(ii) reflected congressional intent to specify tax evasion as the only deportable tax offense under the aggravated felony definition, thus precluding other tax offenses, such as knowing false statements, from the scope of subparagraph (M)(i). *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004). Then-Circuit Judge Alito dissented in *Ki Se Lee*; in turn, three judges dissented from the denial of rehearing en banc in *Kawashima*. *See Ki Se Lee*, 368 F.3d at 226 (Alito, J., dissenting); *Kawashima*, 615 F.3d at 1046 (Graber, Wardlaw, and Paez, JJ., dissenting from denial of rehearing en banc). The Fifth Circuit, in a 2-1 decision, previously disagreed with *Ki Se Lee*—and just last Term, the Supreme Court *denied* a petition for certiorari from the decision. *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008), *cert. denied*, 130 S. Ct. 736 (2009).

This is the extent of the circuit split that the Supreme Court will presumably resolve. There seems to be an abundance of other immigration-related "splits" affecting far greater numbers of cases. *See, e.g.*, *Salem v. Holder*, No. 10-1078, 2011 WL 1998330 (4th Cir. May 24, 2011) (holding, in opposition to *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), and *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9th Cir. 2011), but in agreement with *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), that an ambiguous record of conviction is insufficient to meet the burden of proof required for an applicant for cancellation of removal to establish that he has not been convicted of an aggravated felony). So why this one, and why so soon after denying review on the same issue? The easy answer, of course, is that one of the parties must ask for the split to be resolved; the harder issue is why this particular split caught the Court's attention and how a decision either way could affect the resolution of charges brought under section 101(a)(43)(M)(i) and perhaps even other aggravated felony provisions.

The Court will not come to this issue, or even this case, in a vacuum. Its decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), rejected the position taken by the Ninth Circuit in an earlier iteration of *Kawashima* and clarified that a fraud offense can constitute an aggravated felony under subparagraph (M)(i) even if the amount of loss is not an element of the offense. The Court also held that in determining whether the $10,000 "loss to the victim" threshold in section 101(a)(43)(M)(i) had been crossed, an Immigration Judge may consult documents outside the formal record of conviction, including an order of restitution. *See id.* at 2303; *cf. Kawashima v. Mukasey*, 530 F.3d 1111, 1117 (9th Cir. 2008) (adopting a "statutory definitional" approach to loss element), *withdrawn and superseded by Kawashima v. Holder*, 593 F.3d 979 (9th Cir. 2010).

Thus, the Court is quite familiar with the seemingly straightforward requirements of subparagraph (M)(i)—that the offense "involve fraud or deceit" and that the loss to the victim(s) exceed $10,000. And in rejecting, unanimously, the "definitional" approach to "loss," the Court in *Nijhawan* applied a legislative wonk's version of the "common language" test employed in *Nix v. Hedden*. The Court acknowledged that the words "an offense . . . in which the loss to the victim exceeds $10,000" could be read to describe a generic class of crimes in which the specified element of loss is a statutory element. It concluded, however, that the phrase "in which" can refer to the specific conduct that gave rise to the offense—a reading that comports with the common, natural meaning of the words. *Nijhawan*, 129 S. Ct. at 2301. Moreover, the Court pointed out, adopting the strict definitional approach would leave almost no fraud offenses covered by subparagraph (M)(i)—because few State or Federal fraud statutes include a monetary loss threshold. *Id.* at 2302.

The upshot of *Nijhawan*—not widely noted in discussions of the case—is that the Court now clearly recognizes two types of offenses in the aggravated felony definition: those to which a strict "definitional" approach is appropriate and those that are "circumstance-specific." Apart from fraud and, notably, tax evasion under subparagraph (M)(ii), examples in the latter category include subparagraph (P), relating to false making of a passport, but exempting circumstances where the purpose of a first offense was to aid a family member to enter the United States. Examples of the former category are crimes of violence under subparagraph (F), and burglary under subparagraph (G). *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Taylor v. United States*, 495 U.S. 575 (1990). Still undecided by the Court, despite a wide variety of

approaches in the circuits, is the aggravated felony offense of sexual abuse of a minor—is it a "circumstance specific" or "categorical" determination?

Applying the "circumstance-specific" approach to the conviction in *Kawashima* is a comparatively easy exercise: a conviction under 26 U.S.C. § 7206(1) requires that the defendant file a tax return or related document that was materially false, that he signed under penalty of perjury, that he did not believe the return to be true and correct, and that he falsely subscribed to the return with the specific intent to violate the law. *Kawashima*, 615 F.3d at 1054-55. Thus, the conviction "necessarily" involved "fraud or deceit" (although the petitioner does not concede this). *Id.* at 1055. In addition, the petitioner stipulated in his plea agreement that the amount of tax loss exceeded $245,000—thus, recourse to documents outside the formal record of conviction was not required. *Id.*

The controversy before the Court, then, arises from the presence of subparagraph (M)(ii)—was it Congress' intent, in the words of the petition for certiorari, to make tax evasion (26 U.S.C. § 7201) "the 'capstone' of tax crimes, the only tax crime which is an aggravated felony deserving of deportation"? Petition for Writ of Certiorari at 29, *Kawashima v. Holder*, 79 U.S.L.W. 3286 (U.S. Nov. 1, 2010) (No. 10-577), 2010 WL 4314350.

The petitioner contends that *Kawashima* renders subparagraph (M)(ii) superfluous; *if* convictions under 26 U.S.C. § 7201 and related sections, such as § 7206(1), all involve "fraud or deceit," then there would have been no need to enact (M)(ii), because the language in (M)(i) would suffice to cover such offenses. Petition for Writ of Certiorari, *supra*, at 18-20. The petitioner also argues that Congress may have intended not merely to ensure that only certain Federal tax convictions were treated as aggravated felonies, but also to distinguish the concepts of "loss to the victim" and "revenue loss to the Government" —the petitioner contending that it is "inappropriate[]" to treat the Government as a "victim" in tax prosecutions. *Id.* at 21-22. Finally, the petitioner contends that convictions under 26 U.S.C. § 7206 do not involve "fraud" at all—citing chiefly Tax Court decisions, arguing that the willful filing of the false return, with or without an intent to defraud the Government, is sufficient to convict. *Id.* at 24-29.

The Court may have granted certiorari with an eye toward accepting the petitioner's argument that *Kawashima* renders subparagraph (M)(ii) superfluous—although there is little precedent for the Court doing so in a case involving the Immigration and Nationality Act. Or, hearkening to the dissent of now-Justice Alito in *Ki Se Lee*, the Court may determine that one legislator's superfluity is another legislator's redundancy—an effort to ensure that, should there be any doubt, crimes of tax evasion above a certain threshold would be deportable offenses. Significantly, no argument is made in the petition, or in any of the published decisions, from legislative history. This is not altogether surprising, as both subparagraphs (M)(i) and (M)(ii) were included in the wholesale rewrite of the aggravated felony definition enacted in the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4320. "INTCA" was long on substance for a "technical corrections" bill, but short on legislative history. But overlapping and possibly superfluous provisions are not unknown, particularly in recent amendments to the Act; the "illegal presence" grounds in sections 212(a)(9)(B) and (C) of the Act are a prominent example. Furthermore, if the Court were to hold that Federal tax offenses other than 26 U.S.C. § 7201 cannot be aggravated felonies, a clear anomaly would result: *State* tax offenses that involved fraud or deceit could be aggravated felonies under subparagraph (M)(i), but not analogous *Federal* crimes, other than § 7201.

The petitioner's argument that Federal tax offenses involve willful but not necessarily fraudulent conduct, even if true, would seem insufficient to bring such offenses outside the ambit of subparagraph (M)(i), which refers specifically to offenses that involve fraud *or deceit*. A Tax Court decision cited prominently in the petition for certiorari refers to § 7206 as covering a voluntary and intentional violation of the legal duty not to make false statements on a tax return. Petition for Writ of Certiorari, *supra*, at 27 ("The purpose of section 7206(1) is to . . . punish[] those who intentionally falsify their Federal income tax returns and the penalty for such perjury is imposed irrespective of the tax consequences of the falsification." (quoting *Wright v. Comm'r*, 84 T.C. 636, 643 (1985) (internal quotation marks omitted))). The petitioner contends that the last proviso of this quote means that such convictions do not involve "fraud"; the remainder, however, appears to establish that, at the very least, they do involve "deceit."

This would all seem straightforward; but every circuit court decision on the subject has been divided (including the dissents from denial of rehearing in the Ninth), and the Court rarely takes cases to restate the obvious. In the end, the Court could determine that most Federal tax fraud is not "fraud" for purposes of the aggravated felony definition simply because Congress meant to exclude all but willful tax evasion. But *Nijhawan* seems to portend a "common meaning" approach that would include all forms of fraud or deceit under subparagraph (M)(i), the approach consistent with the analysis and conclusion reached by the Ninth Circuit.

It may be a bit puckish to compare the issue in *Kawashima* to the great fruit vs. vegetable controversy. But the burden of the petitioner is to reverse a decision that, in essence, held that "fraud" means "fraud" as it is commonly understood, and that includes deliberately deceiving the tax man. The thought processes, if not the analysis, of the Justices may hearken back to the "common language of the people" cited in *Nix v. Hedden*. Only one thing is certain—the Court will not resolve the issue in the mere 500 words it took for Justice Horace Gray to find tomato importer John Nix just a bit too clever in his effort to avoid the customs duties on his produce.

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR APRIL 2011

by John Guendelsberger

The United States courts of appeals issued 337 decisions in April 2011 in cases appealed from the Board. The courts affirmed the Board in 298 cases and reversed or remanded in 39, for an overall reversal rate of 11.6% compared to last month's 10.4%. There were no reversals from the First, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits.

The chart below shows the results from each circuit for April 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	97	93	4	4.1
Third	53	48	5	9.4
Fourth	12	12	0	0.0
Fifth	15	15	0	0.0
Sixth	10	10	0	0.0
Seventh	3	3	0	0.0
Eighth	2	2	0	0.0
Ninth	118	90	28	23.7
Tenth	5	4	1	20.0
Eleventh	21	20	1	4.8
All	337	298	39	11.6

The 337 decisions included 145 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 53 direct appeals from denials of other forms of relief from removal or from findings of removal; and 139 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	145	123	22	15.2
Other Relief	53	51	2	13.8
Motions	139	124	15	10.8

Of the 22 reversals or remands in asylum cases, 18 were from the Ninth Circuit. These involved credibility (seven cases); disfavored group analysis (three cases); nexus (three cases); the 1-year filing bar for asylum (two cases); and past persecution (one case), as well as two remands to address excluded evidence or further consider issues raised on appeal. Three reversals from the Second Circuit addressed credibility, forced IUD insertion, and particular social group nexus. The Eleventh Circuit reversed an adverse credibility determination.

The two cases in the "other relief" category were from the Ninth Circuit (physical presence for cancellation

of removal) and the Tenth Circuit (crime involving moral turpitude).

Of the 15 reversals of denials of motions, 9 were from the Ninth Circuit. Four of these address the departure bar. The others involved an in absentia late arrival, ineffective assistance of counsel, NACARA eligibility, and a motion to reissue a Board decision. The Third Circuit reversed in five motions cases—two involving ineffective assistance of counsel, two for changed country conditions, and one involving sua sponte reopening. The Second Circuit also reversed a denial of a motion to reissue a Board decision.

The chart below shows the combined numbers from January through April 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
First	8	6	2	25.0
Tenth	14	11	3	21.4
Ninth	696	582	114	16.4
Third	122	110	12	9.8
Eleventh	76	70	6	7.9
Fourth	46	43	3	6.5
Sixth	34	32	2	5.9
Seventh	18	17	1	5.6
Fifth	61	58	3	4.9
Second	250	241	9	3.6
Eighth	10	10	0	0.0
All	1335	1180	155	11.6

Last year's reversal rate at this point (January through April 2010) was 10.3%, with 1435 total decisions and 148 reversals.

The numbers by type of case on appeal for the first 4 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	653	582	71	10.9
Other Relief	285	239	46	16.1
Motions	397	359	38	9.6

CIRCUIT COURT DECISIONS FOR MAY 2011

The United States courts of appeals issued 257 decisions in May 2011 in cases appealed from the Board. The courts affirmed the Board in 214 cases and reversed or remanded in 43, for an overall reversal rate of 16.7% compared to last month's 11.6%. There were no reversals from the First, Fourth, Fifth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	49	43	6	12.2
Third	34	31	3	8.8
Fourth	12	12	0	0.0
Fifth	12	12	0	0.0
Sixth	10	8	2	20.0
Seventh	4	3	1	25.0
Eighth	5	4	1	20.0
Ninth	114	85	29	25.4
Tenth	2	2	0	0.0
Eleventh	13	12	1	7.7
All	257	214	43	16.7

The 257 decisions included 139 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 51 direct appeals from denials of other forms of relief from removal or from findings of removal; and 67 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	139	120	19	13.7
Other Relief	51	33	18	35.3
Motions	67	61	6	9.0

The 19 reversals or remands in asylum cases involved credibility (four cases); nexus (three cases); past persecution (three cases); well-founded fear (two

cases); Convention Against Torture (three cases); and frivolousness (one case), as well as several remands to further consider issues raised on appeal.

Of the 18 reversals or remands in the "other relief" category, 15 were from the Ninth Circuit. These involved imputation to a minor of a parent's lawful permanent resident status for cancellation of removal (four cases); whether the scope of a Board remand to an Immigration Judge permitted consideration of new evidence of hardship for cancellation of removal (three cases); eligibility for a section 212(c) waiver (two cases); and criminal grounds of removal (four cases). The two cases from the Second Circuit addressed Jamaican legitimation law and denial of a continuance. The Third Circuit reversed an adverse credibility determination in a NACARA case.

The six motions cases included claims of ineffective assistance of counsel (three cases), rescission of an in absentia order of removal for lack of notice, and a remand to address sua sponte reopening.

The chart below shows the combined numbers from January through May 2011, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
First	10	8	2	20.0
Tenth	16	13	3	18.8
Ninth	810	667	143	17.7
Third	156	141	15	9.6
Seventh	22	20	2	9.1
Sixth	44	40	4	9.1
Eleventh	89	82	7	7.9
Eightth	15	14	1	6.7
Fourth	58	55	3	5.2
Second	299	284	15	5.0
Fifth	73	70	3	4.1
All	1592	1394	198	12.4

Last year's reversal rate at this point (January through May 2010) was 11.2%, with 1666 total decisions and 186 reversals.

The numbers by type of case on appeal for the first 5 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	792	702	90	11.4
Other Relief	336	272	64	19.1
Motions	464	420	44	9.5

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Reason to Believe: Satisfying the Standard of Proof of Section 212(a)(2)(C)(i)

by Alexa C. McDonnell

Section 212(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(C), states:

> Any alien who the consular officer or the Attorney General knows or has reason to believe—
>
> (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . .
>
> is inadmissible.

(Emphasis added.)

No published decision of the Board of Immigration Appeals or the United States Courts of Appeals defines "reason to believe" in section 212(a)(2)(C)(i) of the Act. For this reason, to determine the contours of the "reason to believe" standard, Immigration Judges must rely on the Board's analysis of section 212(a)(2)(C)(i)'s predecessor, former section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23) (1988), and on comparisons with similar reasonable belief standards of proof under the Act and in other areas of the law.[1]

This article first analyzes case law that sheds some light on the definition of reason to believe in the controlled substance or drug trafficking context. Second,

the article analyzes reasonable belief standards of the Act. Third, it discusses examples of evidence that support a "reason to believe" that the alien "is or has been an illicit trafficker . . . or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others" in drug trafficking. Section 212(a)(2)(C)(i) of the Act. Finally, it addresses the knowledge element of section 212(a)(2)(C)(i). For ease of reference and to use the language of precedent on this topic, the term "knowing participant" will be used in place of "a knowing aider, abettor, assister, conspirator, or colluder." See *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) (referencing a "knowing and conscious participant"); *Matter of Rico*, 16 I&N Dec. 181, 186 (BIA 1977) (same); *Matter of R-H-*, 7 I&N Dec. 675, 678 (BIA 1958) (same).

The Meaning of "Reason to Believe" in Section 212(a)(2)(C)(i)

Neither the Board nor the Act define the "reason to believe" standard in the context of section 212(a)(2)(C)(i). *Black's Law Dictionary* defines "reasonably believe" as "[t]o believe (a given fact or combination of facts) under circumstances in which a reasonable person would believe." *Black's Law Dictionary* 175 (9th ed. 2009). "Probable cause," which has been likened to the "reason to believe" standard, is defined in the criminal context as "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime" or, in the context of torts, "[a] reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself." *Id*. at 1321. Does this mean that "reason to believe" may be equated with probable cause? Despite the use of "reasonable belief" in its torts definition of probable cause, *Black's Law Dictionary* does not cross-reference "reasonably believe" with its definition of probable cause. Rather, it cross-references "reasonable suspicion," which it defines as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." *Id*. at 1585. In the absence of a clear definition of "reason to believe," courts must look to case law that interprets former section 212(a)(23) of the Act.

In *Matter of Rico*, the Board addressed the "reason to believe" standard of former section 212(a)(23) of the Act, the predecessor to section 212(a)(2)(C)(i). At that time, the Act excluded from admission "any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs." *Matter of Rico*, 16 I&N Dec. at 184. In *Rico*, the Board held that "an administrative finding of excludability must be based upon reasonable, substantial, and probative evidence." *Id*. at 185. While this sheds light on the general standard for finding an alien inadmissible, it does not address the particular complexities of the "reason to believe" standard in comparison to other more definite grounds of inadmissibility such as those requiring a conviction. *Compare* section 212(a)(2)(C)(i) of the Act, *with* section 212(a)(2)(B). In *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992), the Eleventh Circuit held that "[i]f credible evidence is presented to show knowledge or a reasonable belief that an individual has trafficked in drugs, the requirements of [section] 212(a)(23)(B) have been satisfied." This holding, however, should not be taken as license to avoid the knowledge element of the "reason to believe" standard because the Eleventh Circuit did not address the knowledge element of the standard since the alien had pled guilty to cocaine trafficking.

In *Alarcon-Serrano v. INS*, 220 F.3d 1116 (9th Cir. 2000), the Ninth Circuit examined current section 212(a)(2)(C)(i) of the Act. The court held that a finding of a "reason to believe" that an alien is or has been a knowing participant in drug trafficking is supportable when it is "based on reasonable, substantial, and probative evidence." *Id*. at 1119. The court did not cite *Rico* for this proposition, but the language is identical.

The Eleventh Circuit provided further guidance on the "reason to believe" standard of section 212(a)(2)(C)(i) of the Act in *Garces*, 611 F.3d at 1345-50. The court cited *Rico* for the proposition that a finding of inadmissibility under section 212(a)(2)(C)(i) must be based on reasonable, substantial, and probative evidence. *Id*. at 1346. In addition, the court found that "the 'reasonable, substantial, and probative evidence' needed to support a determination of removability is considerably less than the proof beyond a reasonable doubt that would be required for a criminal conviction." *Id*. at 1347. To explain the meaning of "reason to believe," the court quoted the State Department's Foreign Affairs Manual. *Id*. at 1346. The Foreign Affairs Manual states that "[t]he essence of the standard is that the consular officer must have *more than a mere suspicion—there must exist a probability, supported by evidence*, that the alien is or has been engaged in trafficking." *Id*. (quoting U.S.

Dep't of State, 9 *Foreign Affairs Manual* 40.23 note 2(b) [hereinafter *FAM*]).

Other Reasonable Belief Standards within the Act

Several other sections of the Act rely on a standard of reasonable belief similar to section 212(a)(2)(C)(i) of the Act.[2] In *Matter of U-H-*, 23 I&N Dec. 355, 356 (BIA 2002), the Board referenced its earlier unpublished decision in which it found that "the 'reasonable ground to believe' standard [found at section 212(a)(3)(B)(i)(II) and section 241(b)(3)(B)(iv) of the Act, 8 U.S.C. § 1231(b)(3)(B)(iv),] is akin to the familiar 'probable cause' standard." *See also Yusupov v. Att'y Gen.*, No. 09-3032, 2011 WL 2410741 (3d Cir. June 16, 2011) (analyzing "reasonable grounds to believe" standard of section 241(b)(3)(B)(iv) as a probable cause standard).

In reaching this conclusion, the Board cited with approval a decision of the First Circuit that held that "a reasonable belief may be formed if the evidence 'is sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category.'" *Id*. at 356 (quoting A*dams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990)).

In *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005), the Attorney General analyzed the "reasonable ground for regarding" standard found at section 208(b)(2)(A)(iv) of the Act, 8 U.S.C. § 1158(b)(2)(A)(iv). The Attorney General found that "[t]he statutory reference to 'reasonable' grounds implies the use of a reasonable person standard" and that this would be consistent with a "probable cause" approach. *Id*. at 788. The Attorney General reiterated the "reasonable person" standard of *Adams* but did not cite *Matter of U-H-*. *Id*. at 789-90. Furthermore, the Attorney General noted that the "'reasonable grounds for regarding' standard is substantially less stringent than preponderance of the evidence." *Id*. at 789. Finally, the Second and the Ninth Circuits have found that the "serious reasons to believe" standard found at section 241(b)(3)(B)(iii) of the Act is the equivalent of a probable cause standard. *Khouzam v. Ashcroft*, 361 F.3d 161, 165 (2d Cir. 2004); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986).

Reasonable Belief Standards in Other Contexts

Reasonable belief and probable cause standards outside of the Act have been interpreted to be equivalent to each other. In extradition cases, adjudicators consider whether there is evidence establishing a reasonable ground to believe the accused individual is guilty. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). That reasonable ground standard has been found to amount to a probable cause standard. *E.g.*, *Sidali v. INS*, 107 F.3d 191, 199 (3d Cir. 1997); *Ludecke v. U.S. Marshal*, 15 F.3d 496, 497 (5th Cir. 1994); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988); *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1152 (5th Cir. 1971). However, the Third Circuit has noted that in the context of home arrests, most courts have held that a "reason to believe" standard requires less proof than a probable cause standard. *United States v. Veal*, 453 F.3d 164, 167 n.3 (3d Cir. 2006) (citing Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 Wash. L. Rev. 299, 362-63 (2002)). Yet, the Supreme Court has stated that in the context of search and seizure, the "substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotation marks omitted).

Evidentiary Support for a "Reason to Believe"

Although there is no definition of the "reason to believe" standard of section 212(a)(2)(C)(i), general guidelines do exist regarding the type of evidence that supports a "reason to believe." A "'[r]eason to believe' might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports." *Garces*, 611 F.3d at 1346 (quoting 9 *FAM* 40.23 note 2(b)). However, where the alien was convicted pursuant to a guilty plea which allowed the alien to maintain his innocence, often referred to as an *Alford* plea, the fact of such a conviction alone cannot support a finding of inadmissibility pursuant to section 212(a)(2)(C)(i) of the Act. *Id*. at 1347-48. A criminal conviction is not necessary to establish inadmissibility as a drug trafficker or knowing participant in drug trafficking. *Matter of Rico*, 16 I&N Dec. at 184; *see also Nunez-Payan v. INS*, 811 F.2d 264, 266-67 (5th Cir. 1987) (finding that the alien was inadmissible under former section 212(a)(23) of the Act where he pled guilty to a narcotics charge and received probation under the Texas deferred adjudication statute but was not convicted of the offense according to State law). Where a conviction exists, the vacation or expunction of that conviction does not bar reliance on the facts leading to the conviction

to find a "reason to believe" the alien falls within section 212(a)(2)(C)(i) of the Act. *Garces*, 611 F.3d at 1345; *Castano*, 956 F.2d at 238-39. Additionally, if the underlying facts of a conviction include evidence of trafficking, the fact that the alien's conviction was not for a trafficking offense does not preclude a finding that there is a "reason to believe" that the alien is a drug trafficker or a knowing participant in trafficking. *Matter of Favela*, 16 I&N Dec. 753, 756-57 (BIA 1979). However, the need for caution exists when relying on arrest reports that are not corroborated by other evidence because the officers preparing such reports often make conclusions rather than simply recording the facts. *See Garces*, 611 F.3d at 1349 (citing *Matter of Arreguin De Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995)). An adjudicator should not base a finding of inadmissibility pursuant to section 212(a)(2)(C)(i) of the Act based solely on the "conclusions of other evaluators . . . no matter how trustworthy." *Id*. (quoting 9 *FAM* 40.23 note 2(c)).

As with other complicated standards of proof, such as the "exceptional and extremely unusual hardship" standard of proof in cancellation of removal cases, Immigration Judges may find that a comparison of the case at hand to the facts of published cases may be the most helpful way to determine whether the "reason to believe" standard of proof has been met.

In *Rico*, the alien's vehicle was stopped at the port of entry in Douglas, Arizona. Rico's car was inspected and was found to contain 162 pounds of marijuana in concealed compartments. Although Rico initially provided a different story to the agents, he ultimately stated that he was offered $200 to drive the vehicle across the border and that he knew something was in the truck. He further offered to provide information to the agents regarding drug traffickers. The agents testified that they had seen Rico drive the vehicle back and forth across the border on several occasions prior to this incident. The Board found that there was sufficient "reason to believe" that Rico knew or had reason to know that marijuana was concealed in the vehicle and that he was a knowing and conscious participant in the attempt to smuggle marijuana into the United States.

In *Alarcon-Serrano*, border officials stopped the alien's vehicle and found that it contained 86 pounds of marijuana in concealed compartments. According to Alarcon-Serrano, a known drug dealer had offered him the use of his car and even provided him with a bill of sale for the vehicle so that he would not encounter trouble at the border. Alarcon-Serrano stated that although he suspected that the car carried drugs, he thought the drug dealer would not attempt to use him to smuggle drugs. He asserted that he had no knowledge that marijuana was concealed in the vehicle. The court found that the Board and the Immigration Judge reasonably determined that Alarcon-Serrano knew about the marijuana and was therefore inadmissible pursuant to section 212(a)(2)(C)(i). *Alarcon-Serrano*, 220 F.3d at 1120.

In *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004), the alien attempted to escape on foot when he observed the police in pursuit of his vehicle. The vehicle contained 147 pounds of marijuana concealed in the trunk. Lopez-Molina claimed that he had believed the bags in the trunk held garbage, rather than marijuana, and that he had fled from the police because he was afraid that they were immigration officials. Lopez-Molina later pleaded guilty to failing to disclose his knowledge of a conspiracy to distribute marijuana. The court held that "evidence of Lopez-Molina's attempted escape and subsequent arrest for driving a car containing 147 pounds of concealed marijuana undoubtedly supports a 'reason to believe' that he was involved in drug trafficking." *Lopez-Molina*, 368 F.3d at 1211.

In *Pichardo v. INS*, 188 F.3d 1079 (9th Cir. 1999), *withdrawn and superseded by* 216 F.3d 1198 (9th Cir. 2000), the alien was stopped by inspectors as he crossed the border into the United States. The inspectors found 126.45 pounds of marijuana hidden in the paneling of the van that Pichardo was driving. Pichardo claimed that he went on a shopping trip to Mexico with a friend in the friend's van. He stated that the friend decided to stay in Mexico and asked Pichardo to drive the van back to the United States. Pichardo insisted that he did not know that the friend was involved in drugs or that the van contained marijuana. Pichardo was charged with a drug offense, but the charge was dropped. The court, however, later withdrew this opinion and decided it on different grounds. *Pichardo v. INS*, 216 F.3d 1198, 1199 (9th Cir. 2000).

In *Garces*, the alien was apprehended when his acquaintance was caught selling cocaine to an undercover officer. When officers approached Garces, he was in a vehicle. According to the officers, Garces swerved towards one of the officers and attempted to "run him

down." *Garces*, 611 F.3d at 1339. According to Garces, he saw a man jump in front of his car and, seeing that the man was waving a gun, thought that he was being robbed. Garces claimed that he had swerved to avoid hitting the person. He testified that he did not know that his acquaintance had drugs and intended to sell them. However, he pled guilty to trafficking in cocaine. The court held that, because Garces could have pled guilty while maintaining his innocence under State law, the conviction resulting from the plea could not be relied upon to support a "reason to believe" that Garces was involved in drug trafficking. Furthermore, the court found that the remaining evidence, namely the arrest reports, was not sufficient to support a "reason to believe" that Garces was a "knowing and conscious participant" in his acquaintance's cocaine transaction. *Id*. at 1350.

Knowledge Element of Section 212(a)(2)(C)(i)

The knowledge element of section 212(a)(2)(C)(i) adds a layer of complexity. The facts of a case may easily support a reason to believe that the alien played a role in the trafficking of a controlled substance, but, for an alien to be inadmissible under the section, the alien must have acted knowingly. Determining the alien's state of mind proves difficult, especially since aliens often claim ignorance of the trafficking scheme. *E.g.*, *Lopez-Molina*, 368 F.3d at 1206; *Alarcon-Serrano*, 220 F.3d at 1118; *Pichardo v. INS*, 216 F.3d 1198, 1199 (9th Cir. 2000); *Rico*, 16 I&N Dec. at 183. To satisfy the knowledge element of section 212(a)(2)(C)(i), there must be a reason to believe that the alien knew about the drugs. *See Matter of Rico*, 16 I&N Dec. at 186. In *Garces*, the court held that "there must be some reasonable, substantial, and probative evidence that [the alien] was a 'knowing and conscious participant'" in the sale of drugs. *Garces*, 611 F.3d at 1350 (citing *Matter of Rico*, 16 I&N Dec. at 186; *Matter of R-H-*, 7 I&N Dec. at 678). This would logically imply that to satisfy section 212(a)(2)(C)(i), there must be a reason to believe that the alien not only knew of the drugs, but also knew that the drugs were being trafficked. *See Matter of McDonald and Brewster*, 15 I&N Dec. 203, 204-05 (BIA 1975) (finding that possession of six marijuana cigarettes for personal use did not bring aliens within former section 212(a)(23) of the Act). Such a standard is difficult to establish when the DHS bears the burden of proof, such as when the alien is a lawful permanent resident regarded as seeking admission, or when it must present some evidence indicating that the alien falls within section 212(a)(2)(C)(i), such as when the alien is an arriving alien or is applying for relief from removal.

Documentary evidence from criminal proceedings may provide insight into the alien's level of knowledge. *See Lopez-Molina*, 368 F.3d at 1211 (citing submission of a Department of Public Safety report detailing the incident leading to the alien's arrest). If the offense with which the alien is charged or of which the alien is convicted contains a knowledge element, the facts supporting such a charge or conviction may support a reason to believe the alien was a knowing participant in drug trafficking. *See id*. (citing the alien's guilty plea to the charge of failing to disclose his knowledge of a conspiracy to distribute marijuana). Of course, if the alien admits that he was involved in the distribution of a controlled substance, there is a reason to believe that he falls within section 212(a)(2)(C)(i) as a knowing participant in drug trafficking. *See Matter of R-H-*, 7 I&N Dec. at 678; *Matter of P-*, 5 I&N Dec. 190 (BIA 1953). Finally, where the alien persists in denying knowledge, but the Immigration Judge has found a reason to believe that the alien was a knowing participant in drug trafficking, the Immigration Judge is not bound to accept the alien's self-serving disavowal. *See Alarcon-Serrano*, 220 F.3d at 1120. *See generally United States v. Jimenez*, 498 F.3d 82, 86 (1st Cir. 2007) (rejecting a defendant's hypothetical version of events in finding a sufficient factual basis for a plea).

Conclusion

Although there is no controlling case law that defines the "reason to believe" standard found at section 212(a)(2)(C)(i) of the Act, case law analyzing other reasonable belief standards indicates that it most likely equates to a standard of probable cause. While convictions for drug-related offenses can indicate a reason to believe the alien is a drug trafficker or knowing participant in drug trafficking, such convictions are not essential to a finding of inadmissibility pursuant to section 212(a)(2)(C)(i). To support a charge of inadmissibility under that section, the Immigration Judge must have a reason to believe that the alien not only participated in drug trafficking but also did so knowingly. Until controlling case law provides further guidance, Immigration Judges should rely on comparisons with other reasonable belief standards and the facts of cases dealing with current section 212(a)(2)(C)(i) or former section 212(a)(23) to determine whether the evidence in any given case supports a reason

to believe that the alien is a controlled substance trafficker or a knowing participant in such trafficking.

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[1] Although this article focuses on the application of section 212(a)(2)(C) in immigration court, case law makes clear that an alien is inadmissible under section 212(a)(2)(C) so long as an appropriate immigration official knows or has reason to believe that the alien is a trafficker in controlled substances or a knowing participant in such trafficking. *See Matter of Casillas-Topete*, 25 I&N Dec. 317, 321 (BIA 2010).

[2] The language of section 212(a)(2)(H) of the Act, involving trafficking in persons, mirrors the language found at section 212(a)(2)(C)(i). However, no published Board or Federal court cases discuss inadmissibility pursuant to section 212(a)(2)(H).

RECENT COURT OPINIONS

Supreme Court:

Flores-Villar v. United States, No. 09-5801, 2011 WL 2297764 (U.S. June 13, 2011): With Justice Kagan taking no part in the decision, the remaining justices were equally divided regarding a decision of the Ninth Circuit, which held that a former provision of the Act that imposed residence requirements on fathers for conferring derivative citizenship on children born out of wedlock, which were different from those on mothers, did not violate the petitioner's equal protection rights. As a result, the decision was affirmed. (Note: Such affirmation carries no precedential value outside of the Ninth Circuit.)

Second Circuit:

Boluk v. Holder, No. 10-2396-ag, 2011 WL 2184305 (2d Cir. June 7, 2011): The Second Circuit dismissed the petition for review of an Immigration Judge's decision (upheld by the Board) denying a hardship waiver of the requirements for filing a joint petition to remove the conditional status of permanent residence deriving from marriage to a United States citizen. The petitioner, whose marriage had ended in divorce prior to the removal of the condition on his status, filed a waiver petition seeking to establish that his marriage had been entered into in good faith. His petition was denied first by DHS, and then on review by the Immigration Judge, who found that the petitioner failed to meet his burden of proof of establishing that his marriage was entered into in good faith. On review, the Second Circuit rejected the petitioner's argument that the Immigration Judge erred in finding that he bore the burden of proof and that the statute's ambiguity should not be resolved in his favor. The court found that the statutory language unambiguously places the burden on the petitioner to demonstrate good faith, a point on which the circuit and Board precedent (*Matter of Mendes*) were in agreement. The court further found no error in the Immigration Judge's consideration of evidence arising after the petitioner's wedding to determine the petitioner's intent in entering into the marriage.

Watson v. Holder, No. 09-0657-ag, 2011 WL 2119768 (2d Cir. May 31, 2011): In the petition for review of a decision of an Immigration Judge (affirmed by the Board) denying the petitioner's motion to terminate proceedings on the grounds that he had derived United States citizenship from his father, the Second Circuit remanded the record for clarification of the Board's interpretation of the term "legitimation," as used in section 101(c)(i) of the Act. The petitioner, a native of Jamaica, had been born out of wedlock and had come to the United States as a minor to live with his father. The father naturalized when the petitioner was 17 years old. The petitioner conceded that he was not legitimated under Jamaican law. The Immigration Judge and Board found that he could therefore not qualify as the "child" of his father under section 101(c)(i), because the Board had held in its 2008 precedent decision *Matter of Hines* that children born out of wedlock are not treated as "legitimate" under Jamaican law. On review, the Second Circuit noted that in 1981, the Board had issued a precedent decision (*Matter of Clahar*) holding that the Jamaican Status of Children Act of 1976 had abolished de facto the concept of illegitimacy by creating equal duties of fathers toward their children regardless of their marital status at the time of birth. But 27 years later, the Board reversed itself in *Hines* because the 1976 legislation still provided that a child born out of wedlock could subsequently be "legitimated" through the marriage of his parents. While acknowledging that an agency's reconsideration of its prior position does not cause it to forfeit the right to *Chevron* deference, the court found that remand was warranted for the Board to clarify its interpretation of the term "legitimation." Specifically, the court asked the Board to explain whether it viewed the difference between legitimate and illegitimate children as "purely formalistic," or whether it requires actual disparate treatment under the law.

Sixth Circuit:

Gordillo v. Holder, Nos. 08-4584, 09-3644, 2011 WL 1812213 (6th Cir. May 13, 2011): The Sixth Circuit remanded in the case of a married couple from Guatemala whose motion to reopen proceedings based on their claim

of ineffective assistance of counsel had been denied by the Board. Both petitioners were apparently eligible to file for special rule NACARA suspension of deportation at the time of their deportation proceedings, which concluded in 1999. Their first lawyer failed to seek this relief before either the Immigration Judge or the Board. Furthermore, the DHS did not dispute that the same lawyer neglected to inform the petitioners of the Board's December 2002 decision denying of their appeal, which the couple only learned of in July 2004. Soon thereafter the petitioners consulted with two other attorneys, both of whom advised that there was no relief available to the couple. When the male petitioner was arrested by the DHS 4 years later, his wife found an attorney who advised that the couple had been eligible for NACARA suspension all along. The petitioners filed a motion to reopen to apply for NACARA suspension and requested equitable tolling based on their first counsel's ineffective assistance. The male petitioner was deported to Guatemala in August 2008. In October 2008, the Board denied the motion, finding that the couple had failed to establish their entitlement to NACARA suspension and thus had not demonstrated ineffective assistance of counsel. In ruling on a subsequent motion to reconsider, the Board found that it lacked jurisdiction over the male petitioner's case because of his deportation. The Board acknowledged the female petitioner's eligibility for relief but denied her motion to reopen as untimely, holding that she had not shown due diligence in seeking new counsel. Granting the Government's motion to remand the record in the male petitioner's case, the court noted its previous rejection of the interpretation that 8 C.F.R. § 1003.2(d) strips the Board of jurisdiction over aliens who have been removed. The court also questioned whether the female petitioner's motion was untimely, holding that the Board erred in finding that the petitioners were put on notice of their first attorney's ineffective assistance by a footnote in the Immigration Judge's 18-page decision and that her actions upon learning of the Board's order in July 2004 established due diligence. The record was remanded for the Board to address whether the petitioners were diligent between the dismissal of their appeal in December 2002 and July 2004.

Seventh Circuit:

Moosa v. Holder, No. 10-1932, 2011 WL 1675943 (7th Cir. May 5, 2011): The Seventh Circuit denied a petition for review of a Board decision denying a motion to reopen to apply for asylum from Pakistan based on purported changed country conditions there. The petitioner had not filed an asylum application at her removal proceeding before an Immigration Judge in 2001; her appeal from the Immigration Judge's order of removal was dismissed by the Board in 2002. Nearly 7 years later, the petitioner filed her motion to reopen, in which she sought to apply for asylum as a member of a particular social group, i.e., "single Westernized women." The Board denied the motion on two grounds: (1) that the petitioner had failed to demonstrate a change in country conditions since 2001, and (2) that she failed to establish a prima facie asylum claim because of the speculative nature of the evidence submitted. The court found no merit to the petitioner's argument that the Board exceeded its authority by considering the merits of the claim, as opposed to considering only whether changed conditions were established. The court further dismissed the petitioner's claim that the denial of the motion constituted a due process violation, finding that the petitioner lacked the requisite liberty or property interest in obtaining the discretionary relief sought in her motion. Lastly, the court agreed with the Board's conclusion that the petitioner's evidence of general conditions arising in an area 900 miles from her home city of Karachi was insufficient to establish changed conditions in the absence of evidence describing the conditions that existed at the time of her removal hearing in 2001.

Frederick v. Holder, No. 09-2607, 2011 WL 1642811 (7th Cir. May 3, 2011): The Seventh Circuit denied a petition for review of a Board order affirming an Immigration Judge's decision ordering the petitioner removed based on his aggravated felony conviction relating to sexual abuse of a minor. The respondent, a lawful permanent resident ("LPR") since 1961, pled guilty in 1990 to two counts of aggravated criminal sexual abuse of a minor and was sentenced to two concurrent 4-year terms of imprisonment. In 2007, he was placed in removal proceedings and was found removable as an aggravated felon under section 101(a)(43)(A) of the Act (relating to sexual abuse of a minor). The Immigration Judge found the petitioner ineligible for a section 212(c) waiver because sexual abuse of a minor has no corresponding ground of inadmissibility under section 212(a) of the Act. The court agreed and rejected the petitioner's argument that he was entitled to apply for section 212(c) relief because the DHS could have charged him as an alien convicted of two or more crimes involving moral turpitude, for which there is a corresponding ground of inadmissibility. The court found this possibility irrelevant. It further disagreed with the petitioner's claim that his 1990 guilty

plea entitled him to apply for section 212(c) relief under the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). The court noted that the petitioner would not have been eligible under section 212(c) at the time of his plea, because his crime had no comparable ground of inadmissibility, thus making *St. Cyr* inapplicable. The court also rejected the petitioner's constitutional arguments, stating that it lacked jurisdiction to review the DHS's discretionary determination of what to charge as the basis for removal and that the petitioner had no due process right to a section 212(c) waiver for the DHS to violate.

Eighth Circuit:

Sandoval v. Holder, No. 09-3600, 2011 WL 2314728 (8th Cir. June 14, 2011): The Eighth Circuit remanded the Board's decision barring the petitioner from adjusting her status because she had made a false claim to United States citizenship in 1998 when she was 16 years old. The Immigration Judge had originally granted the adjustment application, ruling that section 212(a)(6)(C)(ii) (in spite of its language barring "[a]ny alien") should not apply to minors, who lack sufficient maturity to understand the consequences of their actions. The Board found no authority to support this "bright line" rule. On remand, the Immigration Judge found the petitioner to be barred, a ruling that was summarily upheld by the Board. The court's majority decision found that the all-inclusive statutory language did not preclude the possibility of exceptions for minors on a case-by-case basis, noting that even the Government conceded that the bar would not apply to an 8-year-old who was instructed to lie by his parents. The court therefore found the Board's decisions to be insufficiently detailed to allow for meaningful review. For example, the court found the rejection of the Immigration Judge's "bright line rule" in the Board's first decision to be open to three interpretations: (1) that the statute applies equally to all aliens (regardless of age); (2) that the statute must be interpreted on a case-by-case basis with an eye towards certain factors; or (3) that the line should have been drawn at an age lower than 18. The court then pointed out that each of these possibilities raised specific legal concerns that the Board would have to address. Noting the dissenting opinion's invocation of *Chevron* deference, the majority agreed that it would need to accord deference to any reasonable interpretation of the Board. However, the court stated that in the absence of such interpretation, remand for a new decision was necessary. On remand, the court also instructed the Board to consider the petitioner's argument that the Immigration Judge failed to take into account the petitioner's maturity level at the time in rejecting her argument that she made a timely retraction of her false claim to citizenship. The court found that the question whether recantation analysis was capacity sensitive was a legal one and that the Board failed to properly consider it in its prior decision.

Ninth Circuit:

Xiao Fei Zheng v. Holder, Nos. 06-75258, 08-71663, 2011 WL 1709849 (9th Cir. May 6, 2011): The Ninth Circuit granted in part and denied in part the petitioner's petitions for review of two orders of the Board: the first denied his applications for a waiver under section 212(c) of the Act and for protection under the Convention Against Torture ("CAT"); the second denied a motion to reopen his CAT claim based on alleged changed country conditions in China and to sua sponte reconsider his section 212(c) application in light of newly acquired equities. The court rejected the petitioner's claims to CAT relief, agreeing that they were speculative. Regarding the section 212(c) denial, the court found that the petitioner's work with youth, which was aimed at preventing them from following in his criminal footsteps, had not been properly considered, stating that the Board has considered "value and service to the community" as a positive factor. The court therefore remanded for consideration of all relevant factors, noting the unusual nature of the case, i.e., that the petitioner was convicted of multiple serious crimes in 1986 at the age of 16 and subsequently spent 19 years in prison, during which time he learned English; earned a GED degree and an Associate of Arts degree; co-facilitated a course entitled "Alternatives to Violence"; developed a curriculum targeting at-risk immigrant teenagers that is currently being used by community service providers in Northern California, and that he has continued this work since his release.

Go v. Holder, No. 06-71575, 2011 WL 1678196 (9th Cir. May 5, 2011): The Ninth Circuit denied a petition for review of the Board's orders of May 2005 (upholding an Immigration Judge's denial of asylum and withholding of removal but remanding for further consideration of the petitioner's CAT claim), and March 2006 (upholding the Immigration Judge's subsequent denial of CAT protection). The court ruled that it had jurisdiction to consider both decisions, because the May 2005 order was not a final order of removal since it held out the possibility of CAT protection and thus did not become final until the denial of all relief in March 2006. Regarding his claims for

relief, the petitioner admitted that he had been involved in an illegal drug-trafficking scheme with a member of a prominent family in the Philippines. The petitioner had a falling out with this individual. The court found that the evidence supported two possible outcomes: either the petitioner kidnapped and assaulted the other person over a financial disagreement, or his co-conspirator falsely accused the petitioner of doing so to cover up his own involvement in the scheme. Claiming the latter, the petitioner argued that he would be subject to a sham criminal prosecution if returned to the Philippines and that he would fear retaliation from his accuser's politically connected family members. The court upheld the Board's determination that the petitioner's admission of his involvement in drug-trafficking activities barred him from eligibility for either asylum or withholding of removal. The court further upheld the Board's ruling that the petitioner failed to establish the requisite likelihood that he would face torture in a Philippine prison. The court also found no due process violation in the Immigration Judge's reliance on testimony from a former prosecutor in the Philippines who was called as a witness by the DHS, noting that nothing precludes the Government from presenting live witnesses in removal proceedings. Although the petitioner questioned the reliability of the witness' testimony, the court found that the petitioner had the opportunity to cross-examine the witness, to offer rebuttal evidence, and to impeach his testimony.

Pannu v. Holder, No. 07-71988, 2011 WL 1782959 (9th Cir. May 11, 2011): The Ninth Circuit remanded the record for the second time to allow the Board to consider whether the petitioner's conviction for failing to register as a sex offender was for a crime involving moral turpitude ("CIMT"). The Board initially considered this matter on appeal from an Immigration Judge's 2004 decision pretermitting the petitioner's applications for relief because he had been convicted of two or more CIMTs. At that time, the Board held that the petitioner's two California indecent exposure offenses were categorically CIMTs. In August 2006, the court disagreed and remanded for the Board to either apply a modified categorical approach or determine in the first instance whether the petitioner's failure to register as a sex offender was a CIMT. On remand, the Board found its recently issued precedent decision in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), to be controlling. In that case, the Board had found a conviction for failure to register as a sex offender, involving the same California statute, to be categorically for a CIMT. The petitioner appealed once again to the circuit court. The court found that the Board's reliance on *Tobar-Lobo* was reasonable at the time, but it noted several subsequent developments. In *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008), the Ninth Circuit found that a conviction under a similar Nevada statute was not for a CIMT, because the strict liability language of the Nevada statute could lead to a conviction for simply forgetting to register or accidentally mailing the registration to the wrong address. The court also noted the Attorney General's 2008 decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), creating a standardized approach to CIMT determinations (including a scienter requirement, which the court found to be in tension with the holding in *Tobar-Lobo*), and the Ninth Circuit's later decision in *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009), according deference to unpublished Board decisions concerning CIMT determinations where they rely on Board precedent decisions "and are dispositive of the interpretive issues in the case." The court accordingly remanded the record to allow the Board to reconsider the issue in light of the significant intervening case law.

Ayala v. Holder, No. 08-71868, 2011 WL 1886391 (9th Cir. May 19, 2011): The Ninth Circuit denied a petition for review of a Board order affirming an Immigration Judge's denial of asylum to a former military officer from El Salvador. Citing its decision in *Arriaga-Barrientos v. INS*, 937 F.2d 411 (9th Cir. 1991), the court noted that as a *former* officer, the petitioner is not precluded from establishing his membership in a cognizable social group under the Act. In reaching that conclusion, the Ninth Circuit granted deference to the Board's interpretation of "particular social group" in its precedent decision *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). Nevertheless, the court found that the petitioner was not entitled to relief because the he failed to establish that his fear of reprisals from drug dealers whom he had personally arrested was on account of his membership in the particular social group of former officers.

Vasquez de Alcantar v. Holder, No. 08-71427, 2011 WL 2163965 (9th Cir. June 3, 2011): The Ninth Circuit denied the petition for review of a decision of the Board finding the petitioner ineligible for cancellation of removal for certain lawful permanent resident aliens and ordering her removed from the United States. The petitioner had entered the United States without inspection and subsequently adjusted her status based on her marriage to a United States citizen. The I-130 petition filed on her behalf by her husband was approved in 1998, and she

subsequently adjusted her status in May 2001. In June 2006, she was placed in removal proceedings after she tried to assist an unrelated alien to enter the country using her own daughter's travel documents. After the Immigration Judge determined that she was removable as charged, the petitioner applied for cancellation of removal, claiming that she had been a lawful permanent resident for over 5 years, had resided in the United States for more than 7 years after being admitted in any status, and had not been convicted of an aggravated felony. The Immigration Judge agreed, finding that the 1998 approval of the I-130 constituted an "admission in any status." The Board disagreed, finding that until an adjustment application is granted, the beneficiary of an approved I-130 petition only has a pending application for admission and has thus not yet been admitted in any status. On review, the Ninth Circuit held that the petitioner did not satisfy the statutory definition of having been "admitted" pursuant to settled prior case law. The court further determined that while both immigrants and nonimmigrants are eligible to accrue time toward the continuous residence requirement following their admission (hence the term "in any status"), the approval of an I-130 does not confer either immigrant or nonimmigrant status on its beneficiary. The court rejected the argument that an approval of an I-130 by itself functions as the equivalent of acceptance into the Family Unity Program ("FUP"). The Ninth Circuit had previously held that because the FUP allowed its beneficiaries to remain and work in the United States in 2-year increments, those aliens would satisfy the "in any status" criteria. However, the court noted that Congress imposed heightened eligibility requirements for FUP benefits and bestowed greater protections on its beneficiaries than those resulting from mere I-130 approval.

BIA PRECEDENT DECISIONS

In *Matter of Cubor-Cruz*, 25 I&N Dec. 470 (BIA 2011), the Board held that personal service of a Notice to Appear (Form I-862) on a minor child who is 14 or older at the time of service is effective, and notice does not also need to be served on an adult. The issue was whether the regulations at 8 C.F.R. § 103.5a(c)(2)(ii), which designate who shall be served if an alien is a minor under 14 years of age, conflict with the definition of a juvenile in 8 C.F.R. §§ 236.3(a) and 1236.3(a) (defining a juvenile as a person under the age of 18). The Board found that 8 C.F.R. § 103.5a(c)(2)(ii) controls, and it only requires service on an adult when the minor is under 14 years of age. Two United States Courts of Appeals have found that the regulatory provisions have different purposes and are not in conflict. *Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 899 (8th Cir. 2008); *but see Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004). In this case, the respondent was 17 at the time of entry and was served in person with the Notice to Appear. He did not appear and was ordered removed in absentia. The Board found that the respondent did not meet his burden of demonstrating that he did not receive proper notice of the hearing.

In *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the Board provided a framework for addressing determinations regarding whether an alien is competent to participate in immigration proceedings. The respondent is a native and citizen of Jamaica who was admitted to the United States as a lawful permanent resident on February 19, 1971. The respondent was placed in proceedings, and an Immigration Judge issued a decision summarizing the respondent's mental health history and finding him removable for having been convicted of two or more crimes involving moral turpitude and for having been convicted of a controlled substance violation and a drug-trafficking aggravated felony. The Immigration Judge denied relief.

The Board found that there is a presumption of mental competency but that the statute and regulations recognize that some aliens may be mentally incompetent. According to the Board, the standard for competency in civil immigration proceedings is whether an alien "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Id.* at 479.

The Board set forth the framework to be applied in competency cases. First, it identified the indicia of incompetence that Immigration Judges should consider, stated the DHS's obligation to provide any relevant evidence, and noted that competency is a varying condition. The Board also provided examples of appropriate measures that Immigration Judges should take to determine a respondent's competence. Finally, the Board addressed appropriate safeguards that Immigration Judges should consider to protect incompetent aliens, stating that Immigration Judges have the discretion to

make this determination. These determinations are informed by precedent from the Board and Federal courts. The Board provided examples of appropriate safeguards, such as refusal to accept an admission of removability, identification and appearance of family members or close friends, and docketing the case to facilitate the ability to obtain legal representation or medical treatment, etc. Applying this framework to the respondent's case, the Board concluded that there was good cause to believe that the respondent lacked sufficient competence to proceed with the hearing and remanded for the Immigration Judge to take appropriate measures to assess the respondent's competency and apply what ever safeguards are appropriate to ensure that the proceedings can fairly go forward.

In *Matter of Dorman*, 25 I7N Dec. 485 (A.G. 2011), the Attorney General issued a decision vacating the decision of the Board and remanding the case to "make such findings as may be necessary to determine whether and how the constitutionality of [the Defense of Marriage Act, 1 U.S.C. § 7] is presented in this case."

At issue in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), was whether an alien must have received an actual offer of permanent resettlement or whether a totality of circumstances is sufficient to show that the firm resettlement bar applies pursuant to 8 C.F.R. § 1208.15. In 1990, the respondent fled Mauritania for Senegal, where he lived from 1990 to 1999. During this time, he worked in a market and married a Senegalese citizen, with whom he had two children. The respondent was issued an identification number in the Senegalese Government's registry of foreigners and never experienced any problems with Senegalese authorities. After the respondent was placed in proceedings, the Immigration Judge found that he was not firmly resettled in Senegal and granted his application for asylum. The DHS appealed the Immigration Judge's decision.

The decision sets forth the history of firm resettlement. It then sets out a four-step analysis for firm resettlement determinations. First, the DHS bears the burden of presenting prima facie evidence of an offer of firm resettlement. In order to make a prima facie showing that an offer of firm resettlement exists, the DHS should make initial attempts to secure evidence that consists of governmental documents indicating an alien's ability to stay in a country indefinitely. If direct evidence of an offer of firm resettlement is unavailable, indirect evidence may be used to show that an offer of permanent resettlement has been made if it has a sufficient level of clarity and force to establish that an alien is able to permanently resettle in the country. The existence of a legal mechanism in the country by which an alien can obtain permanent residence *may* be sufficient to make a prima facie showing, and this finding is not contingent upon the alien applying for that status.

Second, if the DHS has made a prima facie showing that an offer of firm resettlement has been made, the alien may present rebuttal evidence to show by a preponderance of the evidence that such an offer has not been made or that he or she would not qualify for it. This includes evidence as to how a law granting permanent residence is applied in practice.

Third, the Immigration Judge will determine whether an offer of firm resettlement has been made upon consideration of the totality of the evidence presented by the parties. If the Immigration Judge finds that the alien has not rebutted the DHS's evidence of an offer of firm resettlement, the Immigration Judge will find the alien firmly resettled. Fourth, if the Immigration Judge finds that the alien is firmly resettled, the burden then shifts to the alien pursuant to 8 C.F.R. §§ 1208.15(a) and (b) to establish that an exception to firm resettlement applies by a preponderance of the evidence.

Due to conflicting evidence regarding permanent residence for foreign men marrying Senegalese citizens, the Board remanded the record to the Immigration Judge to apply the four-step analysis described in the decision and for the parties to provide more evidence regarding firm resettlement in Senegal.

In *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011), the Board found that a conviction under section 21-3843(a)(1) of the Kansas Statutes Annotated for violation of the no-contact provision of a protection order constitutes a deportable offense under section 237(a)(2)(E)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(ii). That section provides for removability of any alien who violates that portion of a protection order that involves "protection against credible threats of violence, repeated harassment, or bodily injury to the person . . . for whom the protection order was issued." The Board found that a no-contact order is entered to protect the victims of domestic abuse—to

ensure that there is no contact so that the victimization will not recur. The Board found that this fell within the definition and affirmed the Immigration Judge's decision finding the respondent removable as charged.

The Board considered two cases involving Temporary Protected Status ("TPS"). In *Matter of Echeverria*, 25 I&N Dec. 512 (BIA 2011), the Board considered whether an alien seeking TPS as a derivative spouse must be from a foreign state designated for TPS eligibility. The respondent, a native and citizen of Argentina who was admitted as a nonimmigrant visitor and overstayed her visa, married a national of El Salvador who received TPS during the initial registration period. The respondent argued that she was eligible under 8 C.F.R. § 1244.2 as the spouse of an alien currently eligible to be a TPS registrant. The Board found that the regulation sets forth the eligibility requirements in six discrete subsections, 8 C.F.R. § 1244.2(a) through (f)(1), using the word "and," which constitutes a clear indication that initial TPS registrants must satisfy each of the six eligibility requirements. On the other hand, the late registration provisions at 8 C.F.R. § 1244.2(f)(2) set forth four separate and distinct conditions precedent for late initial registration, but they do not provide an independent, alternative means for establishing eligibility for TPS. Because the respondent was not a national of a designated foreign state for which the Attorney General has authorized TPS, she was not able to satisfy the initial registration requirements.

In *Matter of N-C-M-*, 25 I&N Dec. 535 (BIA 2011), the Board found that a TPS applicant filing for late initial registration as a "child" must only establish that he or she qualified as a child at the time of the initial registration period, not at the time the application was filed. In this case, the respondent was 24 years old when he filed for TPS benefits. The Immigration Judge interpreted 8 C.F.R. § 1244.2(g) to mean that the late registration application had to be filed within 60 days of the date the applicant ceased to be a child for purposes of the Act. The Board found this interpretation to be in error based upon the regulatory language, the regulatory history, and guidance provided by the Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS"). The Board concluded that 8 C.F.R. § 1244.2(g) does not apply to a child who seeks late initial registration for TPS benefits and that the regulations provide a clear date on which to measure a child's age for purposes of qualifying for TPS benefits through a parent who registered during the initial registration period. The appeal was sustained and the record was remanded for further consideration of the respondent's application.

In *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011), the Board resolved the question whether section 235(b)(1)(A)(i) of the Act, 8 U.S.C. § 1225(b)(1)(A)(i), limits the prosecutorial discretion of the Department of Homeland Security ("DHS") to place arriving aliens in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, finding that it does not. An Immigration Judge terminated removal proceedings against the respondents, natives and citizens of Cuba who arrived at a land border crossing, finding that arriving aliens who are inadmissible must be placed in expedited removal proceedings. The Immigration Judge found that only aliens described in section 235(b)(1)(F) of the Act are exempt from expedited removal proceedings because section 235(b)(1)(A)(i) uses the word "shall" in referring to this placement. The DHS appealed.

The Board found that the word "shall" in section 235(b)(1)(A)(i) of the Act in this context does not require that the respondents be placed in expedited removal proceedings for two reasons. First, where "shall" relates to decisions made by the Executive Branch of the Government on whether to exercise prosecutorial discretion, it usually means "may." Second, the statutory scheme supports the reading that the DHS has discretion to place aliens in section 240 removal proceedings. Even though certain aliens, including arriving aliens, may be subject to expedited removal and are not entitled to section 240 proceedings, the statute makes clear that only stowaways are precluded from being placed in section 240 proceedings. The language relating to other classes of aliens states that they "shall" be placed in expedited removal proceedings, but the DHS has discretion to place those aliens in section 240 proceedings.

In *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011), the Board considered the standards for assessing "whistle-blower" asylum claims under the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302. The respondent, a native and citizen of Colombia, filed an Application for Asylum and Withholding of Removal, alleging that from 1991 to 2004, the respondent worked in a variety of administrative positions at the state-run Institute of Social Security in Colombia. She testified

that from 1998 to 2004, her superiors pressured her to hire private contractors outside the official approval process and to falsify statistical information, which she refused to do. She asserts that, in retaliation, she was overworked and forced to transfer to another division. After transferring, she continued to resist corruption by voicing concerns regarding improperly vetted contracts to her agency's internal audit department, refusing to certify payment for work that was unfinished, and speaking out against building a costly filing system. From December 2003 to May 2004, she received threatening phone calls from anonymous callers that escalated in frequency and severity. She believed, and the Immigration Judge found, that the threats were a response to her efforts against corruption.

The DHS argued that the respondent failed to show that she held a political opinion or that her persecutors imputed a political opinion to her where her only acts of resistance to corruption were internal (to her supervisors and her agency's internal audit department). The DHS also contended that she failed to demonstrate that the anonymous phone call threats she received were made on account of her actual or imputed political opinion, rather than out of greed or revenge. The respondent argued that the Immigration Judge correctly found that the harm she experienced occurred on account of her imputed political opinion: her opposition to government corruption.

The Board sustained the DHS appeal. The Board acknowledged that agitation against state corruption may, in some circumstances, constitute the expression of political opinion or give a persecutor a reason to impute such an opinion to an alien. However, post-REAL ID Act, a showing of retaliation for opposing governmental corruption is, by itself, insufficient to establish eligibility for relief. Instead, the alien must persuade the trier of fact that his or her actual or imputed anticorruption beliefs (or other protected trait) was one central reason for the harm. In making this determination, an Immigration Judge may find it useful to consider: (1) whether and how the alien manifested his or her anticorruption beliefs; (2) whether there is any direct or circumstantial evidence that the persecutor was motivated by the alien's perceived or actual anticorruption beliefs; and (3) whether corruption was pervasive within the governing regime. In this case, simply because the calls were triggered by the respondent's actions, which threatened to expose the corrupt officials' operations, did not necessarily mean that the callers were motivated by her political opinion. The case was remanded for further fact-finding regarding the motivations of the anonymous callers and eligibility for relief under the Convention Against Torture.

In *Matter of Le*, 25 I&N Dec. 541 (BIA 2011), the Board addressed whether a fiancé(e) derivative child who accompanied or followed to join his alien fiancé(e) parent to the United States remains eligible to adjust status under sections 245(a) and (d) of the Act, 8 U.S.C. §§ 1255(a) and (d), if, after satisfying the other statutory requirements, he attains the age of 18 or 21. On December 27, 2004, when the respondent was 19 years old, he was admitted to the United States on a K-2 visa. Although his mother, the K-1 visaholder, subsequently adjusted status after marrying the United States citizen fiancé petitioner within 90 days of admission, the respondent's adjustment application was denied by the USCIS, which found him ineligible to adjust because he had already reached the age of 18 at the time of the marriage and thus was not a "stepchild" of the United States citizen petitioner. After the respondent was placed into removal proceedings, the Immigration Judge found him to be removable as charged and denied his application to adjust status. While the Immigration Judge found that the USCIS's decision was likely incorrect at the time it was made, he determined that because the respondent had since turned 21 years of age, he was ineligible to adjust status because he no longer met the statutory definition of a child of the K-1 visaholder under section 101(b)(1) of the Act. The respondent appealed.

The Board noted that the changes to statutory provisions governing adjustment of status for fiancé(e)s and their derivatives have undergone significant changes over the years, which has resulted in statutory gaps. The Board resolved these gaps by reference to the law as originally enacted, because the amendments were designed solely to address marriage fraud, not to otherwise disrupt the existing procedures for issuing visas to fiancé(e) derivative children. The Board concluded that the undefined term "minor child" in sections 101(a)(15)(K)(iii) and 245(d) of the Act should be read synonymously with the term "child," as that term is defined in section 101(b)(1) of the Act. In addition, the Board held that the fiancé(e) derivative child need not qualify as the "stepchild" of the United States citizen petitioner, but rather only need show that he or she is the child of the alien fiancé(e) parent. Finally, consistent with *Matter of Sesay*, 25 I&N Dec. 431

(BIA 2011), the Board determined that the K-2 fiancé(e) derivative child must meet this definition at the time he or she is admitted to the United States on the K-2 visa. In this case, the respondent was 19 years of age at the time he was admitted to the United States. He therefore met the definition of a "child" as an unmarried person under 21 years of age. Since his mother's timely marriage to the petitioner was bona fide, the respondent was entitled to renew his application for adjustment of status before the Immigration Judge.

REGULATORY UPDATE

76 Fed. Reg. 29,777 (May 23, 2011)
DEPARTMENT OF HOMELAND SECURITY

Re-registration Procedures for Temporary Protected Status (TPS) Beneficiaries Under the Extended TPS Designation of Haiti and Automatic Extension of Employment Authorization Documentation for Haitian TPS Beneficiaries

SUMMARY: This notice announces the opening of the 90-day re-registration period (May 23, 2011 through August 22, 2011) for individuals who were granted Temporary Protected Status (TPS) under the original designation of Haiti for TPS and whose initial TPS applications were approved on or before May 19, 2011. These TPS beneficiaries may now re-register under the 18-month extension of TPS for Haiti that was announced in the Federal Register notice published on May 19, 2011.

New employment authorization documents (EADs) with a January 22, 2013 expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security recognizes that all re-registrants may not receive new EADs until after their current EADs expire on July 22, 2011. Accordingly, this notice automatically extends the validity of EADs issued under the TPS designation of Haiti for six months, through January 22, 2012. This notice also explains to TPS beneficiaries and their employers which EADs are automatically extended.

DATES: The extension of the TPS designation of Haiti is effective July 23, 2011, and will remain in effect through January 22, 2013. The 90-day re-registration period begins on May 23, 2011, and will be open through August 22, 2011.

76 Fed. Reg. 28,303 (May 17, 2011)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 204

Requiring Residents Who Live Outside the United States To File Petitions According to Form Instructions

ACTION: Final rule with a request for comments.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations to establish the location where a Petition for Alien Relative, Form I–130, or a Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360, may be filed, accepted, processed and approved through form instructions. DHS is promulgating this rule to reduce DHS costs by reducing filings of a Petition for Alien Relative at non-U.S. Citizenship and Immigration Services (USCIS) international locations, such as United States consulates and embassies, and to increase USCIS's flexibility in administering this program. DHS is removing references to offices, form numbers, approval authorities, and internal procedures from the regulation.

DATES: Effective date: This rule is effective on August 15, 2011.