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# Immigration Law Advisor

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*The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.*

## In this issue...



*We are pleased to present the first issue of the Immigration Law Advisor, produced by and for the Executive Office for Immigration Review. The purpose of this publication is to disseminate developments in immigration law to the Board and the Immigration Judges in a timely, concise and user-friendly format every month. Each issue of the Advisor will report on developments in the federal Courts, precedent decisions of the Board, legislative and regulatory updates, and other developments in the law.*

*This is your publication. We hope you find it useful and that it helps you in the important work that you do on a daily basis. We welcome feedback and suggestions for articles and other types of information to include in the Advisor.*

Juan P. Osuna, Acting Chairman, Board of Immigration Appeals
David L. Neal, Acting Chief Immigration Judge

## Crimes and Misdemeanors:
### The Supreme Court's Decision in *Lopez v. Gonzales*

*By Ed Kelly*

The Supreme Court recently weighed in to settle an immigration issue that has been emptying inkwells since 1990, involving the meaning of aggravated felony in the drug crime context. *Lopez v. Gonzales*, 549 U.S. 47 (2006).

A drug trafficking crime, or "illicit trafficking in a controlled substance," is an aggravated felony. This much has been clear enough. See section 101(a)(43)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(B). But whether a state felony drug crime that does not include "trafficking" is also an aggravated felony, even though federal law would classify it as a misdemeanor, has never been a simple matter. The interplay of cross-referenced statutory language among the INA, and 18 U.S.C. § 924(c), and the Controlled Substances Act ("CSA"), as well as the penultimate sentence of INA section 101(a)(43) itself, has inspired plausible interpretations on both sides of the issue, resulting in a split of authority which the Supreme Court has now stepped in to resolve.

The case which brought the issue to the Supreme Court was that of Jose Antonio Lopez. Lopez was a lawful permanent resident who was

convicted in South Dakota in 1997 for "aiding and abetting another person's possession of cocaine." The crime under South Dakota law was equivalent to possession itself. South Dakota classified the crime as a felony, carrying a five-year prison sentence. Under the federal Controlled Substances Act, however, possession of cocaine is only a misdemeanor. Can a drug crime that is a mere misdemeanor when prosecuted under the federal CSA also be an aggravated felony under the INA, simply because the state law says the crime is a felony?

Faced with this problem, the Immigration Judge presiding over Lopez' hearing relied on Eighth Circuit precedent, *United States v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997). He found Lopez had been convicted of an aggravated felony as charged, regardless of the CSA's classification of the crime as a misdemeanor. The Eighth Circuit had expressed its view in *Briones* as follows, "[i]n other words, for INA purposes, a drug trafficking crime is an offense which would be punishable under [the Controlled Substances Act] 21 U.S.C. §§ 801 et seq., and which would qualify as a felony *under either state or federal law" Briones,* 116 F.3d. at 309 (emphasis added). Board attorneys and Immigration Judges will be familiar with the statutory scheme at issue, which defines aggravated felonies in the drug crime context via three different statutes: First, the INA itself defines aggravated felony to include, "Illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Sub stances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code). 8 U.S.C 1101 § (a)(43)(B). Next, the above-referenced section of 18 U.S.C. § 924(c)(2) states in relevant part, "[f]or purposes of this subsection, the term 'drug trafficking crime' means any *felony punishable under* the Controlled Substances." 21 U.S.C. 801 et. Seq. (emphasis added). Finally, the penultimate sentence of section 101(a)(43) of the act states in relevant part, "[t]he term [aggravated felony] applies to an offense described herein whether in violation of federal or state law..."

In the case of Antonio Lopez, his possession crime was punishable under the Controlled Substances Act, and his crime was a felony under state law. Accordingly, the Immigration Judge found that Lopez had been convicted of an aggravated felony and was ineligible for cancellation of removal. He ordered Lopez removed and the Board affirmed.

On review before the Eighth Circuit, the Circuit Court followed its precedent in *Briones-Mata, supra*. The Court viewed Lopez' possession offense as a "drug trafficking crime," specially defined under federal law, and therefore, as an aggravated felony. Specifically, the Court reasoned that if the felony is a crime "punishable under" the federal Controlled Substances Act, and the prosecuting jurisdiction classifies the crime as a felony, then the crime is an aggravated felony for immigration purposes. After all, the INA says the crimes described therein are aggravated felonies "whether in violation of federal or state law."

On certiorari to the Supreme Court, however, Justice Souter for the Supreme Court majority disagreed. The majority were disturbed by the prospect of classifying a mere abetting-of-possession drug crime as a "drug trafficking" felony, with no indication that large quantities of the drug were involved. The Court was especially reluctant to follow this route because the classification would result from an application of state law, and not from a clear and explicit application of any federal definition of the drug possession crime as a felony. In the absence of any fixed and explicit definition, the Court's opinion zeroed-in on the word "trafficking" as the real commonsense focus of the statutory language. Since Lopez's crime was not "trafficking" in the usual commercial sense of the word, the Court insisted that before his crime could be crow-barred into being an aggravated felony, there must be a federal statute that explicitly says so.

The government of course argued that federal law does say so. The government claimed that by incorporating state laws into the scope of the aggravated felony definition, and also by defining "felony" for certain federal purposes as any crime resulting in a sentence of more than a year, Congress, in effect, included state felony classifications in the aggravated felony definition. The Court, however, was unmoved. The Court determined that without a more explicit expression of Congressional intent, a misdemeanor if prosecuted under the CSA could not simultaneously be a felony under the INA. In the Court's simplest formulation of its holding, Justice Souter, referring only to non-trafficking crimes as commonly understood in plain English, stated: "Unless a state offense is punishable as a federal felony it does not count."

The Court further explained that grammatically speaking, "felony punishable under the Controlled Substances Act" means not only that the crime must be

a felony under some law and also "punishable" under the CSA itself, but also that the CSA must punish the crime as a felony. The Court therefore found that Antonio Lopez was not removable for committing an "aggravated felony" and was eligible to be considered for cancellation of removal.

In short, since Lopez's state drug possession felony would have been only a misdemeanor if prosecuted under the federal Controlled Substances Act (CSA), it could not also be an aggravated felony "trafficking" crime under the Immigration and Nationality Act.

The Court's decision impacts the continued viability of a variety of federal circuit Court rulings. In particular, the Court noted in a footnote that in addition to the Eighth Circuit, four others had agreed with the now-erroneous view that a non-trafficking state drug felony should govern the aggravated felony definition: the First, Fourth, Fifth, and Tenth Circuits. On the other hand, the Court essentially agreed with three Circuit Court decisions which, therefore, remain good law after *Lopez*: *Gonzalez-Gomez v. Achim,* 441 F.3d 532 (7th Cir. 2006); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); *Gerbier v. Holmes,* 280 F.3d 297 (3rd Cir. 2002). The Second and Ninth Circuits had treated immigration and federal sentencing separately in this regard, and had also found that in the immigration context, a state law felony does not govern the aggravated felony definition. *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); and *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996).

For the Board of Immigration Appeals, *Lopez v. Gonzales* caps years of administrative decisions and adjustments to circuit Court rulings. The tale began with *Matter of Barrett*, 20 I&N Dec. 191 (BIA 1990), which Congress essentially codified in 1990, and which is still valid, especially if read with *Lopez*. See the Court's footnote 8 in *Lopez v. Gonzales,* observing that *Barrett* only includes state crimes "analogous to" offenses under the CSA, but does not declare specifically that the state crime must be analogous to a CSA felony. The Board's later decision in *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), reinforced this approach and suggested only a federal test would be recognized, but did not squarely address the issue of whether a non-trafficking state felony classified as a misdemeanor under the CSA could be an aggravated felony under the INA. The Board's view on this issue emerged more clearly in *Matter of L-G-,* 21 I&N Dec. 89 (BIA 1995). Here the Board, building on *Barrett* and *Davis*, enunciated a thoroughly federal test for these crimes, and concluded that a state conviction involving a non-trafficking controlled substance violation, in order to be an aggravated felony, must be for a crime that would be punishable as a felony under federal law.

Eventually, as the federal circuits split on the issue, the Board itself yielded to governing circuit law, as declared in *Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2003) (recounting the interpretive history of this issue at the Board). With the Supreme Court's decision in *Lopez v. Gonzales*, however, the circuit-by-circuit approach ends.

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# FEDERAL COURT ACTIVITY

## Board Decisions Under Review: A Qualitative Analysis

*by Edward R. Grant*

Elsewhere in these pages, John Guendelsberger provides a fine statistical analysis of the approximately 5000 petitions for review (PFRs) resolved by the circuit Courts during 2006. Picking up where John left off on statistics, and hoping to provide a deeper glimpse into the types of cases in which petitions for review are granted, and the reasons why, I offer this qualitative analysis of the first 265 circuit Court PFRs resolved in 2007 (through January 24).

*The Numbers*: Petitions for review were granted in 50 cases on a substantive issue requiring re-adjudication by the Board and/or Immigration Judge. (This includes cases where the "grant" is solely for the Board or Immigration Judge to address an issue that was previously overlooked; it does not include remands to the Board solely for the purpose of extending voluntary departure.) This constitutes 18.9 percent of the total, quite close to the overall 2006 percentage. Thirteen of the "grants" were published, and many of these involved the circuit addressing a contested issue of law for the first time. Several of these cases will be discussed below.

The 265 cases reveal several trends that are worth noting. One is the use of summary or other short orders to dispose of cases, particularly in the 9th Circuit, which issued at least 40 such decisions during this period. Related to this is continued refusal by the circuits to disturb the process of summary disposition of cases by the Board, whether in the form of AWOs or short orders. However, as noted below, the circuits are closely examining such short orders to determine which issues have and have not been addressed, and to determine the extent to which they will review the decision of the Immigration Judge as well as that of the Board.

Another trend is the virtual disappearance of cases in which the circuit directs remand to a different Immigration Judge. None of the 50 remands issued during this period included such an order. In addition, none set forth any systemic complaints against the immigration adjudication system, of the type that gave rise to numerous stories in the media a year ago.

The cases also reveal substantial deference in asylum cases to the credibility determinations of Immigration Judges, as affirmed by the Board. Just under two-thirds of the decisions (172) involved claims for asylum, withholding of removal, or CAT (including a number involving motions to reopen for these forms of relief), and PFRs were granted in 36 (21 percent). However, only 9 of these decisions found an Immigration Judge's Adverse Credibility Determination ("ACD") to be erroneous, and in 53 other cases, the ACD was specifically affirmed.

Of the remaining 27 asylum-related PFR grants, approximately 10 reversed findings of no past persecution or "no nexus" to a protected ground, and an equivalent number remanded for consideration of issues or evidence that were not adequately in the eyes of the Circuit Court.

**Significant Rulings**

Turning from protection-related cases, there were a number of significant rulings on matters pertaining to discretionary relief. Resolving a frequently-litigated subject, the Ninth Circuit ruled that under section 240A(c)(6) of the INA, an alien cannot seek a "simultaneous" grant of cancellation of removal and relief under former section 212(c) in a single hearing. *Garcia-Jimenez v. Gonzales*, 472 F.3d 679 (9th Cir. 2007). However, despite the bar to judicial review in section 242(a)(2)(B), the same circuit has reviewed the discretionary determination whether to grant such relief, holding that such review is permissible as long as it is limited to consideration of whether the Immigration Judge and the Board applied the correct standard. *Ancheta v. Gonzales*, No. 03-73883, 2007 WL 28239 (9th Cir., Jan. 4, 2007) (Immigration Judge erred in requiring showing of "outstanding and unusual equities" in a section 240A(a) cancellation matter); *Mascorro v. Gonzales,* No. 05-72854, 2007 WL 173752 (9th Cir., Jan. 18, 2007) (While Immigration Judge stated and applied the "EEUH" standard correctly as to the individual qualifying relatives, Immigration Judge failed to correctly apply the standard on a cumulative basis). These latter decisions test the boundaries of the jurisdiction of the circuit Courts to "question of law" under the REAL ID Act.

The Fifth Circuit, following the lead of the Second, Third, Fourth, and Tenth Circuits, has adopted a "subjective reliance" test for determining whether an alien convicted after trial prior to enactment of AEDPA nevertheless qualifies for section 212(c) relief. *Carranza-De Salinas v. Gonzalez*, _ F.3d _ , 2007 WL 155195 (5th Cir., Jan. 23, 2007). In this case, the respondent claimed that she deferred filing an "affirmative" application for section 212(c) relief after her 1993 conviction (prior to which she had declined a plea agreement) in the expectation that by acquiring more equities and showing rehabilitation, she would strengthen her case for such relief. The Court appeared to assume that such an affirmative process was readily available, but this among other issues are to be addressed on remand.

Resolving (for the moment, at least) two other frequently-litigated issues, the Ninth Circuit ruled: (1) that the illegibility of the issuing officer's name on a Notice to Appear is not a jurisdictional defect mandating the termination of proceedings. *Kohli v. Gonzalez*, 473 F.3d 1061, (9th Cir. 2007); and (2) that an alien who has departed the United States under an order of removal, and then files a motion to reopen, is not an alien who "is subject" to removal proceedings, and thus, the jurisdictional bar to such post-departure motions in 8 C.F.R. 1003.2(d) and 1003.23(b). *Zi-Xing Lin v. Gonzales,* 473 F.3d 979, (9th Cir. 2007).

**What the Circuits Are Looking For**

It is notable that approximately 20 of the 50 remanded cases require the Board or Immigration Judge

to consider newly-issued precedent or, in the greater number of these, to address issues or evidence that were not adequately addressed, at least in the view of the circuit. The good news in this is that the rate of actual substantive error found by the circuits is quite low – about 10 percent of the decisions issued. The lesson, of course, is the need, especially in light of the increased dockets at the Circuit Court level, to ensure that the final administrative decision clearly sets forth what it is deciding, and on what basis.

An illustrative, and final, decision on this point was issued by the Tenth Circuit in *Sarr v. Gonzalez* 474 F.3d 783, (10th Cir. 2007). Reversing an ACD affirmed by the Board, the Circuit stressed that where a single-Member "brief order" of the Board does not explicitly or implicitly incorporate the reasoning of the Immigration Judge, but is "opaque" on the subject, the Circuit's review of the Immigration Judge decision will be limited. Accordingly, in *Sarr*, the Circuit looked to the reasons stated by the Board in finding the respondent not credible, and examined those reasons against the record. While it considered to some extent the Immigration Judge decision, the Court rejected the argument of government counsel that it also should examine the decision of the Immigration Judge, and affirm the denial of asylum if the rationale from either decision supported the denial.

The issue presented by *Sarr* is common, and the scholarly opinion of the Tenth Circuit will likely gain attention in other jurisdictions. Adverse outcomes on PFRs will be minimized by clear findings of fact, credibility determinations, and conclusions of law in Immigration Judge decisions, and similar clarity in Board decisions regarding what aspects of the Immigration Judge decision are being affirmed, and what new or additional rationales are being provided in the first instance by the Board.

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## CIRCUIT COURT DECISIONS YEAR 2006

*By John Guendelsberger*

The circuit Courts issued nearly 5400 decisions (published and unpublished) in petitions for review of Board decisions in calendar year 2006.[1] Over 82% of these decisions completely dismissed the petition for review. The Courts reversed or remanded for one reason or another in about 17.5% of the cases.[2] The numbers of decisions and reversal rates for each circuit are shown in the chart below.

The rate of reversal varied from circuit to circuit from a low of 5% to a high of about 25%. The Seventh Circuit, while rendering relatively few decisions, had the highest reversal rate. Next was the Second Circuit at 22 % and then the Ninth Circuit at 18%. Four circuits -- the First, Fourth, Fifth and Eleventh -- reversed in under 10 % of their decisions.

The Second Circuit issued the largest number of reversals with about 400 of the total 944. The Ninth Circuit was second with 356. Taken together, these two circuits issued 70 % of the total decisions and 80 % of all reversals.

The rate of reversal varied from month to month with a low of 14% in December and a high of 22 % in April. Numbers of decisions ranged from 324 in October to 560 in December.

Needless to say, we've seen a huge increase in the numbers of decisions from ten years ago when the same survey would have yielded about 500 circuit Court decisions, or even five years ago when numbers had risen to about 1000 circuit Court decisions per year. Our overall reversal rate of about 17.5 %, however, has not significantly changed over the last decade.

Circuit Court decisions for calendar year 2006
arranged by rate of reversal.
(published and unpublished)

| | Total Cases | Affirmed | Reversed | %Reversed |
|---|---|---|---|---|
| 7th | 133 | 100 | 33 | 24.8 |
| 2nd | 1782 | 1379 | 403 | 22.6 |
| 9th | 1963 | 1607 | 356 | 18.1 |
| 10th | 61 | 50 | 11 | 18.0 |
| 3rd | 341 | 287 | 54 | 15.8 |
| 6th | 123 | 107 | 16 | 13 |
| 8th | 80 | 71 | 9 | 11.3 |
| 11th | 314 | 287 | 27 | 8.6 |
| 1st | 84 | 78 | 6 | 7.1 |
| 5th | 306 | 288 | 18 | 5.9 |
| 4th | 211 | 200 | 11 | 5.2 |
| All | 5398 | 4454 | 944 | 17.5 |

**Overview of reversal and remands**

As would be expected, the kinds of cases reversed and the reasons for reversal varied from circuit to circuit based on the makeup of the caseload (e.g., the concentration of Chinese coercive family planning and Falun Gong claims in the Second Circuit), differences in circuit law and in the judicial philosophy of the various judges in each circuit, as well as panel composition within the circuit.

The vast majority of Second Circuit reversals and remands involved asylum and nearly half of these decisions found fault with the adverse credibility determination for one reason or another such as failure to make a clear credibility determination, impermissible speculation or conjecture, failure to afford an opportunity to explain inconsistencies or to address explanations given for inconsistencies, or failure to follow the steps for requiring corroboration.

The Ninth Circuit reversed less often than the Second Circuit on the adverse credibility determination but frequently found fault with other asylum issues including nexus and level of harm for past persecution, changed country conditions, internal relocation, and firm resettlement.

Across all the circuits, some of the recurring reasons for reversal included:

- failure to make clear that the burden of proof shifts to the DHS to overcome the presumption of a well-founded fear of persecution when past persecution has been shown;
- improper application of corroboration requirements;
- failure to address well-founded fear after finding no past persecution;
- failure to address separately the CAT claim;
- making findings of fact on our own or reversing an Immigration Judge's factual finding without explaining why the finding was clearly erroneous;
- failure adequately to address evidence submitted in support of a motion to reopen;
- failure to address exceptions to the filing of an untimely motion to reopen.

**Circuit Court deference**

In several recent decisions, the Supreme Court has reminded the circuit Courts of the deference owed to the Board's decisions. In *I.N.S. v. Orlando Ventura,* 537 U.S. 12 (2002), the Court found that the Ninth Circuit had overstepped its bounds in addressing changed country conditions when neither the Immigration Judge nor the Board had reached that issue. Similarly, in *Gonzales v. Thomas*, 547 U.S. 183 (2006), the Court summarily reversed a Ninth Circuit decision addressing an aspect of the meaning of particular social group before the Board had addressed the question. In both *Ventura* and *Thomas*, the Court made clear that when the Board has not yet addressed an issue, the circuit Court should remand for additional investigation or explanation.[3]

In another recent decision, the Court addressed the intersection of circuit Court *Chevron*[4] deference and *stare decisis* and concluded that an agency is not bound by circuit Court precedent when the agency acts within its area of expertise to formulate a reasonable agency interpretation of an ambiguous statutory provision. *Nat'l. Cable & Telecomm. Assoc. v. Brand X Internet Serv.*, 545 U.S. 967 (2005) [Brand X]. Although *Brand X* involved FCC rulemaking, its reasoning would appear to apply as well to the Board's authority to issue precedent decisions addressing the meaning of ambiguous or open-ended provisions of immigration law in situations in which the Courts have already spoken. In the immigration context, the Second Circuit has described *Brand X* as standing for the proposition "that a Court's earlier construction of a statute trumps an agency's more recent construction only if the original interpretation by the federal Court was thought to be premised on the unambiguous terms of the statute." *Ucelo-Gomez v. Gonzales,* 464 F.3d 163, 170 (2d Cir. 2006) amending and superseding 448 F.3d 180 (2d Cir. 2006), and quoting from *Yuaniang Liu v. United States Dep't of Justice*, 455 F.3d 106, 117 (2d Cir. 2006).

New developments

Two developments related to the Supreme Court's decisions on Court deference emerged in this year's crop of cases. First, rather than address a legal issue raised on appeal, the Second Circuit and other circuit Courts have begun to remand cases with requests that the Board analyze and resolve the issue in the first instance. Although such

remands occurred in the past, they were relatively rare and the Courts did not hesitate to offer their interpretations of ambiguous provisions in the immigration law. Moreover, in some of these recent remands the Court has requested that the Board develop general legal frameworks for application of the law. In a second development, the Second Circuit has determined that it should remand if it finds flaws in some, but not all, aspects of an Immigration Judge's adverse credibility determination, such that it cannot confidently predict whether the Immigration Judge would have reached the same result had he or she relied solely upon the unflawed factors. In explaining both of these developments, the Second Circuit has relied, in part, on the Supreme Court decisions in *Ventura, Thomas* and *Brand-X* regarding appropriate deference to agency determinations.

**Remands to address legal issues of first impression**

In 2005, the Second Circuit remanded a coercive family planning case with a request that the Board further develop the law to explain the rationale in *Matter of C-Y-Z-*[5], and to address whether and why the rationale of *Matter of C-Y-Z-* should or should not be extended to boyfriends and fiances. *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005). In so doing, the Court indicated that it would not afford *Chevron* deference to an Immigration Judge's decision on a legal issue of first impression that was summarily affirmed by the Board and remanded to the Board to explain the scope of its holding in *Matter of C-Y-Z-*.[6]

In 2006, the Second Circuit remanded several more cases along the lines of *Shi Liang Lin* with requests that we provide guidance or develop a framework for the application of legal issues of first impression. Among these remands were the following:

- *Ucelo-Gomez v. Gonzales, supra* (discussing *Chevron* deference to the Board and remanding for the Board to address whether "wealthy Guatemalans" are members of a particular social group);
- *Mirzoyan v. Gonzales*, 457 F.3d 217 (2d Cir. 2006) (When does economic persecution rise to the level of past persecution?);
- *Yuanliang Liu v. U.S. Dep't of Justice, supra* (Under what circumstances may an asylum application be found frivolous?);
- *Jian Hui Shao v. Board of Immigration Appeals*, 465 F.3d 497 (2d Cir. 2006) (Under what circumstances, if any, is having two chil dren in China a sufficient ground for a well-founded fear of future persecution?);
- *Shou Yung Guo v. Gonzales,* 463 F.3d 109 (2d Cir. 2006) (Whether certain Fujian Province and Changle City documents establish the existence of an official policy of forcible sterilization of parents of two or more children).

The Ninth Circuit recently remanded a case to give the Board an opportunity to issue a precedent decision explaining the meaning of "child abuse" under section 237(a)(2)(E) of the Act. *Velazquez-Herrera v. Gonzales*, 466 F.3d 781 (9th Cir. 2006).

The Second Circuit has reasoned that it would be wasted effort for a Court to first address the meaning of an ambiguous provision within the Board's *Chevron* domain when, under *Brand X*, the Board could later reach a different, yet reasonable interpretation of that provision. *Yuanliang Liu, supra*, at 116-17. Additionally, the Court noted that permitting the Board to take the lead role in interpreting the immigration law would avoid the development of nonuniform law in the circuits. Id.

The Second Circuit has indicated that it will not defer to an Immigration Judge's legal interpretation adopted by or affirmed without opinion by the Board, stating that "were we to accord *Chevron* deference to non-binding IJ statutory interpretations, we could find ourselves in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction we had affirmed as reasonable the Monday before." *Ucelo-Gomez*, 464 F.3d at 169-70, quoting from *Shi Liang Lin, supra*, at 190. The Court has also suggested that it may not necessarily afford *Chevron* deference to unpublished Board decisions.[7]

## Remands to reassess flawed adverse credibility determinations.

In applying the substantial evidence test to an adverse credibility determination, the Courts generally examine the factors relied upon by the Immigration Judge and eliminate aspects of the analysis which involve speculation, conjecture or inconsistencies that

are not borne out by the record. The Second Circuit, in recent decisions, has considered what course of action is appropriate when an Immigration Judge gets part of the credibility reasoning correct but erroneously relies on other factors. In this situation, a Court could disregard the flawed factors and examine whether a decision based on the unflawed aspects of the credibility determination would meet the substantial evidence test.

The Second Circuit, however, has indicated that it will also examine whether it can "state with confidence that the IJ would adhere to his decision if we were to remand." *Xiao Ji Chen v. Gonzales*, 434 F.3d 144, 158, 161 (2d Cir. 2006); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 395, 401-02 (2d Cir. 2005). If the Court cannot confidently predict that the Immigration Judge would have reached the same result with the flawed factors eliminated, the Court will remand to the agency for another look. This may mean that some cases which would otherwise have met the substantial evidence test, i.e., whether any reasonable factfinder would be compelled to reach a contrary result, will instead be remanded for the particular factfinder to reassess his or her credibility determination.

## Conclusion

Circuit Courts, in particular the Second Circuit, are invoking *Ventura, Thomas,* and *Chevron* deference to remand more cases to the Board than might have been the case in the past. Particularly after the Supreme Court's decision in *Brand X*, Courts are asking the Board to take the lead in providing a definitive agency position on questions of statutory interpretation within the agency's *Chevron* domain. The Second Circuit's recent decisions also suggest that when legal or factual errors in an Immigration Judge's decisions have not been addressed by the Board, the decision may be remanded when the Court lacks confidence that the Immigration Judge would have reached the same result with the erroneous factors eliminated.

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[1] The numbers of decisions referred to in this report are based on a continuous electronic search of all circuit Court decisions (published or unpublished) in which the word "immigration" appears. Cases are then culled for those involving a petition for review of a Board decision.

[2] A decision is counted as a reversal or remand if any aspect of the decision is reversed outright or returned to the agency for further consideration. Therefore, cases in which the Board applied controlling law at the time of its decision but the law changed while the case was pending on appeal are included (e.g., remands to apply the amendment to the regulation governing adjustment of status by arriving aliens). Remands for relatively minor errors were also counted. For example, if the only error was that the Board afforded 30 days to voluntarily depart rather than the 60 days granted by the Immigration Judge, the decision is counted as a reversal.

[3] See also, *Gonzales v. Tchoukhrova*, -- U.S. --, 127 S.Ct. 57 (Oct. 2, 2006), *granting certiorari and vacating Tchoukhrova v. Gonzales,* 404 F.3d 1181 (9th Cir. 2005) *reh'g denied*, 430 F.3d 1222 (9th Cir. 2005), and remanding for consideration in the light of *Gonzales v. Thomas, supra.* The underlying issue *Tchoukhrova,* whether harm inflicted upon a disabled child could be taken into account in considering the parent's asylum application, had not been directly addressed by the Board.

[4] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that when the statute is silent or ambiguous, and the issue is within the domain of agency expertise, a Court must defer a reasonable agency interpretation, and may not substitute to its own construction that it finds preferable.

[5] 21 I & N Dec. 915 (BIA 1997) (holding that an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee under the IIRIA amendment to section 101(a)(42) of the Act).

[6] *Matter of S-L-L,* 24 I & N Dec. 1 (2006), issued by the Board in response to the remand in *Shi Liang Lin, supra*, is now being reviewed by an *en banc* panel of the Second Circuit.

[7] See *Ucelo-Gomez, supra,* at 170: "When we remand because the BIA has not yet spoken with sufficient clarity, it will often be up to the BIA to decide whether to issue a precedential or non-precedential opinion. And where the former is the case, we ... must grant the BIA's responsive opinion *Chevron* deference, assuming the basic requirements of *Chevron* are met."

## RECENT COURT DECISIONS

***Supreme Court***

*Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007): The Supreme Court held that a "theft offense" within the meaning of the aggravated felony provision of section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), includes the crime of aiding and abetting a theft offense. This case came to the Court from the Ninth Circuit which had held in a prior decision, *Penuliar v. Ashcroft*, 395 F.3d 1037 (2005), that the code provision in this case, Cal. Veh. Code Ann. § 10851(a), is broader than the generic definition of theft because it would permit convictions for aiding and abetting, and one might aid and abet without taking or controlling property.

The Court, citing *Taylor v. United States*, 495 U.S. 575 (1990), began with a review of the categorical approach to determining whether a state criminal statute falls within the scope of the crimes listed as aggravated

felonies at section 101(a)(43). The *Taylor* Court found that a state statute falls within the aggravated felony definition as long as a conviction has the basic elements of the generic offense, in that case burglary.

The Court then turned to the question of whether aiders and abettors fall outside the generic definition of theft. The Court found that all states and the federal government have eliminated the distinction between principals and aiders and abettors, and treat these categories alike in their criminal codes. Because of this, aiders and abettors themselves fall within the scope of the term "theft." The Court also rejected the alien's argument that because California law treats aiders and abettors as criminally responsible not only for the crimes they intend, but also for any crimes that naturally and probably result from the intended crime, the law has created a subspecies of crimes falling outside the generic theft definition. The Court found that few jurisdictions have rejected the "natural and probable consequences" doctrine, and the alien could not show any caselaw in which California's law was applied more broadly than in other states. The Court found that there must be a realistic probability, not just a theoretical possibility, that a state would apply a statute to conduct falling outside the generic definition.

The Supreme Court declined to reach the alien's remaining issue that the statute holds liable accessories after the fact and joyriding, both of which fall outside the generic theft definition, because these were not questions the Court agreed to reach, and the lower Court did not consider the claims in the first instance.

## BIA PRECEDENT DECISIONS

In *Matter of Moncado*, 24 I&N Dec. 62 (BIA 2007), the Board considered the personal use exception to the grounds of deportability for a controlled substance violation under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). The respondent was convicted of unauthorized possession of controlled substances in prison under section 4573.7 of the Cal. Penal Code. The record reflected that his conviction arose from his possession of not more than 28.5 grams of marijuana. The controlled substance ground of deportability does not apply to a single offense involving possession for one's own use of 30 grams or less of marijuana. This exception is called the personal use exception.

The Board held that a natural reading of the statute is that it is intended to ameliorate the harsh immigration consequences of the least serious drug violations only, and that possessing marijuana in prison is significantly more serious than simple possession because of the inherent potential for violence and threat of disorder. As possession of drugs in prison is not a simple drug possession, the Board found the respondent deportable.

In *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006), the Board addressed the general requirements for motions to reconsider, and also looked more specifically at the requirements when a motion requests reconsideration of an affirmance without opinion (AWO). The Board restated that the motion to reconsider must include an allegation of material factual or legal errors in the prior decision that is supported by pertinent authority. A motion raising a new legal argument that could have been raised earlier in proceedings will be denied; rather, the additional legal arguments must flow from new law or a de novo legal determination reached by the Board in its decision.

A motion to reconsider an AWO must present some additional arguments. It must show that the alleged errors and legal arguments were previously raised on appeal, explain how the Board erred in affirming the Immigration Judge's decision under the AWO regulations, and if there has been a change in law, a reference to the relevant statute, regulation, or precedent and an explanation of how the outcome of the Board's decision is materially affected by the change.

In the case before the Board, the respondent's motion generally reiterated the arguments raised on appeal without any detailed application to the respondent's case. The respondent also set forth a new legal theory for his asylum claim - that he was persecuted or has a well-founded fear of persecution on account of his membership in a social group. The Board denied the motion, finding that he did not raise the issue in his application, before the Immigration Judge or on appeal, and did not set forth any new facts or evidence that would convert the motion to a motion to reopen.

# LEGISLATIVE UPDATE

## Legislative Wrap-up for 2006

While there was much activity on Capitol Hill regarding immigration in 2006, only two bills significantly modified the Immigration and Nationality Act. The Violence Against Women and Department of Justice Reauthorization Act of 2005, and the Adam Walsh Protection Safety Act of 2006. Both of these laws are designed to increase protections for battered immigrants, victims of trafficking, and child crime victims.

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005), signed into law January 1, 2006, amended and broadened existing protections for battered immigrants and victims of severe forms of trafficking. This legislation, and the technical corrections in VAWA, Pub. L. No. 109-271, 120 Stat. 750, signed August 12, 2006, also corrected some errors in the original Violence Against Women Act (VAWA) legislation. The legislation, which made an array of changes to the Immigration and Nationality Act, included the following elements:

•Extended the self-petitioning provisions of the VAWA to battered parents of lawful permanent residents;

•Made the provisions barring adjustment of status and cancellation of removal due to failure to depart after a grant of voluntary departure inapplicable to aliens who filed petitions as VAWA self-petitioners, battered spouses, or children if such battering or extreme cruelty is substantially connected to the alien's overstaying the grant of voluntary departure.

•Expanded the "Exceptional Circumstances" definition in section 240 and 240A of the Act, which appears in the rescission of an in absentia order and on limitation for relief upon failure to appear, to include "battery or extreme cruelty to the alien or any child or parent of the alien."

•Extended the Nicaragua and Central American Relief Act application period for the spouse or child victim of extreme cruelty.

•Permitted battered spouses of Cubans who could have but did not adjust under the Cuban Adjustment Act and battered spouses and children of Haitians who could have but did not adjust under the Haiti Refugee Immigration Fairness Act to apply for status.

•Extended aging out protection to children who are victims of domestic abuse by an LPR parent, and gives a grace period for filing a petition for immigrant status from 21 to 25 years if the person can show that the abuse was at least one central reason for the filing delay.

•Eliminated from the definition of "child" the 2-year custody and residency requirement for adopted children who have been battered or subject to extreme cruelty.

•Waived numerical and time limits on motions to reopen to pursue VAWA relief.

•Authorized T status (victims of severe forms of trafficking) for an additional year to four years and permitted yearly extensions.

•Removed the requirement that there must be a finding of hardship for the admission of family members accompanying or following to join a trafficking victim with T or U (victims of certain abuse from criminal activity) visa status.

•Permitted adjustment of status for aliens with T status and permits aliens to change from another nonimmigrant classification to T status.

The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat 587, effective July 27, 2006, was enacted to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims. Pertinent to EOIR, the Act did the following:

•The Adam Walsh Act added a new ground of deportability at section 237(a)(2)(A)(v) of the INA: "(v) FAILURE TO REGISTER AS A SEX OFFENDER. -- Any alien who is convicted

under section 2250 of title 18, United States Code, is deportable."

•A petitioner convicted of specified offenses against minors is now ineligible to file a family-based visa petition unless DHS finds no risk to the beneficiary.

The Adam Walsh Act requires that the DHS check the background of citizen or LPR visa petitioners who file a family-based visa petition. The Adam Walsh Act is effective as of the date of enactment and applies to family-based visa petitions pending on the date of enactment. The Adam Walsh Act amendment does not apply to employment-based or diversity visa petitions.

•The Adam Walsh Act also amended section 101(a)(15) of the INA to remove spouses or fiances of United States citizens convicted of the specified offenses from eligibility for "K" nonimmigrant status.

Other immigration-related legislation addressed border security and visas. Some examples include the Secure Fence Act of 2006, Pub.L. No. 109-367, 120 Stat. 2638 (2006), which directs DHS to construct border fencing along the southern border and to study border security infrastructure along the northern border. The Department of Homeland Security Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2007), criminalizes the construction and financing of border tunnels. The John Warner National Defense Authorization Act for Fiscal Year 2007, 120 Stat. 2083 (2006) exempts returning workers from the H-2B annual visa cap. The Compete Act of 2006, Pub. L. No. 109-463, 120 Stat. 3477 (2006) authorizes certain athletes to be admitted temporarily to compete in the U.S., and the Physicians for Underserved Areas Act, Pub. L. No. 109-477, 120 Stat. 3572 (2007), was reauthorized.

## REGULATORY UPDATE

72 Fed. Reg. 1923 (2007)
DEPARTMENT OF HOMELAND SECURITY
Bureau of Immigration and Customs Enforcement
8 CFR Part 236
Consular Notification for Aliens Detained Prior to an Order of Removal

SUMMARY: This final rule amends the Department of Homeland Security (DHS) regulations governing the detention of aliens prior to an order of removal. The rule updates the list of countries in 8 CFR 236.1(e), which, based on existing treaties, requires immediate communication with consular or diplomatic officers when nationals of listed countries are detained in the United States. The rule adds Algeria, Tunisia, and Zimbabwe to the list of countries and removes Albania and South Korea from the list of countries. In addition, the rule clarifies provisions related to treaties that the United States has with China, Hong Kong, and Poland. Finally, the rule updates the list with Antigua and Barbuda's official name and by adding clarifying language about provisions governing U.S.S.R. successor states.

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