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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.

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Equitable Tolling of Motions Deadlines - A Survey of Circuit Court Decisions

by Karen Fletcher Torstenson and S. Kathleen Pepper

The statute and regulations set definite time periods for filings with the Board of Immigration Appeals and the Immigration Courts. With few exceptions, and subject to the possibility for *sua sponte* reopening under 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1) (2007), a motion to reopen must be filed with the Board or Immigration Judge within 90 days of the final administrative order, and only one motion to reopen may be filed. *See* 8 C.F.R. §§ 1003.2(c)(2); 1003.23(b)(1)(2007); section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7).

A single appellate court - ***Eleventh Circuit Court of Appeals*** - has found that the motion to reopen period is "mandatory and jurisdictional," and not subject to equitable tolling, even where a claim of ineffective assistance of counsel is raised. *Abdi v. U.S. Att'y. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005); see also *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (concerning a motion to reopen *in absentia* order).

In other jurisdictions, courts have either ruled that equitable tolling may be applied to excuse the deadlines or numeric bars for motions to reopen, or have not squarely decided the issue in a published decision. These judicial decisions mainly relate to situations in which an alien is claiming that a deadline or numeric bar should be excused based on ineffective assistance of counsel. The critical issue in situations where equitable tolling has been found to apply is often whether the alien has shown *due diligence* during the time period that he seeks to have tolled. The following provides a brief overview of some of the circuit court decisions concerning equitable tolling in immigration cases.

First Circuit - The Court has indicated that the issue of whether equitable tolling is ever available in the immigration context is an issue that remains open under *Jobe v. INS*, 238 F.3d 96, 100 (1st Cir. 2001)

(en banc). *See also Boakai v. Gonzales*, 447 F.3d 1, 2 n.2 (1st Cir. 2006); *Cai Xing Chen v. Gonzales*, 415 F.3d 151, 154 n.3 (1st Cir. 2005). The Court in *Cai Xing Chen*, at 154, held that the Board correctly found the alien's second motion to reopen, and first to raise the ineffective assistance claim, to be number barred but then identified 5 factors to be used when evaluating equitable tolling for an ineffective assistance claim (apparently derived in non-immigration contexts): "(1) a lack of actual notice of a time limit: (2) a lack of constructive notice of a time limit; (3) diligence in the pursuit of one's rights: (4) an absence of prejudice to a party opponent; and (5) the claimant's reasonableness in remaining ignorant of the time limit."

The Court stated in *Boakai*, at 3, that "the BIA correctly noted that if the equitable tolling doctrine is available at all, the petitioner must first show that he has acted with due diligence." Where the alien received notice of the Board's initial decision in March 2002, and counsel was appointed to represent the alien in October 2002, but the motion was not filed until April 2003, the Board found that due diligence was not shown. Significantly, the Court found that it lacked jurisdiction to review the Board's factual finding concerning whether due diligence was shown:

> The narrow issue before us is whether, assuming *arguendo* that equitable tolling is available, Boakai's challenge to the BIA's decision not to grant such tolling presents a 'question of law' within the meaning of the REAL ID Act. The answer is plainly no. Boakai does not question the legal standard for equitable tolling. The only issue he raises before us is one of fact . . . . The BIA relied on a factual determination that Boakai had not exercised due diligence, and Boakai simply disagrees, arguing that he did in fact exercise due diligence. We have no jurisdiction to review this sort of challenge to a denial of a motion to reopen.

Boakai, at 4 (citation omitted).

Second Circuit - The Court has found that the 90-day period for filing a motion to reopen, as well as the numerical bar to more than one motion, is subject to equitable tolling. *Iavorski v. United States INS*, 232 F.3d 124, 129-133 (2d Cir. 2000). Aliens relying on equitable tolling must establish that (1) their constitutional right to due process was violated by counsel's conduct; and (2) they exercised due diligence during the period sought to be tolled. *See Jin Bo Zhao v. INS*, 452 F.3d 154, 159 (2d Cir. 2006) (finding that under facts of that case, motions period could be tolled for 5 months):

> Although Zhao's third attorney took nearly three months from being retained to file Zhao's second motion to reopen, in the circumstances presented we conclude that he moved quickly enough to protect Zhao's rights. Before Zhao's current counsel could file the second motion to reopen, he was required to file a complaint against his predecessor with the relevant disciplinary committee, and to protect his record on appeal he also refiled Zhao's prior complaint against his first attorney. Although even speedier action would have been prudent, we decline to hold Zhao responsible for this moderate delay.

Zhoa at 154.

See also Ali v. Gonzales, 448 F.3d 515, 517 (2d Cir. 2006)(finding that alien failed to show diligence in filing motion years late); *Zheng Zhong Chen v. Gonzales*, 437 F.3d 267, 270 (2d Cir. 2006) (holding that an alien failed to show due diligence in waiting 20 months to file motion to reopen).

The Court has issued strong language concerning the vital importance that the alien's actions have on whether equitable tolling will be found appropriate: "no matter how egregiously ineffective counsel's assistance may have been, an alien will not be entitled to equitable tolling unless he can affirmatively demonstrate that he exercised reasonable due diligence during the time period sought to be tolled." *Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006).

The Court in *Zhao Quan Chen v. Gonzales*, __ F.3d __, 2007 WL 1805375 (2d Cir. June 25, 2007) rejected an alien's argument that the Board's decision was non-final until the Court ruled on it. Moreover, the Court found "meritless . . . Chen's argument that the limitations period for a motion to reopen should have been equitably tolled until this Court had issued its decision on his peti-

tion [appealing the Board's decision that the alien sought to reopen]."

Third Circuit - Equitable tolling may be appropriate in the Third Circuit, where fraud has been shown. *Borges v. Gonzales*, 402 F.3d 398, 406-07 (3d Cir. 2005) (finding that equitable tolling may be available where ineffective assistance claim made in untimely motion to reopen in absentia proceedings and distinguishing its holding from that in *Bejar v. Ashcroft*, 324 F.3d 127 (3d Cir. 2003)); *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005) (Board dismissed appeal of Immigration Judge denial of motion to reopen an *in absentia* order as untimely filed. Court found that equitable tolling not appropriate, where diligence not shown in pursuing motion).

Fourth Circuit - The Court has no published decisions on the issue but has acknowledged published decisions from other circuits which have applied principles of equitable tolling. *Amegashie v. Ashcroft*, 188 Fed. Appx. 226 (4th Cir. July 6, 2006) (evidence that the alien sought to present in motion would not have altered final result, and any errors committed by previous counsel were known to the alien prior to his appeal of the decision of the Immigration Judge; therefore alien did not present exceptional situation for possible tolling of motions deadline).

Fifth Circuit - The Court has no published decisions on the issue. In an unpublished decision, *Cavazos v. Gonzales*, 181 Fed.Appx. 453 (5th Cir. May 23, 2006), the Court stated that the doctrine, if applicable at all, should be employed only in "rare and exceptional circumstances" where the alien has shown that he acted with due diligence in pursuing his rights. The Court determined that the failure to file the motion to reopen until nearly three months after the voluntary departure date had passed did not demonstrate the sort of due diligence and exceptional circumstances necessary to invoke the equitable tolling doctrine. *Cavazos, supra*. In another unpublished decision, *Mapku Kol v. Gonzales*, 214 Fed.Appx. 414 (5th Cir. Jan. 18, 2007), the Court acknowledged that "we have not issued a published opinion squarely adopting the doctrine of equitable tolling in the context of a motion to reopen immigration proceedings," but stated that if tolling is available, the alien failed to show diligence in waiting years to raise the issue of ineffective assistance of counsel.

Sixth Circuit - In *Tapia-Martinez v. Gonzales*, __ F.3d __, 2007 WL 627822 (6th Cir. Feb. 27, 2007), the Court acknowledged its previous case law in which it found that the time limitation for motions to reopen is subject to equitable tolling. *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004) (finding no ineffective assistance claim made in this case). However, the Court has not squarely held whether equitable tolling applies to numerical limitations to motions to reopen. In any event, equitable tolling for either the time or numerical limitation is only available if the alien shows "due diligence" in bringing the claims. *Tapia-Martinez, supra* (requisite diligence not shown, where the alien did not file motion to reopen until 15 months after discovering former attorney's alleged defective performance); *Scorteanu v. INS*, 339 F.3d 407, 413 (6th Cir.2003).

Seventh Circuit - The Seventh Circuit has found that a motions period may be tolled. *See Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005) (considering deadline for filing motion to reopen in the context of an *in absentia* hearing); *Asere v. Gonzales*, 439 F.3d 378, 381 (7th Cir. 2006) (finding that a deadline for motions to reopen is not jurisdictional, but subject to equitable tolling). The "test" for equitable tolling, as stated by the Court in *Pervaiz, supra*, at 490, "is whether the claimant could reasonably have been expected to file earlier."

In *Patel v. Gonzales*, 442 F.3d 1011 (7th Cir. 2006), the alien claimed that, in presenting her claim of ineffective assistance of counsel, the Board should have looked to the factors set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), rather than requiring her to show diligence in making her late-filed claim. The Court stated:

> this argument confuses the substantive criteria for succeeding on an ineffective assistance of counsel claim with the procedural rules that must be satisfied, including the rules governing the time for filing various motions. The Board would indeed turn immediately to the *Lozada* test if the motion to reopen were filed within the 90 days permitted by the regulations. With an untimely motion, in contrast, the alien must first show that her situation warrants equitable tolling of the time limits, and equitable tolling in turn requires a showing of due diligence.

Patel, at 1016

The Court in *Johnson v. Gonzales*, 478 F.3d 795 (7th Cir. 2007), found that the Board did not abuse its discretion in not tolling the deadline for filing a special motion seeking relief under section 212(c) of the Act. The Court stated that "it is a rare occasion that we reverse a decision on the basis that a time limit should have been equitably tolled." *Id*. at 799 (noting that the respondent had waited too long after the Supreme Court's decision in *INS v. St. Cyr,* 533 U.S. 289 (2001), to make his claim).

Eighth Circuit - The Court has recognized the potential applicability of equitable tolling concerning motions deadlines, but the alien "bears the burden of making a prima facie showing of entitlement to equitable tolling, and therefore of filling in any gaps in the record regarding whether his case is a case warranting equitable relief." *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); see *Kanyi v. Gonzales*, 406 F.3d 1087, 1091 (8th Cir. 2005) (even assuming that 180-day period for filing motion to reopen removal proceedings when removal order has been entered *in absentia* was subject to equitable tolling based on ineffective assistance that alien allegedly received when his attorney failed to appear at rescheduled hearing of which he had been properly noticed, alien knew or should have known that his attorney received notice of rescheduled hearing and nonetheless failed to appear, thereby providing ineffective assistance, at least from date of Immigration Judge's denial of his initial motion to reopen based on alleged lack of notice).

In *Habchy v. Gonzales*, 471 F.3d 858, 864 (8th Cir. 2006), the Court affirmed an Immigration Judge's, and the Board's, refusal to extend the time period for filing a reconsideration motion concerning an in absentia order where the alien claimed that he failed to file a proper motion earlier due to his pro se status:

> [w]e sympathize with the plight of an alien who attempts to trudge through the morass of immigration law without legal counsel, particularly after he believes his first lawyer deprived him of an opportunity to present his case. But we do not believe it is an abuse of discretion when the Board refuses to wholly overlook procedural requirements merely because an alien makes the choice to file a motion pro se.

Ninth Circuit - In the Ninth Circuit, equitable tolling of the time limits for motions to reopen is available to aliens who have filed with the Board otherwise untimely motions in which they raise allegations of ineffective assistance of counsel. *See Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (holding that equitable tolling will be applied where the alien is prevented from timely filing a motion by deception, fraud, or error so long as the alien acted with due diligence in discovering the deception, fraud, or error).

In *Valeriano v. Gonzales*, 474 F.3d 669, 673 (9th Cir. 2007), the Court reiterated its previous conclusion that equitable tolling is only available if diligence is shown, and "the party's ignorance of the necessary information must have been caused by circumstances beyond the party's control." The Court decided that an alien who delays filing a motion to reopen while awaiting the government's response to his counsel's request to join the motion to reopen until the deadline is past is not entitled to equitable tolling.

In the case of *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 845 (9th Cir. 2006), the Court rejected a claim that the motions period could be extended based on the alien's claim that he had been removed to Mexico and did not learn of new cases impacting his claim. The Court found nothing to suggest that legal research could not be conducted in Mexico, noted that the Immigration Judge told the alien that a significant legal issue was present in his case, and observed that the alien was represented by counsel.

The Court found in *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099-1100 (9th Cir. 2005) that the time limit for filing a NACARA motion was tolled until the date the new attorney found out that the representative had not filed a timely motion. In its decision in *Singh v. Ashcroft*, 367 F.3d 1182, 1185-86 (9th Cir. 2004), the Court stated that the motion to reopen period may be tolled due to "deception, fraud, or error;" prejudice must be shown concerning an ineffective assistance of counsel claim, and the attorney's failure to file a brief with the Board creates a presumption of prejudice. However, that presumption may be rebutted if the respondent does not show "plausible grounds for relief."

In *Singh v. Gonzales*, __ F.3d __, 2007 WL 1805553 (9th Cir. June 25, 2007), the Court found that the alien had failed to exercise due diligence by not investigating prior counsel's actions after he became suspicious. Where the respondent suspected fraud within weeks of

the Board's March 28, 2003, decision, but did not consult new counsel until September 30, 2003, due diligence was not shown even where the alien asserted that he was ignorant of the law.

Tenth Circuit - Equitable tolling of the motions deadline is potentially available in the Tenth Circuit, but a party must show that he has exercised due diligence. *See Mahamat v. Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005); *Galvez Piñeda v. Gonzales*, 427 F.3d 833, 838-39 (10th Cir. 2005) ("[t]o avoid unnecessary delay in immigration proceedings, motions to reopen must be brought promptly;" alien must show "requisite diligence" in filing motion); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362-63 (10th Cir. 2004); *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002).

In *Galvez Piñeda*, the Court found that the requisite diligence in filing the motion was not shown where new counsel began representing the alien many months before the motion was filed.

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JULY 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeal of petitions for review of Board decisions for June 2007 was 20.6%. This is up a bit from last month's 18.9%. The following chart provides the results from each circuit for July 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	9	8	1	11.1
2nd	113	86	27	23.9
3rd	31	29	2	6.5
4th	23	22	1	4.3
5th	13	12	1	7.7
6th	6	4	2	33.3
7th	15	12	3	20.0
8th	7	6	1	14.3
9th	134	98	36	26.9
10th	5	5	0	0.0
11th	22	18	4	18.2
All:	378	300	78	20.6

The Ninth Circuit reversed in 36 of its 134 cases (26.9 %). The reversals covered a wide range of issues including credibility in asylum cases (10); past persecution (1); nexus (3); well-founded fear determination (2); changed country conditions (2); particularly serious crime bar (1); discretionary denial (1); and CAT issues (4). Several cases were remanded with instructions to address issues, arguments, or facts that had not been fully addressed by the Immigration Judge or the Board. The Second Circuit reversed in 27 of 113 cases (23.9 %). The majority of these reversals involved flaws in the adverse credibility determination in asylum claims.

The Eleventh Circuit reversed in two asylum cases from Colombia, one involving level of harm for past persecution, the other involving nexus. The Seventh Circuit reversed in three asylum cases, two involving credibility and one involving level of harm for past persecution. The Sixth Circuit reversed an asylum denial based on an improper standard for well-founded fear and found an Immigration Judge failed to provide adequate explanation for denying a continuance. The Third Circuit found that the Board, in overturning a grant of cancellation of removal, ignored the Immigration Judge's findings of fact.

The chart below shows numbers of decisions for January through July of 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	64	44	20	31.3
8th	54	41	13	24.1
2nd	689	564	134	19.2
6th	76	63	13	17.1
9th	1469	1226	243	16.5
3rd	205	182	18	11.2
10th	46	42	4	8.7
11th	195	179	16	8.2
5th	126	117	9	7.1
4th	116	108	8	6.9
1st	37	35	2	5.4
All:	3086	2601	485	15.7

Last year at this point (January through July 2006) we had a total of 3341 decisions with 596 reversals for a 17.8 % overall reversal rate. The ordering of the circuits by rate of reversal at this point last year was just about the same as this year with the Eighth and Tenth Circuit switching places in the order.

John Guendelsberger is Senior Counsel to the Board Chairman, and is serving as a Temporary Board Member.

Persecution and Persecutors: No Bright Lines Here

by Edward R. Grant

We are hesitant to announce a brightline rule, particularly in immigration cases.

This seemingly offhand observation by the U.S. Court of Appeals for the Third Circuit – in a case in which it did adopt a bright-line rule – explains many of the dilemmas facing Immigration Judges and the Board of Immigration Appeals. *See Cespedes-Aquino v. Att'y Gen.*, ___ F.3d ___, 2007 WL 2362520 (3d Cir. Aug. 21, 2007). To the extent it is true, the Court's "hesitation" also guarantees a future of full employment for your humble scribe.

On no issue is the lack of bright-line distinctions more evident than the matter of what constitutes "persecution," and the related question of what level of past conduct by a potential applicant constitutes "persecution of others," thus barring the application.

Several recent decisions have addressed both issues. Last month, we reported on significant Eleventh Circuit cases addressing persecution in the context of Colombian asylum claims. *See Jimenez v. Gonzales*, ___ F.3d ___, 2007 WL 2034955 (11th Cir. July 12, 2007); *Lopez v. Att'y Gen.*, 490 F.3d 1312 (11th Cir. 2007). Since then, several circuits have pronounced on the question from a variety of perspectives, addressing the burden of proof, the role of economic harm, and special consideration that must be given to claimants who witnessed horrific acts when they were children. In addition, two recent decisions (one from earlier this year) have shed new light on the standards that must be met before a claimant can be found to be a persecutor of others.

In keeping with the Third Circuit's observation, this column will offer no bright-line rules. It will, however, examine how the standards for determining "persecution," and those for determining who can be counted as a "persecutor," continue to evolve.

Seventh Circuit: Specific Evidence of Severe Harm Required

The Seventh Circuit, in two decisions finding that the applicants did not establish past persecution, held that while non-physical harm may rise to the level of persecution, such harm must be severe, and cannot be established through "scant" testimony. The Court held in *Yun Jian Zhang v. Gonzales*, ___ F.3d ___, 2007 WL 2177951 (7th Cir. July 31, 2007), that extensive damage to the applicant's home by Chinese authorities as a sanction for having an "out of plan" birth did not rise to the level of persecution because the applicant was himself skilled in construction, his family were able to find housing with his wife's family, and both children were, after the home damage, permitted to be registered with the government. The Court noted that the damage to the door, windows, and roof of the home was not irreparable, "particularly for someone who made his livelihood doing construction," and who was not forced out of his job. *Id.* at *4. The Court also noted that the respondent and his family were unharmed by the authorities after the home damage, and his children were able to attend public school.

Tarraf v. Gonzales, ___ F.3d ___, 2007 WL 2164157 (7th Cir. July 30, 2007), involved a Lebanese applicant for withholding of removal who was found not credible due to serious discrepancies regarding the length and conditions of his detention by Hezbollah, and who alternately was found not to have met his burden of proof for establishing past persecution. While the Court affirmed both findings, its affirmance of the latter is interesting because the harm alleged – which included detention, mistreatment, and shooting – might, "on another record," have compelled the Court to find past persecution.

> The extremely scant details in Mr. Tarraf's testimony, however, prevent this court from reaching that conclusion in this case. We do not hold that a petitioner must provide a blow-by-blow, minute-by-minute account of his experiences in his home country in order to establish past persecution; we note only that something more than the general allegations of detention and torture provided to the IJ in this case will compel a finding of past persecution.

Tarraf, at *8.

Both in *Zhang* and *Tarraf*, the Court emphasized that physical harm is not required to meet an applicant's burden, but that "severity" of harm is a critical factor for the applicant to prove.

> Physical abuse causing serious injuries is not the sine qua non of persecution. Persecution can include confiscation of property, surveillance and behavior that threatens future harm. Conduct can rise to the level of persecution without being life-threatening, including even such acts as severe economic deprivation. *Frequency and severity of the harm suffered by a petitioner, however, remain relevant factors in an inquiry into whether those particular harms compel a court to conclude that the alien suffered persecution.*

Id. (citations ommitted; emphasis added).

In making these determinations, the Seventh Circuit quoted its 2004 decision in *Mei Dan Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004), in which it affirmed the denial of asylum to a Chinese applicant who, at the age of 16, was detained for two days and beaten for selling books related to Falun Gong. *Liu* concluded that this treatment did not rise to the level of persecution; it further noted that claims of persecution "cannot simply be evaluated against a generic checklist. Review of an applicant's past experience must be carried out on the most specific level – it is the details that reveal the severity of a particular situation." *Id.* at 10. The Court, while holding that asylum claims by minors must be considered in light of how persecution is perceived by one who is underage, determined that since Ms. Liu was so close to the age of majority, there was no error in the BIA's giving less weight to this factor. *Id.* at 12.

Ninth Circuit: Age as a "Critical Factor" in Determining Persecution

The Ninth Circuit, in *Hernandez-Ortiz v. Gonzales*, ___ F.3d ___, 2007 WL 2263878 (9th Cir. August 8, 2007), employed the "persecution as a child" doctrine to remand the case of two Guatemalan brothers of Mayan dissent whose village was occupied by government troops in 1982, at which time they were ages 9 and 7. The family immediately fled to Mexico, after which another brother who had remained in the village was killed by the army. The Court found that the Immigration Judge had committed "legal error" by not considering the impact of these events on children of the age the applicants were in 1982 – or 22 years prior to their merits hearing before the Immigration Judge.

Citing the Seventh Circuit's decision in *Liu*, the Ninth Circuit agreed that age can be a "critical factor" in determining the impact of particular events on an individual applicant for asylum. The Court relied even more directly on the Second Circuit's decision in *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006), also involving a Mayan from Guatemala, (stating it was legal error "not to have considered the events in the village [which included the killing of three family members] from the perspective of a small child.") Likewise, the Sixth Circuit, in *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004), reversed an Immigration Judge finding that the testimony of a 9-year-old Ethiopian asylum applicant was too vague and ambiguous to establish a well-founded fear of female genital mutilation. The Court found that the applicant's age should have been taken into account in assessing her testimony, and that in light of her age, objective country conditions (which showed a high prevalence of FGM) should have been given greater weight.

All of these decisions have adopted standards set forth in December 1998 guidelines for asylum officers of the legacy Immigration and Naturalization Service which relied in part upon guidance set forth for asylum adjudicators by the United Nations High Commissioner for Refugees. *See* Guidelines for Children's Asylum Claims, INS Policy and Procedural Memorandum from Jack Weiss, Acting Director, Office of International Affairs to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) 14, (Dec 10, 1998), available at 1998 WL 34032561. In particular, the Ninth Circuit stated in *Hernandez-Ortiz* that

> three sister circuits have now vindicated a principle that is surely a matter of common sense: a child's reaction to injuries to his family is different from an adult's. . . . We now join the Second, Sixth, and Seventh Circuits in affirming the legal rule that injuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child.

Hernandez-Ortiz at *2.

The Court found that the incidents of losing their home, being driven out of their country, and losing their brother must be re-assessed to determine if they rose to the level of persecution in light of the applicants' ages in 1982. (It should be noted that the Immigration Judge decision in this case was 36 pages long, explicitly took into account the applicants' difficulties with time sequence and other abstract concepts, and acknowledged that a reviewing court might disagree with the conclusion that past persecution was not established.)

The fact that four circuits have cited approvingly to the December 1998 INS guidelines is a reminder of their relevance to EOIR adjudicators – which will not be news to those many judges whose work with juvenile applicants has been widely and justifiably noted. Equally noteworthy is the extent to which the guidelines remain relevant in the case of *adult* applicants even decades after the events in question – provided that the applicants were children at the time.

Furthermore, the decisions in *Abay, Jorge-Tzoc,* and *Hernandez-Ortiz* suggest that applicants testifying as adults to events which occurred when they were children may not be held to the standard of "specific evidence" highlighted in our previous discussion of Seventh Circuit cases. *Abay*, of course, involved a now-juvenile applicant. However, the other two cases, no less than *Abay*, highlighted the importance of relying on objective reports of country conditions to supplement and fill in evidentiary gaps in an applicant's testimony regarding events occurring during childhood. It seems, therefore, that the influence of the 1998 guidelines extends far past the point of reaching adulthood.

The Persecutor Bar: The Line Between Haircutter and Prison Camp Guard

Given the nature of the conflicts that give rise to many asylum cases, it is not surprising that some applicants may themselves be implicated in acts of persecution. Accordingly, rules established in the quintessential "bright-line" context – cases of Nazi death camp guards – are receiving additional "gloss" in cases where the factual and equitable lines are not as clear.

Two recent decisions, *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007) and *Im v. Gonzales*, ___ F.3d ___, 2007 WL 2296778 (9th Cir. August 13, 2007), demonstrate that as difficult as it may be to draw the line between what harm rises to the level of persecution, and what harm does not, it may be even more difficult to draw the line between who is and who is not a "persecutor" for purposes of the statutory bars to asylum and withholding of removal. See Sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act. As stated by the First Circuit in another recent case, "[t]he statute that bars persecution has a smooth surface beneath which lie a series of rocks." *Castenada-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007)(en banc)(holding that to be barred as a "persecutor", an asylum applicant must have "culpable knowledge" of the acts of persecution); accord, *Gao v. U.S. Att'y Gen'l*, __ F.3d __, 2007 WL 24717 46 (2nd Cir. Sept. 4, 2007).

The *Doe* and *Im* decisions held that a Salvadoran army lieutenant present at the infamous massacre of six Jesuits in 1989, and a Cambodian who served in 1979 as a supervosory guard at a prison in which torture and other inhumane treatment were common, did not meet the standard of having "ordered, incited, assisted, and otherwise participated" in the persecution of any person on the account of the five grounds enumerated in the Immigration and Nationality act.

How the courts arrived at the lines drawn in their decisions requires some brief background. The seminal decision is the Supreme Court's ruling in *Fedorenko v. United States*, 449 U.S. 490 (1981), involving the denaturalization of former guard at the Treblinka concentration camp who was forced to serve in that capacity under penalty of death. A "cryptic" footnote in that decision has served as the touchstone for line-drawing in subsequent persecutor-bar cases.

> An individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the perse-

> cution of civilians. *Other cases may present more difficult line-drawing problems but we need decide only this case.*

Id. at 512, n.34 (emphasis added).

How true, as we will see. Fedorenko's denaturalization order was affirmed by the Supreme Court, and his subsequent deportation order affirmed by the Board. *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984). Both decisions rejected Fedorenko's claim that he should not have been considered a persecutor because he was a former prisoner of war who was compelled to serve by the Nazis in this capacity.

Subsequent decisions have focused, literally, on whether a particular asylum applicant's conduct is closer to that of the hypothetical hair-cutter, or to the quite genuine prison camp guard. While several circuits have addressed the issue, the Ninth's Circuit's 2006 ruling in *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006), appears to have captured the current state of where the line may be drawn.

The applicant was a former member of the Peruvian civil guard who, due to his language skills, was assigned to serve as an interpreter during the interrogation of suspected Shining Path guerrillas during the 1980s. He served six years in this capacity; during the interrogations, suspects were subject to electric shock and beatings on the soles of their feet. He did not participate in this mistreatment, and personally opposed it, but did not refuse to interpret at such sessions because it would have affected his performance rating.

The Ninth Circuit addressed the legal question of what constitutes "assistance" in persecution de novo, after concluding that the Immigration Judge's decision finding the applicant to be a persecutor (which had been summarily affirmed by the Board) was not entitled to Chevron deference because Immigration Judges do not have the authority to make agency-binding decisions on matters of law. (Notably, the Court did not mention in this regard the Attorney General's decision in *Matter of A-H-*, 23 I&N Dec.774 (A.G. 2005), which set forth rather specific standards for the adjudication of such cases.)

The Court concluded that the question of "assistance" requires a "particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." *Miranda Alvarado*, at 927. The standard does not require "actual trigger-pulling," but does require more than "mere membership" in an organization engaged in persecutory activity. By this standard, the former interpreter was found to meet the standard of "personal involvement."

The next step, according to the Circuit, is to assess to what degree his own actions were instrumental to the persecutory end of the activities in question. The mythical hair-cutter is not committing an act of persecution, and his activity is not essential to the ensuing act of execution, or in furtherance of it, the Court wrote. However, the camp guard, even if he does not shoot a single prisoner, is essential to the "orderly" functioning of a death camp, and thus his actions are instrumental to its persecutory ends.

On this continuum, the Court concluded that, though this case might be "at the margin" of culpability, the interpreter's actions are closer to that of the prison guard. Without his assistance, the interrogation could not have proceeded, and the persecutory actions of beating and electric shock would have been pointless, because they would not have elicited information useful to those conducting the interrogation. Furthermore, he was not compelled by self-defense to participate, and did not actively oppose the use of persecutory techniques.

The "margin" referred to in *Miranda Alvarado* may have been further clarified in the Ninth Circuit's just-issued decision in *Im v. Gonzales*, ___ F.3d ___, 2007 WL 2296778 (9th Cir. August 13, 2007) (holding that a Cambodian applicant variously described as a "prison guard" by the Circuit, and as the "deputy director" of the prison by the Immigration Judge, was found not to have assisted in persecution of Khmer Rouge who were tortured and otherwise mistreated during interrogations in 1979 and 1980.)

On its face, *Im* appears to be difficult to reconcile with *Fedorenko,* or even the Ninth Circuit's own indication in *Miranda Alvarado* that a prison camp guard clearly is culpable as a persecutor. This is particularly true when considering the facts as stated by the Immigration Judge. The Immigration Judge found that Im had told an asylum officer "clearly" that he was the "deputy direc-

tor" of the prison in which Khmer Rouge suspects were detained, that he was a supervisor, and that while he never personally harmed a prisoner, his responsibilities included ensuring that prisoners to be interrogated were taken to that unit and then returned to their cells. "As a supervisor," the Immigration Judge found, "the Respondent was responsible for overseeing the process. He stated that he knew that prisoners were tortured during interrogation." *Im* specifically recalled the case of a non-Khmer Rouge political prisoner who was tortured. He continued in the task, he said, because he thought he would otherwise be tortured himself. In re *Im*, A79 267 089, (I.J. Opin. August 21, 2003) (Unpublished; available on EOIR Virtual Law Library).

The Ninth Circuit, without finding error in, or even commenting upon, the Immigration Judge's statement of the facts, described Im's responsibilities quite differently. He was not a supervisor, but was one of five guards, and his task with regards to the interrogations were simply, upon orders, to unlock the cells of those prisoners being brought for interrogation, and to accompany them back to their cells after the interrogation. He did not participate in the interrogations. *Im*, 2007 WL 2296778 at *1, 5-6.

Under the standard of "purposeful, material assistance" set forth in *Miranda Alvarado*, the Court concluded that Im's actions were not sufficiently culpable to bar him as a persecutor. His actions in unlocking the cell doors prior to interrogation were analogous to the hypothetical hair-cutter in *Fedorenko* – his actions neither facilitated the persecutory interrogations nor, unlike the role of the language interpreter, were essential to their conduct. Others, including the interrogators themselves, could have carried out his task. *Id*. at 5-6.

Even accepting the facts as set forth by the Ninth Circuit, *Im* appears to break significant new ground. By finding an applicant's role as a prison guard in an institution where persecution takes place is not sufficient, the Circuit now requires adjudicators to examine the specific *functions* carried out by the former guard. In the context of former Nazi camp guards, the role itself has been sufficient to find culpability – and the Ninth Circuit appeared to endorse this view in *Miranda Alvarado*. *See United States v. Friedrich*, 402 F.3d 842 (8th Cir. 2005). The authorities after *Fedorenko* are clear that "involuntariness" is not an exonerating factor, *United States v. Hansel*, 439 F.3d 850 (8th Cir. 2006), and that direct personal involvement in the acts of persecution is not required, *Ofoso v. McElroy*, 98 F.3d 694 (2d Cir. 1996). While *Im* does not depart from these principles, its analysis suggests that other factors also will be considered, and that those applicants who may have been "caught up" in reprehensible actions during one of the brutal wars or civil conflicts of more recent time will receive more individualized consideration of their particular circumstances.

Clearly, *Im* indicates that persecutor cases are to be closely assessed on their specific facts – which makes the riddle of the conflicting versions of the facts in that case all the more frustrating. Also lacking, from a doctrinal point of view, is a clear statement of who bears the burden of proof regarding the persecutor bar and, assuming the government bears the initial burden of proof, at what point the burden shifts to the applicant to establish that he is not subject to the bar.

The Seventh Circuit's decision in *Doe* further emphasizes the extent to which at least some circuits will look to specific, individual circumstances in assessing the persecutor bar. The applicant, an army lieutenant assigned to San Salvador, was ordered by superiors to participate in a mission to kill a Jesuit priest and university president deemed sympathetic to the leftist rebels. While he personally objected to the mission as immoral, he complied with orders and accompanied the force of 30 to 40 soldiers to the university. Six Jesuits and two lay women were killed; Doe (a pseudonym used because of the danger he now faced on return to El Salvador) did not fire his gun, seize anyone, or prevent anyone's escape from the massacre. However, he did take actions afterwards to cover up the offense.

These facts were not disputed; Doe was convicted of complicity in a trial later deemed to be part of a military cover-up protecting those more directly responsible, and against whom Doe later testified. (The Circuit also reversed that aspect of the Immigration Judge decision barring the respondent from asylum because he had been convicted of murder; the trial, the Court concluded, was a "farce.")

The Court found that no decision by the Board, or other federal courts, had addressed whether "mere presence at the scene of persecution constitutes participation in it." The Court cited to the "hair-cutter vs. prison guard" dichotomy, concluding that the hair-cutter hypothetical in *Fedorenko* signaled that the Supreme Court would not

find "mere presence" to be sufficient to implicate the bar. Citing its own recent decision in *United States v. Kumpf*, 438 F.3d 785, 790 (7th Cir. 2006), it noted that a camp guard is culpable even if he does not harm or shoot any persons, because his "personal presence functioned to discourage escape attempts and maintain order over the prisoners." In this case, the Court concluded, the evidence did not establish that Doe's presence in accompanying a battalion to which he did otherwise belong did not discourage attempts to escape or otherwise contribute to the persecution.

Curiously, in light of the Attorney General's rather clear statements in *Matter of A-H-*, the subsequent circuit cases discussed here do not look to that decision for any guidance on the meaning of either "persecution" or "assistance." Doe emphasizes that the Board has not "parsed" the meanings of the words "assist" and "participate;" in fact, in the unpublished Board panel decision vacated by the Attorney General in *Matter of A-H-*, the Board had spoken to these issues, and the Attorney General felt compelled to issue different standards. It is not clear how these standards would cut in a case such as *Doe*; the applicant in A-H- was an Algerian political leader charged with inciting and encouraging followers to engage in actions which the Attorney General found to constitute persecution. Nevertheless, the near-complete oversight of *Matter of A-H-* as a binding administrative precedent in this area – even if courts found it of limited applicability to distinct fact situations – is startling.

The type of individualized assessment represented in these cases does find doctrinal roots in the noted footnote to *Fedorenko*; as discussed previously, the contexts that give rise to such issues also appear to have influenced the courts. It is difficult to separate the analysis upon the agreed facts in *Doe*, for example, from the now-discounted murder conviction, and the ensuing danger he faces as a result of his later cooperation with investigators. Strictly speaking, these latter factors are irrelevant to whether *Doe* was a persecutor; in reality, they appear to be part of the "fog of war" that at least the Seventh and Ninth Circuits now expect Immigration Judges and the Board to pierce in assessing such claims.

The Third Circuit may have been able to establish its bright-line rule: that aliens *convicted* of disqualifying offenses after the enactment of the Antiterrorism and Effective Death Penalty Act cannot be eligible for relief under former section 212(c). *Cespedes-Aquino*, at n.1. When it comes to the persecuted and persecutors, no such luck.

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RECENT COURT DECISIONS

First Circuit

Chedad v. Gonzales, _ F.3d _, 2007 WL 2178427 (1st Cir. July 31, 2007) . The First Circuit found that the grant of a timely filed motion to reopen does not toll the running of voluntary departure. In this case, the petitioner's request for a continuance was denied by an Immigration Judge. The Immigration Judge granted voluntary departure, and the petitioner appealed the denial of the continuance. The Board dismissed the appeal and a motion to remand for adjustment of status. Before the expiration of the voluntary departure period, the petitioner filed a motion to reopen with the Board. The Board granted the motion. On remand, the Immigration Judge pretermitted the adjustment application, finding that the petitioner had overstayed a period of voluntary departure and was thus ineligible for adjustment. The Board affirmed. The First Circuit held that the filing of a motion to reopen does not toll the period of voluntary departure. This creates a 3-4 circuit split on the issue. *See Ugokwe v. Attorney Gen.*, 453 F.3d 1325 (11th Cir.2006); *Kanivets v. Gonzales,* 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ahscroft*, 394 F.3d 1278 (9th Cir. 2005)(allowing tolling) and *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir.2006) (no tolling).

Second Circuit

Burger v. Gonzales, _ F.3d _, 2007 WL 2331944 (2nd Cir. August 17, 2007). The Second Circuit found that in the context of an appeal, the Board may not take administrative notice of changed country conditions without allowing an alien the opportunity to respond, extending its holding in *Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196, 201 (2d Cir.2007). In this case, the Immigration Judge had granted asylum to the petitioner, a native of Yugoslavia and citizen of Serbia-Montenegro. The Board reversed, taking administrative notice of changed country conditions, to wit, that following the Immigration Judge's decision, Milosevic was removed from power and faced trial for crimes against humanity in the Interna-

tional Criminal Tribunal for the former Yugoslavia in the Hague. The Court acknowledged that the Fifth, Seventh, and D.C. Circuits have held that a motion to reopen suffices to satisfy due process in this context. *See Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C.Cir.1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 968 (5th Cir.1991); *Kaczmarczyk v. INS*, 933 F.2d 588, 597 (7th Cir.1991). The Court joined the Ninth and Tenth Circuits, however, in holding that a motion to reopen does not contain sufficient guarantees of due process. Due process requires that the Board provide applicants with notice and an opportunity to be heard before the Board determines on the basis of administratively noticed facts that a petitioner lacks a well-founded fear of persecution. *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir.1994); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1100 (10th Cir.1994).

Fifth Circuit

Gaona-Romero v. Gonzales, _ F.3d _, 2007 WL 2372357, (5th Cir. August 21, 2007). The petitioner sought en banc review of a Fifth Circuit panel decision affirming the Board's decision finding the petitioner removable on the basis of a vacated controlled substance conviction pursuant to *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2003). The petitioner urged the Court to abandon its adherence to *Renteria* and instead follow the interpretation of "conviction," adopted by the Board in *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003). The Government stated that it no longer takes the position that the petitioner should be removed on the basis of his vacated controlled substances conviction. As a policy decision, the Government now does not seek to uphold removal decisions pursuant to *Renteria*. The Government requested that the court vacate its panel decision and remand to the Board so that the government may withdraw the charge of removability based upon petitioner's vacated drug conviction. The Court treated the Government's response to the alien's petition for en banc reconsideration as a motion for panel rehearing, vacated its prior decision, and remanded the case.

Ninth Circuit

Sandoval-Lua v. Gonzales, _ F.3d _, 2007 WL 2421427 (9th Cir. Aug. 28, 2007). The Ninth Circuit held that an alien seeking to prove eligibility for cancellation of removal under section 240A(a) of the Act meets his burden of establishing by a preponderance of the evidence that he has not been convicted of an aggravated felony when the record of conviction is inconclusive. In this case, the alien was convicted under California Health and Safety Code 11379(a), a provision which includes some criminal conduct such as solicitation which is not covered by the Controlled Substances Act. DHS did not charge aggravated felony as a ground for removal.

The Court employed the following approach in considering when an alien meets his burden of proof: 1) alien has burden of proof by preponderance of evidence to show he was not convicted of an aggravated felony per 8 CFR 1240.8(d); 2) *Taylor* categorical and modified categorical approach applies in regard to evidence relevant to alien's burden of proof; 3) the record of conviction is a self-sufficient body of the only evidence that can be considered on the issue; 4) under the modified categorical approach, the judicially noticable documents must establish that the conviction necessarily was for all of the elements constituting an aggravated felony. The Court found that the Board erred in looking outside the record of conviction to the alien's admissions during the immigration hearing (alien admitted that the underlying offense involved sale of methamphetatmine rather than solicitation) to find that alien had not met his burden of proof. The record of conviction produced at the immigration hearing consisted of an abstract of judgment and a complaint reciting the statutory language of 11379(a) in the disjunctive. The disjunctive pleading indicated that the respondent could have been pleading to solicitation and the abstract of judgment did not describe the facts of the conviction. Under these circumstances, the record of conviction was inconclusive as to whether the offense was an aggravated felony. Therefore, the alien met his burden to show that his conviction was not necessarily an aggravated felony. In its footnote 11, the Court seems to suggest that the respondent has no initial burden of producing the record of conviction. So long as the evidence remains inconclusive, respondent meets his burden.

Anderson v. Gonzales, _ F.3d _, 2007 WL 2264698 (9th Cir. August 9, 2007) The petitioner is a native and citizen of Mexico who sought termination to pursue her naturalization application and, in the alternative, suspension of deportation. The Court affirmed the Board's finding that termination required a statement from the Department of Homeland Security that the petitioner is prima facie eligible for naturalization, affirming *Matter of Acosta Hidalgo*, 24 I. & N. Dec. 103 (BIA 2007). The Court then considered whether the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) repeal of suspension of deportation was impermissibly retroactive as applied to the petitioner. The Court announced a test for

determining the second prong of a *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), analysis, holding that "individuals demonstrate reasonable reliance on pre-IIRIRA law and ...plausibly claim that they would have acted ... differently if they had known..about the elimination of [the] relief...if it would have been objectively reasonable under the circumstances to rely on the law at the time."(citations omitted) *Id.* at * 12. In this case, the alien was a lawful permanent resident who sought naturalization 18 months before IIRIRA's effective date, thereby disclosing her attempted voluntary manslaughter conviction and incurring the risk that the Immigration and Naturalization Service (INS) would initiate deportation proceedings. The Court found that her act of waiting an additional five years after being eligible for citizenship to ensure availability of suspension of deportation in the event INS sought to deport her could be deemed an act of reasonable reliance on then-existing relief, and she could plausibly claim that she would have acted differently had she known that suspension of deportation would be eliminated.

Camins v. Gonzales, _F.3d_ , 2007 WL 2421466 (9th Cir., Aug. 28, 2007), the court holds that IIRIRA section 301(a)(13) abrogated the old INA section 101(a)(13) of the Act and the *Fleuti* doctrine, but that the new law cannot be applied retroactively to LPRs who acted in reasonable reliance on the old law prior to IIRIRA's effective date.

The respondent was an LPR who pled guilty in January 1996 to sexual battery. He took a short trip outside the United States in 2001 and on return was placed in removal proceedings as an LPR seeking admission under 101(a)(13)(C)(v), and charging him with inadmissibility for commission of a CIMT. Respondent contended that he should not have been charged with admissibility because the *Fleuti* "brief, casual, innocent" departure rule should have been applied to his case and he should not be considered to be seeking an admission.The court rejected this argument and approved the Board's holding in *Matter of Collado-Munoz,* 21 I&N Dec. 1061 (BIA 1998), that the *Fleuti* doctrine did not survive IIRIRA's revisions of section 101(a)(13).

The court then addressed whether the IIRIRA abrogation of the *Fleuti* doctrine could be retroactively applied to a situation in which the guilty plea was entered prior to IIRIRA (even though the trip outside the country which led to the inadmissibility charge occurred after IIRIRA). Applying *Landgraf* and *St. Cyr*, the court concluded, as did the Fourth Circuit in *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004), that the new section 101(a)(13) may not be applied retroactively to an LPR who pled guilty prior to the enactment of IIRIRA because LPRs who pled guilty to such crimes prior to IIRIRA would have reasonably relied on the continuing ability to travel abroad under the old section101(a)(13), as interpreted by *Fleuti*.

BIA PRECEDENT DECISIONS

In *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), the Board considered a claim based upon China's coercive population control policies (CPC) in the context of an alien's untimely motion to reopen based upon birth of a second child in the United States. The applicant argued that she fell within the changed circumstances exception to the motion to reopen requirements in that there is increased enforcement in Fujian Province, Changle City. The Board first noted that because the applicant was found to lack credibility in her hearing below, the Board is not inclined to favorably exercise discretion. The Board then discussed the primary documents relied upon by the applicant: 2003 Changle City opinion and a Fujian Province decision in the case of Zheng Yu He, and 1999 and 2005 Q&A Handbooks. The Board found that the first group of documents, decisions regarding a Chinese national couple who had a child overseas after birth of a first child in China, show that the couple was viewed by local birth control officials as violating local family planning policies. The Board could not extrapolate that the applicant's behaviour would also be so interpreted as the evidence from the Department of State in the file contradicted this assertion. Furthermore, there are some important factual distinctions, and, as noted in *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007), these documents do not show that sanctions would amount to persecution. The Q&A Handbooks do not show a change in country conditions and do not indicate that forcible sterilizations are mandated. The applicant did not meet her burden with the remaining documents standing alone or in conjunction with the above documents to show changed circumstances in China and a prima facie case for a grant of asylum.

In *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007), the Board addressed the REAL ID Act focusing on the credibility provisions. The respondent presented

an asylum claim based upon alleged persecution in China due to his Christian faith. The Immigration Judge made an adverse credibility finding based upon inconsistencies between the testimony of the respondent and his sister, inconsistent statements made by the respondent at the airport interview, the respondent's demeanor, implausibilities, and the failure to produce corroborative evidence. The Board found that the inconsistencies were present, and that the inconsistencies do not need to go to the heart of the claim under the REAL ID Act. As regards the airport statement, the Board noted that the respondent did not argue that the airport interview was unreliable and did not attempt to explain the inconsistencies about the passport he used. Finally, the Board noted that Congress codified in the REAL ID Act the Board's corroboration standards set forth in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). The Board found that the absence of corroboration of the respondent's attendance at home churches in China or the United States, or affidavits from his relatives without a satisfactory explanation of the absence, contributed to the adverse credibility and ultimately the failure of the burden of proof.

In *Matter of Jara Riero and Jara Espinol*, 24 I&N Dec. 267 (BIA 2007), the Board found that an alien seeking to establish eligibility for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), on the basis of a previous marriage-based visa petition must prove that the first marriage was bona fide at its inception. At issue in the case were the regulations at 8 C.F.R. §§ 1245.10(a)(3) and (i), which set forth the grandfathering requirements and provide that the first visa petition must have been "approvable when filed." This term is defined, and requires that the visa petition was (1) properly filed, (2) meritorious in fact, and (3) not frivolous. The Board found that "approvable when filed" requires more than the existence of a marriage, that the visa petition must have been based upon a genuine marriage at its inception. This determination may require testimony at the hearing about the prior marriage. In this case, the Immigration Judge and the Board considered the district director's Notice of Intent to Deny, the testimony and arguments regarding the inconsistencies noted in the Notice of Intent to Deny, and the lack of documents submitted at the hearing in finding that the marriage was not bona fide at its inception.

In *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007), the Board considered who bears the burden of proving that a conviction was not vacated solely for immigration purposes in a motion to reopen. In this case, the respondent was found removable by an Immigration Judge based upon a conviction for criminal sexual abuse. During the pendency of the respondent's appeal, he filed a motion to remand, alleging that his conviction had been vacated. The Board granted the motion, and on remand, the Immigration Judge sought evidence establishing the reason that the conviction had been vacated. After several continuances, the Immigration Judge found that the respondent had not established that his conviction was vacated as a result of a procedural or substantive defect in the underlying conviction. The Board noted that there is a split among the United States Circuit Courts of Appeal on the burden of proof issue, but the Circuit in which this case arose, the Seventh Circuit, had not yet ruled on the matter. The Board found that at this late stage of proceedings, the burden is appropriately placed upon the respondent.

REGULATORY UPDATE

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
8 CFR Part 103
Temporary Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule for Certain Adjustment of Status and Related Applications
SUMMARY: This rule temporarily amends the applicable fees for employmentbased Forms I–485, "Application to Register Permanent Residence or Adjust Status," and applications for derivative benefits associated with such Forms I–485 filed pursuant to the Department of State's July Visa Bulletin No. 107, dated June 12, 2007. The fees for all other petitions and applications administered by U.S. Citizenship and Immigration Services will continue in force as effective on July 30, 2007.

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
Extension of the Designation of El Salvador for Temporary Protected Status; Automatic Extension of Employment AuthorizationDocumentation for Salvadoran TPS Beneficiaries
SUMMARY: This Notice announces that the designation of El Salvador for Temporary Protected Status (TPS) has been extended for 18 months to March 9, 2009, from its current expiration date of September 9, 2007. 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) for the additional 18-month period. Reregistration is limited to persons who have previously registered for TPS under the designation of El Salvador and whose application has been granted or remains 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.

Given the timeframes involved with processing TPS re-registrants, the Department of Homeland Security (DHS) recognizes that re-registrants may not receive a new EAD until after their current EAD expires on September 9, 2007. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of El Salvador for 6 months, through March 9, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the March 9, 2009 expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 274a
Safe-Harbor Procedures for Employers Who Receive a No-Match Letter
SUMMARY: U.S. Immigration and Customs Enforcement is amending the regulations relating to the unlawful hiring or continued employment of unauthorized aliens. The amended regulation describes the legal obligations of an employer, under current immigration law, when the employer receives a no-match letter from the Social Security Administration or receives a letter regarding employment verification forms from the Department of Homeland Security. It also describes "safe-harbor" procedures that the employer can follow in response to such a letter and thereby be certain that the Department of Homeland Security will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the United States. The final rule adds two more examples to the current regulation's definition of "'knowing" to illustrate situations that may lead to a finding that an employer had such constructive knowledge. These additional examples involve an employer's failure to take reasonable steps in response to either of two events: The employer receives a written notice from the Social Security Administration (such as an "Employer Correction Request" commonly known as an employer "no match letter") that the combination of name and Social Security account number submitted to the Social Security Administration for an employee does not match agency records; or the employer receives written notice from the Department of Homeland Security that the immigration status or employment-authorization documentation presented or referenced by the employee in completing Form I– 9 was not assigned to the employee according to Department of Homeland Security records. (Form I–9 is retained by the employer and made available to DHS investigators on request, such as during an audit.) The rule also states that DHS will continue to review the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien in a situation described in any of the regulation's examples. The "safeharbor" procedures include attempting to resolve the no-match and, if it cannot be resolved within a certain period of time, verifying again the employee's identity and employment authorization through a specified process.

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