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It is intended only to be an educational resource for the use of employees of the Executive Office for Immigration Review.

In this issue...

Splitting Hairs: Burden of Proof, Voluntariness and Scienter Under the Persecutor Bar to Asylum-Based Relief

By Derek C. Julius

Asylum-based relief rests at the heart of United States immigration law, but not all aliens are eligible for such relief. The Immigration and Nationality Act (the Act or INA) provides that these forms of relief shall be denied to those who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion." *See* section 208(b)(2)(A)(i) of the Act, 8 U.S.C. § 1182(b)(2)(A)(i) (bar to asylum); section 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i) (bar to withholding of removal). As the United States Court of Appeals for the Second Circuit has stated, these provisions are collectively known as the "persecutor bar" and render an applicant statutorily ineligible for either asylum or withholding of removal "even if the applicant can otherwise satisfy the requirements for obtaining those forms of relief." *Xu Sheng Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 98 (2d Cir. 2007).

The number of removal cases in which the persecutor bar to relief becomes an issue appears to be on the rise. This may be due in large part to increased efforts by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) to target human rights abusers. According to published reports, ICE has currently identified "over 800 cases from 85 countries involving suspected human rights violators … ." U.S.I.C.E. , Fact Sheet: Human Rights Violators Investigations (Apr. 3, 2007), *available at* www.ice.gov/pi/news/factsheets/hrvc1.htm.

An observer has noted that "[t]he legal definition of persecutor and persecuted originally applied to the Nazi war criminal and the Holocaust victim." Lori K. Wells, *The Persecutor Bar in U.S. Immigration Law*, 16 Pac. Rim L. & Pol'y J. 228 (Jan. 2007). When applying the persecutor bar to removal cases, the Immigration Courts, the Board of Immigration Appeals, and Federal Courts of Appeals have relied heavily on a case

from the United States Supreme Court involving the denaturalization of a former prison guard at Treblinka, a Nazi concentration camp in Poland. In *Fedorenko v. United States*, 449 U.S. 490 (1981), the Supreme Court famously noted that:

> [A]n 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 persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Fedorenko, 449 U.S. at 514 n.34.

Perhaps not surprisingly, many cases fall within the gray area that exists between the black-and-white dichotomy of the haircutter and the prison guard. An analysis of those acts that constitute ordering, inciting, assisting or otherwise participating in the persecution of another on account of a statutorily protected ground, however, is beyond the scope of this article. For an in-depth discussion of those issues, see Edward R. Grant, *Persecution and Persecutors: No Bright Lines Here*, Immigration Law Advisor Vol. 1 No. 8 (Aug. 2007). This article addresses other "hair-splitting" issues involved in the persecutor bar including: the burden of proof in such cases, involuntary actions, and the role of *scienter*.

Burden of Proof

As a threshold matter, it is important to note that if the evidence indicates that the persecutor bar applies to the applicant, the *applicant* bears the burden of proving by a preponderance of the evidence that he or she did not order, incite, assist or otherwise participate in the persecution of any person on account of a statutorily protected ground. 8 C.F.R. § 1208.13(c)(2)(ii) (2008). To what degree of certainty the evidence must implicate the persecutor bar remains a question, and few decisions directly address the burden-shifting aspect of the persecutor bar. *See*, *e.g.*, *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 21 n. 3 (1st Cir. 2007) (noting that, when "[t]he government's evidence showed that atrocities had occurred, that they were likely on account of political opinion, and that [the applicant]—wittingly or not—had been involved," sufficient evidence existed to shift the burden of proof to the applicant); *Xu Sheng Gao, v. U.S. Atty. Gen.*, 500 F.3d 93, 99 (2d Cir. 2007) (noting that mere association with an organization that engages in persecution is insufficient to trigger the bar); *Dacaj v. Gonzales*, 177 Fed. Appx. 185, 186 (2d Cir. 2006) (unpublished) (finding that when an asylum officer testified at a hearing and presented detailed notes of the interview, initialed by the applicant, sufficient evidence existed for the Immigration Judge to find that applicant did, in fact, interrogate, beat, and deliver prisoners to his command for further punishment).

Voluntariness

When analyzing a similarly-worded relief-bar under the Displaced Persons Act of 1948 (DPA), the Supreme Court concluded that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for [relief]." *Fedorenko*, 449 U.S. at 512. In so holding, the Supreme Court relied on the DPA's definition of "displaced person" as anyone who met the definition of "displaced person or refugee" in the Constitution of the International Refugee Organization of the United Nations (IRO Constitution). *Id.* at 495 (citing DPA § 2(b), 62 Stat. 1009); *see also Zhang Jian Xie v. INS*, 434 F.3d 136, 140-41 (2d Cir. 2006) (discussing voluntariness under *Fedorenko*). The Supreme Court noted that §§ 2(a) and 2(b) of the IRO Constitution specifically exempted from refugee status those who "assisted the enemy in persecuting [civilians]" as well as those who had "*voluntarily* assisted the enemy forces." *Fedorenko*, 449 U.S. at 495 (citing IRO Constitution, Annex I, Part II, § 2(a) & (b), 62 Stat. 3051-52) (emphasis added). Nonetheless, the Supreme Court was "unable to find any basis for an 'involuntary assistance' exception to the [persecution] language" of the IRO Constitution. *Id.* at 512. Using statutory construction principles, the Supreme Court concluded that "the deliberate omission of the word 'voluntary' from § 2(a) [of the IRO Constitution] compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas [not just those who voluntarily assisted in such acts]." *Id.* at 512 (emphasis in original).

The Board of Immigration Appeals (Board) endorsed the Supreme Court's approach to the persecutor bar to relief under the Act, noting that "[t]he participation or assistance of an [applicant] in persecution need not be of his own volition to bar him from relief . . . the objective effects of an [applicant's] actions [are] controlling." *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814-15 (BIA 1988).

The Circuit Courts have nonetheless varied in their adherence to the *Fedorenko* holding regarding voluntariness. The Fifth Circuit, in particular, has taken the Supreme Court's language to heart. In *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003), the Fifth Circuit affirmed the decision to apply the persecutor bar to an applicant who testified that he had been an active member of the Revolutionary United Front (RUF), an insurgent group in Sierra Leone. In support of his assertion that the persecutor bar should not apply to his circumstances, the applicant argued that he had been forcibly recruited by RUF under the threat of death, and that he had not engaged in political persecution because "he did not share the RUF's intent of political persecution." *Id.* at 351. The Fifth Circuit rejected the applicant's contention and categorically held that "[t]he syntax of the statute suggests that the alien's personal motivation is not relevant." *Id.* The Fifth Circuit reasoned that if Congress had wanted to insert a requirement of intent, "it could have enacted a statute that withheld removal only of an alien who, because of an individual's political opinion, ordered, incited, assisted, or otherwise participated in the persecution." *Id.* (internal quotation marks omitted).

The Sixth and Eleventh Circuits appear to have followed the Fifth Circuit's approach. *See Hajdari v. Gonzales*, 186 Fed. Appx. 565, 569 (6th Cir. 2006) (unpublished) (citing *United States v. Dailide*, 227 F.3d 385, 390 (6th Cir. 2000) (denaturalization analysis)) ("On the other hand, we . . . determined that even involuntary conduct may be considered as giving 'assistance' to another."); *Su Zing Chen v. U.S. Atty. Gen.*, 513 F.3d 1255, 1260 n. 4 (11th Cir. 2008) ("Nor do we mean to imply that voluntariness is a requirement for finding assistance or participation in persecution. [*F]edorenko* specifically disclaimed any notion that the DPA's language included a voluntariness requirement, and there is little reason to believe that the INA's similar exclusionary language requires the assistance or participation be voluntary.")

The Ninth Circuit, however, has noted that, aside from the Fifth Circuit, courts interpreting the INA's persecutor bar have "used caution in applying *Fedorenko*'s reading of the similarly-worded DPA to mean that 'an individual's service as a concentration camp armed guard—*whether voluntary or involuntary*—ma[kes] him ineligible [for relief]." *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 n. 10 (9th Cir. 2006) (emphasis and alterations in original).

The Second Circuit, in particular, appears to have left open the possibility that involuntariness may be a factor in the persecutor bar analysis. In reviewing the Supreme Court's analysis in *Fedorenko*, the Second Circuit noted: "[i]t is true that unlike the IRO Constitution, the INA does not contain a contrasting section that covers only 'voluntary' conduct. But inasmuch as the INA and the DPA were enacted for similar purposes—to enable refugees to find sanctuary in the United States in the wake of World War II—we find it unlikely that the phrase 'assisted in persecution' implicitly includes a voluntariness requirement in one statute but not the other." *Zhang Jian Xie v. INS*, 434 F.3d 136, 141 (2d Cir. 2006). The Second Circuit, nonetheless, proceeded to assess the voluntariness of the applicant's conduct and "emphatically" did not conclude that "redemptive behavior is necessarily irrelevant to the inquiry as to whether an applicant has assisted in persecution." *Id*. at 144.

The Eighth Circuit has taken the question of voluntariness a step further. In *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), the Eighth Circuit addressed the case of an applicant forcibly recruited by guerillas and forced to shoot at villagers, or else be killed himself. Notably, the Immigration Judge originally had granted the applicant asylum; that decision was later appealed by the former Immigration and Naturalization Service (INS), and the Board determined that the Immigration Judge erred in not applying the persecutor bar and ordered the applicant deported. *Id*. at 810-11. In vacating the Board's decision, the Eighth Circuit criticized the Board for failing to conduct a proper analysis in deciding whether the applicant was barred from asylum-based relief due to his participation in guerilla activities, including shooting civilians. *Id.* at 813-14. Specifically, the Eighth Circuit criticized the Board's failure to consider the applicant's "uncontroverted testimony that his involvement with [guerillas] was at all times *involuntary* and compelled by threats of death and that he shared no persecutory motives with the guerrillas." *Id*. at 814 (emphasis added). The Eighth Circuit recognized that *Fedorenko* did not provide for a voluntariness exception; however, it relied on what

it termed the Supreme Court's indication that "all aspects relevant to an individual's conduct must be examined in order to determine whether he assisted in persecution." *Id.* at 813; *see also Matter of A-H-*, 23 I&N Dec. 774, 785 (A.G. 2005) (noting the appropriateness of looking at "the totality of the relevant conduct in determining whether the bar to eligibility applies" and citing *Hernandez* favorably).

The question of what role, if any, voluntariness plays in the persecutor bar may soon have an answer. On March 17, 2008, the Supreme Court granted *certiorari* in the case of *Negusie v. Mukasey* to address the question of whether the persecutor bar prohibits granting asylum to, or withholding the removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution. *Negusie v. Mukasey*, 231 Fed. Appx. 325 (5th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3212, 2008 WL 695623 (U.S. Mar. 17, 2008) (No. 07-499). The Fifth Circuit, relying on its holding in *Bah*, denied Negusie's appeal from the Board's decision finding him ineligible for asylum and withholding of removal due to activities in which he engaged as a guard at an Eritrean military prison, which included standing guard while prisoners were kept in the sun as a form of punishment and depriving prisoners of access to showers and fresh air. *Id.* Negusie conceded that the prisoners were persecuted on protected grounds, but claimed the persecutor bar should not apply to him because his actions were committed involuntarily. *Id.* at 326. The Fifth Circuit concluded that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." *Id.* (citing *Bah*, 341 F.3d at 351). Citing the conflicting approaches taken by the Fifth and Eighth Circuits regarding voluntariness in the persecutor bar analysis, Negusie petitioned for a writ of *certiorari*. Petition for Writ of Certiorari, *Negusie,* No. 07-499, 2007 WL 3022792 (US Oct. 15, 2007).

Scienter

Two Circuit Courts have approached the persecutor bar from a different angle and concluded that, when determining whether the persecutor bar applies in a given case, the court must look beyond the mere objective effects of an applicant's actions and analyze whether the applicant had *scienter*, or knowledge of wrongdoing. *See Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 22 (1st Cir. 2007) (*en banc*); *Xu Sheng Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 102-03 (2d Cir. 2007); *Cf. Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814-15 (BIA 1988) (holding that the objective effects of the applicant's acts are controlling).

The concept of *scienter* was first applied to the persecutor bar by an *en banc* panel of the First Circuit in *Castaneda-Castillo*. In 1985, Castaneda was part of a military operation searching for members of the Shining Path, a revolutionary Marxist organization, in the village of Llocllapampa, Peru. *Castaneda-Castillo*, 488 F.3d at 19. Two military units were assigned to enter the village and conduct the search, while two other units, one of which Castaneda led, were to block escape routes from the village. *Id.* Inside the village, the two units brutally massacred "dozens of innocent villagers, including many women and children." *Id.*

At his removal hearing, Castaneda testified that, while he remained in radio contact with his base commander, he had no communication with the units inside the village and did not learn that a massacre had occurred until three weeks later. *Id.* The Immigration Judge rendered an adverse credibility determination and concluded that the persecutor bar applied to Castaneda. *Id.* at 19-20 (discussing procedural history). The Immigration Judge further concluded that, even if Castaneda were to be believed, he "had nevertheless assisted in persecution because the 'objective effect' of his participation in the operation . . . aid[ed] in their massacre." *Id.* The Board affirmed the Immigration Judge's determination. *Id.* Castaneda then petitioned the First Circuit to review the Board's order.

The First Circuit held that presumptively the persecutor bar should not apply to an applicant who did not have prior or contemporaneous knowledge of the acts constituting persecution. *Id.* at 22. In so holding, the First Circuit rejected a number of arguments advanced by the government. The First Circuit found the lack of a specific scienter requirement in the persecutor bar statute to be unpersuasive, inasmuch as the term "persecution" "strongly implies both scienter and illicit motivation." *Id.* at 20. The First Circuit also employed a common-sense approach in its analysis and noted that "the bus driver who unwittingly ferries a killer to the site of a massacre can hardly be labeled a 'persecutor,' even if the objective effect of his actions was to aid the killer's secret plan." *Id.* In addressing the cases cited by the government in support of its position, the First Circuit noted that most

precedent addressing the persecutor bar deals with the issue of whether certain conduct constitutes "assistance;" however, the First Circuit also determined that these cases tend to "reaffirm the need for some degree of moral culpability." *Id*. at 21.

The First Circuit found substance to the government's argument regarding the need for some flexibility in applying the statute to "gray areas and the latitude implicitly confided to the Attorney General in administering the scheme." *Id*. at 21 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). These hypothetical "gray-area" cases may require less than full and detailed knowledge and include cases of willful blindness or strong suspicions, or an abettor who knows generally of a pattern of persecution while being ignorant of specific incidents. *Id.* Nonetheless, the First Circuit found that *Castaneda* fell outside this "gray area" as "it appears as if Castaneda either had guilty knowledge or (as he claims) knew nothing about the massacre until after it had occurred." *Id*.

Upon remand, the First Circuit instructed the Board to apply the facts of *Castaneda* to the Court's holding that the persecutor bar includes a scienter requirement. Though the Court left open the possibility that Castaneda could be found to have possessed knowledge of the persecution, the Court warned that any such conclusion would need to be reached "expressly and persuasively," and not "by vague reference to the 'totality of the . . . conduct' that conflates the question whether one's conduct constitutes 'assistance' with the question whether one possessed such scienter as may be required under the circumstances." *Id*. at 22.

The Second Circuit found the First Circuit's approach persuasive. *See Xu Sheng Gao v. U.S. Atty.* Gen., 500 F.3d 93, 102-03 (2d Cir. 2007). The Second Circuit further clarified that the "persecutor bar requires some level of culpable knowledge that the consequences of one's actions would assist in acts of persecution," although the evidence need not show that the alleged persecutor had "specific actual knowledge" that his actions assisted in a particular act of persecution. *Id*. at 103.

As more cases involving the persecutor bar make their way through the appellate review process, further guidance will emerge on the issues of burden-shifting, involuntary acts and the role of *scienter*. Nonetheless, as the cases discussed herein reveal, the application of the persecutor bar is heavily fact-dependent and requires a case-by-case approach. As such, these cases will likely continue to require hair-splitting exercises by adjudicators.

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR FEBRUARY 2008

by John Guendelsberger

The United States Courts of Appeals issued 367 decisions in February 2008 in cases appealed from the Board. The Courts affirmed the Board in 322 cases and reversed or remanded in 45 for an overall reversal rate of 12.3% compared to last month's 15.6%. There were no reversals from the First, Fifth, Eighth and Tenth Circuits. The highest reversal rate was from the Seventh Circuit at 25%.

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

Circuit	Total	Affirmed	Reversed	%
1st	9	9	0	0.0
2nd	162	140	22	13.6
3rd	33	31	2	6.1
4th	11	10	1	9.1
5th	11	11	0	0.0
6th	12	10	2	16.7
7th	8	6	2	25.0
8th	3	3	0	0.0
9th	101	86	15	14.9
10th	5	5	0	0.0
11th	12	11	1	8.3
All:	**367**	**322**	**45**	**12.3**

The Second Circuit issued the lion's share of decisions this month, nearly 44% of the total number, and reversed in 22 of its 162 cases (13.6%). Half of the reversals involved asylum claims and included issues relating to credibility (4 cases); level of harm for past persecution; reasonableness of relocation; pattern and practice of persecution; corroboration requirements; and, frivolousness. The other reversals involved a wide variety of claims including several appeals involving ineffective assistance of counsel claims and application of equitable tolling, due diligence, and *Lozada* requirements. Other issues in-

cluded notice and opportunity to designate a country of removal, 212(c) Restrepo reliance, and several remands to consider issues overlooked or not fully addressed on appeal.

The Ninth Circuit handed down fewer decisions than in a normal month, reversing in only 15 of its 101 cases (14.9%). Most of the reversals came in asylum cases, including issues related to credibility (3); level of harm for past persecution (3); burden of proof and corroboration requirements (3); an asylum discretionary denial; and CAT acquiescence. Other reversals involved a determination that failure to register as a sex offender is not categorically a crime involving moral turpitude; a ruling that motions to reopen or remand for adjustment of status by "arriving aliens" should not be denied by the Board for lack of jurisdiction; and, something we haven't see in quite a while, a *Lanza* remand (Board's affirmance without opinion will not suffice when IJ decision is based on alternative grounds only one of which the court would have jurisdiction to review).

Outside the Second and Ninth circuits, all the other circuit courts combined decided 104 cases and reversed in 8 (7.8%). The reversals included two motions to reopen in absentia proceedings based on inadequate notice and a motion to reopen based on ineffective assistance of counsel. Remands involving asylum issues included the claim that forced IUD insertion amounted to persecution, a pattern and practice claim in regard to Ethiopia, and a frivolousness finding.

The chart below shows the numbers of decisions for January and February 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total Cases	Affirmed	Reversed	% Reversed
7th	14	9	5	35.7%
6th	24	20	4	16.7%
9th	275	230	45	16.4%
2nd	249	210	39	15.7%
11th	30	26	4	13.3%
3rd	74	68	6	8.1%
4th	25	24	1	4.0%
5th	28	27	1	3.6%
8th	7	7	0	0.0%
10th	9	9	0	0.0%
1st	17	17	0	0.0%
All :	**752**	**647**	**105**	**14.0%**

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

Crimes & Misdemeanors: Recent Trends on CIMTs, Aggravated Felonies, and Eligibility for Relief

Edward R. Grant

Back when he consistently made good movies, Woody Allen's masterpiece may have been *Crimes & Misdemeanors*, a tragi-comic drama of moral crisis, obsession, and resentment set (where else?) in 1980s Manhattan. The cast was superb, and the moral dilemma compelling: does the passage of time heal even the most heinous moral failing, or are we fated to carry the burdens of our "crimes and misdemeanors" until their debt is paid? (Allen returned to the same themes, more darkly but less successfully, in the recent *Match Point*).

Those engaged in immigration law would likely select the latter horn of this dilemma: In our world, time does *not* wither the consequences of criminal behavior, and the question of what crimes give rise to deportation - and eligibility for relief from those crimes - seems endless, forever unsettled, and hopelessly complex. Our format does not permit an epic survey of these questions; rather, like the quintessential 90-minute Allen film, this article will aim for a briefer exposition, drawn chiefly from circuit court decisions of the past few months.

Sequel First - Crimes Involving Moral Turpitude

During my first formal immigration law training in 1992, I remember being drilled on the subject of Crimes Involving Moral Turpitude (CIMTs) in the form of two relatively static lists: those that are, and those that are not. Sixteen years later, the "lists" are so fluid that a sequel is necessary to a column written just four months ago.[1]

We begin far from Manhattan, in the United States Court of Appeals for the Ninth Circuit, where several Board of Immigration Appeals decisions on CIMTs have been reversed, and another seems poised to fall.

The Board held in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007) that the offense of willful failure to register as a sex offender is a CIMT, finding that the statutory purpose of protecting children, and the serious risk thus posed by a failure to comply, makes the crime "inherently base or vile" within the traditional CIMT definition. *Id.* at 146. The Board noted that while regulatory offenses (such as a failure to register) are not *mala in se* and thus not generally found to be turpitudinous,

that result is not foreclosed when the harm sought to be prevented is as grievous as that at stake here.

The Ninth Circuit, in *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008), found otherwise, concluding that the gravity of the purpose behind a regulatory offense does not alter the essence of the offense:

> The IJ and BIA correctly observed that the recent proliferation of sex offender registration laws reflects our society's increasing outrage with sexual offenses. *But it is the sexual offense that is reprehensible, not the failure to register*. Registration statutes can serve important purposes by helping to prevent future sex crimes, and assisting law enforcement in apprehending recidivist offenders. *But registration is not itself a socially desirable good.*

Id. at 748 (emphasis supplied).

The Court cited two precedents: one involving an alien's failure to register his status with the Attorney General, *Fong v. INS*, 308 F.2d 191 (9th Cir. 1962); and more recently *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007), holding that the crime of accessory after the fact met neither CIMT standard (involving fraud or "base, vile, or depraved"). *Id*. In *Navarro-Lopez,* the plurality concurrence[2] lamented that the term "crime involving moral turpitude" is "at risk of losing its meaning," and being seen as synonymous with the term "crime." *Id.* at 1075. It further vowed its best efforts to resist this corruption of terms:

> Precision in language is necessary not only for effective communication, but also for a well-functioning legal system. As guardians of the rule of law, we should be careful not to contribute to the deterioration of the English language, with the loss of respect for the law that inevitably results.

Navarro- Lopez at 1076.

Plasencia-Ayala may be seen as further payment on that pledge, as may the Ninth Circuit's recent decisions finding that moral turpitude does not inhere in the California crimes of providing false information to a police officer, *Blanco v. Mukasey*, __ F.3d__, 2008 WL 553869 (9th Cir., Mar. 3, 2008), and of leaving the scene of an accident in which injury to another or death results. *Cerezo v. Mukasey,* 512 F.3d 1163 (9th Cir., 2008). In *Blanco*, the alien was convicted of the California misdemeanor offense of misrepresenting himself to a police officer, either to "evade the process of the court," or to evade proper identification…." *Blanco, supra*, at *3. The Ninth Circuit, categorizing the offense as a "general intent" crime, emphasized that "fraud does not equate with mere dishonesty," but requires something more, namely, "an attempt to induce another to act to his or her detriment" in order to obtain something "tangible." *Id*. at *3. When the only "benefit" is to impede the enforcement of the law, there is no fraud. Similarly, there is no fraud in violating the duty to be truthful in the absence of a *"specific intent* to avoid arrest or trial." *Id*. at *4. The Court repeated the theme sounded in *Navarro-Lopez*: that if the benchmark for moral turpitude was the violation of a duty owed to society, then all crimes would be CIMTs. *Id*.

The Court's analysis in *Cerezo* focused on the "categorical" approach to determining if a crime is one involving moral turpitude. A "literal" reading of the California statute, the Court concluded, would criminalize a driver who stops and provides accurate personal information, but fails to provide a vehicle registration number. The government argued that there was no "realistic possibility" that the State would apply the law in such a case. While calling this a "close" question, the Court concluded, based on California appellate court rulings, that a violation could occur if "any" of the information required by the statute was omitted. While suggesting that the conduct of leaving the scene of an injury-causing accident is reprehensible, the Court agreed with the Fifth Circuit that the specific offense of failing to provide information is not. *Cereza*, 512 F.3d at 1168-69; *see Garcia-Maldonado v. Gonzales*, 491 F.3d 294 (5th Cir. 2007). The latter offense is not categorically a CIMT, and nothing in the record of conviction established that, under the modified categorical approach, it could be regarded as a CIMT. *Cereza*, at 1168-69.

In light of these decisions, it is not surprising that the Ninth Circuit has voted to vacate, and to rehear *en banc*, its somewhat unexpected decision in *Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007); *vacated and reh'g en banc granted*, 2008 WL 681334 (9th Cir. Mar. 14, 2008). That 2-1 ruling affirmed the Board's decision in *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), holding that the Arizona offense of aggravated driving under the influence constitutes a CIMT. The dissent noted that the Arizona crime consisted of two "regulatory"

offenses in conjunction: driving drunk, while on a license revoked due to a prior DUI offense. *Id*. at 1197.

A final recent decision illustrates the type of crime that *will* pass muster as a CIMT in the Ninth Circuit: counterfeit of a registered trademark. *Tall v. Mukasey*, __ F.3d __, 2008 WL 509219 (9th Cir. Feb. 27, 2008). This offense is inherently a CIMT, the Court concluded, because the deception constitutes either fraud on the buyer of the knock-off product, or, even if the buyer is in the know, the owner of the trademark who has seen its value diminished. Based on *Tall* and *Blanco*, one could summarize the current state of the law in the Ninth Circuit as follows: it's turpitudinous to sell those counterfeit Rolexes, but not turpitudinous if, when caught, you give a counterfeit name to the police officer.

Traversing back across the country, we make a brief stop in Chicago, to note the decision in *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008). The respondent, convicted of aggravated assault upon a police officer, was found to have committed a CIMT by the Board. The Seventh Circuit came quickly to the point: The crime in question "sounds fearsome enough[.] . . . But states are free to give whatever names they like to crimes, and a brief look at Illinois law shows that the behavior punished under this statute can be small potatoes. Spitting on someone, for example, qualifies as battery, and if the victim is a police officer, it is aggravated battery." *Id.* at 536. The Court found that the Illinois statute must therefore be distinguished from that at issue in *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (Texas assault upon a police officer) because the latter statute required physical injury on the officer. The inquiry must then focus on whether committing "mere" battery, with knowledge that the victim is a police officer, is turpitudinous. The Court strongly suggested that the question should be answered by reference to M*atter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (despite special status of victim, domestic battery did not involve requirement of bodily harm; thus not a CIMT); *see also*, *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006).

Finally returning to Manhattan, two recent Second Circuit decisions merit attention for their analysis of applying the "categorical approach" to determine if a crime involves "moral turpitude." The first case, appropriately enough, involved a burglary offense, specifically, burglary with intent to commit larceny. *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007); s*ee Taylor v. United States*, 495 U.S. 575 (1990) (seminal case on categorical approach; held that state-denominated "burglary" offense did not "categorically" constitute "generic burglary" for purposes of federal law); *Shepard v. United States*, 544 U.S. 13 (2005) (record of conviction must clearly show that alien plead to elements of "generic" burglary).

The Board held in *Wala* that the "categorical" approach was satisfied because the respondent had been convicted of what seemed a classic, generic burglary offense: unlawful entry into an unoccupied home to commit larceny. The Board rejected the alien's argument that because he was not charged with a "permanent" taking, the offense could not be a CIMT.

The Second Circuit reversed, finding that since the Connecticut larceny statute covered both permanent and temporary takings, the respondent's conviction for burglary could not be considered a "categorical" burglary offense. In other words, it was not enough that the respondent's offense met the generic elements of being an unlawful entry into a dwelling; in addition, it must be shown that the accompanying larceny offense *also* qualify as a categorical CIMT. The respondent, during his plea colloquy, admitted to taking jewelry, a credit card, and two watches. *Wala*, 511 F.3d at 109. Thus, he admitted "sufficient facts" to establish a conviction for burglary with intent to commit a larceny. *See Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007) (explicating evidentiary standards for modified categorical approach in the wake of *Shepard*). But, the Court pointed out, he did not admit to an intention to take them *permanently*. *Wala,* 511 F.3d at 107.

In a more recent case, the Circuit found that the *Wala* and *Dulal-Whiteway* standard was met when an alien's "Conditions of Probation" document (which he had himself submitted in Immigration Court) clearly stated that he had been convicted of the first prong of New York's second-degree assault statute - a prong that all parties agreed was a categorical CIMT. *Singh v. U.S. Dep't of Homeland Sec.*, __ F.3d __, 2008 WL 539788 (2d. Cir., Feb. 29, 2008). Given the official authentication of the probation document, and the presence of both a rap sheet and a "certificate of disposition," the result in *Singh* is not remarkable. What is more noteworthy is the standard employed by the court in reviewing the Immigration Judge's and Board's conclusions on deportability: substantial evidence. "We cannot conclude . . . that any rational trier of fact would be compelled to conclude that the proof did not rise to the level of clear and convincing

evidence of Singh's conviction of a [CIMT]." *Singh*, 2008 WL 539788 at *6 (quoting *Francis v. Gonzalez*, 442 F. 3d. 131 (2d Cir, 2006).

Looking back to *Wala*, would similar deference have supported a conclusion that jewelry, credit cards, and watches are the types of items that, when taken from a home, are not taken "temporarily?" Clearly, to find such an offense "turpitudinous" would not risk, as the Ninth Circuit has expressed, classifying virtually any crime as a CIMT. Perhaps it was this concern that motivated Judge Calabresi's brief concurrence in *Wala*: "I write separately simply to say that this case seems to me to demonstrate the severe problems that adhere to the categorical approach and the modified categorical approach." *Wala*, 511 F.3d at 110. In noting this problem, Judge Calabresi might be speaking for many.

Section 212(c): Dead Twelve Years -- Or So You Thought

The saga of relief under former section 212(c) of the Act, which was sharply curtailed twelve years ago this month, and repealed altogether six months later, continues on. Think not of Woody Allen, but of the endless, campy Dracula sequels you used to watch on "Creature Features." No matter how many times the villagers march with their torches, and the Brillo-haired professor drives the stake through the heart, the creature lives on. Some recent cases suggest, however, that the end of the line may be in sight.

At issue, of course, is the question of "permissible retroactivity" in the wake of *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (deportable alien remains eligible for section 212(c) if he entered a plea bargain prior to enactment of Anti-Terrorism and Effective Death Penalty Act of 1996 (April 24, 1996)). Most circuits have held to the requirement of a plea bargain in order for the alien to demonstrate a "reliance interest" under *St. Cyr*. *See, e.g., Rankine v. Reno*, 319 F.3d 93, 99-102 (2d Cir. 2003); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204 (11th Cir. 2006). Notable exceptions are the Third and Fourth Circuits, both of which held that *any* conviction, whether by plea or trial, prior to April 24, 1996, was sufficient to invoke *St. Cyr*. *See Atkinson v. Att'y Gen. of the United States*, 479 F.3d 222 (3d Cir. 2007); *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004).

Despite its holding in *Rankine*, the Second Circuit now occupies a "middle ground" in this circuit split, chiefly by adopting a more elastic standard for what constitutes "reliance." In *Restrepo v. McElroy*, 369 F.3d 627, 634-35 (2d Cir. 2004), the Court held that an alien who had been convicted at trial of an aggravated felony prior to April 24, 1996, could still claim reliance on the availability of section 212(c) if he could show that he had delayed making an affirmative application for such relief in order to acquire greater equities and demonstrate rehabilitation. *See also Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) (alien invoking *Restrepo* must make an individualized showing of reliance; rejects categorical presumption of reliance).

Recently, in *Walcott v. Chertoff*, 517 F.3d 149, (2d Cir. 2008), the Court addressed whether an alien whose conviction was not final (due to adjudication of his appeal) until 1998 could still claim reliance under a *Restrepo* theory. The Court rejected the government's argument that, since the respondent could not have been found deportable for his offense until after section 212(c) had been repealed, it was impossible for the respondent to have relied on the continued availability of section 212(c). The fact that the respondent chose to appeal his criminal conviction does not foreclose a claim that he *also* chose to delay filing an affirmative 212(c) application, the Court wrote. The two tactics are consistent, because both would tend to preserve his eligibility for relief (if, indeed, relief was required).

In closing, the Court "pause[d]" to address what type of evidence is needed to make an "individualized showing" under *Restrepo*. *Id* at *153. Noting that this is not a "simple or mechanical task . . . leav[ing] room for disagreement in hard cases," the Court stated that it is not enough for an alien to show that, in hindsight, he would have acted differently had he known that section 212(c) would be repealed. *Id*. at 155 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)).

> Rather, the proper inquiry is whether, prior to the AEDPA's passage, an alien reasonably and detrimentally conformed his conduct to the then-prevailing law by making choices intended to preserve or heighten his chances of receiving 212(c) relief. Under *Restrepo* and *Wilson* . . . [aliens] must show that they knew of their ability to affirmatively apply for 212(c)

> relief and desired to do so, but decided to delay their applications based upon the understanding that their chances of obtaining relief would grow stronger with time.

Landgraf at 155.

The Second Circuit subsequently addressed the applicability of *Walcott* in *Singh v. Mukasey*, __ F.3d __, 2008 WL 658239 (2d Cir. Mar. 13, 2008), where the alien claimed "detrimental reliance" based on a guilty plea, prior to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), to an aggravated felony for which he served 5 years in prison. The alien actually made two retroactivity arguments: that he had confessed to police before the passage of the Immigration Act of 1990 Pub. L. No. 101-649, 104 Stat. 4978, 5061-65 (IMMACT), making imposition of the 5-year imprisonment bar added by IMMACT to section 212(c) impermissibly retroactive; and that he had detrimentally relied on the continued availability of section 212(c) in not filing for such relief prior to AEDPA. The Court rejected both arguments. A confession of guilt, the Court noted, does not involve a *quid pro quo* such as that present in a plea agreement; indeed, such an alien has no "settled expectation" of a favorable plea deal. *Singh*, 2008 WL 658239 at *4. The Court analogized this argument to those of aliens who have claimed that the *commission* of a crime prior to AEDPA was enough to claim detrimental reliance. *See Khan v. Ashcroft,* 352 F.3d 521, 523 (2d Cir. 2003) ("it cannot reasonably be argued that aliens committed crimes in reliance on the availability of section 212(c)"); *United States v. De Horta Garcia*, __ F.3d __, 2008 WL 656909 (7th Cir. Mar. 13, 2008) (same; alien must demonstrate that he either conceded deportability or pled guilty prior to AEDPA in order to demonstrate required reliance on section 212(c)). The Court's conclusion led it to reject the alien's *Restrepo* argument since he was ineligible for relief even under pre-AEDPA law, having served 5 years in prison. *Singh*, 2008 WL 658239 at *5.

Time, one expects, will cause a dwindling of section 212(c) litigation. The "middle-ground" approach of the Second Circuit may require still further development in that jurisdiction; it is also possible that the approach may be adopted elsewhere. However, the circuit split between those who require a concrete showing of detrimental reliance, such as a pre-AEDPA plea agreement or concession of deportability, and those that only require a pre-AEDPA conviction (by plea *or* by trial) is fairly stable. Perhaps we are approaching a time when Immigration Judges, and the parties before them, can have "reasonable reliance" regarding the law that ought to be applied to the 212(c) cases remaining on their dockets. But one should be cautious before developing "settled expectations" on that point.

Aggravated Felonies and the Modified Categorical Approach: The Saga Continues

On March 14, 2008, the Ninth Circuit granted the Government's petition for rehearing en banc in *United States v. Snellenberger*, 493 F.3d 1015, *amending* 480 F.3d 1187 (9th Cir. 2007) (to establish a crime of violence, government must provide terms of plea agreement or transcript of colloquy between judge and defendant in which factual basis for plea was confirmed by defendant, or comparable judicial record; facts stated in criminal information not sufficient). *Snellenberger* was one of the touchstones of the evolving federal jurisprudence on what evidence is acceptable to satisfy the "modified categorical approach," i.e., to prove that, in circumstances where a statute is divisible, the defendant has pled to, or otherwise been convicted of, that aspect of the criminal statute that meets the statutory definition of a sentence-enhancing (or, in our context, deportable) offense, such as "theft" or "crime of violence." The defendant in *Snellenberger* was sentenced as a "career offender" based on an earlier California burglary conviction; the district court concluded this was a "crime of violence." However, the Ninth Circuit found the conviction could not be so classified because the criminal information (which clearly charged the defendant with residential burglary, a categorical "crime of violence") coupled with a minute order recording his plea of *nolo contendere*, did not prove the facts "to which the [respondent] admitted." *Id*. at 1019.

Snellenberger was significant in that there was no indication that the respondent had, in fact, plead to facts other than those stated in the information, or that he has plead to a lesser offense of burglary. He had been indicted for an offense that was a crime of violence; but the record of conviction, in the view of the Ninth Circuit, did not satisfy the *Shepard* standard of showing that he had pled to the elements of such a crime. The natural question, representing the apparent position of the district court, was: given the facts alleged in the information, to what else would he have been pleading? We can only speculate if the Ninth Circuit will return to that question in its en banc reconsideration.

The withdrawal of *Snellenberger* does not, however, affect a number of other Ninth Circuit precedents that have staked out a similar position. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (hereinafter "*Ruiz*") and *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc). In *Ruiz*, the alien was originally charged with possession for purpose of sale, and for transportation, of a controlled substance, namely, methamphetamine. (Since California's definition of "controlled substance" sweeps more broadly than the federal one, the specification of "meth" was essential for this to be considered a removable offense.) The alien pled, however, to a mere possession offense, and the abstract of judgment did not specify the controlled substance involved. While logic might dictate that, having been charged with possession for sale of "meth," the alien had merely pled guilty to the lesser crime of possession, the argument could also be made - and was adopted by the Ninth Circuit -- that since the original charging document was clearly not what the alien had pled to, some evidence beyond that was necessary. Indeed, *Shepard* would likely require this result.

The principal issue in *Vidal*, on which the en banc panel split 9-6, was whether a conviction under section 10851 of the California Vehicle Code is a "generic" or "categorical" theft offense. The majority contended that since section 10851 makes reference to an "accessory," it is possible to be convicted under this provision as an "accessory after the fact," which makes the statute overbroad and thus excludes it from being considered a "categorical" theft offense. The dissent, contending that California law mandates prosecution of accessories after the fact under a separate statute, and that the inclusion of the word "accessory" in section 10851 provides no basis for such liability, concluded to the contrary. Hovering over the Circuit's deliberations was the ruling of the Supreme Court in *Gonzales v. Duenas-Alvarez*, __ U.S. __, 127 S.Ct. 815 (2007) (rejecting earlier Ninth Circuit decision that inclusion of "aiding and abetting" liability in section 10851 precluded it from being a categorical theft offense). *Duenas-Alvarez* had at one point cautioned against relying on the "theoretical possibility" that a crime would be applied to situations outside the reach of a categorical offense in order to classify the statute as "overbroad;" the Ninth Circuit split on whether that was, in fact, what the majority was doing. *Id.* at 822. Having determined that section 10851 is not "categorically" theft, the Court turned to the question of whether the government had met its burden under the modified categorical approach. Here, the situation was quite similar to *Snellenberger* - the defendant was charged in Count I of the criminal complaint with "willfully and unlawfully" driving and taking a vehicle, without permission, with the intent to deprive the owner of title and possession. He pled guilty - "only" in the Ninth Circuit's description - to "Count I, 10851(a), Driving a Stolen Vehicle." The document recording that plea did not identify the facts to which he pled, and no plea colloquy was entered in evidence. Thus, although the defendant was clearly charged as a principal, not as an accessory after the fact, the Ninth Circuit found that it could not exclude the possibility that the plea had been entered only as to conduct that would lie outside the generic definition of theft. Accordingly, no sentence enhancement could be made based on that conviction. Accordingly, while *Snellenberger* has been withdrawn, *Vidal* appears to stand for the identical proposition - a plea of guilty to a specific count in an indictment does not equate to an admission of the facts stated in that count.

While the focus here has been on the Ninth Circuit, the standards appear to be similar in the Second Circuit. *See Dulal-Whiteway*, 501 F.3d at 129-130 (neither pre-sentence investigation report nor restitution order sufficient to prove that "loss to the victim" in fraud offense exceeded $10,000). Given the relative recency of *Shepard*, continued volatility on this issue can be expected.

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Recent Court Decisions

Supreme Court:

Negusie v. Mukasey, __ S. Ct. __. 2008 WL 695623 (Mem)(Mar. 17, 2008): Certiorari granted to review the unpublished Fifth Circuit decision in *Negusie v. Mukasey*, 231 Fed. Appx. 325 (May 15, 2007), in which the Fifth Circuit upheld the Board's denial of asylum and withholding of removal upon a determination that the applicant assisted in the persecution of others. In its decision, the Circuit Court held that "[t]he question of whether an alien was compelled to assist authorities is irrelevant, as is the question of whether the alien shared the authorities' intentions." The issue on review by the Supreme Court is whether the persecutor bar applies where assistance in persecution was involuntary.

First Circuit:

Aragon-Munnoz v. Mukasey, __ F. 3d __, 2008 WL 748106 (1st Cir. Mar. 21, 2008): The First Circuit

dismissed the appeal from the Board's denial of a motion to reopen following an *in absentia* order. The applicant alleged that he never received notice (mailed in March, 2000, to a Rhode Island address), claiming that he had informed the government of his move to Arizona. The Court found reasonable the Board's conclusion that the applicant failed to meet his burden for reopening where he failed to state an exact address in Arizona, failed to provide proof of residence there, and where the record contained an amended asylum application signed by the applicant in August 1999, accompanied by his 1999-2000 Rhode Island employment card. Lastly, the Court rejected the applicant's claim that reopening is required due to the government's failure to provide him with oral warnings in Spanish of the consequences of a failure to appear. The Court noted that such failure would negate the ten year bar on forms of relief, but does not require reopening.

Second Circuit:

Corovic v. Mukasey, __ F. 3d.__, 2008 WL 612695 (2d Cir. Mar. 7, 2008): The Second Circuit held that the government violated the applicant's right to confidentiality under 8 C.F.R. § 208.6 (2008) in disclosing his name to the Macedonian authorities while authenticating his documents. However, the Court found the determination that one such document was fraudulent to be reliable, as it was supported by independent evidence (i.e. a forensics report). The Court further upheld the Immigration Judge's finding of fraud where he relied on a document not in evidence, where such finding was also based on other evidence. The Court remanded to determine (1) the authenticity of a document, (2) whether the applicant had knowledge that the documents were fraudulent, and (3) whether the breach of confidentiality gave rise to additional forms of relief.

Gao Ni v. BIA, __ F. 3d __, 2008 WL 681147 (2d. Cir. Mar. 14, 2008): The Second Circuit remanded the cases of three applicants whose motions to reopen to apply for adjustment of status were denied by the Board because each applicant was an arriving alien, and thus barred by regulation from adjusting status. The Court, citing its recent decision in *Melnitsenko v. Mukasey*, found the Board's rulings insufficient "because a rote recital of jurisdictional statement-even if technically accurate-does not adequately discharge the BIA's duty to 'consider the facts of record relevant to the motion' and provide a 'rational explanation' for its ruling." On remand, the Board is directed to "provide adequate reasons" should they deny the motions, "thereby furnishing this Court with a meaningful opportunity to review such denial."

Third Circuit:

Kosak v. Aguirre, __ F. 3d __, 2008 WL 597928 (3d Cir. Mar. 6, 2008): The Third Circuit affirmed the decision of the Board holding that an adoptee may not confer immigration benefits on her biological sister. While the statute only bars an adoptee from petitioning for her biological parents, the Court found reasonable the government's view that the severance of ties with the biological parents prevents a biological sibling from meeting the definition of a sister, as there is no longer a shared parent. The Court rejected the applicant's argument that Congress and the Board lack jurisdiction to make determinations about parental relationships, noting that such determinations were being made for immigration purposes only.

Yusupov v. Att'y Gen., __ F. 3d __, 2008 WL 681851 (3d Cir. Mar. 14, 2008): The Third Circuit remanded the cases of two applicants from Uzbekistan who were barred from the relief of withholding of removal as posing a danger to the security of the U.S. under section 241(b)(3)((B)(iv) of the Act. Both were granted deferral of removal pursuant to Article III of the U.N. Convention Against Torture. In reaching such decision, the Board had relied on the Attorney General's interpretation of the security exception as stated in *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005). The Court found that the AG's interpretation of the statute was due *Chevron* deference on all points but one: while the statute requires a belief that an alien **is** a danger, the AG's test in *Matter of A-H-* is satisfied upon a finding that an alien **may** pose a danger. The cases were thus remanded for consideration under the correct standard.

Augustin v. Att'y Gen., ___ F.3d ___, 2008 WL 732107 (3d Cir. Mar. 20, 2007): The petitioner sought review of the Board's order concluding that he was removable and ineligible for cancellation of removal. The Court was asked to decide whether the Board erred in refusing to impute to the alien his father's years of continuous residence in order to meet the seven year requirement for cancellation of removal under 8 U.S.C.A. § 1229b(a). The alien was admitted to the United States as a lawful permanent resident at the age of 13 to join his parents who had previously come to the United States. Approximately five years after coming to the United States, the alien committed a crime involving moral turpitude. He was

later charged with being removable based in part on that crime. The alien admitted the allegations but argued that he was eligible for cancellation of removal based on his father's seven years of continuous residence in the United States prior to any of the crimes being committed. The Board rejected that argument, interpreting the statute as requiring that the alien himself actually dwell in the United States for seven years before he committed the crime. On review, the court held that the Board's denial of cancellation of removal and its refusal to impute the father's years of residence was permissible because it was a straightforward application of the statute's requirements.

Fifth Circuit:

Martinez v. Mukasey, __ F. 3d __, 2008 WL 642565 (5th Cir. Mar. 11, 2008): The Fifth Circuit held that the applicant's conviction for bank fraud was an aggravated felony under section101(a)(43)(M) of the Act (involving fraud or deceit), but not under section 101(a)(43)(G) (theft or burglary offense), which would require taking without consent, which was not an element of the statute. The Court further found the applicant eligible to apply for a 212(h) waiver, reversing the Board. The Court held that the statute barring one who had been admitted for permanent residence and was subsequently convicted of an aggravated felony did not apply to an individual who had adjusted status to a lawful permanent resident and was not subsequently admitted.

Seventh Circuit:

Haxhiu v. Mukasey, __ F. 3d __, 2008 WL 724047 (7th Cir. Mar. 19, 2008): The Seventh Circuit reversed the Immigration Judge's denial of asylum to a former colonel in the Albanian army who was dismissed from his job for exposing corruption in the army. When he continued his anti-corruption efforts after his dismissal, he was threatened, shot at, and his daughter was nearly kidnaped. The Immigration Judge had found that the applicant did not meet his burden because (1) he was acting within his official duties within the army in fighting corruption, and (2) he feared a few rogue individuals and not the government at large. While the Court agreed that for a whistleblower to meet his burden, he must go outside of the scope of his official duties, it found the continuation of his activities following his dismissal from the army to satisfy this criteria. The Court further found that agents of the government persecuted the respondent in tandem with private actors. Accordingly, the Court found that the respondent had suffered past persecution on account of his political opinion.

Eighth Circuit:

Rodriguez v. Mukasey, __ F. 3d __, 2008 WL 724100 (8th Cir. Mar. 19, 2008): The Eighth Circuit upheld the decision of an Immigration Judge finding that by marking the "citizen or national of the United States" box on an Form I-9 to obtain employment with a private employer, the alien had falsely represented himself for a purpose or benefit under the Act, and as such was ineligible for the relief of adjustment of status. The Court found that the Immigration Judge's decision was supported by substantial evidence, in spite of the applicant's testimony that he did not understand some of the questions asked of him and that he only checked the box because he was told to do so in order to work, where the applicant had signed a sworn statement at his adjustment interview admitting that he knew he had made a claim to a government agency that he was a U.S. citizen.

Tamenut v. Mukasey, ___ F.3d ___, 2008 WL 637617 (8th Cir. Mar. 11, 2008): The petitioner filed a petition for review after the Board denied his second motion seeking to reopen his immigration case. A panel of the Court concluded that it had jurisdiction over the alien's petition for review, but it denied him relief. The Court granted a rehearing en banc to consider the question of whether the Court could exercise jurisdiction over the alien's petition for review. The alien moved to reopen his case well after the time limit for filing the motion had expired. He filed his second motion to reopen almost a year after his first motion was denied. The alien argued that the Board abused its discretion by failing to exercise its power under 8 C.F.R. § 1003.2(a)(2008) to sua sponte reopen his case and that its refusal to do so violated his rights under the Due Process Clause. The en banc Court disagreed with the panel's conclusion that it had jurisdiction over the petition. The Court lacked jurisdiction over the petition to the extent that the alien challenged the Board's decision not to exercise its power to sua sponte reopen his case because that decision was committed to the Board's discretion by law, which made that decision unreviewable under 5 U.S.C.A. § 701(a)(2). Neither 8 U.S.C. § 1229a(c)(7) nor 8 C.F.R. § 1003.2(a)(2008), the statute and regulation governing motions to reopen, established any standard to guide the Board's exercise of its discretion. Although the court could review constitutional claims under 8 U.S.C. § 1252, the alien's due process claim was nothing more than a challenge to the Board's discretionary decision cloaked in constitutional garb.

BIA PRECEDENT DECISIONS

In *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008), the Board found that a mother and daughter from Somalia who suffered female genital mutilation (FGM) are eligible for a grant of asylum based on humanitarian grounds pursuant 8 C.F.R. § 1208.13(b)(1)(iii)(A)(2008). The Immigration Judge denied asylum on credibility grounds, and specific to the FGM claim, also found that the respondents did not have a well-founded fear of future persecution. Without specifically addressing the credibility finding, the Board found that the medical evidence was sufficient to support a finding that the respondents have suffered an atrocious form of persecution which resulted in continuing pain and discomfort such that the case falls within *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

In *Matter of Baires*, 24 I&N Dec. 467 (BIA 2008), the Board considered whether, in order for a child to derive automatic citizenship under former section 321(a) of the Act as a result of her parent's naturalization and following a divorce, the child must have been in the naturalizing parent's legal custody on the date of naturalization or only prior to age 18. The respondent's parents divorced when respondent was 2 years old. Her father became a United States citizen when she was 12. When she was almost 14 her mother executed an affidavit relinquishing custody, and she was admitted to the U.S. as an immigrant shortly thereafter. The Board found that the respondent must show that she was in the legal custody of her father before she reached the age of 18 years. She need not show that she was in his legal custody on the date he naturalized. This interpretation is supported by Board precedent, and is the policy of the State Department and the United States Citizenship and Immigration Service. The Board remanded the case for further factfinding on whether the respondent was in her father's custody prior to reaching her 18th birthday.

In *Gonzalez-Muro*, 24 I&N Dec. 472 (BIA 2008), the Board found that a denaturalized alien who committed crimes while a lawful permanent resident and concealed them during the naturalization application process is removable on the basis of those crimes, even though the alien was a naturalized citizen at the time of the conviction. The Board distinguished the Supreme Court case of *Costello v. INS*, 376 U.S. 120 (1964) because *Costello* was predicated on former section 241(b) of the Act relating to judicial recommendations against deportation. In this case, the respondent could not have obtained a valid judicial recommendation against deportation at the time he was convicted. The respondent was a lawful permanent resident at the time he committed some of his crimes and was therefore removable then. Furthermore, he lied under oath about committing crimes, which means he should have known that his citizenship was obtained through fraud, and his fraudulently obtained status would not protect him. Lastly, he entered into a settlement agreement with the United States in which he agreed that he would not rely on his fraudulently obtained naturalization to claim a right or privilege.

In *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008), the Board granted asylum to the respondent, a Christian and ethnic Chin from Burma. The respondent had previously been found barred from asylum because she had provided material support to a terrorist organization, the Chin National Front (CNF). *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). The Attorney General certified the case and then remanded the record to the Board due to the Secretary of Homeland Security's decision to exercise his authority to determine that the material support bar did not apply to an alien who provided material support to the CNF. See section 212(d)(3)(B)(i) of the Act, 8 U.S.C. § 1182(d)(3)(B)(i); *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007). Subsequent to this decision, the President signed legislation that expanded the discretionary authority of the Secretary of Homeland Security to determine the applicability of section 212(d)(3)(B)(i), and also provided that certain groups, including the CNF, shall not be considered to be terrorist organizations. Section 691(b) of the Consolidated Appropriations Act of 2008, 121 Stat. at 2365. The respondent is not therefore ineligible for asylum. The Board further clarified that its first decision in *Matter of S-K-*, which set forth the parameters for addressing the material support bar to asylum and withholding of removal, still applies to determinations involving the applicability and interpretation of the material support provisions except for those groups specifically listed in section 691(b).

In a visa petition case, *Matter of Kodwo,* 24 I&N Dec. 479 (BIA 2008), the Board addressed the requirements for establishing the dissolution of a customary tribal marriage in Ghana. In *Matter of Kumah,* 19 I&N Dec. 290 (BIA 1985), the Board held that pursuant to the Foreign Affairs Manual, the essential element of proof

of a customary divorce is a court order. In this case, the Department of Homeland Security submitted evidence from the Library of Congress indicating that *Matter of Kumah* has been superseded by amendments to statutory Ghanaian divorce law. These amendments allow for heads of families, i.e. fathers of the husband and wife, to declare the divorce final following the customary tribal divorce proceeding. The Board agreed and found that *Matter of Kumah* is modified such that affidavits may be sufficient to prove the dissolution of a customary tribal marriage in Ghana provided they meet certain evidentiary requirements detailed in the decision.

REGULATORY UPDATE

73 Fed. Reg. 13245
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Extension of the Designation of Somalia for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Somali Temporary Protected Status Beneficiaries
ACTION: Notice.

SUMMARY: This Notice announces that the designation of Somalia for temporary protected status (TPS) has been extended for 18 months through September 17, 2009, from its current expiration date of March 17, 2008. This Notice also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) 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 Somalia and whose applications have been granted or remain pending. Certain nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) 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-registration applications, the Department of Homeland Security (DHS) recognizes the possibility that re-registrants may not receive a new EAD until after their current EAD expires on March 17, 2008. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Somalia for 6 months, through September 17, 2008 and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. DHS will issue new EADs with the September 17, 2009 expiration date to eligible TPS beneficiaries who timely re-register and apply for an EAD.

DATES: The extension of the TPS designation of Somalia is effective March 18, 2008 and will remain in effect through September 17, 2009. The 60-day re-registration period begins March 12, 2008 and will remain in effect until May 12, 2008. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period.

73 Fed. Reg. 15389
DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 214

Petitions Filed on Behalf of H–1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation
AGENCY: U.S. Citizenship and Immigration Services,
ACTION: Interim rule with request for comments.

SUMMARY: The Department of Homeland Security is amending its regulations governing petitions filed on behalf of alien workers subject to the annual numerical limitations applicable to the H nonimmigrant classification. This rule precludes a petitioner from filing more than one petition based on the H–1B nonimmigrant classification on behalf of the same alien temporary worker in a given fiscal year if the alien is subject to a numerical limitation or is exempt from a numerical limitation by virtue of having earned a master's or higher degree from a U.S. institution of higher education. Additionally, this rule makes accommodations for petitioners seeking to file petitions on the first day on which filings will be accepted for the next fiscal year on behalf of alien workers subject to the annual numerical limitation or U.S. master's or higher degree holders exempt from this limitation. This rule also clarifies the treatment of H nonimmigrant petitions incorrectly claiming an exemption from the numerical limitations. Finally, the rule removes from the regulations unnecessary language regarding the annual numerical limitation applicable to the H–1B nonimmigrant classification. These changes are necessary to clarify the regulations and further ensure the fair and orderly adjudication of petitions subject to numerical limitations.

DATES: Effective date: This rule is effective March 24, 2008.

ADDENDUM: The Real Deal on REAL ID – An Update on Implementation

In *Lin v. Mukasey*, __ F. 3d__, 2008 WL 787569 (1st Cir., March 26, 2008), the Court addressed section 208(b)(1)(B)(iii) of the Act, which specifies that, among other factors, inconsistencies and inaccuracies can undermine an asylum applicant's credibility without regard to whether the factors go to the heart of the claim. In denying the petition for review, the Court acknowledged that this standard applied rather than the Court's prior case law stating that an adverse credibility finding may not be predicated on inconsistencies which do not go to the heart of the claim. In this case, an asylum claim based upon the alien's practice of Falun Gong, the Immigration Judge had relied on inconsistencies regarding when and why the respondent stopped working, his current practice of Falun Gong, and other implausibilities. The decision provides a list of cases addressing this provision of the REAL ID Act.

For the original article *The Real Deal on REAL ID...*, see the Immigration Law Advisor Vol. 2, No. 2

ADDENDUM: Calculating "Loss to Victim or Victims" under section 101(a)(43)(M) of the Immigration and Nationality Act

The United States Court of Appeals for the Sixth Circuit addressed the issue of calculating loss to a victim or victims under section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M) in *Graham v. Mukasey*, __ F.3d __, 2008 WL 731227 (6th Cir., Feb. 20, 2008). This case arose in the context of expedited removal proceedings. See section 238 of the Act, 8 U.S.C. § 1228. The petitioner was convicted in federal court of conspiracy to commit mail fraud, and the certified copy of the judgment of conviction entered against him included an order of restitution to three victims totaling over $800,000. The Court found that this was sufficient to establish the loss amount necessary under section 101(a)(43)(M) of the Act. The Court distinguished *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002), wherein the Ninth Circuit found that the restitution order was not sufficiently tied to the conviction to show a loss to the victims of over $10,000. The Court pointed out that in the instant case, the petitioner failed to allege, let alone provide documentation, that he was a party to a plea agreement that limited the loss caused by his convictions to less than the restitution amount, or that the government was otherwise attempting to "sandbag" him with removal despite a prior agreement to the contrary. Without such limiting language or any other substantiated claim by the petitioner that the losses to his victims were less than $10,000, the Court concluded that the restitution ordered in the sentencing order was either specifically tied to the counts of conviction, or was the aggregate of loss from a "plan or scheme" alleged in the counts of conviction, both of which charged a conspiracy. The Court compared the latter situation to that in *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002).

For the original article *Calculating "Loss to the Victim or Victims"...*, see the Immigration Law Advisor Vol 1 No 4. Additional updates can be found in Vol. 1 No. 6, Vol. 1 No. 11, and Vol 2 No. 1.

Crimes & Misdemeanors *cont.*

Classifying Crimes on Their Elements: A Brief Review

As courts struggle with the application of *Shepard* and the modified categorical approach, they continue to rule on the seemingly more basic question of whether certain crimes fit the "generic" or "categorical" concepts of moral turpitude or the various definitions of "aggravated felony." Herewith a recent sampling:

Domestic Violence: At press time, the Supreme Court granted a petition for certiorari in *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255, 2008 WL 754339 (U.S. Mar. 24, 2008) (No. 07-608). In *Hayes*, the Fourth Circuit held that a conviction for simple battery, committed by the defendant on his spouse, did not constitute a "misdemeanor crime of domestic violence" (MCDV) under 18 U.S.C. 921(a)(33)(A) because the statute of conviction did not include as an element the domestic relationship of the perpetrator and victim. The Fourth Circuit is alone among the circuits in this interpretation - a point noted by the dissent and this position does not appear in circuit interpretations of section 237(a)(2)(E)(I) of the Act. *See Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (relationship to victim in alien's burglary and kidnaping convictions could not be proven by evidence outside the record of conviction, including alien's own admissions in immigration court); *Sutherland v. Reno*, 228 F.3d 171 (2d Cir. 2000) (Massachusetts conviction under provisions related to protection of designated domestic victims).

Neither *Tokatly* nor *Sutherland* took the position that the victim's status must be an *element* of the underlying offense; *Tokatly* presumed that status could be established by reference to the indictment, plea agreement, and other valid items in the record of conviction, and *Sutherland* did not need to go further than the statute in question. *See also United States v. Kavoukian*, 315 F.3d 139, 143-144 (2d Cir. 2002) (domestic relationship as an element not required to establish MCDV, but relationship must be proven).

Given the lopsided tally among the circuits on the legal issue in *Hayes*, the Supreme Court may have granted certiorari simply to correct - or vindicate - the Fourth Circuit's iconoclastic position. In that case, the future decision would likely have little bearing on the interpretation of section 237(a)(2)(E). However, it remains possible that the Court, if it reverses the Fourth Circuit, may also address the permissible scope of evidence that may be used to prove the domestic relationship. Specifically, would a defendant's admission, or even testimony from the victim, made outside the context of the original criminal proceeding, meet the burden? The Ninth Circuit rejected such evidence in *Tokatly* as "going behind the record of conviction." Will the Supreme Court reach this issue? And, if it does, will it apply a strict *Shepard* standard, limited to the original conviction? For these answers, we must await the October 2008 Term.

Sexual Abuse of a Minor: A day after certiorari was granted in *Hayes*, the Second Circuit addressed - or more precisely, directed the Board to address - the question of whether the New York offense of "Endangering the Welfare of a Child" is divisible, thus allowing the government to offer evidence that the conduct for which the alien was convicted was sexual in nature. *James v. Mukasey*, __ F.3d __, 2008 WL 763158 (Mar. 25, 2008). No element of the New York statute makes specific reference to sexual abuse or sexual conduct of any kind; the Immigration Judge and the Board nevertheless treated the statute as divisible because it was possible to commit the offense with or without committing a sexual offense. The Board found that the allegation in the charging document, that the alien, when 22, had sexual intercourse with a 16-year-old victim, was sufficient to support the aggravated felony charge under section 101(a)(43)(A) of the Act.

The Board erred in its first ruling, according to the Second Circuit, because it assumed that circuit law would treat the child endangerment statute as divisible. *James* noted that the circuit's subsequent decision in *Dulal-Whiteway* had outlined three potential approaches to a statute which, on its face, proscribes only one generic form of conduct, without specifying elements that would bring it more clearly into one of the categories of aggravated felonies. *James*, 2008 WL 763158 at *4; *Dulal-Whiteway*, 501 F.3d at 127-128.

> We could "find[] divisible *only* those statutes where the alternative means of committing a violation, some of which constitute removable conduct and some of which do not, are enumerated as discrete alternatives." Or we could "take the position that all statues of conviction may be considered 'divisible' regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." And somewhere in the middle is a third approach . . . under which a criminal statute may be considered divisible if *either* (1) the statute of conviction is phrased in the disjunctive or divided into subsections such that "some variations of the crime of conviction meet the aggravated-felony requisites and others do not," *or* (2) the relevant removability provision "invite[s] inquiry into the facts underlying the conviction at issue."

James at *4 (citations omitted); *see Singh v. Ashcroft*, 383 F.3d 144, 161-62 (3d Cir. 2004) (adopting third approach described here).

Dulal-Whiteway did not choose among these approaches and neither did *James*. Despite recognizing that it would owe no deference to the Board's determination of the question, and thus, that there was no requirement that it remand for that purposed, the *James* panel nevertheless deemed

> it the wiser and more prudent course to give the BIA the opportunity to consider, in the first instance, and in light of our recent pronouncements . . . whether [the New York statute] should properly be treated as divisible (thereby allowing inquiry into the facts underlying the conviction), or, rather, whether the categorical approach that we have applied

> in other cases precludes inquiry into the singular circumstances of James's crime.

James at *5.

The Court likewise remanded on the issue of whether, assuming the statute is divisible, the government had met its burden, under the standards for the modified categorical approach set forth in *Dulal-Whiteway* and *Wala*, to establish that the respondent had been convicted of an offense constituting sexual abuse of a minor. The allegation of sexual intercourse in the charging document was not sufficient, the Court stated, because that allegation was not "actually and necessarily pleaded" in order to establish the elements for the offense of which the respondent was convicted. *Id*. (quoting *Dulal-Whiteway*, 501 F.3d 116). Rather, the alien actually pleaded to having "sexual contact" with the victim. Noting that kissing can constitute "sexual contact" under New York law, and that other New York statutes do not criminalize "sexual contact" between parties of the ages involved at the time of this offense, the Court clearly expressed doubt as to whether the modified categorical approach could be satisfied in this case.

The Court's remand is curious. Two issues plainly within its jurisdiction to decide, and otherwise ripe for adjudication, were sent back to the Board for resolution. The "wiser and more prudent" course, to quote *James*, is to comment no further and await that further resolution.

Assault, Battery, and Abduction: Recent decisions from the First, Ninth, and Eleventh Circuits illustrate the continued effort to match state offenses with the federal definition of "crime of violence." *Ramirez v. Mukasey*, __ F.3d__, 2008 WL 682602 (1st Cir. Mar. 14, 2008), held that a Massachusetts conviction for indecent assault and battery on a person 14 years or older constituted a crime of violence under 18 U.S.C. §16(b) because there was a substantial risk that force might be used in the commission of the offense. *See Sutherland v. Reno*, 228 F.3d 171, 176-77 (same). Meanwhile, the Ninth and Eleventh Circuits reached contrasting positions on whether assault and battery convictions constitute crimes of violence under 18 U.S.C. §16(a), which requires that force be an element of the offense. Construing Washington's fourth-degree assault statute, the Ninth Circuit held that since a conviction could be obtained for "unlawful touching with criminal intent," including "nonconsensual offensive touching," the "full range of conduct" covered by the statute does not fall within the meaning of section 16(a). *Suazo Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008). In *Estrada-Rodriguez v. Mukasey*, 512 F.3d 517 (9th Cir. 2007), the Court found that an Arizona conviction for intentionally resisting arrest was a section 16(b) COV because resisting arrest naturally involves the risk that physical force may be used against an officer. *Id*. at 520. The Eleventh Circuit found that a conviction under either prong of Georgia's simple battery statute (one involving physical injury, the other involving "insulting or provoking" touching) would constitute a crime of violence under section 16(a). The Court noted that any offensive touching, especially but not limited to one causing physical injury, involves some level of physical force. *Hernandez v. U.S. Atty. Gen.*, 513 F.3d 1336 (11th Cir. 2008); *see also United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006), *cert. denied* 127 S.Ct. 2028 (2007).

The approach of the Eleventh Circuit departs from those circuits that require, explicitly or implicitly, the intentional use (or threat or attempt) of "violent" force in order to satisfy section 16(a), and that do not consider the presence of a "physical injury" element to satisfy that standard. *See, e.g., Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (intentional causation of physical injury not sufficient); *Gonzalez-Garcia v. Gonzales*, 431 F.3d 234 (5th Cir. 2005) (class of assault involving offensive or provocative contact not a COV); *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) (same); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (battery statute, requiring only a touching, not a COV); *but see*, *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006) (simple assault statute requiring attempt by physical menace to put another in fear of serious bodily injury is COV). Since charges based on assault and battery offenses are relatively common - and can present both CIMT and COV issues - care should be taken, guided by the most recent available law in the governing circuit, that the correct legal standard be applied. On that note, caution should be used in employing cases decided under the United States Sentencing Guidelines (U.S.S.G.). The U.S.S.G. definition of "crime of violence" has changed over the years, and it does not precisely match the definition in 18 U.S.C. §§16(a) & (b). *See United States v. Hermosa-Garcia*, 413 F.3d 1085 (9th Cir. 2005) (Washington second-degree assault a COV under the revised U.S.S.G. standard that includes *reckless* infliction of substantial bodily harm); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) ("reckless" use of force can satisfy COV definition); *but see Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005) (rejecting *Trinidad-Aquino* and requiring *intentional* use of force).

Fraud Offenses: Recent fertile ground for litigation arises from the (M) class of aggravated felonies - fraud offenses. First, as with other "generic" offenses set forth in section 101(a)(43) of the Act, there is the issue of whether a particular offense, even if "denominated" as fraud, meets the essential elements of that offense. Second, the drafting of this provision - with its "loss to the victim" in excess of $10,000 requirement - generates litigation because the amount of fraud is rarely an element of the offense (although it can appear as a factor in classifying the degree of the offense.) Thus, the question arises as to what evidence may be used to show the amount of loss. *See Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (determination of loss not limited to strictures of modified categorical approach; presentence investigation report may be used). Finally, a somewhat less evident issue is how fraud offenses relate to "theft" offenses - and whether if *both* elements of fraud and theft are present, the government must establish removability under both the "theft" and "fraud" prongs of section 101(a)(43). *See Nugent v. Ashcroft*, 367 F.3d 162 (3d. Cir. 2004) (where alien convicted of "theft by deception" offense is only an aggravated felony if it meets the $10,000 loss-to-the-victim requirement of section 101(a)(43)(M)(i)).

Nugent is a rare oyster in the vast seabed of criminal immigration jurisprudence. It is analagous to a court deciding that a crime denominated as "sexual battery upon a minor" can only be an aggravated felony if it meets the definitions of both 101(a)(43)(A) and (F). In *Martinez v. Mukasey*, __ F.3d __, 2008 WL 642565 (5th Cir. Mar. 11, 2008), the Fifth Circuit, declined to follow *Nugent*, drawing a more clear line between fraud and theft offenses. The alien's crime was not an aggravated felony theft because he had not been sentenced to a year in prison. But the Court held that a conviction for bank fraud could not constitute "theft" as the bank property was not obtained "without consent" - a critical element of common law theft - but rather, *with* its consent, fraudulently obtained. That, the Court ruled, is the essence of fraud: "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *James v. Gonzales*, 464 F.3d 505, 518, n. 14 (5th Cir. 2006). The Court thus upheld the finding that the alien had been convicted of an "(M)" aggravated felony.

In another "(M)" case, the Seventh Circuit held that an alien convicted of conspiracy to commit identity theft, in order to purchase a car worth in excess of $10,000, was removable as an aggravated felon. *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008). While not citing *Babaisakov*, the Court suggested that its inquiry into the amount of the fraud was limited by *Shepard* to the charging document, the terms of the plea agreement or plea colloquy, or comparable judicial record. It found these requirements satisfied in a "Certified Statement of Conviction/Disposition" that set forth, in abbreviated form, that the conspiracy sought to obtain goods worth in excess of $10,000. *Id.* at 379-380.

Conclusion

Fraud may be a fitting topic to bring us back to the beginning. The two protagonists in *Crimes & Misdemeanors* are distinct in many ways, no more so than in their capacity for shielding the truth. Judah Rosenthal, the Park Avenue ophthalmologist, regains control over his threatened double-life through the ultimate deceit; Cliff Stern, the indigent filmmaker, cannot stop himself from lampooning, on film, the brother-in-law who gave him his last job. Who, in the end, is the success?

The issues addressed here, even in their difficulties, thankfully do not present that level of moral dilemma.

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

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1. *See Crimes Involving Moral Turpitude: Categorical Approach or Evolving Moral Standards?*, Immigration Law Advisor, Vol. 1, No. 12 (December 2007).

2. *See id.* for further discussion of the unique split among the *en banc* panel that decided this case.