



# Immigration Law Advisor

January 2012 A Legal Publication of the Executive Office for Immigration Review Vol. 6 No. 1

## In this issue...

- Page 1: Feature Article:  
*The Expanded Bond Docket for Immigration Judges in the Ninth Circuit . . .*
- Page 4: Federal Court Activity
- Page 5: *Citizenship, Crimes, Asylum, and Motions . . .*
- Page 16: BIA Precedent Decisions
- Page 20: Regulatory Update

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## The Expanded Bond Docket for Immigration Judges in the Ninth Circuit: Conducting Bond Hearings after Final Administrative Orders of Removal

By Eric J. Drootman

The United States Supreme Court has repeatedly recognized the detention of aliens as a necessary part of the removal procedure. *Carlson v. Landon*, 342 U.S. 524, 538 (1952). Under the regulatory framework, the authority to set bond for aliens is shared between the Department of Homeland Security ("DHS") and Immigration Judges. *See Matter of D-J*, 23 I&N Dec. 572, 574 n.3 (A.G. 2003); Amanda J. Adams, *Bond Proceedings Before Immigration Judges and the Board of Immigration Appeals*, Immigration Law Advisor, Vol. 2, No. 7 (July 2008). Pursuant to regulation, once DHS has made an initial custody determination, an alien in a removal proceeding may apply to an Immigration Judge for a custody redetermination under section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a). *See* 8 C.F.R. § 1236.1(d); *see also Matter of X-K-*, 23 I&N Dec. 731, 732 (BIA 2005). To obtain release on bond, an alien has the burden to prove by clear and convincing evidence that he is not a danger to persons or property and that he is likely to appear for any future proceeding. 8 C.F.R. § 1236.1(c)(8). "Only if an alien demonstrates that he does not pose a danger to the community should an Immigration Judge continue to a determination regarding the extent of flight risk posed by the alien." *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009). In assessing "danger" and "flight risk," Immigration Judges are required to evaluate a nonexclusive list of factors set forth in *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006).

Still, numerous aliens—such as those subject to mandatory detention under section 236(c) of the Act and arriving aliens—are ineligible to receive custody redetermination hearings before Immigration Judges. *See* 8 C.F.R. §§ 1003.19(h)(2)(i), 1236.1(d). Likewise, with some exceptions, aliens with final administrative orders of removal are restricted by regulation

to seeking a review of their detention with DHS.<sup>1</sup> See 8 C.F.R. §§ 241.4, 241.13, 241.14, 1236.1(d).

The Supreme Court has held mandatory detention under section 236(c) of the Act to be facially constitutional. *Demore v. Kim*, 538 U.S. 510 (2003). Likewise, the Department of Justice has taken the position that “the authority that the immigration judges exercise in conducting custody reviews is drawn solely from the delegation of authority by the Attorney General by regulation” and “is not required by law.” Review of Custody Determinations, 71 Fed. Reg. 57,873, 57,880 (Oct. 2, 2006) (Supplementary Information) (“Though allowing further review of DHS custody decisions is not required by law, the Attorney General has chosen to provide that, if an alien is dissatisfied with that determination, he or she may ask an immigration judge to review the conditions of his or her custody, subject to further review by the Board.”) (citing *Marcello v. Bonds*, 349 U.S. 302, 311 (1955)). Yet over the past few years, the United States Court of Appeals for the Ninth Circuit has become increasingly dissatisfied with the length some aliens have been subjected to mandatory detention, as well as the regulatory scheme affording DHS exclusive post-final order custody determination authority. The result is a series of published Ninth Circuit opinions creating a framework restricting the scope of mandatory detention while simultaneously expanding the authority of Immigration Judges to redetermine the custody conditions of aliens who remain detained after final administrative removal orders have been entered.

Without doubt, the Ninth Circuit’s vesting of Immigration Judges with jurisdiction to redetermine the custody conditions of aliens ordered removed is a considerable modification to agency practice.<sup>2</sup> The purpose of this article is to provide an overview of these circuit court decisions and the practical implications they have on detained aliens in the Ninth Circuit.

### **The *Casas* Hearing: Creation of the Immigration Judge Post-Final Order Bond Docket**

As has previously been discussed in the Immigration Law Advisor, see Amanda J. Adams, *Addendum: Bond Proceedings Before Immigration Judges and the Board of Immigration Appeals*, Immigration Law Advisor, Vol. 2, No. 8, at 12 (Aug. 2008), on July 25, 2008, the Ninth Circuit issued *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th

Cir. 2008), and *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008), two companion decisions addressing the right of aliens subjected to “prolonged detention” to receive bond hearings before Immigration Judges after entry of final administrative orders of removal. The aliens in *Prieto-Romero* and *Casas-Castrillon* were both detained lawful permanent residents challenging final orders of removal with the Ninth Circuit. The primary difference between the two cases was that during their removal proceedings *Prieto-Romero* was detained under section 236(a) of the Act with a \$15,000 bond, whereas *Casas-Castrillon* was subject to the mandatory custody provisions of section 236(c). Both aliens had been detained for lengthy intervals: *Prieto-Romero*’s period of immigration detention was over 3 years, while *Casas-Castrillon*’s time in confinement was around the 7-year mark.

Relying on *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (holding that section 241(a)(6) of the Act, 8 U.S.C. § 1231(a)(6), does not authorize “indefinite detention” and that an alien is entitled to release if, after a presumptively reasonable 6-month period to effect removal, there is “no significant likelihood of removal in the reasonably foreseeable future”), and *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (holding that section 236(c) of the Act only applies to “expedited removal of criminal aliens”), the *Casas-Castrillon* and *Prieto-Romero* panels held that a lawful permanent resident alien who (1) has filed a circuit petition for review challenging a final order of removal; (2) has obtained a stay of removal in conjunction with that petition;<sup>3</sup> and (3) has been subjected to “prolonged detention,”—i.e., confinement in excess of the presumptive 6-month period during which the detention of an alien is reasonably necessary—is entitled to an individualized custody redetermination hearing before an Immigration Judge pursuant to section 236(a) of the Act, even if the alien was previously detained under section 236(c) of the Act during the removal proceeding. See *Casas-Castrillon*, 535 F.3d at 947-48.

In addition to this enlargement of Immigration Judge bond jurisdiction, *Casas-Castrillon* and *Prieto-Romero* held that during such a post-final order bond hearing the burden is on the DHS to prove that the alien is a danger or flight risk such that release on bond is unwarranted. See *Casas-Castrillon*, 535 F.3d at 951. Finally, *Casas-Castrillon* made clear that once an alien files a Ninth Circuit petition for review challenging a removal order, the governing detention authority enduringly shifts

to section 236(a) of the Act and cannot return to section 236(c) if the petition for review is granted and the case is remanded to the Board. *Id.* at 947-48; *see also Owino v. Napolitano*, 575 F.3d 952, 955 (9th Cir. 2009) (same).

After *Casas-Castrillon* and *Prieto-Romero*, it was unclear how many aliens would qualify for post-final order custody hearings (commonly referred to as a “*Casas* hearing”) before Immigration Judges. For instance, these Ninth Circuit precedents left unresolved whether aliens who are not lawful permanent residents, as well as aliens with petitions for review challenging agency decisions other than final removal orders, were entitled to receive *Casas* hearings. *See Prieto-Romero*, 534 F.3d at 1060 n.6 (explaining that the “beginning of the removal period is not delayed by every judicially entered stay”). Indeed, *Casas-Castrillon* and *Prieto-Romero* never explicitly addressed the Board’s jurisdictional authority to consider an appeal of an Immigration Judge’s *Casas* bond decision.

Less than 2 months after *Casas-Castrillon* and *Prieto-Romero* were issued, in *Diouf v. Mukasey (Diouf I)*, 542 F.3d 1222 (9th Cir. 2008), the Ninth Circuit held that an alien subjected to prolonged detention challenging the denial of a motion to reopen with a petition for review remained detained under section 241(a)(6) of the Act—not section 236(a). Still, *Diouf I* explicitly declined to resolve whether an alien detained under section 241(a)(6) also is entitled to a bond hearing in front of an Immigration Judge. *See Diouf I*, 542 F.3d at 1234-35 (remanding the case to district court for further fact-finding); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1115-16 (9th Cir. 2010) (recognizing that *Diouf I* “refused to reach the issue of whether a bond hearing was required under Section [241](a)(6),” but stating “that the issue was ‘somewhat similar’ to that in *Casas-Castrillon*, strongly implying that the district court’s determination should at least be informed by its reasoning”).

Although it left unresolved whether aliens detained under section 241(a)(6) of the Act are entitled to *Casas* hearings, *Diouf I* did clarify the interplay between the varied paragraphs of section 241(a) of the Act that govern post-final order detention. As the statutory text plainly discloses, section 241(a)(2) of the Act makes detention mandatory during the 90-day removal period established in section 241(a)(1), whereas detention under section 241(a)(6) is discretionary. *See Zadvydas*, 533 U.S. at 683. Detention governance immediately shifts from

section 241(a)(2) of the Act to section 241(a)(6) upon the expiration of the 90-day removal period. *Diouf I*, 542 F.3d at 1231. But not all aliens remain in the section 241(a)(1) removal period for exactly 90 days. As was illuminated in *Diouf I*, pursuant to section 241(a)(1)(C), an alien’s refusal to cooperate with the DHS can extend the removal period and trigger a reset of the 90-day period of mandatory detention under section 241(a)(2) “following the latest date of documented obstruction.” *Id.*; *see also Lema v. INS*, 341 F.3d 853, 857 (9th Cir. 2003) (“We conclude that [section 241](a)(1)(C) . . . authorizes the INS’s continued detention of a removable alien so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents.”).

On the other hand, *Diouf I* held that “repeatedly and unsuccessfully petitioning for relief” with the Ninth Circuit is not considered to be obstructionist conduct that implicates a revival of the 90-day removal period. *Diouf I*, 542 F.3d at 1232; *see also Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (“An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him.”). *But see Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) (holding that an alien “may not rely on the extra time resulting [from litigation] to claim that his prolonged detention violates substantive due process”). *Diouf I* spilled much ink on this topic for good reason: whether an alien is detained under section 241(a)(2) or section 241(a)(6) of the Act has considerable importance. This is because it is well settled that detention under section 241(a)(2) “poses no due process issues, regardless of whether removal of the detained alien is foreseeable,” *Rodriguez*, 591 F.3d at 1116, whereas “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by” section 241(a)(6) of the Act. *Zadvydas*, 533 U.S. at 699.

### ***Diouf II, Singh, and Leonardo: Clarification and Further Expansion of Post-Final Order Bond Jurisdiction for Immigration Judges and the Board***

The apparent lack of clarity resulting from *Casas-Castrillon* and *Prieto-Romero* was short lived. Since the spring of 2011 the Ninth Circuit has issued three published opinions further expanding the scope of *Casas-Castrillon* and, in turn, the role of Immigration Judges, as well as the Board, in adjudicating the custody conditions of aliens after the entry of a final administrative order of removal.

*continued on page 21*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR DECEMBER 2011 AND CALENDAR YEAR 2011 TOTALS

*by John Guendelsberger*

The United States courts of appeals issued 122 decisions in December 2011 in cases appealed from the Board. The courts affirmed the Board in 109 cases and reversed or remanded in 13, for an overall reversal rate of 10.7%, compared to last month's 8.7%. There were no reversals from the Fifth, Sixth, Eighth, and Tenth Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	3	1	25.0
Second	26	25	1	3.8
Third	13	12	1	7.7
Fourth	8	7	1	12.5
Fifth	6	6	0	0.0
Sixth	6	6	0	0.0
Seventh	8	7	1	12.5
Eighth	4	4	0	0.0
Ninth	28	22	6	21.4
Tenth	5	5	0	0.0
Eleventh	14	12	2	14.3
All	122	109	13	10.7

The 122 decisions included 53 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 44 direct appeals from denials of other forms of relief from removal or from findings of removal; and 25 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	53	45	8	15.1
Other Relief	44	42	2	4.5
Motions	25	22	3	12.0

The eight reversals or remands in asylum cases involved credibility (one case), nexus (two cases),

relocation (two cases) and Convention Against Torture (three cases). The two reversals or remands in the "other relief" category addressed a section 212(c) waiver and cancellation of removal. The three reversals in motions cases involved ineffective assistance of counsel (two cases) and an in absentia order of removal.

The chart below shows the combined numbers for calendar year 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	62	50	12	19.4
First	21	17	4	19.0
Ninth	1516	1234	282	18.6
Third	311	276	35	11.3
Tenth	42	38	4	9.5
Eighth	40	37	3	7.5
Eleventh	220	205	15	6.8
Sixth	103	96	7	6.8
Fourth	116	110	6	5.2
Second	554	527	27	4.9
Fifth	138	134	4	2.9
All	3123	2724	399	12.8

The numbers by type of case on appeal for all of 2011 are indicated below

	Total	Affirmed	Reversed	% Reversed
Asylum	1517	1315	202	13.3
Other Relief	695	589	106	15.3
Motions	911	820	91	10.0

As the chart below indicates, over the last 6 calendar years we have seen a significant downward trend in both the number of overall decisions issued each year and in the number of reversals or remands. The annual reversal rate is up slightly for the second year in a row after falling for 3 years in a row.



	2006	2007	2008	2009	2010	2011
Cases	5398	4932	4510	4829	4050	3123
Reversals	944	753	568	540	466	399
% Reversals	17.5	15.3	12.6	11.2	11.5	12.8

The reversal rates by circuit for the last 6 calendar years are shown in the following chart by the percentage reversed.

Circuit	2006	2007	2008	2009	2010	2011
First	7.1	3.8	4.2	5.6	8.6	19.0
Second	22.6	18.0	11.8	5.5	4.9	4.9
Third	15.8	10.0	9.0	16.4	10.7	11.3
Fourth	5.2	7.2	2.8	3.3	5.2	5.2
Fifth	5.9	8.7	3.1	4.0	13.5	2.9
Sixth	13.0	13.6	12.0	8.6	8.7	6.8
Seventh	24.8	29.2	17.1	14.3	21.0	19.4
Eighth	11.3	15.9	8.2	7.7	8.1	7.5
Ninth	18.1	16.4	16.2	17.2	15.9	18.6
Tenth	18.0	7.0	5.5	1.8	4.9	9.5
Eleventh	8.6	10.9	8.9	7.1	6.5	6.8
<b>All</b>	17.5	15.3	12.6	11.2	11.5	12.8

*John Guendelsberger is a Member of the Board of Immigration Appeals.*

**Citizenship, Crimes, Asylum, and Motions:  
A Winter’s Smorgasbord**  
*By Edward R. Grant*

For an event that got its name from a toy sensation of the mid-1960s, the annual competition between champions of the National Football Conference and American Football Conference is a bit touchy in the copyright infringement department. Thus, not having paid the requisite licensing fees, we are permitted to refer to the competition only in euphemistic terms such as the “Big Game” or simply “The Game”—monikers that are themselves pilfered, because they define rivalries far more storied and meaningful than the over-hyped termination of the professional gridiron season. *See, e.g., The Play: Cal-Stanford, 1982 and Harvard Beats Yale, 29-29.* Perhaps we could call it “The Big Lebowski”—okay, that name is also taken, but it somehow fits the proceedings.

Come the appointed Sunday, though, most of our readers, including those who care not a whit for what

transpires between the commercials, and even less for what transpires at halftime, will convene at parties for the ostensible purpose of viewing the proceedings. But let’s face it—the real reason is to eat. Comfort food, lots of it, and no guilt. At some homes, it is truly a smorgasbord, conflating every ethnic tradition from Mexican to Italian to Lebanese. In the spirit, we offer a hodge-podge of significant recent decisions that touch all the major food groups of immigration law: citizenship, crimes, motions, and asylum and Convention Against Torture (“CAT”) protection. As the NFL playoffs have displayed so far, there are a number of upsets and close calls in these cases, and much to ponder as we enter a new year of decision-making.

**Citizenship: Derivation Remains a Contested Issue**

Despite the settled and clear-cut rules in sections 320 and former 321 of the Act, which was repealed by section 103(a) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631, 1632 (“CCA”), the issue of derivative citizenship continues to present perplexing issues, particularly in circumstances where only one parent has naturalized. *See Matter of Rodriguez-Tejedor, 23 I&N Dec. 153 (BIA 2001)* (holding that the provisions of the CCA are not retroactive to persons over age 18 on the CCA’s effective date). Two late December decisions from the Second and Ninth Circuits demonstrate the point.

*Romero-Mendoza v. Holder*, No. 08-74674, 2011 WL 6318336 (9th Cir. Dec. 19, 2011), held that a native of El Salvador, who entered in 1993 and was subsequently admitted as a lawful permanent resident, failed to derive citizenship from his mother, who naturalized in 1997 when he was 17. The provisions of repealed section 321 were thus applicable; these included the requirement that, for a legitimated child, both parents (if married) must naturalize in order for the alien child to derive citizenship. The question was whether the petitioner—who was born to his parents before they were married—was legitimated. The marriage unquestionably legitimated the petitioner, but he nonetheless argued that he was not legitimated at the time of his birth and, further, that the placement of his father’s name on his birth certificate was not necessarily proof of paternity. The Ninth Circuit held that, notwithstanding these questions, the 1983 amendment to the Salvadoran constitution that eliminated legitimacy distinctions between those born in and out of wedlock had the effect of legitimating the petitioner. *Id.*

at \*3 (citing *Matter of Moraga*, 23 I&N Dec. 195 (BIA 2001)). The petitioner also argued that legitimation is a “legal impossibility” in countries that have eliminated the distinction between children born to married and unmarried parents and that principles of family unity favor his interpretation of former section 321. The court dismissed the argument, noting that the requirement of naturalization of both parents actually *preserved* family unity by not infringing upon, and perhaps extinguishing, the parental rights of the spouse who did not naturalize. *Id.* at \*4 (citing *Barthelmy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003)).

*Garcia v. USICE (Dep’t of Homeland Sec.)*, No. 09-4211-pr., 2011 WL 6825581 (2d Cir. Dec. 29, 2011), held that a putative custody award from a foreign court, not enforceable under the law of the State (New York) in which the petitioner actually resided, did not settle the question of which parent had “legal custody” for purposes of former section 321(a)(3) of the Act. The petitioner’s parents immigrated to New York and divorced during a brief trip to their native Dominican Republic in 1988. The decree of divorce included a grant of “personal guardianship” to the petitioner’s mother. After returning to New York, the couple still resided together; his mother finally moved out in 1994. The petitioner was placed in removal proceedings based on criminal convictions in the 1990s, and he was granted cancellation of removal. When he reoffended in 2000 and 2001 and faced removal with no prospect of relief, he applied to U.S. Citizenship and Immigration Services (“USCIS”) for a certificate of citizenship based on the fact that his father had naturalized in 1996 (when the petitioner was 17). The USCIS denied the application, citing the Dominican courts’ grant of guardianship to the mother. *Id.* at \*1. A habeas petition followed, which was denied in district court.

The Second Circuit’s reversal of the district court highlights two critical points for those adjudicating claims to derivative citizenship. First, questions of “custody” are not as strictly governed by formal decrees as are questions of legal separation and divorce. See *Brissett v. Ashcroft*, 363 F.3d 130, 133-34 (2d Cir. 2004); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950). Custody is often shared and is frequently subject to informal agreements. Thus, “[r]equiring a formal act to change custody—something more than mere agreement—is counterintuitive to the attempts that parents make following a divorce to conduct their lives and those of their children with one goal: the

children’s best interests.” *Garcia*, 2011 WL 6825581, at \*3. Second, putative awards of custody will be assessed by whether they have legal force in the jurisdiction of actual residence. Since New York “would not even consider” recognizing the Dominican “guardianship” award unless it substantially complied with the Uniform Child Custody Jurisdiction Act, the Dominican award had no force or effect on the question of citizenship. *Id.* at \*4. The court remanded for the USCIS to address the factual question whether the petitioner’s father had “actual uncontested custody” at the time of his naturalization. *Id.* at \*5.

### **Crimes: Clarifying “Rape”; Further “No” to Tobar-Lobo**

The world of “aggravated felonies” is populated by an evolutionary biologist’s matrix of flora and fauna: old crimes and new crimes; crimes linked to specific Federal statutes and “crimes” that are more descriptive than element-based; crimes that we virtually never see as grounds of deportability and crimes we see frequently. The immigration jurist’s task—to make sense of it all—has been one of the most profound challenges of the past two decades.

One perennial challenge is defining the contours of section 101(a)(43)(A) aggravated felonies—murder, rape, and sexual abuse of a minor. There, in one section, is the matrix displayed. “Murder,” at common law and today, remains the unlawful killing of another with malice aforethought. It is as clear as a generic crime can be in this age of model codes and redefined offenses. “Rape” is an example of a crime clearly defined at common law, but with substantially different contours in modern statutes—hence requiring a hunt for the correct “generic” elements among an array of sources. “Sexual abuse of a minor,” as these pages have chronicled, falls into a separate category: a crime unknown at common law, it is best described as an umbrella term requiring jurists to determine which of myriad crimes—including those that may involve putatively consenting parties—fall under the umbrella. See, e.g., Edward R. Grant, *The 2010 Top Twenty: Few Easy Choices*, Immigration Law Advisor, Vol. 4, No. 10, at 21-22 (Nov./Dec. 2010).

The Fifth Circuit, somewhat remarkably, became the first circuit court of appeals to address the scope of “rape” since its addition to the aggravated felony definition in 1996. *Perez-Gonzalez v. Holder*, No.

10-60798, 2012 WL 94333 (5th Cir. Jan. 12, 2012). The court concluded that the Montana offense of sexual intercourse without consent in section 45-5-503(1) of the Montana Code Annotated did not constitute “rape” because neither at common law, nor in the majority of American jurisdictions at the time of enactment (1996), did “rape” include digital penetration or penetration by a foreign object. Since the Montana statute punishes penile as well as these other forms of penetration, it could not constitute the generic crime of “rape.” *Id.* at \*4.

The court determined that by including “rape” in section 101(a)(43)(A) of the Act, Congress intended to hew close to the common law definition: “unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will” where there was “at least a slight penetration of the penis into the vagina.” *Id.* at \*2 (quoting *Black’s Law Dictionary* (9th ed. 2009) (internal quotation marks omitted)). In 1986, Congress had repealed the Federal crime of rape, replacing it with bans on “aggravated sexual abuse” and “sexual abuse.” 18 U.S.C. §§ 2241, 2242. For purposes of these provisions, a “sexual act” was more broadly defined to encompass various forms of contact and penetration, including digital penetration. 18 U.S.C. § 2246. Since Congress is presumed to have deliberately chosen the term “rape,” then used in 23 States, as opposed to updated terms such as “sexual abuse” appearing in the codes of the remaining jurisdictions, the court concluded that its categorical inquiry should focus on the common meaning of “rape” in 1996. The court unanimously held that since only a handful of States at that time considered digital penetration to constitute rape, a violation of the Montana statute could not be a categorical aggravated felony under section 101(a)(43)(A) of the Act. *Id.* at \*4.

The panel split, however, on application of the modified categorical approach. The record of conviction was sparse; the information stated that the petitioner committed the offense of “sexual intercourse without consent,” and the factual charge stated that he “did knowingly have sexual intercourse without consent with a person of the opposite sex, not his spouse.” *Id.* at \*5. The majority, under the pen of Judge Southwick, concluded that there is more than a realistic possibility that an act of digital penetration could result in a conviction under this statute and that the criminal information and plea did not resolve this factual question. Judge Edith Jones, in dissent, concluded that the information stated exactly

what crime the petitioner committed, namely, common-law rape. She cited the close tracking of the language of the information to the common law definition and the absence of any allegation that the crime was committed through means of digital or mechanical penetration. She also lobbed not-so-veiled criticism at the required adherence, in civil immigration proceedings, to the strict modified categorical approach set forth in *Shepard v. United States*, 544 U.S. 13, 16 (2005):

[W]hether the “modified categorical approach” conforms to the purposes or procedures of the INA is not clear to me. Here, an affidavit of the Deputy County Attorney filed in support of the Information details the investigation in a 3 page memorandum, the substance of which is that M.M., a fourteen-year-old, was caught in a car with the petitioner while both were semi-clad. An empty condom package was found at the scene. After initially denying that she engaged in sexual intercourse with the petitioner, she admitted to the events while being taken to a hospital for physical testing. It is one thing for the law, guided by the due process clause and the rule of lenity, to give a criminal defendant the benefit of the modified categorical approach for purposes of enhanced sentencing. I question whether the immigration policy of the United States need also favor lenity for those wishing to remain here after felony rape convictions.

*Perez-Gonzalez*, 2011 WL 94333, at \*6 (Jones, J., dissenting). The dissent likely will do no more than encapsulate the frustration of some jurists faced with minimal “formal” records involving serious, even heinous crimes. Moving the needle on this issue—as well as other profundities of the law regarding immigration and crimes—will take the proverbial act of Congress.

Another perennial example is the scope of the term “crime involving moral turpitude” (“CIMT”)—in this case, the virtually universal requirement that perpetrators of designated sexual offenses register with authorities and keep current their address and other information. The Board, in a split decision, determined that violation of



this requirement was a CIMT, in large part due to its nexus to crimes that undoubtedly partake of moral turpitude. *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007). Recently, the Third Circuit joined the Ninth and Tenth Circuits in rejecting this position. *Totimeh v. Att’y Gen. of U.S.*, Nos. 10-3939, 11-1998, 2012 WL 89580 (3d Cir. Jan. 12, 2012); *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011); *Plascencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (en banc) (finding that *Chevron* deference is owed to the Board’s determination that certain conduct is morally turpitudinous, but not addressing the specific offense at issue in *Matter of Tobar-Lobo*); *see also Pannu v. Holder*, 639 F.3d 1225, 1228 (9th Cir. 2011) (stating that the analysis of scienter in *Tobar-Lobo* appears to be inconsistent with the scienter standard in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). The petitioner, after several years of compliance, violated Minnesota’s predatory offender registration statute, section 243.166 of the Minnesota Statutes, and was charged, in conjunction with the underlying offense of criminal sexual conduct, as being deportable for having committed two CIMTs. The Third Circuit, following closely the analysis in *Efagene*, concluded that despite its connection to an underlying turpitudinous offense, the “failure to register” was a regulatory offense, analogous to filing, reporting, and licensing requirements, which have historically been held not to involve moral turpitude. *Totimeh*, 2012 WL 89580, at \*4 (citing *Efagene*, 642 F.3d at 922-23 (holding that the crime did not involve an identifiable victim, any actual harm, or any intent to cause harm)). The court also rejected the Board’s rationale that a violation of such statutes breaches a duty owed to society—that analysis, the court concluded, could apply to *any* violation of the law. Since a conviction for failure to register in Minnesota requires no showing of intent and can result from simple forgetfulness, it is inherently regulatory in nature. *Id.* at \*5. Furthermore, the inherent vileness or malicious conduct inherent in a CIMT arises solely from the underlying offense, not from violation of this regulatory requirement. *Id.*

### **Motions: More Curbs on Discretion**

Motions practice before Immigration Judges and the Board, traditionally seen as an exercise of administrative discretion, is increasingly seen as vindication of a “right.” *See* Edward R. Grant, *The Right To File a*

*Motion To Reopen: An Intended Consequence of IIRIRA?*, Immigration Law Advisor, Vol. 4, No. 1, at 5 (Jan. 2010). As such, administrative limitations on motions (such as the “departure bar”) are subject to greater scrutiny. *See* Edward R. Grant and Patricia M. Allen, *When Cousins Are Two of a Kind: Circuits Issue Not-Quite-Identical Paired Decisions*, Immigration Law Advisor, Vol. 5, No. 7, at 5, 8-9 (Aug. 2011). Recent decisions from the Third and Fifth Circuits underscore this point.

It is long settled that no time or numerical limitations apply to motions to reopen deportation proceedings conducted in absentia under former section 242(b) of the Act, or to exclusion proceedings conducted in absentia. *Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999); *Matter of N-B-*, 22 I&N Dec. 590 (BIA 1999). The Fifth Circuit now holds that the Board cannot deny such a motion based on an alien’s lack of due diligence. *Rodriguez-Manzano v. Holder*, No. 09-60795, 2012 WL 34070 (5th Cir. Jan. 9, 2012). The petitioner was placed in deportation proceedings in 1987 and failed to appear at his scheduled hearing in September 1988, whereupon he was ordered removed pursuant to former section 242(b) of the Act. Twenty years later, he filed a motion to reopen alleging ineffective assistance of counsel as the reason for his failure to appear. The motion was denied for lack of compliance with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and the Board affirmed. The Fifth Circuit agreed and denied the petition for review from *this* decision of the Board. *Rodriguez-Manzano*, 2012 WL 34070, at \*3.

However, the petitioner had also filed a motion to reconsider with the Board, this time complying with *Matter of Lozada* and explaining the obstacles to complying earlier—including that the attorney in question no longer lived in the United States. The Board acknowledged the *Lozada* compliance but denied the motion to reconsider on grounds that the petitioner had not acted diligently in pursuing his claim of ineffective assistance of counsel. The Fifth Circuit did not agree with this decision of the Board, concluding that by imposing the standard of “due diligence,” the Board “ignored” its precedent in *Matter of Cruz-Garcia* and imposed a requirement not present in *Matter of Lozada*. *Rodriguez-Manzano*, 2012 WL 34070, at \*4. The court found the Board’s ruling “especially troubling” and an abuse of discretion, because its decision denying the initial motion to reopen had relied on *Cruz-Garcia* to find the motion timely. *Id.* “In light of the



[Department of Justice’s] imposition of time limitations to post-1992 deportation proceedings but not to pre-1992 deportation proceedings, it was improper for the BIA to insert its policy preferences into this complex and carefully calibrated area of law at this late stage.” *Id.* at \*5.

*Rodriguez-Manzano* leaves unanswered a critical question: since pre-1992 motions to reopen could be denied in the exercise of discretion, why would a requirement that a movant have acted diligently constitute an *abuse* of discretion? Older Board case law was clear that “motions to reopen can be denied for purely discretionary reasons,” including a determination that the alien engaged in “dilatory tactics” or otherwise flouted the immigration laws. *Matter of Reyes*, 18 I&N Dec. 249, 253 (BIA 1982); see also Gerald S. Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 San Diego L. Rev. 79, 88 (1982) (“A properly constructed motion to reopen must include not only a clear showing of prima facie eligibility as a matter of law, but must also make an equally clear showing as a matter of discretion.”). The imposition of regulatory (later statutory) time limits on motions did not alter this fundamental characteristic of motions practice; arguably, it simply codified, for future cases, what would be considered “dilatory” and what would not.

The court’s ruling, however, does not spell the demise of “due diligence” as a factor in motions practice. The concept of “equitable tolling” has gained wide favor among the circuits—though notably not as much in the Fifth—and application of that equitable principle to forgive the *late* filing of a motion to reopen continues to depend on the exercise of due diligence by the respondent making the claim. Nonetheless, by stripping Immigration Judges and the Board from the ability to deny “old rules” motions on the grounds that were acceptable when the “old” rules were the *only* rules, the Fifth Circuit has taken another step in dismantling the inherent discretionary nature of motions practice.

More dismantling may follow the Third Circuit’s recent decision in *Chehazeh v. Attorney General of the United States*, No. 10-2995, 2012 WL 77881 (3d Cir. Jan. 12, 2012), holding that the Board’s discretion to sua sponte *reopen* removal proceedings is not as immune to judicial review as its discretion to *deny* a request for sua sponte reopening.

The table was set by the petitioner’s acquaintance with two perpetrators of the terrorist attacks of September 11, 2001—men who had told him they were training to become pilots. First detained on a material witness warrant, he was placed in removal proceedings and applied for asylum on several grounds: his fear of creditors from whom he had borrowed money in his native Syria and his fear arising from the fact that he had given information to the FBI. The Immigration Judge concluded that he was a member of a particular social group comprising “hopeless debtors,” and that he would be prosecuted and not receive a fair trial in Syria. Legacy INS filed an appeal, but no brief, and the appeal was dismissed in 2004. *Id.* at \*2-3. Three years later, the DHS moved to reopen proceedings based (1) on Interpol findings that he was not wanted by police in Syria for his alleged debts; and (2) he posed a danger to the security of the United States because of his association with the 9/11 hijackers. The petitioner objected, but the Board sua sponte reopened the proceedings on the basis of the national security concerns, specifically, that the FBI has been “unable to rule out the possibility that [Chehazeh] poses a threat to the security of the United States.” *Id.* at \*3. The Board also directed assignment to a new Immigration Judge as a result of allegations of bias against the Government’s position in the prior proceedings. A habeas petition filed in district court was denied on grounds that the Board’s exercise of its sua sponte authority is not subject to judicial review.

In reversing, the Third Circuit acknowledged its own caselaw (agreeing with that of virtually every other circuit), that Federal courts lack jurisdiction to review Board decisions declining to exercise sua sponte authority. *Id.* at \*5 & n.12 (citing *Pllumi v. Att’y Gen. of U.S.*, 642 F.3d 155, 159 (3d Cir. 2011); *Alzaarir v. Att’y Gen. of U.S.*, 639 F.3d 86, 89 n.2 (3d Cir. 2011)). A decision to *exercise* this authority to reopen a settled case—especially one in which a right to remain in the United States has been fully adjudicated and granted—is a different matter because the Board’s published decisions have clearly stated that the sua sponte authority is a “limited” discretionary power applicable only to exceptional situations or circumstances. *Id.* at \*6 (citing *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997)).

When the BIA refuses to reopen proceedings, it puts an end to the administrative process without the exercise of any additional “coercive power

over an individual's liberty or property rights." By contrast, when the BIA reopens proceedings, the administrative process starts again, potentially placing in jeopardy an adjudicated right to stay in this country.

*Id.* at \*7 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (citation omitted)). Moreover, nothing except "trust" would prevent the Board "from reopening and remanding a case to a new immigration judge over and over again until satisfied with the outcome." *Id.*

The remainder of this lengthy decision considered, and rejected, potential statutory bars to judicial review under section 242 of the Act. *See* sections 242(b)(9) and (g) of the Act. Those provisions did not bar review because (1) there was no order of removal under review, thus making section 242(b)(9) inapplicable, and (2) the appeal did not concern a decision to commence proceedings, adjudicate cases, or execute a removal order, thus making section 242(g) inapplicable. *Chehazeh*, 2012 WL 77881, at \*9-10. The court also determined that the requirement of "final agency action" did not bar review because the order to reopen proceedings sua sponte was collateral to the final order granting asylum. Analogizing this circumstance to the interests protected by the Double Jeopardy clause, the court held that shielding such collateral orders from judicial review would allow the Government to compel an alien granted relief "to live in a continuing state of anxiety and insecurity" regarding his status. *Id.* at \*13 (quoting *Abney v. United States*, 431 U.S. 651, 661-62 (1977)) (internal quotation mark omitted). Finally, addressing the issue of "exceptional circumstances," the court determined that there was insufficient evidence that concerns regarding the petitioner's status as a security threat were not sufficiently documented in the record, and it remanded to the district court for further proceedings.

Given the rarity of sua sponte reopenings—and the alternate mechanisms to rescind certain grants of relief based on factors such as fraud—*Chehazeh* may prove to have limited effect. Nonetheless, it is a clear chink in the armor of nonreviewability, which may lead to requirements, at least in some circumstances, for Immigration Judges and the Board to explain why "exceptional circumstances" (or even lack thereof) justified their decisions on motions to reopen. *See Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010); Grant, *The 2010 Top Twenty: Few Easy Choices, supra*, at

20-21. The Third Circuit articulated what it believed to be a clear line between grants and denials of motions to reopen sua sponte. It remains to be seen if the line holds.

### **Persecution, Particular Social Group, and CAT "Acquiescence"**

In the realm of "protection" relief, the contours of "persecution," "particular social group," and "government acquiescence" under the Convention Against Torture are among the most vexing issues. Recent decisions from the Third, Fourth, and Tenth Circuits may add to our understanding of these concepts.

On the subject of persecution, the Tenth Circuit recently affirmed the Board's holding that a respondent whose wife was forcibly sterilized, was fined the equivalent of 5 years of salary, and suffered confiscation of household goods when he was unable to pay the full amount, did not suffer past persecution. *Zhi Wei Pang v. Holder*, No. 10-9570, 2012 WL 28950 (10th Cir. Jan. 6, 2012). The court found that economic persecution may exist "when the government imposes penalties so severe that it jeopardizes the petitioner's life or freedom," or "when the government deliberately places the petitioner at a severe economic disadvantage even though he is spared the bare essentials of life." *Id.* at \*3 (citing *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1088-90 & n.4 (10th Cir. 2008)). Examples of sanctions that may amount to persecution include a "particularly onerous fine, a large-scale confiscation of property, or a sweeping limitation of opportunities to continue to work in an established profession or business." *Id.* at \*3 (quoting *Matter of T-Z-*, 24 I&N Dec. 163, 174 (BIA 2007)) (internal quotation marks omitted).

The court distinguished the facts of Pang's situation from other cases which found that the economic sanctions in response to violating the Chinese population control measures amounted to persecution. In *Li v. Attorney General of the United States*, 400 F.3d 157 (3d Cir. 2005), the couple was fined the equivalent of 20 months' salary; lost their government jobs and accompanying health insurance, food rations, and school payment; were effectively blacklisted from other government employment; and had their furniture and major household appliances confiscated. *Id.* at 159. The court held that these restrictions constituted economic persecution that

threatened the family's freedom and possibly their lives. *Id.* at 168–69. Similarly, in *Fei Mei Cheng v. Attorney General of the United States*, 623 F.3d 175, 191 (3d Cir. 2010), the court found that the Chinese Government's cumulative economic and noneconomic sanctions constituted a “pattern of mistreatment” amounting to persecution. This mistreatment included the forced insertion of an intrauterine device, threats to take the petitioner's daughter and detain her boyfriend, and the imposition of fines. The Government also confiscated her family farm and truck and forbade the entire family from working on the farm. *Id.* at 194. The court held that the seizure of such significant property, which “served as the exclusive source of the family's livelihood,” constituted an economic sanction so severe that it jeopardized the family's freedom and possibly their lives. *Id.* at 195. In contrast, the Tenth Circuit noted that Pang was allowed to continue to farm on government land, there was no large-scale confiscation of his property, and his family appeared to have maintained their standard of living as rice farmers because they continue to farm their state-owned plot of land in China. *Zhi Wei Pang*, 2012 WL 28950, at \*4-5. Thus, the court found that the penalties imposed on Pang did not jeopardize his life or freedom.

A concurring opinion by Judge Matheson would have found that Pang suffered past persecution but recognized the “highly deferential standard of review” and concluded that the evidence did not compel a conclusion different from that of the Board. *Id.* at \*6 (Matheson, J., concurring).

One of the most significant recent Federal precedents on asylum was that of the Fourth Circuit, determining that family members of those who actively oppose gangs by testifying against them constitute a particular social group. *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011). This month, the Fourth Circuit revisited the issue to clarify that it is the *family members* of those who so testify, and not the witness himself, who can claim membership in the protected group. *Zelaya v. Holder*, No. 10-2401, 2012 WL 76059 (4th Cir. Jan. 11, 2012).

The Honduran petitioner in *Zelaya* was not a prosecution witness, but he claimed membership in a group consisting of those who have notified police of the MS-13's harassment tactics and have a specific tormentor within the gang. *Id.* at \*5. For resisting the gang, he had

suffered repeated beatings, death threats, and a shooting; when he reported the shooting to the police, they responded that they could not help because the MS-13 would harm them as well. He conceded that the Board's decision in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), was controlling, but claimed that under *Crespin-Valladares*, his putative social group was distinguishable from that in *S-E-G-*. The Fourth Circuit disagreed, finding that the petitioner is “under the misimpression” that *Crespin-Valladares* recognized that the complaining witness against the gangs is also part of the protected social group, along with members of his family. “Zelaya patently misreads *Crespin-Valladares* in this regard. Indeed, we made clear in *Crespin-Valladares* that the particular social group proposed by the alien family in that case did not include the family member who agreed to be the prosecutorial witness; rather, it only included the family members of such witness.” *Zelaya*, 2012 WL 76059, at \*6 (citing *Crespin-Valladares*, 632 F.3d at 125). The “critical problem” with the petitioner's proposed social group, the court concluded, is its lack of particularity: opposition to gangs is an “amorphous characteristic providing neither an adequate benchmark for determining group membership nor embodying a concrete trait that would readily identify a person as possessing such a characteristic.” *Id.*

The court's “clarification” of *Crespin-Valladares* was not without some hedging. Judge Floyd, concurring and with the agreement of Judge Davis, pointed out an apparent anomaly in the narrow reading of *Crespin-Valladares*: if the family members of prosecution witnesses are deemed members of a PSG, then the witnesses themselves—who are members of a group that is more particular and socially visible—should be protected as well. He nonetheless concurred in the judgment because the petitioner's group was broader and more amorphous than those who have actually testified for the government in formal prosecution of gang members. *Id.* at \*9.

The Tenth Circuit, in *Rivera-Barrientos v. Holder*, No. 10-9527, 2012 WL 75974 (10th Cir. Jan. 11, 2012), found that a claimed social group of women, aged 12 to 25, who resisted gang membership *did* have the requisite element of particularity under *Matter of S-E-G-*, but it lacked the element of social visibility. The petitioner, after repeatedly refusing to join MS-13, was abducted at knifepoint, beaten, and brutally raped by three of the gang members. The gang members released her with a threat that they would kill her and her mother if she

went to the police. For several days after the attack, gang members came to her house demanding to speak with her and repeating their intention to recruit her. The petitioner left El Salvador shortly after the attack.

The court affirmed the Board's holding that Rivera Barrientos's political opinion of opposition to the gangs was not a central reason for the attack. *Id.* at \*4 (citing *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010)). Substantial evidence supported the finding that she was harmed for refusing to join the gang, particularly the fact that after the attack, the gang members again pressured Rivera Barrientos to join the gang and later visited her house repeatedly, stating their intention of recruiting her. *Id.*

The court then considered the social group claim, rejecting the argument of the petitioner and the United Nations High Commissioner for Refugees ("UNHCR"), as amicus curiae, that the Board's requirement of "particularity" in *Matter of S-E-G-* is contrary to law. *Id.* at \*6. "[A]s a matter of logic, it is reasonable to read the statute as limiting its recognition of 'social groups' to those that can be defined with some specificity—to encourage amorphous definitions would likely yield inconsistent, arbitrary, and over broad results." *Id.* The proposed group, however, did meet the particularity requirement, because it defined a "discrete class of young persons sharing the past experience of having resisted gang recruitment." *Id.* at \*7. In addition, "the characteristics of gender and age are also susceptible to easy definition." *Id.*

The court determined, however, that the group was not socially visible, because members of society would not perceive "those with the characteristic in question as members of a social group." *Id.* \*8 (quoting *Matter of C-A-*, 23 I&N Dec. 951, 957 (BIA 2006)) (internal quotation mark omitted). The court noted that the Board looks for two necessary conditions in applying social visibility—that citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group and that the applicant's community is capable of identifying an individual as belonging to the group. *Id.* Thus the issue becomes whether individuals of the proposed social group suffer "more negative attention than the general public," *id.*, and whether "the shared characteristic of the group [is] generally [] recognizable by others in the community." *Id.* (quoting *Matter of S-E-G-*, 24 I&N Dec. at 586-87 (finding no societal perception

of a group where the record did "not suggest that victims of gang recruitment are exposed to more violence or human rights violations than other segments of society")) (internal quotation marks omitted).

Rivera Barrientos and the UNHCR argued that the court should follow the Seventh Circuit in rejecting the "recognizability" requirement as "unexplained and illogical." See *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009); *Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009). The court disagreed and dismissed the Seventh Circuit's interpretation as too narrow, finding "no need to interpret social visibility as demanding the relevant trait be visually or otherwise easily identified." *Rivera-Barrientos*, 2012 WL 75974, at \*9. The court therefore joined those circuits that have accepted the Board's social visibility test. See, e.g., *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007); *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006). But see *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 605-07 (3d Cir. 2011). A clear circuit split having emerged, it remains to be seen whether it will be resolved.

"CAT acquiescence" is an increasingly vexing topic for immigration jurists. Many CAT claims rest on fear of the actions of private actors, in countries where violence is endemic and police efforts to control that violence are less than fully effective. The standard of "willful blindness" on the part of government officials is now well established, but vexing questions remain when there is evidence that authorities do take serious and sincere steps to combat private actors such as gangs, drug cartels, and revolutionary militias and guerrillas. See Teresa Donovan, *The Convention Against Torture: When Does a Public Official Acquiesce to Torture Committed by a Third Party*, Immigration Law Advisor, Vol. 1, No. 3 (Mar. 2007); see also Sarah Cade, *Recent Developments in the Specific Intent Standard in Convention Against Torture Cases*, Immigration Law Advisor, Vol. 3, No. 1 (Jan. 2009).

In *Zelaya v. Holder*, the Fourth Circuit remanded the CAT issue, concluding that the Board had not explained why the credible evidence of beatings, threats, and shooting, coupled with the police refusal to intervene, did not establish that he faced a likelihood of torture to



which the authorities would be “willfully blind.” *Zelaya*, 2012 WL 76059, at \*8. “What is not clear to us . . . is why the police officer’s ultimate refusal to help Zelaya in any way . . . does not satisfy Zelaya’s burden of proving that it is more likely than not that if Zelaya is removed to Honduras, he would endure severe pain or suffering . . . with the awareness of the local police that this would take place and the breach of the local police’s legal responsibility to intervene to prevent it from happening.” *Id.* The Board, the court concluded, abused its discretion by failing to address this critical issue and by failing to give a reasoned explanation for why the facts of the case did not satisfy the standard of government acquiescence. *Id.*

Similar concerns animated the Third Circuit’s recent decision remanding a Colombian petitioner’s CAT claim to the Board. *Pieschacon-Villegas v. Att’y Gen. of U.S.*, No. 09-4719, 2011 WL 6016134 (3d Cir. Dec. 5, 2011). The petitioner, a convicted money launderer turned FBI confidential informant, was arrested upon return to Colombia in 2007 and detained for 22 days. He posited that his arrest—for nonpayment of a long-overdue fine—was a pretext for his assassination by the AUC paramilitary organization. A series of incidents on the day of his release—including the appearance of individuals he recognized as being with the AUC and the seizure of the an armored car that was sent by an associate to pick him up—led him to believe that his release was a police set-up to have him killed. In the meantime, four men who knew of his FBI cooperation were arrested and extradited to Colombia. The Immigration Judge denied the CAT claim, finding that despite evidence of government officials engaging in corrupt actions with impunity, any such actions are in contradiction to official government policy. Thus, any harm inflicted in *Pieschacon-Villegas* would result from the actions of rogue agents and not by or with the acquiescence of the Colombian Government. The Board affirmed, concluding that CAT protection does not extend to persons who fear entities the Government is unable or unwilling to control; the fact that officials are powerless to stop activity constituting torture does not establish that such officials are aware of such activity and have breached their duty to stop it. *Id.* at \*4.

The Third Circuit concluded that the Board made three legally incorrect statements “regarding different circumstances under which a government is not willfully blind and does not acquiesce: (1) when a government is unable to control the entities carrying out the torture;

(2) when a government actively opposes the entities that the applicant fears; and (3) when the only evidence is the existence of a pattern of flagrant or mass violations of human rights within the country.” *Id.* at \*6. To the first point, the court noted that a government’s ability to control groups engaged in torture “may be relevant to, but is not dispositive of, an assessment of willful blindness.” *Id.* at \*7 (citing *Silva-Rengifo v. Att’y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007)). On the second point, the court cited a prior decision where it stated, in the context of a CAT claim based on alleged torture by FARC, that “[t]he mere fact that the Colombian government is engaged in a protracted civil war with the FARC does not necessarily mean that it cannot remain willfully blind to the torturous acts of the FARC.” *Pieschacon-Villegas*, 2011 WL 6016134, at \*7 (quoting *Gomez-Zuluaga v. Att’y Gen. of U.S.*, 527 F.3d 330, 351 (3d Cir. 2008)) (internal quotation marks omitted). *Gomez-Zuluaga* held that there may be official tacit approval of certain acts of torture, even if the government is at war with FARC.

The court also clarified that while evidence of “gross, flagrant, or mass violations of human rights” is not sufficient to establish that a particular person will be in danger, *id.* (quoting the Board’s decision), such evidence is relevant, and that the Board must consider it along with the evidence presented by the petitioner that he and his family had been threatened because he was a “rat,” and that the FBI had cautioned his wife against returning to Colombia. This evidence, the court concluded, had not been sufficiently considered.

## Conclusion

We will soon know whether the fans of New York or New England will carry bragging rights into the off-season, thus allowing the rest of us to enjoy uninterrupted the joys of winter sports and the blessed recurrence of Spring Training. In the meantime, we will deal with the perennial issues of immigration law, perhaps better equipped by the decisions analyzed here.

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

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## RECENT COURT OPINIONS

### *Third Circuit:*

*Totimeh v. Att’y Gen. of U.S.*, Nos. 10-3939, 11-1998, 2012 WL 89580 (3d Cir. Jan. 12, 2012): Granting a petition for review, the Third Circuit reversed the Board’s

holding that the petitioner's conviction was for a crime involving moral turpitude ("CIMT") and vacated the order of removal. The petitioner entered the U.S. in July 1980 with a B-1 visa. After changing his status to F-1 student, the petitioner adjusted his status to that of lawful permanent resident ("LPR") in May 1983. In January 1988, he pled guilty to criminal sexual conduct in the 4th degree. After a 1995 predatory offender registration statute was enacted in Minnesota where the petitioner lived, he complied with the registration requirement until 1998, when he failed to register his move to a friend's apartment. In April 1998, he pled guilty to violation of the registration requirement. In October 2009, the petitioner was placed in removal proceedings and was charged with removability on two grounds. Based on the 1988 conviction, he was charged with having been convicted of a CIMT within 5 years of admission; he was further charged as having been convicted of two CIMTs not arising out of a single scheme of misconduct. At his removal hearing, the petitioner affirmed the factual allegation in the Notice to Appear that he was admitted in May 1983, and he further conceded that his 1988 conviction was for a CIMT. The Immigration Judge ruled that the petitioner was removable on both grounds, relying on the Board's precedent decision in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), in holding that the failure to register constituted a CIMT. Later, during the pendency of the removal proceedings, the petitioner sought to amend his date of entry to July 1980, which would have meant his 1988 conviction was not within 5 years of entry. However, because the petitioner failed to offer evidence in support of his claimed date of entry, the Immigration Judge did not amend the date and ordered removal based on the two grounds charged. The Board affirmed on appeal, relying on *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), in ruling that an adjustment of status qualifies as a date of admission under section 237(a)(2)(A)(i) of the Act. The Board concluded that whether the petitioner had entered earlier was moot, since his 1983 adjustment would nevertheless be viewed as his date of entry. The Board subsequently amended that view in *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), but nevertheless denied the petitioner's motion to reopen, which was based on his eventually obtaining evidence of his 1980 entry through a FOIA request. On petition for review, the Third Circuit did not accord *Chevron* deference to the Board's holding in *Tobar-Lobo*. The court adopted the view expressed by the Tenth Circuit in *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011), that the holding departs from longstanding precedent requiring

that CIMTs involve "intentional conduct, identifiable victims and actual harm, and are deemed wrong by society independent of any statutory prohibition." The court further noted that the Minnesota statute in question, as applied by State courts, involves "an offense that can be committed without intent, indeed simply by forgetfulness." The court also reversed the Board's ruling regarding the petitioner's date of entry, by relying on the Board's own precedent in *Alyazji*. Finally, the court rejected the Government's argument that because the petitioner had fallen out of valid student status in 1982, his subsequent adjustment of status constituted a "readmission," which superseded his original date of entry.

***Fifth Circuit:***

*Perez-Gonzalez v. Holder*, No. 10-60798, 2012 WL 94333 (5th Cir. Jan. 12, 2012): The Fifth Circuit granted the petition for review and reversed the Board's decision holding that the petitioner's State conviction for sexual intercourse without consent under section 35-5-503(1) of the Montana Code Annotated was for an aggravated felony, and it remanded for further proceedings. The court noted that although the definition of an aggravated felony in the Act includes rape, that term has not been defined by the Act or the Board. The court therefore undertook an analysis to reach the "commonly understood legal meaning" of the term. The court concluded that at the time "rape" was added to the Act as an aggravated felony, Congress interpreted the term as remaining close to its common law definition. Applying the categorical approach, the Fifth Circuit concluded that the Montana statute included a broader range of conduct than that encompassed by the definitions of rape in the majority of States. The court noted that the Montana statute contained three subsections, at least one of which did not fall within the general meaning of the term "rape," and it thus concluded that there was a realistic possibility that the petitioner pled guilty to a crime that would not be considered rape under Federal law. Under the modified categorical analysis, the court found that the record contained only two documents that could be considered: the charging document and the judge's order accepting the petitioner's guilty plea. The court held that the sparse details contained in these documents were insufficient to determine under which subsection the petitioner pled guilty. Therefore, finding that the petitioner did not necessarily plead guilty to a crime that could be characterized as rape under section 101(a)(43) of the Act, the court reversed and remanded to the Board.

*Rodriguez-Manzano v. Holder*, No. 09-60795, 2012 WL 34070 (5th Cir. Jan. 9, 2012): The Fifth Circuit affirmed the Board's denial of the petitioner's motion to reopen proceedings but reversed the denial of his subsequent motion for reconsideration. The petitioner had been ordered deported in absentia in 1988. He moved to reopen nearly 20 years later through new counsel, claiming ineffective assistance of prior counsel. The motion was denied by the Immigration Judge because of the petitioner's failure to comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The Board affirmed, and the petitioner filed a timely petition for review with the circuit court. The petitioner also filed a motion with the Board requesting reconsideration or, in the alternative, sua sponte reopening. The second motion contained evidence that subsequent to the Board's decision, the petitioner complied with the *Lozada* requirements. The second motion additionally explained that his previous failure to comply was because of his inability to locate his prior counsel, who it turned out was not a licensed attorney and no longer resided in the U.S. Although finding that the petitioner had now complied with *Lozada*, the Board nevertheless dismissed the motion, holding that the petitioner had failed to show due diligence in pursuing the matter. Regarding the initial motion to reopen, the Fifth Circuit rejected the argument that compliance with the second requirement of *Lozada* was excused by the fact that it would serve no bona fide interest in light of prior counsel's departure from the country, observing its prior rejection of "similar arguments for a flexible approach to *Lozada*." However, the court held that the Board had abused its discretion in denying the motion to reconsider for lack of due diligence, stating that *Lozada* imposes no due diligence requirement. It further found the imposition of such a requirement to be contrary to the Board's own precedent in *Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999), holding that current time limits on motions to reopen may not be applied retroactively to motions to reopen deportation proceedings commenced prior to 1992. The court therefore reversed the Board's denial of the second motion and remanded for further proceedings.

#### ***Ninth Circuit:***

*United States v. Melendez-Castro*, No. 10-50620, 2012 WL 130348 (9th Cir. Jan. 18, 2012): In a case arising in the criminal context, the Ninth Circuit remanded an appeal from a conviction in Federal district court for illegal reentry after deportation under section 276(b) of the Act,

8 U.S.C. § 1326(b). The petitioner, a permanent resident since 1988, was placed into removal proceedings in 1997 for having been convicted of two petty theft offenses (the court noted that the first involved the theft of three pairs of boxer shorts valued at \$6). At his removal hearing, the petitioner (appearing pro se) chose not to apply for cancellation of removal. He then declined to apply for voluntary departure after the Immigration Judge informed him that his application would be denied in discretion on the basis of his criminal record. The petitioner thus accepted his order of removal as final and was deported to Mexico the same day. The petitioner subsequently returned to the U.S. and in June 2010, was indicted for illegal reentry after deportation. His motion to dismiss based on his invalid deportation was denied, and he was convicted by jury and sentenced to 33 months' custody. On appeal, the Ninth Circuit noted that an alien is barred from collaterally attacking his underlying removal order if he validly waived the right to appeal the order during his removal proceedings. However, the court held that the petitioner's waiver was neither "intelligent" nor "knowing" because of an underlying defect in the removal proceedings. Specifically, the court held that the petitioner was not meaningfully advised of his right to apply for voluntary departure because of the Immigration Judge's explanation that his application would be futile. Finding the district court's conclusion that there was no due process violation to be error, the court remanded the record for a determination of whether the petitioner had established prejudice.

*Chettiar v. Holder*, Nos. 08-70035, 08-73865, 2012 WL 118573 (9th Cir. Jan. 17, 2012): The Ninth Circuit denied in part and dismissed in part a petition for review from the Board's decision upholding the U.S. Citizenship and Immigration Service's ("CIS") denial of an I-751 (Petition to Remove Conditions on Residence). The petitioner was admitted to the country as a conditional resident based on his marriage to a U.S. citizen. He filed a timely I-751 with the CIS California Service Center, which then referred the petition to the CIS district office in Reno, Nevada, after finding insufficient evidence of a bona fide marriage. After interviewing the petitioner and his wife in December 2004, the CIS scheduled a second interview in April 2005 based on insufficient documentation by the couple. The CIS denied the petitioner's request to reschedule the interview and transfer the case to a CIS office near his new home in California. When the petitioner and his spouse failed to appear for the second



interview in Reno, the CIS denied the petition, concluding that the marriage was fraudulent. Before the Immigration Judge, the petitioner did not contest the merits of the CIS decision. Rather, he moved to terminate, claiming that the CIS violated section 216A(c)(3)(A) of the Act by failing to decide his I-751 petition within 90 days of the initial interview. The Immigration Judge denied the motion and ordered the petitioner removed. On appeal, the Board affirmed, rejecting the petitioner's statutory argument upon concluding that the 90-day clock did not start running after the first scheduled interview where the CIS did not intend it to be the final interview. The Board also dismissed the petitioner's argument that the CIS's failure to reschedule and change venue to California was a "gross abuse of discretion," because the petitioner's spouse continued to reside in Nevada and the petitioner had been willing and able to travel there for the first interview. The Ninth Circuit agreed with the Board on the 90-day issue, holding that the most logical interpretation of the statute would start the clock at the conclusion of the interview process, not at its commencement. The court further held that it lacked jurisdiction to consider the petitioner's claim that CIS violated his right to procedural due process by failing to provide him with a reasonable opportunity to participate in a second interview, because that argument was not raised at the administrative level.

#### ***Tenth Circuit:***

*Zhi Wei Pang v. Holder*, No. 10-9570, 2012 WL 28950 (10th Cir. Jan. 6, 2012): The Tenth Circuit denied the petition for review of an Immigration Judge's denial of asylum, which was upheld by the Board. The petitioner, a native of China, claimed that he suffered past persecution when Chinese Government officials fined him 3,000 RMB (the equivalent of 5 years' income) for violating family planning policies by having a second child without permission. The petitioner stated that his second child was officially recognized by the Government after he paid half of the fine; 14 months later, officials confiscated his home entertainment equipment after he was unable to pay the remainder. The petitioner, who entered the U.S. in 1993, sends \$2,000 to \$3,000 per month to his wife, who continues to live on and farm the same government-issued land that the petitioner himself had farmed in China. The Board found that the fine did not constitute persecution, observing that it was unclear how the payment impacted his standard of living. Affirming the Board, the court found that the penalty imposed did not jeopardize the petitioner's life or freedom, and he did not experience any large-scale confiscation of property based on his political

opinion. The court noted that the petitioner's family seemed to have maintained the same standard of living as rice farmers, because the wife continues to live on and farm the same state-owned plot of land. The court also distinguished the instant facts from a Ninth Circuit case cited by the petitioner, *Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010), noting that, unlike *Jiang*, the petitioner was assessed a smaller fine and was never detained and forced into hiding to avoid arrest. To the contrary, he was allowed to continue to farm on government land.

## BIA PRECEDENT DECISIONS

**I**n *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012), the Board considered whether the respondent was barred from establishing eligibility for asylum as an alien convicted of an aggravated felony under section 101(a)(43)(I) of the Act, based on his possession of child pornography in violation of California Penal Code § 311.11(a), which criminalizes the knowing possession or control of any image or film depicting a person under 18 engaging in or simulating sexual conduct. The Board also considered whether the offense is a "particularly serious crime," which renders an alien convicted of the offense ineligible for withholding of removal.

Section 101(a)(43)(I) of the Act includes within the definition of an aggravated felony an offense "described in" 18 U.S.C. § 2252. Finding that the offense of conviction was described in 18 U.S.C. § 2252(a)(4)(6), which proscribes the knowing possession of child pornography, the Board held that the respondent had been convicted of an aggravated felony and was precluded from obtaining asylum under sections 208(b)(2)(A)(ii) and (B)(i) of the Act.

The Board then considered whether the respondent's conviction was for a particularly serious crime. Employing a case-by-case analysis, the Board examined the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction. Thus, the Board reviewed the following facts—law enforcement officers seized two computers from the respondent's residence containing multiple images and videos of child pornography; the respondent admitted during immigration proceedings that he told police he knew child pornography was on the computers; he testified that a friend was responsible for downloading the images but admitted that the friend had access to only



one of his computers; the respondent pled no contest to possession of child pornography, for which he was sentenced to 280 days in prison and 3 years' probation; and he was required to register as a sex offender.

Based on the nature of the crime and the individual factual circumstances of the conviction, the Board concluded that the respondent's crime was a particularly serious one. The Board pointed out that child pornography is intrinsically a serious offense directly related to the sexual abuse of children. Observing that the respondent's conviction was for possession, rather than production or dissemination of child pornography, the Board determined that his offense was not per se particularly serious. However, it rejected the Immigration Judge's reasoning that the children depicted in the numerous images and videos had already been victimized before the respondent downloaded the pornography for his personal use. Stating that child pornography creates a permanent record of a child's abuse and that its circulation creates continuing harm to the child's reputation and emotional well-being, the Board found that even if the respondent had never physically harmed a child, his actions of downloading child pornography for his personal use contributed to the sexual abuse of children.

Recognizing that the respondent's sentence of 280 days in prison and 3 years' probation was less than he could have received, the Board noted that the sentence was not "light" and that the severity of an offense is not always reflected in the length of the sentence. The Board concluded that the "condemnable" nature of the respondent's offense was more significant than the term of the sentence. The Board also pointed out that the potential of future violence by the respondent is not dispositive in a particularly serious crime analysis, where the focus is on the nature of the crime, rather than the likelihood of prospective serious misconduct. Additionally, the Board stated that while an offense is more likely to be particularly serious when directed against a person, the element of violence is not a requirement in finding an offense to be a particularly serious crime.

The Board held that child pornography, by its nature, is a serious offense because of the life-long adverse effects to its victims, who are among society's most vulnerable members. Finding that the respondent's crime of downloading numerous images and videos of child pornography for his personal use was a particularly

serious crime, the Board concluded that he was ineligible for withholding of removal under section 241(b)(3)(B)(ii) of the Act. The record was remanded for consideration of the respondent's application for protection under the Convention Against Torture.

In *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012), the Board considered the issue of firm resettlement in deciding both an appeal by the Department of Homeland Security ("DHS") challenging an Immigration Judge's grant of asylum to the female respondent and the male respondent's appeal from the denial of his asylum application. The Immigration Judge had found that the female respondent was not firmly resettled in Belize prior to her arrival in the United States and thus was not ineligible for asylum, but that the male respondent had been firmly resettled and was barred from that relief.

Applying the framework announced in *Matter of A-G-G-*, 25 I&N Dec. 486, 500-03 (BIA 2011), the Board found that the DHS presented prima facie evidence that the female respondent had an offer of firm resettlement in the form of a Permit to Reside in Belize, which allowed her to live there and travel in and out of the country. The female respondent was able to obtain a nonimmigrant visa to visit the United States by presenting the permit, along with her Chinese passport, and she returned to Belize utilizing the permit.

Proceeding to the next step in the *Matter of A-G-G-* analysis, the Board rejected the respondents' attempt to rebut the DHS's prima facie showing of firm resettlement by arguing that they obtained their Belize permits through fraud. The Board observed the well-settled law that an alien is not faulted for using fraudulent documents to escape persecution and seek asylum in the United States. However, it noted that the issue here was not the fraudulent nature of the documents, but the fact that the respondents used them to firmly resettle in a third country where they were not at risk of persecution. In this regard, the Board pointed to circuit court law rejecting claims that an alien's fraudulently obtained resident status in a third country should undercut a finding of firm resettlement. Further observing that aliens who obtained an immigration status by fraud should not be allowed to disavow that status in order to claim eligibility for another form of relief, the Board concluded that the respondents had not rebutted the DHS's prima facie evidence of firm resettlement.

In the third step, the Board considered the totality of the evidence and concluded that the female respondent's relatively short residence in Belize and her lack of employment did not rebut the DHS's evidence of an offer of firm resettlement, in this case, the facially valid permit. The Board also found unavailing the female respondent's argument that she obtained the permit to transit through Belize to seek asylum in the United States, since she traveled to the United States from Belize and voluntarily returned there.

In the final step of the *Matter of A-G-G* analysis, the Board found that the female respondent did not establish that an exception to firm resettlement was applicable since she did not demonstrate that she entered Belize as a necessary consequence of her flight from persecution, that she remained there only as long as necessary to arrange onward travel, and that she did not establish significant ties in Belize. According to the Board, the female respondent also did not demonstrate that the conditions of her residence were so restrictive that she was not, in fact, resettled. Thus, concluding that the female respondent had been firmly resettled in Belize and was subject to the mandatory bar to asylum under section 208(b)(2)(A)(vi) of the Act, the Board sustained the DHS's appeal but remanded the record for consideration of her eligibility for withholding of removal under section 241(b)(3) of the Act.

For the same reasons stated regarding the female respondent, the Board concluded that that the male respondent had been firmly resettled in Belize, as indicated by his facially valid permit to reside there and his inability to establish an exception to rebut the presumption of firm resettlement. Although his appeal was dismissed, the male respondent had been granted withholding of removal, which the DHS did not appeal.

In *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012), which arose in the Fourth Circuit, the Board addressed the question whether Ninth Circuit law reversing a Board precedent was controlling. The respondent had been convicted of a stalking offense for harassing conduct in violation of section 646.9(b) of the California Penal Code and was charged under section 212(a)(2)(A)(i)(I) of the Act as an alien who was removable based on his conviction for a crime involving moral turpitude. The Immigration Judge found the respondent removable but,

after concluding that he had not been convicted of an aggravated felony offense, granted his application for a waiver under section 212(h) of the Act. The Immigration Judge noted the Board's decision in *Matter of Malta*, 23 I&N Dec. 656 (BIA 2004), which held that the same stalking offense under California law was a crime of violence under section 101(a)(43)(F) of the Act. However, the Immigration Judge concluded that *Matter of Malta* was not binding because it had been overturned by the Ninth Circuit in *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007).

The Board held that while it applies the law of the circuit in whose jurisdiction a case arises, it is not bound to follow a decision of a court of appeals in a different circuit. The Board noted that one of its primary purposes was to establish a uniform interpretation of law in cases adjudicated by Immigration Judges and the Board, and it stated that whether or not its precedent was binding should not turn on the actions of the circuit court reviewing the published decision. Reasoning that if a decision in one circuit reversing Board precedent were universally applied, then a court decision upholding a Board precedent should similarly be applied across the circuits, the Board declined to follow such a rule, noting that Congress has not created such a system.

The Board also rejected the respondent's argument that 28 U.S.C. § 2342 mandates that the Ninth Circuit's ruling in *Malta-Espinoza v. Gonzales* should control. The Board reasoned that the statute, which provides that a court of appeals has exclusive jurisdiction to set aside or determine the validity of an agency's decision, does not purport to make binding on any other circuits a court of appeals decision regarding a Board precedent decision. Thus, the Board concluded that it would not apply the Ninth Circuit's decision reversing the Board's precedent in a case arising in the Fourth Circuit.

The Board pointed out developments occurring since *Matter of Malta* was issued, including amendments to section 646.9(b), that it found did not alter its prior analysis of the statute. Additionally, the Supreme Court had developed a line of jurisprudence regarding crimes of violence, issuing authority that supported *Matter of Malta*. Concluding that its own analysis in *Matter of Malta* was sound, the Board applied it to the respondent in this case.

The Board explained that in *Matter of Malta* it found that the offense of stalking in the form of harassment under section 646.9(b) involved a substantial risk that physical force may be used in committing the crime and that the force would be used “at least recklessly.” The Board noted that the Ninth Circuit reversed that decision in *Malta-Espinoza v. Gonzales* but pointed out that subsequently the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), clarified that 18 U.S.C. § 16(b) covered offenses where the perpetrator exhibited “reckless disregard” of the risk that physical force might be used in the crime. The Court explained that the critical inquiry was not the mens rea required for conviction of the crime, but whether the offense, by its nature, involves a substantial risk of the use of force. The Board concluded that a risk of the intentional use of force inheres in a violation of section 646.9, so that it was a crime of violence as contemplated by 18 U.S.C. § 16(b). Reaffirming its holding in *Matter of Malta*, the Board determined that it would adhere to that decision in cases arising outside of the Ninth Circuit and found that the respondent had been convicted of a crime of violence, which rendered him ineligible for a section 212(h) waiver.

In *Matter of J. R. Velasquez*, 25 I&N Dec. 680 (BIA 2012), the Board addressed the issue of what documents are admissible as evidence of a criminal conviction. The respondent was charged with removability as an alien convicted of two or more crimes involving moral turpitude under section 237(a)(2)(A)(ii) of the Act, based on convictions for receipt of stolen property and sexual battery under Virginia law. The Department of Homeland Security (“DHS”) submitted a certified copy of a county district court document, which included a judgment signed by a judge reflecting that the respondent pled guilty to and was convicted of receiving stolen property. The Board held that the document was conclusively admissible as valid evidence of a criminal conviction because a judgment serves as proof of a conviction pursuant to section 240(c)(3)(B)(i) of the Act, and it was certified by the county court clerk as a true copy of the original, as specified in 8 C.F.R. §§ 287.6(a) and 1003.41(a)(1) and (b).

As evidence of the respondent’s conviction for sexual battery, the DHS presented a document designated as a Disposition Notice issued by a county district court. The document was in the nature of an abstract of judgment, a type of document normally admissible to prove a conviction pursuant to section 240(c)(3)(B)(v) of the Act and 8 C.F.R. § 1003.41(a)(5).

However, it was submitted electronically and was not certified or accompanied by a written attestation by an immigration officer as to its authenticity.

The Immigration Judge had determined that although the Disposition Notice was not certified in accordance with 8 C.F.R. § 1003.41(c)(1) or (2), it was admissible under the “catch-all” provision at 8 C.F.R. § 1003.41(d), which provides that “[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.” The Board pointed out that while the relevant inquiry in determining the admissibility of a conviction record ordinarily is whether the respondent has had due process or whether the criminal record correctly reflects the facts, in section 240(c)(3)(B) of the Act Congress enumerated certain types of conviction documents, or certified copies thereof, that are categorically admissible in removal proceedings. As the Board noted, 8 C.F.R. § 1003.41(b) also provides that *a copy* of any enumerated conviction document or record is admissible if it is authenticated by the attestation of either the official having legal custody of the original record or an authorized deputy, *or* an immigration officer, that it is a true and correct copy of the original. The regulatory framework further provides that *an electronically transmitted document* is conclusively admissible if authenticated by written certification from *both* the official with custody of the original *and* a qualified DHS official pursuant to section 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41(c).

Stating that the methods of authentication described in section 240(c)(3)(C) and 8 C.F.R. § 1003.41 are not “mandatory or exclusive,” but serve as a “safe harbor” to set forth the conditions under which conviction documents *must be* admitted, the Board noted that Immigration Judges may also admit documents authenticated by other methods if found to be reliable. However, the Disposition Notice submitted by the DHS as proof of the respondent’s sexual battery conviction was not authenticated by any method, and its proffer by the Government alone was insufficient to establish its inadmissibility.

Examining the purpose and effect of the “catch-all” provision at 8 C.F.R. § 1003.41(d), the Board rejected the position of the Immigration Judge and the DHS that the documents referenced in 8 C.F.R. § 1003.41(c) and 240(c)(3)(B) of the Act, including those submitted electronically, could be admitted without

authentication because they reasonably indicate the existence of a criminal conviction. The Board reviewed the regulatory history and found no intent to create an exception to the general authentication requirement, observing that such an interpretation would render meaningless the methods of authentication set forth in the contemporaneously promulgated regulations at 8 C.F.R. §§ 1003.41(b) and (c). The history reflects, instead, that 1003.41(d) was promulgated to clarify that the list of documents in 8 C.F.R. § 1003.41(a) is not exhaustive and that other evidence may be used to establish a criminal conviction if an Immigration Judge deems it probative and relevant. The Board formally adopted this rule and added that other documents, such as an appellate court decision affirming or referencing a conviction, likely would fall within the 8 C.F.R. § 1003.41(d) catch-all provision.

The Board concluded that the DHS's certified copy of the respondent's receipt of stolen property conviction was admissible as proof of the conviction. However, the uncertified electronic copy of the respondent's sexual battery conviction record was inadmissible as proof of the conviction because it lacked authentication by any method. Therefore the charge that the respondent was removable as an alien convicted of two crimes involving moral turpitude under section 237(a)(2)(A)(ii) was not sustained.

## REGULATORY UPDATE

**76 Fed. Reg. 1710 (Jan. 11, 2012)**

DEPARTMENT OF HOMELAND SECURITY

### **Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries**

Action: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of El Salvador for temporary protected status (TPS) for 18 months from its current expiration date of March 9, 2012 through September 9, 2013. The Secretary has determined that an extension is warranted because the conditions in El Salvador that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in

2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals.

This Notice also sets forth procedures necessary for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) (Forms I-766) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of El Salvador and whose applications have been granted or remain pending. Certain nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

USCIS will issue new EADs with a September 9, 2013 expiration date to eligible Salvadoran TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that all re-registrants may not receive new EADs until after their current EADs expire on March 9, 2012. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of El Salvador for 6 months, through September 9, 2012, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Form I-9 and E-Verify processes.

DATES: The 18-month extension of the TPS designation of El Salvador is effective March 10, 2012 and will remain in effect through September 9, 2013. The 60-day re-registration period begins January 9, 2012 and will remain in effect until March 9, 2012.

**76 Fed. Reg. 2011 (Jan. 13, 2012)**

DEPARTMENT OF JUSTICE

8 CFR Parts 1003 and 1292

### **Reorganization of Regulations on the Adjudication of Department of Homeland Security Practitioner Disciplinary Cases**

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Justice is amending its regulations governing the discipline of immigration practitioners as follows. First, the Department is



removing unnecessary regulations and adding appropriate references to applicable regulations of the Department of Homeland Security (DHS). Second, the Department is making technical amendments to the Executive Office for Immigration Review's (EOIR) practitioner disciplinary regulations and clarifying the Department of Justice's final rule on Professional Conduct for Practitioners— Rules and Procedures, and Representation and Appearances, which became effective on January 20, 2009.

DATES: Effective date: This rule is effective January 13, 2012.

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### **The Expanded Bond:** *continued*

To begin, in *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), the Ninth Circuit extended the individualized bond hearing mandate of *Casas-Castrillon* to both (1) aliens challenging the denial of motions to reopen through petitions for review who are detained under section 241(a)(6) of the Act, and (2) aliens who are not lawful permanent residents. While recognizing that “there are shades of difference” between aliens detained under sections 236(a) and 241(a)(6) of the Act, *Diouf II* ultimately held that “[t]he distinctions between [the provisions] . . . are not substantial enough to justify denying a bond hearing to all aliens subject to extended detention under [section 241(a)(6)],” given that “[b]oth may be detained for prolonged periods; both may succeed in setting aside their orders of removal; and both may be detained without bond when necessary to ensure their availability for removal.” *Diouf II*, 634 F.3d at 1087-88. Having determined that aliens detained under sections 236(a) and 241(a)(6) are “similarly situated,” *id.* at 1088, the court, perhaps not surprisingly, next rejected the Government’s argument that the holding in “*Casas-Castrillon* [was] distinguishable because *Diouf* was an admitted alien before he was ordered removed, whereas the alien in *Casas-Castrillon* was a legal permanent resident.” *Id.* While recognizing that aliens who are lawful permanent residents have greater protection than those who are not, the Ninth Circuit, invoking the “lowest common denominator” canon of statutory interpretation set forth in *Clark v. Martinez*, 543 U.S. 371, 380 (2005),<sup>4</sup> held that it was required to apply section 241(a)(6) of the Act to all aliens identically, without regard to the immigration status of the particular alien at issue.

*Diouf II* also clarified that the 6-month presumption of “prolonged detention” that triggers a *Casas* hearing is not an inflexible deadline. Rather, the court made clear

that “detention is prolonged when it has lasted six months and is *expected to continue more than minimally beyond six months.*” *Diouf II*, 634 F.3d at 1092 n.13 (emphasis added); *see also id.* (“If the 180-day threshold has been crossed, but the alien’s release or removal is imminent, DHS is not required to conduct a 180-day review, and neither should the government be required to afford the alien a hearing before an immigration judge.” (citation omitted)). The court likewise emphasized that the “DHS should be encouraged to afford an alien a hearing before an immigration judge *before* the 180-day threshold has been reached if it is practical to do so and it has already become clear that the alien is facing prolonged detention.” *Id.* (“When, for example, this court grants a stay of removal in connection with an alien’s petition for review from a denial of a motion to reopen, the alien’s prolonged detention becomes a near certainty.”).

Just weeks later, in *Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011), the Ninth Circuit took the opportunity to address the various “procedures that must be followed in [*Casas*] hearings to comport with due process.” In particular, *Singh* held in regard to *Casas* bond proceedings that (1) “the clear and convincing evidence standard of proof applies;” (2) a contemporaneous record of the hearing must be created; and (3) Federal district courts have habeas corpus jurisdiction under 28 U.S.C. § 2241 to review these final bond determinations for “constitutional claims and legal error.” *Id.* at 1205, 1208. Perhaps as important, *Singh* made it clear that when assessing the prongs of “danger” and “flight risk,” Immigration Judges must faithfully apply the *Matter of Guerra* factors while specifically considering the “recency and severity” of an alien’s criminal history. *Id.* at 1206. As is the case with a bond hearing governed by section 236(a) of the Act, *Singh* held that in a *Casas* hearing Immigration Judges may rely “upon any information that is available . . . or that is presented . . . by the alien or the [DHS].” 8 C.F.R. § 1003.19(d).

*Singh* also rejected the argument that DHS must prove an alien “is ‘a specially dangerous person’ to justify denial of bond.” *Singh*, 638 F.3d at 1206-07. In particular, the Ninth Circuit noted that unlike the aliens in *Zadvydas* and *Clark*, who were subjected to “indefinite detention” in a “removable-but-unremovable limbo,” *id.* at 1207 (internal quotation marks omitted), *Singh*’s country of origin, Fiji, (1) did not lack a repatriation treaty with the United States or (2) refuse to accept his removal. *Id.* Consequently, because *Singh* was only

subject to “prolonged detention” —as opposed to a more severe “indefinite detention”—an individualized hearing governed by the standards set forth in *Matter of Guerra* was constitutionally sufficient. *Id.*

Most recently, in *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011), the Ninth Circuit held that an alien must first appeal a *Casas* bond decision to the Board before seeking habeas corpus relief in a district court. Thus, even though there is no regulation explicitly vesting the Board with jurisdiction to consider *Casas* hearing appeals, *Leonardo*—without addressing the nonexistent regulatory structure—has resolved that an alien must seek review of a *Casas* hearing with the Board prior to filing a petition of habeas corpus in a Federal district court.

### **Summarizing the Current *Casas* Hearing Framework**

To simplify, under the Ninth Circuit’s current framework, an alien (whether or not a lawful permanent resident) who (1) has filed a Ninth Circuit petition for review of a final order of removal, or who is detained under section 241(a)(6) of the Act<sup>5</sup> and has filed a petition for review challenging a motion to reopen; (2) has obtained a stay of removal in conjunction with that petition; and (3) has been in custody in excess of the 6-month “presumptively reasonable period of detention,”<sup>6</sup> *Diouf II*, 634 F.3d at 1091, is entitled to an individualized bond hearing before an Immigration Judge where DHS “must meet a clear and convincing evidence standard of proof.”<sup>7</sup> *Singh*, 638 F.3d at 1207.

Whether these post-final bond hearings will provide a significant benefit to many aliens is less than certain and requires an individualized analysis. For instance, an aggravated felon alien with a recent criminal history previously detained under section 236(c)(1)(B) of the Act faces a significant prospect of being considered a danger to persons or property. *See Demore*, 538 U.S. at 515 (stating that the purpose of section 236(c) of the Act is “(1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens”). Even if an alien is found to be a danger, an individual with a final administrative order of removal obviously is a greater flight risk than one who is contesting removability or pursuing relief from removal in Immigration Court. *See Diouf II*, 634 F.3d at 1087 (recognizing that “an alien’s incentive to flee may increase as the removal date approaches”). Still, with *Casas* hearings now occurring on a daily basis, an understanding of the

procedural rules governing these hearings is imperative. Here are the basics:

- *Recording Requirement:* In *Casas* bond proceedings, the Immigration Judge must create a contemporaneous record of the hearing. *See Singh*, 638 F.3d at 1208. This rule is contrary to the procedure that applies to bond hearings occurring during removal proceedings. *See* Immigration Court Practice Manual, Chapter 9.3(e)(iii), at 126 (Apr. 1, 2008) (“Bond hearings are generally not recorded.”). Thus, an unrecorded section 236(a) bond hearing provided to an alien during the pendency of the removal proceeding is insufficient to satisfy the standard for a *Casas* hearing.
- *Burden of Proof:* The DHS has the burden to prove by clear and convincing evidence that the alien should not be released because he is a danger to the community or a flight risk. *See Singh*, 638 F.3d at 1205. This, too, is contrary and, in fact, the inverse of the standard applicable during a bond hearing that occurs prior to a final administrative order. *See* 8 C.F.R. § 1236.1(c)(8). Consequently, a bond hearing provided under section 236(a) of the Act during a removal proceeding may not serve to comply with the *Casas* framework. For example, the fact that an alien previously failed to establish he was not a danger does not necessarily mean the DHS will be able to prove that the alien is a danger at a *Casas* hearing.
- *Application of Matter of Guerra:* Like bond hearings conducted during removal proceedings, *Casas* hearings require scrutiny of the factors set forth in *Matter of Guerra*. When addressing whether an alien is a danger to persons or property, there must be a focus on “the recency and severity of the offenses” while keeping in mind *Singh*’s instruction that “not all criminal convictions conclusively establish that an alien presents a danger.” *Singh*, 638 F.3d at 1206. Similarly, the fact that an alien is subject to an administratively final order, while obviously important, is not sufficient by itself to support a finding that an alien is a flight risk who warrants detention without bond. *See id.* at 1205 (“Although [the final administrative order] is a relevant factor in the calculus, it alone does not constitute clear and convincing evidence that *Singh* presented a flight risk justifying denial of bond.”).
- *Consideration of All Evidence:* In adjudicating *Casas* bonds, an Immigration Judge may continue to rely “upon any information that is available . . . or that

is presented to him or her by the alien or the [DHS].” 8 C.F.R. § 1003.19(d); *Singh*, 638 F.3d at 1210 (stating that it was permissible for an Immigration Judge to rely on an “unauthenticated RAP sheet”).

### Conclusion

Given the increasing complexity of immigration cases as well as the number of aliens seeking review in the circuit courts of appeal, it is no surprise that cases involving detained aliens will take some time to work their way through the administrative process and the courts. By requiring *Casas* hearings, the Ninth Circuit has invoked the doctrine of constitutional avoidance and applied the principles in *Zadvydas* governing “indefinite detention” to aliens subject to “prolonged detention.” Perhaps as significant, the Ninth Circuit has enlisted Immigration Judges as bond hearing adjudicators and mandated that aliens challenge *Casas* hearing decisions by seeking an appeal with the Board before pursuing habeas relief.

Without doubt, *Casas* hearings, while a benefit to some aliens, place a burden on Immigration Judges and the Board by imposing a brand new array of bond cases that must be adjudicated. Although only the Ninth Circuit has mandated *Casas* hearings for aliens subject to prolonged detention, other circuits have begun to hold that aliens detained for prolonged periods are entitled to some form of an individualized hearing by the authorities. *See, e.g., Diop v. ICE/Homeland Security*, 656 F.3d 221, 231 (3d Cir. 2011). It remains uncertain whether other circuit courts of appeals will similarly adopt a framework that involves the participation of the Immigration Judges and the Board in the post-final order custody review process. As this area of law continues to develop, adjudicators must continue to familiarize themselves with the applicable circuit precedent addressing the role of EOIR in determining custody conditions, even where such responsibilities fall outside the jurisdictional framework circumscribed by the statute and the regulations.

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1. A regulatory exception to the jurisdictional bar precluding Immigration Judges from reviewing the detention of aliens subject to final orders of removal is set forth at 8 C.F.R. § 1241.14. This regulation, promulgated in light of *Zadvydas v. Davis*, 533 U.S. 678 (2001), authorizes Immigration Judges to conduct “Continued Detention Review” hearings of DHS “special dangerousness” determinations with respect to aliens who are subject to “indefinite detention” under section 241(a)(6) of the Act, 8 U.S.C. § 1231(a)(6), i.e., “where there is no significant likelihood of removal in the reasonably foreseeable future.” 8 C.F.R. § 1241.14(a)(1).

2. Prior to 1954, only the District Director of the Immigration and Naturalization Service (“INS”) was empowered to determine the custody conditions of aliens. *See Matter of Toscano-Rivas*, 14 I&N Dec. 523, 526 (BIA 1973). Authority to review INS District Director decisions was conferred on the Board of Immigration Appeals in 1954 and later on Immigration Judges (then referred to as special inquiry officers) in 1969. *See id.* Even then, “once [an] alien [was] notified to surrender for deportation and [was] taken into custody for that purpose,” an Immigration Judge was foreclosed from reviewing the custody decision of the INS District Director. *Matter of Kwun*, 13 I&N Dec. 457, 475 (BIA 1969, 1970).

3. Pursuant to Ninth Circuit General Order 6.4(c)(1), every alien who files a petition for review accompanied by a motion for a stay of removal receives a temporary stay of removal until the court rules on the motion. *See De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997).

4. *See generally Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009) (“Under *Clark v. Martinez*, where a provision of immigration law applies to both nonadmitted and admitted aliens, it must be interpreted the same way as to both classes of aliens.” (citation omitted)).

5. Aliens with petitions for review challenging the denial of motions to reopen are not entitled to *Casas* bond hearings unless detained under section 241(a)(6) of the Act. *See Rodriguez*, 591 F.3d at 1116 (“[D]etention pursuant to Section [241](a)(2) poses no due process issues, regardless of whether removal of the detained alien is foreseeable, because the statute authorizes detention for only the ninety-day removal period and therefore does not create any danger of unconstitutionally indefinite detention.”). Realistically, it will be a rare case that an alien has been subjected to prolonged detention (i.e., in custody for more than 180 days) that is still within the 90-day removal period that occurs before detention shifts to section 241(a)(6) of the Act.

6. For aliens detained under section 241(a)(6) of the Act, the 6-month clock appears to start with the beginning of the section 241(a)(1) statutory removal period. *See Diouf II*, 634 F.3d at 1091; *see also Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1102 n.5 (9th Cir. 2001) (stating that *Zadvydas* permits a detention period “of six months after a final order of removal—that is, three months after the statutory removal period has ended”).

7. It remains uncertain whether *Diouf II*'s expansion of *Casas-Castrillon* permits all aliens subject to prolonged detention with stays of removal and petitions for review challenging agency decisions to receive *Casas* bonds. In particular, the Ninth Circuit has not yet specifically addressed whether all aliens detained under section 241(a)(6) of the Act challenging agency action other than motions to reopen—such as asylum/withholding only proceedings, expedited removals, and orders reinstating prior removal orders—are entitled to *Casas* hearings. To be sure, at least a portion of *Diouf II*'s holding hinged on the “importance of motions to reopen in safeguarding immigrants’ rights.” *Diouf II*, 634 F.3d at 1087.

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