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LITIGATION HIGHLIGHTS

Inside

Ninth Circuit En Banc Untangles Application of Retroactivity Principles when *Chevron* Deference Under *Brand X* is Given to an Interpretation by the BIA

Pursuant to the "Judicial Power" vested in Article III courts over cases arising under the Laws of the United States, when a U.S. Court of Appeals interprets a federal statute, it provides an authoritative statement of its meaning and announces the law of the circuit. Moreover, when the court as a judicial decisionmaker also changes the law of the circuit, it follows that the analysis in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), which sets forth retroactivity factors to consider when a court changes the law is controlling.

Although these principles are well settled in the Ninth Circuit, their applicability when the BIA construes the meaning of an ambiguous INA provision in a precedential decision was recently decided by the en banc Ninth Circuit in ***Garfias-Rodriguez v. Holder***, __F.3d__, 2012 WL 5077137 (9th Cir. Oct. 19, 2012). The court's discussion is rooted in the BIA's role as the authoritative interpreter of ambiguous INA provisions as explained in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and pursuant to the "Executive Power" to ensure that the laws be faithfully executed. *See* U.S. Const. art. II sec. 1, sec. 3.

Understanding the *en banc* court's opinion requires an understanding of the complex procedural posture in which the case arrived in

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Alien Divorce, and Related Curiosities

Immigration is about relationships. Central to our regulation of who may visit or join our society are familial bonds which may or may not conform to the requirements of our laws and jurisprudence. *See* Ezer, *The Intersection Of Immigration Law and Family Law*, 40 Fam. L. Q. 339 (Fall 2006). Because marriage can both confer and preclude immigration benefits, the ques-tion whether a marriage has been properly dissolved may be as important as knowing whether it was lawfully contracted. Our clients and the courts rightfully give considerable attention to the institution of marriage, but its counterpart – unmarriage, or divorce – must also be given its due. As the sage observed, a good marriage is a treasure, but a good divorce is a miracle.

This note takes a look at the immigration aspects of divorce. Paul Simon counseled that there are "50 Ways To Leave Your Lover," but breaking up without a righteous divorce can bust more than the alien's heart. As Professor Friedman explains, divorce may have economic, moral, and symbolic meaning, but it is above all a legal matter. Fried-

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Retroactivity of BIA's Branded X Decisions

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the Ninth Circuit. The *Garfias* line of cases, which involves § 212(a)(9)(C)(i)(I) (unlawful re-entry following unlawful presence) follows a track parallel to a line of cases addressing § 212(a)(9)(C)(i)(II) (unlawful re-entry following prior removal). After Congress amended the INA by adding the inadmissibility provisions of § 212(a)(9)(C) for recidivist immigration violators, the former INS issued a memorandum providing that aliens inadmissible under § 212(a)(9)(C) were not eligible to adjust status under § 245(i). Immigration judges routinely followed this guidance, and their decisions were affirmed in unpublished BIA decisions.

In 2004, the Ninth Circuit issued *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), where it rejected the former INS memorandum's application to § 212(a)(9)(C)(i)(II), and concluded that aliens inadmissible under 212(a)(9)(C)(i)(II) were eligible to adjust status under 245(i). *Perez-Gonzalez* relied on former §§ 212.2(e) and (i)(2) of the regulations to reconcile the inadmissibility provision with the special adjustment of status provision.

Two years later, exercising its authority under *Brand X*, the BIA issued an authoritative interpretation of the interplay between §§ 212(a)(9)(C)(i)(II) and the regulations in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006), finding that, because the regulations predated section 212(a)(9)(C)(i)(II), they could not be reasonably construed as implementing the statute. Shortly thereafter, the Ninth Circuit, relying on *Perez-Gonzalez*, issued a decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), where it rejected the former INS memorandum's application to section 212(a)(9)(C)(i)(I) and concluded that aliens inadmissible under 212(a)(9)(C)(i)(I) were eligible to adjust status under 245(i).

Later the next year, the BIA issued the authoritative interpretation of the interplay between sections 212(a)(9)(C)(i)(I) and 245(i) in *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007), finding that aliens inadmissible under 212(a)(9)(C)(i)(I) were ineligible to adjust status under 245(i). The Ninth Circuit next issued *Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007), where it accorded *Chevron* deference under *Brand X* to the authoritative interpretation of section 212(a)(9)(C)(i)(II) as set forth in *Torres-Garcia*.

Subsequently, in *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076 (9th Cir. 2010), the court applied *Gonzales* retroactively to all cases open on direct review. In doing so, the court explained that, when it accords deference to the BIA's authoritative interpretation of the INA, it "adopts" that interpretation as its own. *Morales-Izquierdo*, 600 F.3d at 1089-90. More specifically, the court ruled that a statute can only have one meaning and that the court's decisions establish that meaning, regardless of the relevant adjudicatory history. *Id.* at 1089. In *Garfias*, the en banc court overruled *Morales-Izquierdo*'s rationale.

Because the BIA is "the authoritative arbiter" of the meaning of ambiguous provisions of the INA, *Briones*, and not the court's decision according deference to *Briones*, "announced" and "changed" the law of the circuit.

First, the en banc court unanimously deferred to the BIA's permissible interpretation of the interplay between §§ 212(a)(9)(C)(i)(I) and 245(i) in *Briones*.

Second, a highly fragmented court, which resulted in a 6-1-1-1-2 split decision, held that, because the BIA is "the authoritative arbiter" of the meaning of ambiguous provisions of the INA, *Briones*, and not the court's decision according deference to *Briones*, "announced" and "changed" the law of the circuit. To hold otherwise, the court noted, "would ignore the effect of *Chevron* and treat the agency decision as though it had issued from the court itself."

Third, the court rejected the government's position that the BIA, as the authoritative interpreter of an ambiguous statute, has issued an interpretation in *Briones* that is comparable to a judicial construction of a statute and is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. The court clarified that agency decisions are not analogous to court decisions because an agency interpretation is not a once-and-for-always definition of what the statute means, but an act of interpretation in light of its policymaking responsibilities that may be reconsidered "on a continuing basis."

Fourth, because the court determined that the BIA, and not the court as a judicial decisionmaker, "changed" the law of the circuit, it follows that the analysis in *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), which sets forth retroactivity factors to consider when an agency changes its law is controlling. After applying the *Montgomery Ward* test, the court held that the BIA's decision may be applied retroactively to Mr. Garfias.

Finally, an eight judge majority held that 8 C.F.R. § 1240.26(i), which terminates any grant of voluntary departure upon the filing of a petition for judicial review of a removal order, was a proper exercise of the Attorney General's authority under §§ 240B(b)(1) and 240B(e), and that the court possesses no equitable authority to stay voluntary departure periods contrary to the Attorney General's regulation.

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man, *Rights of Passage: Divorce Law In Historic Perspective*, 63 Or. L. Rev. 649 (1984).

The Definition Of Divorce

The Supreme Court has declared marriage to be "one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967), *quoting Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942). The Court, a little less breathlessly, has observed,

> Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society.

Williams v. North Carolina , 325 U.S. 226, 230 (1945). And the Court has held that access to divorce is guaranteed by the due process clause. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). But despite the constitutional significance of marriage and divorce, and its often critical significance for tax, immigration, and other statutory matters, there is relatively little federal law on the making and breaking of marital bonds.

Neither the Immigration and Nationality Act nor the immigration regulations define "divorce". *See generally* Gordon, Mailman & Yale-Loehr, 3 *Immigration Law And Procedure*, Chap. 36, Immediate Relatives (Bender rev. ed.). Immigration law is similarly silent regarding the institution of marriage, except to limit "proxy" marriages.

> The term [*sic*] "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

8 U.S.C. § 1101(a)(35). *See* Edwards, *Kicking The INA Out Of Bed: Abolishing The Consummation Requirement For Proxy Marriages*, 22 Hastings Women's L. J. 55 (2011). Earlier, proxy marriages had been acceptable for immigration purposes. *See, e.g., United States ex rel. Aznar v. Commissioner of Immigration*, 298 F. 103, 105 (S.D. N.Y. 1924). Marriage under the immigration statutes was deemed gender-restricted. *See, e.g., Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982) (homosexual marriage does not qualify for INA "immediate relative" classification). *See also* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 (2006)(defining marriage as "only a legal union between one man and one woman"). *Cf.* 8 U.S.C. § 1101(b) (defining "child", "parent", "father", and "mother" for immigration purposes).

The Supreme Court has declared marriage to be "one of the 'basic civil rights of man,' fundamental to our very existence and survival."

The INA's limits on marriage included exclusion and deportation for plural unions, a constraint that remains in the law today. 8 U.S.C. §§ 1182(a)(10)(A), 1227(a)(1)(A). However, for individuals who limit their enjoyment to one spouse at a time, Congress until recently has been indifferent to the number or frequency of our marriages and divorces. *But see* Act of August 10, 1939, Pub. L. No. 366, ch. 638, 53 Stat. 1341 (prohibiting under criminal penalty the use of the mails for solicitation of the procurement of divorce in foreign countries). The 1986 Immigration Marriage Fraud Amendments added several "time-sensitive" marital provisions to the INA. *E.g.*, 8 U.S.C. § 1154(a)(2) (barring second preference visas where the alien re-marries within five years of his or her LPR admission). *Cf.* 8 C.F.R. § 214.2 (k)(5) (non-immigrant fiance(e) visas contemplate marriage within 90 days of the alien's admission).

Save for these several immigration provisions, federal marital law has been largely limited to enactments for the governance of the District of Columbia, the territories, and the Panama Canal. *See, e.g.*, Act of September 29, 1965, Pub. L. No. 89-217, 79 Stat. 889 (District of Columbia, divorce for adultery, desertion, cruelty, or felony conviction, and annulment for bigamy, lunacy, coercion, or incapacity); Act of September 21, 1922, Pub. L. No. 332, 42 Stat. 1004, 1008 (Panama Canal, divorce for impotence, bigamy, adultery, desertion, neglect, habitual drunkenness, attempted spousal murder, cruelty, or felony conviction). *See also Reynolds v. United States*, 98 U.S. 145, 164-66 (1878)(sustaining a polygamy conviction under the criminal code of the Utah Territory); *Matter of Agbulos*, 13 I&N Dec. 393 (BIA 1969)(recognizing tribal marriage pursuant to the marital law established by the U.S. Military Government of the Philippines). Congress otherwise left to the States the enactment of laws for the making and breaking of marital unions.

In contrast to the plurality and gender constraints on marriage, there are no federal limits on who may divorce. As discussed below, divorce for immigration purposes involves the application of local law. While marriage usually depends upon the law where the union was celebrated (*lex loci celebrationis*), divorce generally is determined by the alien's domicile, the availability and procedures for dissolving a marriage being dependent upon the family law of the state or foreign country in question.

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International law similarly leaves divorce and related matters to local practices and preferences. There is a general divorce treaty, the *Hague Convention On The Recognition Of Divorces And Legal Separations* (978 U.N.T.S. 399, 1 June 1970), but the treaty imposes no standards on divorce and the United States is not a signatory.

A critical distinction between marriage and divorce is that there is no such thing as "common law" divorce. *See, e.g.*, *Glover v. Bowen*, 1987 WL 123580 (N.D. Ala. 1987). *See generally Common Law Marriage* @ http://en.wikipedia.org/wiki/Common-law_marriage (visited Mar. 7, 2012). *See also Meister v. Moore*, 96 U.S. 76 (1877) (adoption of state marriage statute not presumed to bar common law marriage); *Matter of F* –, 5 I&N Dec. 163 (BIA 1953) (common law marriages valid for immigration purposes). *Cf. Matter of M* –, 7 I&N Dec. 601 (BIA 1957) (discussing common law marriage and sexual relations). While many jurisdictions recognize common law or consensual marriages, none accepts the notion of consensual or do-it-yourself divorce. *Common Law Marriage, supra*. Once married, by ceremony, common law, or otherwise, dissolution of the union requires intervention by a court or other third party. Id. Importantly, one cannot end a marriage by attempting to enter into a second union. A divorce must first be obtained to dissolve the prior marriage or the second marriage will be void.

Marital law differentiates between void and voidable marriages. *See generally* Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure*, ¶ 36.02[2][a]. A void marriage has no validity; a voidable marriage is recognized as long as the marriage persists. *Id. See, e.g.*, *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 876-82 (S.D. Tex. 1969), *aff'd*, 440 F.2d 1163 (5th Cir. 1971) (sustaining widow's Jones Act claim, finding "limited purpose" marriage to gain husband's admission was not void). There is an analogous differentiation in divorce. Void divorces are those contrary to public policy, typically where the divorcing authority lacks jurisdiction (for lack of the parties' domicile or presence), or where there is no notice to one of the spouses. *See generally* Harper, *The Validity of Void Divorces*, 79 U. Pa. L. Rev. 158 (1930). *Cf.* Abrams, *Marriage Fraud*, 100 Cal. L. Rev. 1 (2012). Voidable divorces are generally salvageable void divorces; that is, defective divorces that are cured by valid remarriage or equitably protected from subsequent challenge. The taxonomy for "migratory" divorces obtained in jurisdictions other than the marital domicile includes "bilateral", "*ex parte*", and "practical recognition" divorces (*i.e.*, where the party attacking the decree is precluded from doing so because of estoppel, laches, unclean hands, or similar equitable constraints). *See, e.g.*, *Black's Law Dictionary* 549-51 (9th ed. 2009). *See also 7 Foreign Affairs Manual* 1460.

Before 1989, consular officers issued "certificates of witness to marriage," but offered no corresponding services for divorce. Today, our foreign service officers are expressly "forbidden to celebrate marriages."

The Immigration Agencies And Divorce

Despite the paucity of federal family law, our administrative agencies are regularly involved in marriage and divorce. *See generally* Levy, *The Family In Immigration And Nationality Law: Part* I, 92-09 Immigration Briefings 1 (Sept. 1992). For example, United States consular officers once married our citizens and other nationals at posts abroad. The Attorney General opined that such officers lacked the authority to do so, but he also concluded that by virtue of the treaty then between the United States and China, consuls might preside over marriages, divorces, and similar matters for United States citizens in that country. *Compare Celebration Of Marriages By Consuls*, 7 U.S. Op. Atty. Gen. 18 (1854), *with United States Judicial Authority In China*, 7 U.S. Op. Atty. Gen. 495 (1855). Before 1989, consular officers issued "certificates of witness to marriage," but offered no corresponding services for divorce. Today, our foreign service officers are expressly "forbidden to celebrate marriages," and are limited to authenticating foreign marriage and divorce records (whereby they "assume no responsibility" for the record contents). *See* 22 C.F.R. Part 52; 7 *Foreign Affairs Manual* 1413, 1461-62.

The Attorney General has long determined the immigration consequences of marriage and divorce. For example, in response to an admissibility inquiry by the Secretary of Labor, Attorney General Cummings opined regarding the citizenship of an American woman who married and divorced two Danish citizens. *Citizenship Of Mrs. Marion Thorgaard*, 37 U.S. Op. Atty. Gen. 206 (1933). Similarly, the Attorney General has passed upon the derivative citizenship of the minor, foreign-born children of women who "resumed" their United States citizenship under the Cable Act after divorce from or the death of their foreign husbands. *E.g.*, *Citizenship of Minor Child Of Native American Mother And Spanish Father, Divorce Of Parents*, 37 U.S. Op. Atty. Gen. 90 (1933); *Citizenship of R. Bryan Owen*, 36 U.S. Op. Atty. Gen. 197 (1929). *See, e.g., In re Lazarus*, 24 F.2d 243 (N.D. Ga. 1928).

Our contemporary immigration adjudicators can neither marry nor divorce aliens, but they do routinely

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pass on questions regarding marital status. Many immigration issues can turn on the existence and validity of a divorce, including any matter in which it is relevant to ask whether the alien is married (and if so, to whom). For example, divorce may be a part of *admission* (*e.g.*, as an immigrant by virtue of being the spouse or the unmarried son or daughter of a citizen or lawful permanent resident, 8 U.S.C. § 1153(a)), *removal* (*e.g.*, as an alien who misrepresented his or her marital status, or had married twice without intervening death or divorce, 8 U.S.C. § 1182(a) (6)(C), (a) (10)(A)), *removal relief* (*e.g.*, as an alien whose removal would cause hardship to a citizen or LPR spouse or child, 8 U.S.C. § 1229b(b)), *adjustment of status (e.g.*, as an alien who is admissible and family visa eligible, 8 U.S.C. § 1255(a)), *derivative benefits* (*e.g.*, as the spouse or child of an alien asylee, 8 U.S.C. § 1158(b)(3)), *or naturalization* (*e.g.*, as an alien barred from good moral character by plural marriage, 8 U.S.C. §§ 1101(f)(2), 1427(a)). Plainly, much of the INA necessarily requires our immigration adjudicators to determine the validity and effect of alien divorce.

Despite the statutory and regulatory silence regarding alien divorce, the administrative jurisprudence is substantial and shows the following:

(1) Alien divorce is first a question of local law.

The Board has rejected a call for uniform federal standards for alien marriage and divorce, declaring that "it is the function of the state to determine how its residents may enter into the marital relationship." *Matter of Hosseinian*, 19 I&N Dec. 453, 455 (BIA 1987). *See, e.g.*, *Matter of Levine,* 13 I&N Dec. 244 (BIA 1969); *Matter of P –*, 4 I&N Dec. 610 (BIA 1952; Atty. Gen. 1952). The same is true for dissolving marriage. *See, e.g., Williams v. North Carolina*, *supra*, 325 U.S. at 232-33. *See also State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) (state, not federal, courts are the appropriate forum for foreign diplomat's divorce).

Like marriage, a divorce that is valid where rendered generally is deemed valid for immigration purposes. As the Board explained in *Matter of Luna*, 18 I&N Dec. 385 (BIA 1983),

> The general rule is that a decree of divorce valid where rendered is valid everywhere and will be recognized either under the "full faith and credit" clause of the United States Constitution, or in the case of divorces rendered in foreign countries, under the principle of comity, provided that recognition would not contravene public policy.

18 I&N Dec. at 386, *citing* 27B C.J.S., *Divorce*, sections 326-333 (1959*). See also Shikof v. Murff*, 257 F.2d 306, 308-09 (2d Cir. 1958)(discussing types of non-judicial divorce; an Islamic divorce obtained in New York held not valid).

The Board-recognized public policy constraints preclude immigration recognition of "mail order" divorces and divorces insufficient to resolve plural marriage issues. *See, e.g.*, *Matter of Hoefflin*, 15 I&N Dec. 31 (BIA 1974)(visa not supported where Michigan law, the place of the second marriage, did not recognize the "mail order" Mexican divorce dissolving the first marriage); *Matter of Darwish*, 14 I&N Dec. 307 (BIA 1973)(foreign decree irregular under Dominican Republic law, but recognized under Jordanian-Muslim law, held insufficient to establish that subsequent Jerusalem marriage was monogamous for visa purposes). *See also Matter of P – and S –*, 5 I&N Dec. 1 (BIA 1947)(coerced, racially-based divorce decrees issued during the Hitler regime held valid, subject to reinstatement of the marriage by subsequent decree recognizing the union by a court of competent jurisdiction). The bar to "mail order" divorces may not be absolute if either spouse has had some contact with the divorcing jurisdiction, and, as noted below, a good re-marriage can sometimes cure a bad divorce. *See, e.g., Matter of W –*, 8 I&N Dec. 16 (BIA 1958).

The Board-recognized public policy constraints preclude immigration recognition of "mail order" divorces and divorces insufficient to resolve plural marriage issues.

Reliance on local law to ascertain an alien's marital status may not be limited to foreign judicial decrees. *See, e.g., Matter of Lashkevich*, 12 I&N Dec. 22, 25-26 (BIA 1966)(sustaining the appeal of a visa denial upon foreign certification that alien was "single").

> [W]e find it unnecessary to rest our decision upon the [beneficiary's] religious divorce . . . [T]he civil status of a person, determined in accordance with the laws of the country of which she is a national and in which she resided, and who has no United States residence or domicile, should, on the basis of comity, be accorded recognition of the civil status accorded to her by the laws of such country.

See also Matter of Dabaase, 16 I&N Dec. 39 (BIA 1976)(proof necessary to establish a customary or tribal divorce), *aff'd sub nom. DaBaase v. INS,* 627 F.2d 117 (8th Cir. 1980*). Cf.* Op. Gen. Counsel No. 96-14, *Effect Of State Court Judgment On Section 216 "Good Faith" Waiver*, 1996 WL 33166345 (INS)(citing possibility of collusion in divorce; state court

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ruling that parties did not marry for immigration purposes is not controlling). The immigration agencies accord extra-judicial ("customary") divorces careful scrutiny. *See, e.g., Matter of Nwangwu,* 16 I&N Dec. 61 (BIA 1975)(extra-judicial divorce requires adherence to local ethnic or tribal formalities); *see also Matter of Kumah*, 19 I&N Dec. 290 (BIA 1985) (alien's failure to persuade Ghanaian authorities fatal to claim of customary tribal divorce). Because it is bottomed on the widely variable state and foreign marital law, alien divorce can challenge counsel and court alike.

(2) The law that governs alien divorce generally depends on domicile.

To be valid for immigration purposes, a divorce decree must be issued by a court or authority having competent jurisdiction. While the divorce itself may depend upon foreign law, the jurisdiction of the divorcing authority ordinarily will be determined under our law.

> A foreign court must have jurisdiction to render a valid [*i.e.*, recognizable] decree, and the applicable tests of jurisdiction are ordinarily those of the United States, rather than of the divorcing country.

Matter of Luna, *supra*, 18 I&N Dec. at 386. Immigration recognition of a divorce decree ordinarily requires that the domicile of at least one of the spouses be in the divorcing jurisdiction.

> [A] divorce obtained in a foreign country will not normally be recognized as valid if neither of the spouses had a domicile in that country, even though domicile is not a requirement for jurisdiction under the divorcing country's laws.

Id., *citing* 24 Am.Jur.2d, *Divorce and Separation*, sections 964-965; *Annot.*, 13 A.L.R.3d 1419 (1967). *Accord, Matter of Dagamac*, 11 I&N Dec. 109 (BIA 1965)(a "mail order" divorce decree is invalid and will not be recognized). *But see Matter of Jimenez*, 18 I&N Dec. 182 (BIA 1981) (recognizing as valid a Dominican Republic mutual consent divorce which, under Dominican law, required neither domicile nor presence of either party). *Cf. Williams v. North Carolina*, *supra*, (sustaining bigamous cohabitation conviction where North Carolina declined to recognize Nevada divorce).

While the divorce itself may depend upon foreign law, the jurisdiction of the divorcing authority ordinarily will be determined under our law.

The requirement of domicile is not absolute, however, and may yield to the rule that the validity of an alien's re-marriage (and hence the immigration validity of his or her divorce) will be governed by the law of the place of celebration. *See, e.g.*, *Matter of P–*, *supra* (fact that prior marriage was dissolved by Mexican *in absentia* divorce while spouses resided in the United States does not bar application of the general rule that the validity of a subsequent marriage is governed by the law of the place of celebration (here, Germany)), *overruling Matter of O –*, 3 I&N Dec. 33 (BIA; Atty. Gen. 1949) (*in absentia* divorces are invalid for immigration purposes if obtained while either party was domiciled or physically present in the United States). *See also Chinese Divorce Valid Even Without Physical Appearance*, 83 No. 27 Interpreter Releases 1484 (July 2006). Absent compelling policy reasons to the contrary, the Board has been willing to overlook divorce defects, even when the spouses had no domicile and but little presence in the divorcing jurisdiction. *See, e.g., Matter of McG –*, 2 I&N Dec. 883 (BIA 1947) (recognizing a Connecticut marriage predicated on a Mexican divorce obtained by two aliens domiciled and residing in other countries).

> The courts of this country have been in perpetual conflict as to the application of the laws of the place of divorce or marriage and the place where recognition of the divorce or marriage is sought . . . [But] [t]he rules of comity may not be departed from except . . . for the purpose of necessary protection of our citizens or in enforcing some paramount rule of public policy.

2 I&N Dec. 885-86. Because the foreign divorce judgment was valid in Mexico, there was no conflict with Connecticut's public policy and morals (the place of re-marriage), and there was no avoidance of the laws of any United States domicile, the Board concluded that a visa should be granted. *Id. See also Matter of San Juan*, 17 I&N Dec. 66 (BIA 1979)(despite the failure to satisfy the jurisdictional requirements for Puerto Rican divorce, INS cannot withhold recognition to deny visa based on subsequent New York marriage where neither Puerto Rico nor New York would permit such collateral attack); *Matter of I –,* 1 I&N Dec. 627 (BIA 1943)(Oklahoma marriage voidable for breach of 6 month waiting period after Missouri divorce, sufficient for suspension eligibility). For divorcing aliens (as well as others), "domicile" depends on intent, and has its own dense and often confusing jurisprudence.

(3) Alien divorce must be final, absolute, and bona fide.

Historically, we have recognized three avenues of marital dissolution: annulment (as if the marriage never occurred), absolute divorce (divorce *a*

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vinculo matrimonii), and limited "bed and board" divorce (divorce *a menso et thoro*, or legal separation). As discussed below, alien annulment presents special concerns. For immigration purposes, alien divorce must be absolute, restoring the alien to a single, unmarried status. *See In re Lazarus*, *supra*, 24 F.2d at 244 ("Total divorce, equally with . . . death, terminates the marital relationship"). Legal separation is not sufficient. *See, e.g., Matter of Miraldo*, 14 I&N Dec. 704 (BIA 1974)(a Brazilian "amicable divorce" is a legal separation that does not permit re-marriage, and thus was insufficient under the INA to accord "unmarried" status); *Matter of Ferreira*, 14 I&N Dec. 723 (BIA 1974) (Portuguese court separation decree does not terminate marriage). *See also* USCIS, *Adjudicator's Field Manual*, § 21.3(a)(2), 2007 WL 3376347 ("A legal separation is not proof of marital capacity"). Of course, while legal separation won't work for immigration purposes, it may be enough for naturalization (*i.e.*, derivative citizenship). *See, e.g., Nehme v. INS*, 252 F.3d 415, 422-24 (5th Cir. 2001); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001). *Cf. Matter of H* –, 3 I&N Dec. 742 (parents cannot "separate" under the immigration statutes if they were never married).

Alien divorce also must be final. *Compare, e.g., Matter of Souza,* 14 I&N Dec. 1 (BIA 1972)(alien not qualified for fiancee visa where divorce – from first fiancee – was not yet final), *with In re Saunders*, 2006 WL 1558871 (BIA 2006)(unpublished; adjustment qualification de-pends on divorce finality). Both the Board and legacy INS have concluded that the finality of foreign divorces is a question to be determined under the foreign law. *Validity of Foreign Divorces and Subsequent Remarriage*, Legal Op. No. 97-9, 1997 WL 33169239 (INS 1997), *citing Matter of Ma*, 15 I&N Dec. 70, 71 (BIA 1974). See also Matter of E–, 2 I&N Dec. 328 (BIA, Atty. Gen. 1945) (bigamy under state law, by re-marriage during one year pendency of interlocutory divorce decree, deemed crime involving moral turpitude).

Alien divorce must be in good faith. *See, e.g., Matter of Aldecoaotalora*, 18 I&N Dec. 430 (BIA 1983) (visa denied where beneficiary admitted she divorced solely to obtain immigration benefits as unmarried child of lawful permanent resident); *accord, In re Mauricia-Valverde, visa petition beneficiary*, 2009 WL 1103517 (BIA 2009) (unpub.*). Cf. Boyter v. Comm'r*, 74 Tax Court 989 (1980) (annual divorce and re-marriage invalid for tax purposes), *remanded*, 668 F.2d 1382 (4th Cir. 1981); *accord,* Rev. Rul. 76-255, 1976-2 C.B. 40, 1976 WL 37839 (IRS). As with marriages, the immigration agencies have recognized the concept of "sham divorces". *See, e.g.*, *Interpreting A "Pro Forma" Russian Divorce*, Legal Op. No. 93-64, 1993 WL 1504011 (INS 1993)(an alien may not disavow a voidable divorce obtained to facilitate immigration); *In re Miroslava Gonzales, visa petition beneficiary*, 2007 WL 4182294 (BIA 2007)(unpublished; a sham divorce will not be given effect). *But see In re [Applicant],* 1995 WL 1796754 (INS AAU Bangkok) (exclusion waiver granted notwithstanding sham divorce). *Cf.* Drinker, *Problems of Professional Ethics In Matrimonial Litigation*, 66 Harv. L. Rev. 443 (1953) (discussing divorce collusion). While sham divorces usually don't count, the jurisprudence has yet to develop a divorce equivalent of the "*bona fide*" marriage. *Compare*, *e.g.*, *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979), *cert. denied*, 449 U.S. 828 (1980)(sham marriage: "Conduct and lifestyle before and after the marriage are relevant . . . in determining the intent of the parties"). That is, immigration adjudicators may look to the couple's intent to live together as proof of a sufficient union (*see, e.g., Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983)), but as long as a divorce was not obtained for immigration purposes, the *bona fides* of the marital dissolution do not seem to matter.

While sham divorces usually don't count, the jurisprudence has yet to develop a divorce equivalent of the "*bona fide*" marriage.

(4) Alien annulment is a whole different matter.

The Board has acknowledged that "the issue of void, voidable, and annulled marriages [is] a difficult one." *Matter of Astorga*, 17 I&N Dec. 1, 3 (BIA 1979). Central to the conundrum is the immigration effect of judgments that declare the marriage never to have existed. The Board has wrestled with annulment's "relation back" doctrine.

> Generally . . . marriages declared void at inception, or annulled, will not relate back to cure a ground of exclusion or deportation at the time of entry . . . to avoid manipulation of immigration priorities through changes in marital status not undertaken in good faith . . . Conversely, however . . . in certain instances, retroactive effect should not be given an annulment . . . where no immigration fraud was noted and where injustice would result . . . .

Matter of Astorga, *supra*, 17 I&N Dec. at 3 (citations omitted). In *Astorga*, the Board reaffirmed its general rule that marriages declared void at inception or annulled will not related back to cure a ground of exclusion or deportation based on the alien's entry as unmarried. 17 I&N Dec. at

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4, *reaffirming Matter of Wong*, 16 I&N Dec. 87 (BIA 1977); *Matter of R – J–*, 7 I&N Dec. 182 (BIA 1956). *Accord, Matter of Magana*, 17 I&N Dec. 111 (BIA 1979)(no relation back to cure entry fraud). *See, e.g., Hendrix v. INS*, 583 F.2d 1102, 1104 (9th Cir. 1978)(annulment would not relate back to cure visa fraud, nor could alien assert that disqualifying marriage was not bona fide). Similarly, annulment will not cure marriage fraud. *See, e.g., In re Gomes Soares, visa petition beneficiary*, 2009 WL 1653742 (BIA 2009) (unpublished; state denial of annulment held not to preclude finding of marriage fraud). Moreover, post-entry annulments may be viewed as indicia of immigration fraud. *See, e.g., Small v. INS,* 438 F.2d 1125 (2d Cir. 1971).

If an alien's marriage is defective or problematic for immigration purposes, divorce alone will not help.

On the other hand, annulments may be deemed to "relate back" in immigration cases to prevent fraud. *See generally Matter of T –*, 8 I&N Dec. 493, 495 (BIA 1959) (discussing deportation upon the annulment of "gigolo" marriages). In the absence of fraud, the Board has chosen to apply (or not apply) the doctrine as "justice" dictates. *See, e.g., Matter of Castillo-Sedano*, 15 I&N Dec. 445 (BIA 1975)(where annulment obtained by default judgment and no evidence of fraud, an alien's immigration status does not revert back to his or her pre-marriage status); *McGreath v. Holder,* 573 F.3d 38 (1st Cir. 2009)(post-entry annulment related back to preclude adjustment). *See also Witter v. INS*, 113 F.3d 549, 552-53 (5th Cir. 1997)(applying "relation back" principles, the vacatur of an annulment did not cure the alien's visa misrepresentation).

As with other marital issues, the immigration effect of annulments may depend upon the local law. *See, e.g., Matter of Samedi*, 14 I&N Dec. 625 (BIA 1974)(adjustment denied where, under local law, marriage annulled for non-immigration fraud was declared void *ab initio*); *Matter of Labiano*, 11 I&N Dec. 200 (BIA 1965)(visa revoked where, under state law, the underlying marriage was prohibited for barred degree of consanguinity and deemed "void without [need for] any decree of divorce or annulment"). But both the Board and the courts have concluded,

> The fact that the law of the jurisdiction in which the annulment was granted deem[s] annulled marriages void *ab initio* [is] not controlling.

Garcia v. INS, 31 F.3d 441, 444 (7th Cir. 1994)(sustaining deportability for visa misrepresentation). Further complicating questions regarding the applicability of the "relation back" doctrine, the particular law under which the annulment was obtained may differentiate between annulments that are effective upon decree and those that dissolve the marriage from its inception. *Compare, e.g., Matter of V –*, 6 I&N Dec. 153 (BIA 1954)(deportation, marriage annulled for fraud *ab initio* under California law could not support a visa), *with Matter of R –*, 4 I&N Dec. 345 (BIA 1951)(deportation terminated, where under District of Columbia law war bride's annulment for marital incapacity declared marriage void from date of decree, not *ab initio*). *Cf. Karayannis v. Brownell*, 248 F.2d 80 (D.C. Cir. 1957)(staying deportation where record failed to show that annulment granted for marriage fraud established immigration fraud). The case law suggests that the immigration effect of alien annulment is particularly unpredictable.

(5) A good divorce cannot cure a bad marriage (but a good marriage may fix a bad divorce.)

If an alien's marriage is defective or problematic for immigration purposes, divorce alone will not help. Thus, for example, an alien who "needs" to be unmarried or singularly married for admission or adjustment cannot fix his or her problem simply by dissolving the offending union. *See, e.g., In re Medrano-Segovia, visa petition beneficiary*, 2006 WL 3922262 (BIA 2006) (unpublished; unmarried child visa automatically revoked upon the alien's marriage, a defect not cured by subsequent final divorce); *Matter of H–*, 9 I&N Dec. 640 (BIA 1962)(second, polygamous marriage valid under Jordanian law would not support visa petition, and defect was not cured by the alien's divorce of first wife after second marriage). *See also Matter of Ali*, 2007 WL 4707517 (BIA 2007) (unpublished; second, polygamous marriage valid under Yemeni law would not support visa petition, and defect was not cured by first wife's subsequent death).

DHS and EOIR look to the alien's marital status at the time of the immigration application or petition. If the alien has too many (or too few) spouses at that time, he or she must correct the problem and then reapply. *See, e.g., In re Pelayo-Martinez, visa petition beneficiary*, 2008 WL 5181831 (BIA 2008) (unpub.; visa denied where alien remarried relying on fraudulent divorce, a defect not cured by a post-petition annulment and re-marriage); *In re Plasencia-Chirino, visa petition beneficiary*, 2006 WL 2024175 (BIA 2006)(unpub.; a post-petition divorce may support a new visa petition, but it is not germane to the approvability of a pre-divorce petition). This may

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mean that an alien must "re-marry" more than once. *See, e.g., Matter of E –, supra*, 2 I&N Dec. at 337 (after divorce is final and absolute, the alien must re-marry the one with whom he or she shared the marriage ceremony). Under the INA, marital choreography matters and the alien must get his or her marriage, divorce, and immigration application in the right order.

While divorce may not cure marriage for immigration purposes, marriage occasionally will cure divorce. That is, a defective (*i.e.*, voidable) divorce that has been recognized by a state or foreign country as sufficient for purposes of re-marriage, generally will be accepted as sufficient for immigration purposes. *See, e.g., Matter of Espinoza,* 16 I&N Dec. 199 (BIA 1977) (absent judicial action, a voidable divorce is valid). *Compare Matter of Agustin,* 17 I&N Dec. 14 (BIA 1979)(a voidable marriage generally will be regarded as valid until annulled or otherwise terminated). Beyond Dr. Johnson's dictum of hope triumphing over experience, re-marriage can be the proof of alien divorce.

(6) The test for good alien divorce often is re-marriage.

In many immigration cases, the immigration validity of the alien's divorce is determined by assessing the validity of his or her re-marriage. The Board has explained:

> Where one of the parties to a marriage has a prior divorce, we look to the law of the state where the subsequent marriage was celebrated to determine whether or not that state would recognize the validity of the divorce.

Matter of Hosseinian, *supra*, 19 I&N Dec. at 455 (visa petition not supported where California law, the place of the subsequent marriage, did not recognize proxy Hungarian divorce), *citing Matter of Ma*, 15 I&N Dec. 70 (BIA 1974), *and overruling Matter of Kurtin*, 12 I&N Dec. 284 (BIA 1967). *See also Matter of Allison*, 12 I&N Dec. 835 (BIA 1968); *Matter of Sena*, 16 I&N Dec. 688 (BIA 1979). Because marriage is assessed under the law of the place of celebration, the immigration sufficiency of an alien's divorce may depend upon the particularities of the law in the place he or she chooses to marry. *Compare, e.g., Matter of Gamero*, 14 I&N Dec. 674 (BIA 1974) (where Chihuahuan proxy decree was recognized by Baja California as sufficient to permit subsequent marriage, such marriage held valid for visa); *and Matter of B –*, 5 I&N Dec. 659 (BIA 1954) (where Mexican proxy decree was recognized by California as sufficient to permit second marriage, such marriage held valid for visa); *Matter of B–,* 1 I&N Dec. 677 (BIA 1943)(German decree obtained by alien having domicile there, recognized as valid for second marriage and sufficient for suspension application), *with Matter of Dagamac*, *supra* (because law of domicile did not recognize validity of Mexican "mail order" divorce, the alien's re-marriage in the Philippines was invalid for immigration purposes). Assuming good faith, it appears that aliens are free to "alter-shop" and find the most accommodating forum to cure a voidable divorce by re-marriage.

If there has been no re-marriage, the validity of an alien's divorce often will be assessed under the law of the divorcing jurisdiction.

Our states typically have substantial jurisprudence regarding the sufficiency of foreign divorces for purposes of re-marriage. California, for example, generally has refused to recognize *in absentia* or "mail order" Mexican divorces where neither party to the divorce proceedings was physically present within the jurisdiction of the foreign court, but has recognized Mexican divorces where the plaintiff at least visited that country during the dissolution proceedings. *See, e.g., Matter of B–, supra; Matter of P –, supra. See also Matter of Kwan,* 11 I&N Dec. 205 (BIA 1965) (full faith and credit; accepting as immigration sufficient a collateral Michigan decree declaring marriage in China invalid but second marriage in Venezuela valid).

If there has been no re-marriage, the validity of an alien's divorce often will be assessed under the law of the divorcing jurisdiction. For example, in *Matter of Ma, supra*, 15 I&N Dec. at 71, the Board concluded that an *in absentia* Korean divorce did not restore the alien to unmarried status.

> In this case . . . there is no subsequent marriage. Consequently we must decide whether or not the divorce in question should be recognized on the basis of comity without any one state's law as a reference point . . . [T]he law of the state granting the divorce must be complied with, regardless of any additional requirements we may impose; for if the divorce is invalid there, it is invalid everywhere.

Alien divorce is governed by the same burden of proof rules that apply to alien marriage. That is, except when the divorce is pertinent to a charge of removability, the alien must establish the fact and immigration validity of his or her divorce. *See, e.g., Matter of Karim*, 14 I&N Dec. 417 (BIA 1973)(absent evidence of compliance with required procedures for "mutual consent" divorce under Pakistani law, termination of first marriage and thus validity of Washington re-marriage for visa petition was not established). Where the al-

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ien has re-married, he or she may be assisted by the law in many states that, where two marriages are shown for the same person, the second is presumed valid. As the Board explained in *Matter of F –*, *supra*, 5 I&N Dec. at 165,

> The presumption of the validity of the second marriage is stronger than and overcomes the presumption of the continuance of the first marriage. A party who attacks the validity of the second marriage has the burden of proof to show affirmatively that the first marriage has not been terminated.

But the weight of immigration jurisprudence gives the presumption limited utility.

> The presumption of marriage . . . gives way to the burden of proof placed upon a[n] [alien] who seeks an immigration visa preference.

Kakko v. INS, 594 F. Supp. 623, 628 (S.D.N.Y. 1984). *See, e.g., Matter of Martinez-Solis*, 14 I&N Dec. 93 (BIA 1972)(presumption of second marriage validity was precluded where citizen spouse was paid to marry alien one week after meeting and offered no evidence that first marriage was dissolved by death, divorce, or annulment); *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966) (state law presumption of validity of second marriage insufficient to show termination of first); *Matter of S–*, 7 I&N Dec. 469 (BIA 1957) (presumption of second marriage validity rebutted by evidence that "former" spouse was living and neither divorce nor annulment obtained). In contrast to marriage, no immigration case has been found suggesting a corresponding presumption of validity for alien divorce.

Federal Courts and Divorce

In our early years, particularly in the South, divorce was rare and available by legislative act (*i.e.*, a private bill passed by the state legislature). Friedman, *supra*, at 651-53, *citing inter alia*, Blake, *The Road To Reno: A History Of Divorce In The United States* (Macmillan 1962). In *Maynard v. Hill*, 125 U.S. 190, 206-10 (1888), the Court explored the origin and prevalence of legislative divorce, rejecting the claim of a wife who had been divorced without cause or notice by special legislative act of the Washington Territory ("the loose morals and shameless conduct of the husband can have no bearing upon . . . the power in the assembly to pass the act"). However, pressed by rising demand, the states gradually replaced legislative divorce with judicial divorce (the statutory form disappearing last from Delaware in 1897). *Id. See also Granville-Smith v. Granville-Smith*, 349 U.S. 1, 6-7 (1955) (sustaining Virgin Island divorce denial, observing that Congress later forbade territories from passing "local" or "special" divorce laws).

The federal courts' reticience regarding divorce has been traced to the Constitution's "reservation" to the States of the "regulation and control of marital and family relationships."

Federal courts consider marriage and divorce to be matters that should be determined by local law. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Williams v. North Carolina, supra*. In *dicta*, the Supreme Court "disclaim[ed] altogether any jurisdiction in the [federal] courts . . . upon the subject of divorce." *Barber v. Barber,* 62 U.S. (21 How.) 582, 584 (1858) (nevertheless finding federal jurisdiction to enforce a state alimony decree). The federal courts' reticience regarding divorce has been traced to the Constitution's "reservation" to the States of the "regulation and control of marital and family relationships" (*Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948)), and to the fact that when our federal courts were given authority over "all Cases, in Law and Equity" (Art. III, sec. 2), marital cases were neither. That is, in 1789 English courts of chancery lacked authority to issue divorce and alimony decrees (such matters being reserved to the ecclesiastical courts). *See Matrimonial Causes Act of 1857, 20 & 21 Vict., c. 85* (reforming and moving English divorce from ecclesiastical to civil courts). *See also Ankenbrandt v. Richards*, 504 U.S. 689, 693-95 (1992) (addressing the "domestic relations exception" to federal jurisdiction). *Cf. Marshall v. Marshall*, 547 U.S. 293, 305-09 (2006)(discussing "domestic relations" and "probate" exceptions to federal jurisdiction, finding bankruptcy court had authority over widow Anna Nicole Smith's claim of tortious interference with her inheritance expectation).

Federal courts will consider constitutional challenges to local marital law. In *Boddie v. Connecticut, supra*, the Court, emphasizing the State's monopoly, held that due process prohibits a state from denying, solely on the basis of inability to pay court fees, access to judicial divorce.

> We know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

401 U.S. at 376. However, the Court found no denial of due process in a state's requirement of one year's residence as a prerequisite to divorce. *Sosna v. Iowa, supra*.

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The courts have stated that a legitimate marriage "need not conform to American customs" (*e.g., Gee Chee On v. Brownell,* 253 F.2d 814, 817 (5th Cir. 1958)), and have suggested a similar latitude regarding divorce. *See, e.g., In re Schlau*, 136 F.3d 480 (2d Cir. 1943) (naturalization, erroneous reliance on rabbinical divorce did not preclude good moral character). *See also DaBaase v. INS, supra* (customary or tribal divorce). And, as discussed above, if a divorce decree is valid where rendered, the federal courts ordinarily will treat the decree as valid everywhere.

State decrees are recognized in accordance with the Constitution's Full Faith and Credit Clause (with questions regarding recognition of foreign decrees belonging to the Attorney General of the state in question). *E.g., Rodriguez v. INS*, 204 F.3d 25, 28 (1st Cir. 2000). *Cf. Loughran v. Loughran*, 292 U.S. 216, 223 (estate dispute, differing local marital laws). Assuming the domicile of at least one spouse, decrees issued by foreign countries are recogized as a matter of comity. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

But resolution of an alien's marital status under state law does not necessarily establish that status for immigration purposes. *See, e.g., Skelly v. INS*, 630 F.2d 1375, 1382 (10th Cir. 1980), *citing Lutwak v. United States,* 344 U.S. 604, 611 (1953), *and DeFigueroa v. United States*, 501 F.2d 191, 195 (7th Cir. 1974).

Our federal courts routinely consider divorce in immigration matters. Much of the jurisprudence involves review of administrative judgments regarding the validity of the marital dissolution. Divorce validity questions typically are questions of law over which the courts would exercise *de novo* review. There is scant caselaw regarding the courts' obligation to defer to the agencies' judgments regarding alien divorce, but analogies to alien conviction may help. That is, while criminal law ordinarily lies outside the province of the immigration adjudicators, it is the Board's role and responsibility to determine the immigration significance of an alien's convictions. Likewise, alien divorce is a matter on which judicial deference is due.

The law of alien divorce is an unwieldy amalgam of state law, conflict of law principles, and the INA. One judge observed,

> At the base of the petitioner's difficulties lies the subject of divorce, fraught as it is with great confusion and uncertainty in these United States and almost totally lacking in unanimity among them. Through it all is woven the ecclesiastical strands of a sacrament as well as the temporal strands of a contract.

Petition of Smith, 71 F. Supp. 968, 973 (D. N.J. 1947)(granting naturalization, finding erroneous reliance on Mexican mail order divorce did not preclude good moral character). It surely is only a matter of time before some enterprising court or counsel finds fault – a la *Padilla* – in an immigration determination on the basis that the alien was given bad counsel on his or her divorce.

Conclusion

If immigration is the ultimate political question, marriage – its formation, meaning, and dissolution – arguably presents our central social construct. As such, divorce inevitably is freighted with moral and religious considerations far beyond the scope of this note. Suffice it to observe that even our most widely recognized theological authorities appear divided on the subject. *Compare, e.g., Deuteronomy* 24:1 ("When a man hath taken a wife . . . [and] she finds no favor in his eyes . . . let him write her bill of divorcement"), *with Matthew* 19:8-9 ("Moses permitted you to divorce . . . But anyone who divorces, except for . . . unfaithfulness, and marries another . . . commits adultery").

If immigration is the ultimate political question, marriage – its formation, meaning, and dissolution – arguably presents our central social construct. As such, divorce inevitably is freighted with moral and religious considerations far beyond the scope of this note.

On a much more prosaic level, divorce was described by Cary Grant as "a game for lawyers." A necessary game, it appears, given the central role of the marital relationship in our immigration law. And in this, our Republic's most political of seasons, immigration lawyers can join with candidates and pundits alike to reaffirm the revered maxim, *"Coniuges sunt renovario auxilium."*

By Thomas Hussey, OIL

The views herein are purely personal, and the author does not speak for the Department of Justice or the Office of Immigration Litigation.

We encourage contributions to the Immigration Litigation Bulletin

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On October 6, 2012, the Supreme Court heard argument in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. The Second and Third Circuits require that the government make these showings, because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution.

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Asylum — Particular Social Group

During the March 20, 2012, *en banc* argument in ***Henriquez-Rivas v. Holder***, the court requested that the government determine whether the BIA would make a precedent decision on remand in *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582 (3d Cir. 2011). The BIA declined to comment on its pending case. The now-withdrawn unpublished *Henriquez-Rivas* decision, 2011 WL 3915529, upheld the agency's ruling that El Salvadorans who testify against gang members do not constitute a particular social group for asylum. Concurring judges on the panel, and the subsequent petition for rehearing, suggested *en banc* rehearing to consider whether the court's social group precedents, especially regarding "visibility" and "particularity," are consistent with each other and with BIA precedent.

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Asylum – Particular Social Group

On September 27, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510 (2012), which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Asylum — Corroboration

On December 11, 2012, an en banc panel of the Ninth Circuit will hear argument on rehearing in ***Oshodi v. Holder***. The court granted a *sua sponte* call for en banc rehearing, and withdrew its prior published opinion, 671 F.3d 1002, which declined to follow, as dicta, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed en banc supplemental briefs.

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Convictions – Modified Categorical Approach

On January 7, 2013, the Supreme Court will hear oral argument in ***Descamps v. United States***, a criminal sentencing case in which the question presented is whether the Ninth Circuit was correct in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach.

Resolution of the case is expected to implicate the reasoning of *Aguila-Montes* and the "missing element" rule that it overruled. The petitioner's brief was filed on October 24, 2012. The government's brief is due by December 3, 2012.

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Convictions – Modified Categorical Approach

In ***Aguilar-Turcios v. Holder***, 691 F.3d 1025 (9th Cir. 2012), and ***Sanchez-Avalos v. Holder***, 693 F.3d 1011 (9th Cir. 2012), the Ninth Circuit applied ***United States v. Aguila-Montes De Oca***, 655 F.3d 915 (9th Cir. 2011) (en banc), and held that the aliens' convictions did not render them deportable. The government has requested extensions of time to seek rehearing through December 14, 2012, so that any rehearing petitions in those cases may be coordinated with the government's brief to the Supreme Court in *Descamps v. United States.*

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Consular Nonreviewability

On July 25, 2012, the government filed a petition for rehearing en banc in ***Rivas v. Napolitano***, 677 F.3d 849 (9th Cir. 2012), which held that the district court had jurisdiction to review a consular officer's failure to act on the alien's request for reconsideration of the visa denial. The petition argues that the longstanding doctrine of consular nonreviewability recognizes that the power to exclude aliens is inherently political in nature and that consular decisions and actions are generally not, therefore, appropriately subject to judicial review. The court ordered the appointment of pro bono counsel to respond to the government petition by December 27, 2012.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that Spouse of an Individual Forced to Undergo an Abortion under China's Coercive Population Control Policy Is Not Automatically Entitled to Asylum

In ***Dong v. Holder***, 696 F.3d 121 (1st Cir. October 3, 2012) (Thompson, *Selya*, Lipez), the First Circuit, on an issue of first impression, joined several of the other circuits in holding that the refugee definition under INA 101(a)(42)(B), for victims of coercive population control policies does not extend automatically to a spouse of a person forced to undergo an abortion.

The petitioner, a Chinese national, entered the United States illegally in March 2006 and affirmatively applied for asylum on October 10, 2006. His application was subsequently referred to an immigration court. Petitioner's claim was heard by an IJ on December 2, 2009. Petitioner stated that following the birth of his first child, his spouse was fitted with an IUD. Flouting government policy, the spouse had the IUD removed at a private clinic and thereafter conceived another child. In 2005, when the government became aware of the pregnancy she was forced to have an abortion. This prompted petitioner to leave China. Petitioner also testified that following his entry into the United State, he became involved in the Evangelical Church in Boston and was baptized the in April 2009.

The IJ found petitioner generally credible but, following *Matter of J-S-* 24 I&N Dec. 520 (A.G. 2008), denied his asylum claim based on his spouse's forced abortion. The IJ also rejected petitioner's claim of fear religious persecution. The BIA affirmed. The First Circuit upheld the BIA's interpretation in *Matter of J-S-*, based on the plain language of the statute. "[T]he statutory language appears unambiguously to refer only to the person who actually undergoes the procedure, not to the spouse of that person. Two courts of appeals have unreservedly embraced this plain-language construction," said the court. Moreover, added the court, "even if we assume -- favorably to the petitioner -- that the statutory text, read charitably, might admit of some conceivable ambiguity, the Attorney General's interpretation would demand the same result." The court agreed with *Matter of J-S-* that, while the statute does not exclude spouses from its purview, the spouse must show special circumstances — something more than his relationship to the victim of a forced abortion — In order to avail himself of this caveat. The court concluded that petitioner failed to make such a showing.

"Petitioner's evidence of potential persecution based on this religious choice is neither specific to his own circumstances nor localized to the region in China from which he hails."

Lastly, the court rejected petitioner claim of religious persecution. "Petitioner's evidence of potential persecution based on this religious choice is neither specific to his own circumstances nor localized to the region in China from which he hails. Such a specific link is normally a necessary element of a claim based on a fear of future persecution," said the court. Also, noted the court, petitioner did not establish a pattern and practice of persecution of Evangelical Christians.

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First Circuit Holds Denial of Continuance Was Not an Abuse of Discretion Where Eligibility to Adjust Status Was Based on Speculative Events

In ***Sheikh v. Holder***, __F.3d__, 2012 WL 4801335 (1st Cir. October 10, 2012) (*Howard*, Ripple (7th Cir. by designation), Lipez), the First Circuit held that the agency properly denied petitioner's motion for a continuance under the standards set forth in *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009), because he was statutorily ineligible to adjust status, and there was "no basis in the record to predict, beyond mere speculation," that events rendering him eligible to adjust would occur in the near future.

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Persons Returning from the United States with Citizen Children, and Perceived as Wealthy, Are Not a Particular Social Group

In ***Rojas-Perez v. Holder***, __F.3d__, 2012 WL 5383261 (1st Cir. November 5, 2012) (*Torruella*, Thompson, Howard (concurring)), the First Circuit concluded that substantial evidence supported the agency's determination that aliens who are wealthy or would be perceived as wealthy upon their return to Mexico do not constitute a particular social group for purposes of withholding of removal.

The petitioners entered without inspection in 2001 and 2003. After being placed in removal proceedings, petitioners applied for withholding of removal based on their fear that, if they returned to Mexico, their son would be kidnapped and held for ransom. The BIA agreed with the IJ that petitioners' stated fear that they would be targeted for their perceived wealth was not related their membership in a particular social group.

The First Circuit held that substantial evidence supported the agency's decision in light of the "well-settled logic" that claims based on perceived wealth or financial status are not related to a statutorily protected ground. The court also rejected petitioners' challenge to the social visibility requirement because it had

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been previously upheld by the court but suggested that the issue "at the very least merits additional examination by and clarification from the BIA." In his concurrence, Judge Howard argued that there was no need to entertain the criticisms of the social visibility requirement as they did not impact the court's decision and cautioned that "the dicta in the majority opinion may encourage what I believe will be misplaced challenges to the BIA's social visibility requirement."

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Because the criminal information identified the basis of the alien's conviction as "Possession with Intent to Sell a Controlled Substance (Marijuana)," his offense constituted "illicit trafficking."

■ **Risk of Injury to Child in Violation of Connecticut General Statute § 53-21(a)(1) Is Not Sexual Abuse of a Minor under the Modified Categorical Approach**

In ***Campbell v. Holder***, __F.3d__, 2012 WL 5077154 (1st Cir. October 19, 2012) (*Boudin*, Selya, Dyk (by desig.)), the First Circuit ruled that petitioner, who pled *nolo contendere* to one count of risk of injury to a minor under section 53-21(a)(1) of the Connecticut General Statute, cannot be held to have pled to an offense that falls within the "sexual abuse of a minor," an aggravated felony under INA § 101(a)(43)(A), and a ground for removal.

The court determined that the Connecticut statute was divisible, that the criminal information in petitioner's case identified no specific conduct, and that the trial judge, during petitioner's *nolo contendere* plea colloquy twice assured the alien "that he was admitting to no conduct whatsoever and the [trial] judge himself made no findings as to the underlying conduct." The court noted that the application of the *Taylor-Sheperd* methodology, which focuses on the statute rather than the conduct, sometimes "hurts the alien or criminal defendant . . . other times as in this case, the alien or defendant comes out ahead."

The court remanded the case to the BIA because it had not ruled whether petitioner would be removable on the alternative grounds of child abuse or on the grounds that he was convicted of a "crime of violence."

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■ **An Alien Is Subject to Removal for Aggravated Felony Conviction Where Criminal Information Established Illicit Trafficking of Controlled Substance**

In *James v. Holder*, __F.3d__, 2012 WL 5077157 (1st Cir. October 19, 2012) (*Boudin*, Selya, Dyk), the First Circuit concluded that the alien's conviction under Connecticut General Statute § 21a-277(b) rendered him removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) as an aggravated felony. The court determined that because the criminal information identified the basis of the alien's conviction as "Possession with Intent to Sell a Controlled Substance (Marijuana)," his offense constituted "illicit trafficking" within the meaning of 8 U.S.C. § 1101 (a)(43)(B).

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■ **First Circuit Rejects Particular Social Group of Guatemalan Nationals Repatriated From the United States**

In ***Escobar v. Holder***, __F.3d__, 2012 WL 5193223) (1st Cir. October 22, 2012) (*Boudin*, Thompson, Torruella), First Circuit rejected petitioner's claim that he would be persecuted in Guatemala based on his membership in the particular social group of "Guatemalan nationals repatriated from the United States." The court noted that the alien's theory appears to be that Guatemalan gangs will assume he amassed significant wealth during his stay in the United States and that he will be a target for extortion and other criminal activity as a result of his perceived wealth. The court thus interpreted the alien's alleged social group as Guatemalans who are perceived as wealthy, and referred to *Sicaju-Diaz v. Holder*, 663 F.3d 1 (1st Cir. 2011), in which it held that such a group does not constitute a social group within the meaning of the Immigration and Nationality Act.

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SECOND CIRCUIT

■ **Second Circuit Holds That It Lacks Article III Jurisdiction to Review a Vacated Board Decision Where the Reasoning of a Subsequent Decision Substantially Differed from the Vacated Decision**

In ***Fuller v. Board of Immigration Appeals***, __F.3d__, 2012 WL 4875696 (2d Cir. October 16, 2012), (*Pooler*, Calabresi, Jacobs (concurring)) the Second Circuit held that it lacked Article III jurisdiction to review a BIA decision that had been vacated upon reconsideration by the BIA while the petition for judicial review was pending, because the reasoning of the decision pending judicial review did not substantially correspond to the BIA's subsequently issued final decision. The court declined to rule on the statutory jurisdictional issue as to whether the order on review remained a final order after it had been explicitly vacated. Judge Jacobs, in a concurring opinion, would have dismissed the appeal because the court's statutory jurisdiction to review the appealed decision lapsed once it was explicitly vacated and replaced by the BIA.

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FOURTH CIRCUIT

■ Fourth Circuit Holds Implausibility and Insufficient Corroboration Support Adverse Credibility Determination

In ***Singh v. Holder***, __F.3d__, 2012 WL 5383287 (4th Cir. November 5, 2012) (*Duncan*, Agee, Diaz), the Fourth Circuit held the agency supplied sufficient reasons for its adverse credibility finding, which was based on the alien's inherently implausible testimony and failure to adequately corroborate his claims.

The petitioner arrived in the United States on a student visa in 2006 and, after being placed in removal proceedings in 2007, applied for withholding of removal and protection under the CAT. The IJ found petitioner not credible regarding his political beliefs or that his claim that he was arrested, detained, and abused by the police. The BIA affirmed.

The Fourth Circuit upheld the adverse credibility finding. The court observed that the IJ was entitled to find petitioner's claim not credible where he testified that the police only arrested petitioner after they could not find his father later claimed that his father was able to secure petitioner's release from police custody without incident. The court also noted that petitioner was nonresponsive at various points in his testimony and failed to articulate "any political views whatsoever" in support of his political asylum claim.

Turning to the corroboration finding, the court held that the IJ reasonably expected corroborative evidence of the events in India and was justifiably skeptical of the proffered affidavits as one was altered by hand without explanation. Finally, the court rejected petitioner's claim that an incompetent translator violated his right to due process because petitioner failed to show how any errors in translation prejudiced his claim.

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FIFTH CIRCUIT

■ Fifth Circuit Holds that Conviction under Texas Assault Statute Was a Crime Involving Moral Turpitude

In ***Esparza-Rodriguez v. Holder***, __F.3d__, 2012 WL 4937384 (King, *Higginson*, Foote) (5th Cir. October 18, 2012), the Fifth Circuit ruled under the modified categorical approach that a conviction under Texas Penal Code § 22.01 (a)(1) for intentional assault that causes bodily injury is a crime involving moral turpitude (CIMT). In so holding, the court more broadly clarified that an "intentional" assault that is intended to and does cause more than *de minimis* physical harm is a CIMT.

An "intentional" assault that is intended to and does cause more than *de minimis* physical harm is a CIMT.

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SEVENTH CIRCUIT

■ Seventh Circuit Defers to BIA Decision that the Good Moral Character Period Is Calculated Backward from Date of Adjudication of Cancellation of Removal Application

In ***Duron-Ortiz v. Holder***, __F.3d__, 2012 WL 4856495 (7th Cir. October 15, 2012) (Bauer, *Manion*, Tinder), the Seventh Circuit ruled that INA § 240A(b)(1) is ambiguous as to when the ten-year period throughout which an applicant for cancellation of removal must establish good moral character terminates. Applying *Chevron* deference, the court concluded that BIA, applying *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), reasonably determined that the relevant period is the ten years preceding the application's final adjudication.

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■ Seventh Circuit Rules that Immigration Judge Overlooked Material Evidence in Denying Waiver

In ***Lam v. Holder***, __F.3d__, 2012 WL 4875151) (7th Cir. October 16, 2012) (Manion, *Williams*, Castillo (by designation)), the Seventh Circuit ruled that the Immigration Judge, in denying waiver under INA § 212(h)(1)(B), overlooked material evidence relating to petitioner's wife's depression when concluding that she would not suffer extreme hardship upon petitioner's removal. The court also ruled that the Immigration Judge improperly relied on a report from the Secret Service discussing a crime committed in Chicago when investigating a crime in another location because the report lacked probative value regarding petitioner's rehabilitation.

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■ Alien's Prior Removal from the United States Rendered Him Ineligible for Adjustment of Status and Cancellation of Removal

In ***Nunez-Moron v. Holder***, __F.3d__, 2012 WL 5315860 (7th Cir. October 30, 2012) (Easterbrook, *Manion*, Tinder), the Seventh Circuit held that an alien who had previously been subjected to expedited removal was ineligible for adjustment

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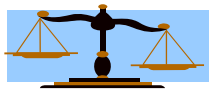

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of status because he was inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II).

The petitioner illegally entered the United States in 1992. After attempting to re-enter the United States in 1997 using another person's residency card, petitioner was apprehended by INS and subsequently removed pursuant to an expedited removal order. Petitioner reentered the United States in 1999 and filed an application for asylum, withholding of removal, and protection under the CAT. When placed in removal proceedings, petitioner withdrew that application and requested cancellation of removal and, in the alternative, voluntary departure. The BIA affirmed the IJ's denial of petitioner's applications for relief and protection from removal.

The Seventh Circuit concluded that petitioner was precluded from applying for adjustment of status because he was inadmissible under INA § 212(a)(9)(C)(i)(II). The court, deferring to the BIA's holding in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), rejected petitioner's argument that he could avoid the ten -year bar for seeking admission by petitioning the Attorney General, via *nunc pro tunc* relief, to retroactively consent to his application for adjustment of status. Finally, the court held that the alien's expedited removal from the United States, pursuant to INA § 235(b)(1), severed his physical presence in the United States and rendered him ineligible for cancellation of removal.

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■ **Seventh Circuit Holds Agency Did Not Abuse Its Discretion in Denying petitioner's Multiple Motions for Reopening or Reconsideration**

In ***Cruz-Mayaho v. Holder***, __F.3d__, 2012 WL 4901108) (7th Cir. October 17, 2012) (Bauer, Posner, Wood), the Seventh Circuit ruled that the BIA did not abuse its discretion in denying petitioner's multiple motions for reconsideration or reopening. The court ruled that the BIA did not abuse its discretion in finding that one of the motions to reopen was untimely, since the filing of a motion to reconsider did not toll the time for a motion to reopen; that the BIA did not abuse its discretion in denying reopening where the alien's fear of generalized violence and crime did not establish prima facie eligibility for asylum; and that the BIA did not violate the alien's due process or equal protection rights because the alien lacked a protected liberty interest in the discretionary relief of reopening, and the agency's decision had a rational basis and there was no evidence of improper motive.

Substantial evidence supported the BIA's decision where petitioner's termination from his government position and any questioning of petitioner's family members did not rise to the level of persecution.

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EIGHTH CIRCUIT

■ **Eight Circuit Holds that Alien's Publications Criticizing the Kenyan Government Failed to Demonstrate Eligibility for Asylum and Alien Does Not Have a Protected Right to Asylum**

In ***Wanyama v. Holder***, __F.3d__, 2012 WL 5357933 (8th Cir. November 1, 2012) (Riley, Arnold, *Gruender*), the Eighth Circuit concluded that the petitioner failed to demonstrate a particularized threat of persecution based on the publication of articles criticizing the Kenyan government, his political affiliation, or the mistreatment his mother and brother suffered in Kenya.

Petitioner entered the United States in 1992 on a nonimmigrant exchange visa and applied for asylum, withholding of removal, and protection under the CAT when his visa expired in 2005. The BIA affirmed the IJ's decision denying petitioner's application for failure to demonstrate an objectively reasonable fear of future persecution.

The Eighth Circuit held that substantial evidence supported the BIA's decision where petitioner's termination from his government position and any questioning of petitioner's family members did not rise to the level of persecution. The court further concluded that petitioner failed to establish an objectively reasonable fear of future persecution because (1) the party petitioner supported was now in power, and (2) petitioner was a professor and, therefore, not similarly situated to the political opponents and journalists that were persecuted in Kenya. Finally, the court rejected petitioner's due process claim based on the IJ's decision to reopen proceedings because there is no constitutionally protected liberty or property interest in receiving asylum.

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■ **Eighth Circuit Upholds Denial of Motion to Reopen on the Basis that Guatemalans Who Resist Joining a Gang is not a Particular Social Group**

In ***Lopez-Mendez v. Holder***, __F.3d__, 2012 WL 5289934 (8th Cir. October 29, 2012) (*Riley*, Smith, Colloton), the Eighth Circuit determined that the BIA did not abuse its discretion when it concluded that the

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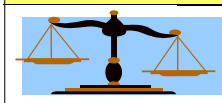

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evidence petitioner's offered to reopen his asylum proceedings — threats motivated petitioner's refusal to join a gang in Guatemala — did not establish a nexus between the threats and a protected ground, and therefore would not likely change the result of the case. Further, said the court, "persons resistant to gang violence are too diffuse to be recognized as a particular social group." The court also rejected the petitioner's claim that the BIA abused its discretion by not finding that gang members persecuted the alien based on his membership in an indigenous group.

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■ **Eighth Circuit Holds that Substantial Evidence Supports Finding that Alien Committed a Serious Nonpolitical Crime**

In ***Zheng v. Holder***, __F.3d__, 2012 WL 5350157 (8th Cir. October 31, 2012) (*Loken*, Gruender, Benton), the Eighth Circuit held that substantial evidence supported the BIA's finding that an alien's premeditated attack on a Chinese family planning official for refusing to return petitioner's property was a serious nonpolitical crime, rendering him ineligible for asylum and withholding of removal.

Petitioner testified that his wife was forcibly sterilized and police officers confiscated his furniture after the birth of petitioner's second child. After officials refused to return petitioner's property, petitioner waited for an official on his way home and beat him with a stick until he suffered "a very serious injury."

The court held that the attack constituted a serious nonpolitical crime where petitioner beat the official because petitioner sought return of his furniture and that any link between the attack and petitioner's "other resistance" to Chinese family planning policy was too remote. The court further concluded that petitioner did not establish a due process violation because of any deficiencies in translation where he failed to demonstrate the requisite prejudice.

Finally, the court also denied petitioner's attorney's motion to withdraw because petitioner allegedly admitted that he fabricated elements of his claim. The court declined to assume the truth of the attorney's unsworn allegations where there was no corroborative evidence and noted that, under 8 U.S.C. § 1252(a)(1), Congress has barred a remand to the Board for further fact-finding or consideration of this new information.

"The BIA cannot disregard the IJ's findings and substitute its own view of the facts. Either it must find clear error, explaining why; or, if critical facts are missing, it may remand to the IJ."

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NINTH CIRCUIT

■ **Ninth Circuit Remands Case for the Agency to Apply the Proper Standard of Review to an Alien's Torture Claim**

In ***Ridore v. Holder***, 696 F.3d 907 (9th Cir. October 3, 2012) (*Fisher*, Rawlinson, Wu (C.D. Cal., by desig.)), the Ninth Circuit held that the BIA erred when it reversed the Immigration Judge's grant of protection under CAT because it did not apply the clear error standard of review as required under 8 CFR §1003.1(d)(3)(i).

The petitioner, a citizen of Haiti and an LPR since 1973, was placed in removal proceedings in 2003 based on a string of criminal convictions, including an aggravated felony. The IJ initially denied cancellation of removal based upon the aggravated felony conviction. However, following the BIA's reversal of that determination, petitioner also sought asylum, withholding and CAT protection. On remand the IJ denied asylum and withholding but granted cancellation and Cat protection. The IJ determined, among other facts, that unlike the situation described in *Matter of J-E-,* 23 I&N Dec. 291 (BIA 2002), petitioner showed that conditions in Haitian prisons had deteriorated "to the point that incarceration in a Haitian prison is almost the equivalent of a death warrant." The IJ also determined that because petitioner had no family in Haiti he would be facing "a long time imprisonment." On appeal, the BIA reversed the IJ and denied cancellation and CAT protection.

The Ninth Circuit, in reversing the BIA, explained that "throughout its CAT ruling the BIA failed to grapple with the evidentiary record in this case and to specifically address any clear errors that IJ made in his factual findings based on that evidence -- evidence showing that both Haiti's current prison conditions and [petitioner's] personal circumstances are different from the record that prompted the BIA's ruling in *Matter of J-E-.*" In particular, the court faulted the BIA for its failure to address the IJ's fact-based determination opting instead to invoke statements from *Matter of J-E-*. "The BIA cannot disregard the IJ's findings and substitute its own view of the facts. Either it must find clear error, explaining why; or, if critical facts are missing, it may remand to the IJ," said the court.

The court also reversed the denial of cancellation, finding that although the BIA had given proper deference to the IJ's factual finding, it failed to give proper deference to the finding of hardship in Haiti. Accordingly, the court remanded to the

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BIA for review of petitioner's CAT claim under the proper standard, and for a reconsideration of his claim of hardship finding in Haiti as a criminal deportee.

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■ Ninth Circuit Affirms Decision Upholding USCIS Regulation on Religious Worker Visas

In ***Ruiz-Diaz v. United States***, 697 F.3d 1119 (9th Cir. 2012) (*Schroeder*, Gould, Rakoff), the Ninth Circuit rejected a constitutional challenge to 8 C.F.R. § 245.2(a)(2)(i)(B), a rule which prohibits applicants for special immigrant religious worker visas from filing adjustment of status applications until after USCIS grants their underlying visa petitions.

"Even assuming immigrant religious workers are being treated differently from other employment-based visa applicants, the difference requires only a rational basis to survive an Equal Protection challenge."

The plaintiffs in the case, who represented a class of non-citizen religious workers, together with their organizations, had been admitted to the United States on five-year special immigrant religious worker visas. Unlike the other employment-based immigrant categories, where the employer can file a visa petition concurrently with an application for adjustment of status, for this category of religious workers, the employees must wait for the USCIS to approve their employers' petitions before they can file the adjustment applications. Plaintiffs challenged this distinction on a number of grounds. Previously, the Ninth Circuit had held that the regulation was not contrary to the statute and had remanded the case to the district court to consider plaintiffs' other contention's *See Ruiz-Diaz v. United States*, 618 F.3d 1055 (9th Cir. 2010). The district court dismissed the remaining contentions.

On this latest appeal, plaintiffs challenged the regulations on constitutional grounds and also argued that the regulation violated the Religious Freedom Restoration Act (RFRA). Plaintiffs based their RFRA claim on the fact that the lag in the processing of their employers' petitions may cause them to accrue unlawful presence time when their five year visa expires. The court rejected this contention explaining that "the challenged regulation does not affect their ability to practice their religion. They are subject to removal after five years because their visas have expired, not because they are practicing their religion. Their inability to file their applications concurrently with their employers' petitions may well delay religious workers from adjusting status before their temporary visas expire, but it does not prevent them from practicing their religion."

The court also rejected plaintiffs' Equal Protection claim noting that the regulation does not target any religious groups but rather targets all members of the fourth-preference visa category. "Even assuming immigrant religious workers are being treated differently from other employment-based visa applicants, the difference requires only a rational basis to survive an Equal Protection challenge," said the court. Here, the court found that the government's concerns about fraud in the religious worker visa program satisfied the rational basis standard.

Finally, the court rejected plaintiffs' contention that USCIS's delay in processing their application, which often meant that their five-year visas had expired before their employers' petition could be acted upon violated their due process. The court found that they had no legitimate claim of entitlement to have their petitions approved and therefore could not claim a due process violation.

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■ Ninth Circuit Holds Conviction of Attempted Kidnapping under California Penal Code § 207(a) Categorically Constitutes a Crime of Violence and Therefore an Aggravated Felony

In ***Delgado-Hernandez v. Holder***, __F.3d__, 2012 WL 4784162 (9th Cir. On October 9, 2012) (Hawkins, McKeown, Bybee) (*per curiam*), the Ninth Circuit held that the crime of attempted kidnapping under section 207(a) of the California Penal Code is a crime of violence under 8 U.S.C. § 1101(a)(43)(F) and (U) and 18 U.S.C. § 16, and therefore an aggravated felony rendering the alien removable under 8 U.S.C. § 1227(a)(2)(A)(iii). The Ninth Circuit analyzed the approach of other courts with respect to comparable kidnapping statutes, congressional and state legislative enactments, and U.S. Sentencing Commission Guidelines, and concluded that an "ordinary kidnapping" under the California statute presents a substantial risk of force, as required in 18 U.S.C. § 16(b). Thus, section 207(a) "defines a crime of violence" rendering a conviction under the statute a categorical match to the aggravated felony ground of removal.

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TENTH CIRCUIT

■ Tenth Circuit Holds that District Court Must Determine the Proper Forum for UNTOC Claims

In ***Musau v. Carlson***, 2012 WL 4903251 (10th Cir. October 17, 2012) (*Kelly*, McKay, O'Brien (dissenting)), the Tenth Circuit, in an

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This Month's Topical Parentheticals

ASYLUM

■ ***Dong v. Holder,*** __ F. 3d __, 2012 WL 4646500 (1st Cir. Oct. 3, 2012) (deferring to the AG's decision in *Matter of J-S-* and joining several other circuits in holding that 8 U.S.C. § 1101(a)(42)(B), a statute enacted to pave the way for asylum for victims of China's coercive population control policies, does not extend automatically to a spouse of a person forced to undergo an abortion; further holding that petitioner's evidence of potential religious persecution based on his claim that his evangelical beliefs would force him to join an unsanctioned Protestant church in China "is neither specific to his own circumstances nor localized to the region in China from which he hails," and thus does not constitute compelling evidence of a well-founded fear of persecution)

■ ***Neri-Garcia v. Holder,*** __ F. 3d __, 2012 WL 4513201 (10th Cir. Oct. 3, 2012) (concluding that the BIA properly relied on the 2009 and 2010 Country Reports to find that the government rebutted the presumption of future persecution on account of the alien's sexual orientation because the reports reflected mostly positive developments in treatment of homosexuals in Mexico since 1994)

■ ***Matter of M-Z-M-R-,*** 26 I.&N. 28 (BIA Oct. 4, 2012) (holding that for an asylum applicant to be able to internally relocate safely, there must be an area of the country where the circumstances are substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim; further holding that if an applicant is able to internally relocate, an IJ should balance the factors identified at 8 C.F.R. § 1208.13(b)(3) in light of the applicable burden of proof to determine whether it would be reasonable under all the circumstances to expect the applicant to relocate)

■ ***Pavlov v. Holder,*** __ F. 3d __, 2012 WL 4477374 (7th Cir. Oct. 1, 2012) (holding that the INA's permanent bar against immigration benefits for an alien who knowingly files a frivolous asylum application applies not just to applications filed with an IJ, but also to those filed with DHS; further, joining Ninth and Tenth Circuits in holding that written warning on the asylum application satisfies statutory requirement that an applicant must be advised of the consequences of knowingly filing a frivolous application)

■ ***Zheng v. Holder,*** __ F. 3d __, 2012 WL 5350157 (8th Cir. Oct. 31, 2012) (affirming that Chinese asylum applicant's after-hours planned assault of a family-planning official causing serious injury, in order to recover property confiscated for earlier violation of family-planning laws, is a "serious nonpolitical crime" barring asylum and does not constitute "other resistance" to family planning, because serious criminal nature of the offense outweighed its political aspect) (*Note: court notes motion of counsel to withdraw based on applicant's admission that testimony about hitting official and other evidence were fabricated, which, if true would warrant dismissal of the petition for abuse of administrative and judicial process; but court concludes that since allegations are unsworn and outside record they will be ignored)

ADJUSTMENT

■ ***Sheikh v. Holder,*** __ F. 3d __, 2012 WL 4801335 (1st Cir. Oct. 10, 2012) (affirming IJ's denial of a continuance where petitioner conceded that he was ineligible for any relief but argued that Congress might pass immigration laws in the future that would make him eligible to adjust his status)

■ ***Nunez-Moron v. Holder,*** __ F. 3d __, 2012 WL 5315860 (7th Cir. Oct. 30, 2012) (deferring to BIA's decision in *Matter of Briones* and *Matter of Torres-Garcia* and holding that 8 U.S.C. § 1182(a)(9)(C)(i)(II) precludes petitioner from seeking adjustment of status pursuant to 8 U.S.C § 1255 (i) or a retroactive waiver of inadmissibility pursuant to 8 C.F.R. § 212.2 (e); further holding that an expedited removal order severs an alien's continuous physical presence for purposes of cancellation eligibility)

■ ***Garfias-Rodriguez v. Holder,*** __ F. 3d __, 2012 WL 5077137 (9th Cir. Oct. 19, 2012) (en banc) (holding that the court must defer to the BIA's decision in *Matter of Briones*, that an alien inadmissible for reentering after accruing unlawful presence was ineligible to adjust status under 8 U.S.C. § 1255(i); because the court concluded that *Briones* clarified an uncertain area of the law, it applied the *Montgomery Ward* retroactivity analysis, and held that the BIA's decision applied retroactively; further holding that in light of the AG's voluntary departure regulation, courts lack authority to stay voluntary departure periods)

CAT

■ ***Ridore v. Holder,*** __ F. 3d __, 2012 WL 4513230 (9th Cir. Oct. 3, 2012) (holding that the BIA violated its standard of review in reversing an IJ's grant of CAT protection to a U.S. criminal deportee claiming likelihood of being subjected to harsh prison conditions in Haiti constituting torture, where BIA failed to articulate any standard of review, and in effect applied overall de novo review rather than clear-error review, by ignoring or failing to address IJ's findings that i) Haitian government maintains harsh conditions with specific intent to torture Haitian prisoners; ii) Haiti's detention policy of U.S. criminal deportees is an unlawful sanction under Haitian law; and iii) applicant was likely to be subject to torture)

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This Month's Topical Parentheticals

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CANCELLATION

■ ***Duron-Ortiz v. Holder,*** __ F. 3d __, 2012 WL __ (7th Cir. Oct. 15, 2012) (deferring to the BIA's interpretation in *Matter of Ortega-Cabrera* that for purposes of cancellation of removal eligibility, the time period for establishing GMC is the ten years immediately preceding the final administrative decision)

■ ***Bedoya-Melendez v. United States Att'y Gen.,*** __ F. 3d __, 2012 WL 5259041 (11th Cir. Oct. 25, 2012) (denying en banc rehearing; Judge Barkett dissented arguing that the court's conclusion that there is no judicial review of the AG's determination of whether petitioner was "battered or subjected to extreme cruelty" for purposes of cancellation eligibility "is based on a misreading of 8 U.S.C § 1252(a)(2)(B)")

CRIMES

■ ***Delgado-Hernandez v. Holder,*** __ F. 3d __, 2012 WL 4784162 (9th Cir. Oct. 9, 2012) (holding that a conviction for attempted kidnapping under Cal. Pen. Code § 207(a) categorically constitutes a crime of violence because the "ordinary case of kidnapping" presents a substantial risk of force)

■ ***Matter of Davey,*** 26 I.&N. 37 (BIA Oct. 23, 2012) (holding that: (1) for purposes of section 237(a)(2)(B)(i) the phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana" calls for a circumstance-specific inquiry into the character of the alien's unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime; (2) an alien convicted of more than one statutory crime may be covered by the exception to deportability for an alien convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana" if all the alien's crimes were closely related to or connected with a single incident in which the alien possessed 30 grams or less of marijuana for his or her own use, provided that none of those crimes was inherently more serious than simple possession)

DETENTION

■ ***United States v. Trujillo-Alvarez,*** __ F. 3d __, 2012 WL 5295854 (D. Or. Oct. 29, 2012) (holding that ICE may not detain an alien for the purpose of securing his appearance at a criminal trial without satisfying the requirements of the Bail Reform Act, which gives defendants a statutory right to pre-trial release)

DUE PROCESS

■ ***Ruiz-Diaz v. United States,*** __ F. 3d __, 2012 WL 4748810 (9th Cir. Oct. 5, 2012) (rejecting plaintiffs' claims that the regulation which precludes special religious worker applicants from filing their visa applications concurrently with the petitions of their sponsoring employers violates the Religious Freedom Restoration Act and the constitutional protections of equal protection and due process)

JURISDICTION

■ ***Fuller v. BIA,*** __ F. 3d __, 2012 WL __ (2d Cir. Oct. 16, 2012) (holding that petition for review was moot because on reconsideration, the BIA vacated and superseded the removal order under review with an order that relies on materially different reasoning)

NATURALIZATION

■ ***Klene v. Napolitano,*** __ F. 3d __, 2012 WL 4840713 (7th Cir. Oct. 12, 2012) (joining Third Circuit and holding that district court had jurisdiction to review USCIS's denial of naturalization despite the commencement of removal proceedings against petitioner after the denial, and that the district court could, in its discretion, issue declaratory relief)

MOTION TO REOPEN

■ ***Anaya-Aguilar v. Holder,*** __ F. 3d __, 2012 WL 4787801 (7th Cir. Oct. 4, 2012) (clarifying on denial of rehearing that the court did "not mean to foreclose review of the Board's denial of a motion to reopen *sua sponte* in case where a petitioner has a plausible constitutional or legal claim that the Board misapplied a legal or constitutional standard")

EAJA

■ ***Jeroski v. Federal Mine Safety and Health Review Com'n,*** __ F. 3d __, 2012 WL 4820609 (7th Cir. Oct. 11, 2012) (joining eight other circuits in holding that the Supreme Court's "prevailing party" analysis in *Buckhannon* applies in the EAJA context; rejecting petitioner's claim that it satisfied prevailing party status where the administrative review commission dismissed petitioner's suit because the Federal Mine Safety and Health Administration vacated its order against petitioner)

WAIVER

■ ***Lam v. Holder,*** __ F. 3d __, 2012 WL __ (7th Cir. Oct. 16, 2012) (vacating and remanding BIA's denial of a section 212(h)(1)(B) waiver because the IJ and BIA overlooked material evidence relating to petitioner's wife's depression and improperly relied on a report to determine that petitioner failed to show rehabilitation)

NOTED

■ ***Renteria v. Metro. Gov't of Nashville & Davidson Cnty.***, __S.W. 3d__, 2012 WL 4712214) (Tenn. Sup. Ct. October 4, 2012) (holding that the Memorandum of Agreement between U.S. Immigration and Customs Enforcement and the Nashville metropolitan government, under Section 287(g) of the Immigration and Nationality Act, does not violate state or local law)

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Summaries Of Recent Federal Court Decisions

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unpublished decision, reversed and remanded the district court's dismissal for lack of subject matter jurisdiction under the REAL ID Act. In so holding, the court instructed the district court on remand to determine three issues: (1) whether an alien can pursue a United Nations Convention Against Transnational Organized Crime ("UNTOC") claim before immigration tribunals or a circuit court; (2) if an alien cannot pursue an UNTOC claim in either forum, whether an alien is entitled to relief under the UNTOC; and (3) if so entitled, whether the REAL ID Act unconstitutionally suspends the writ of habeas corpus.

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■ **Tenth Circuit Holds that Country Reports Were Sufficient to Rebut the Presumption of Future Persecution**

In *Neri-Garcia v. Holder*, 696 F.3d 1003 (10th Cir. October 3, 2012) (Hartz, Anderson, *O'Brien*), the Tenth Circuit concluded that the BIA properly relied on the 2009 and 2010 Country Reports to find that the government rebutted the presumption of future persecution on account of the petitioner's sexual orientation because the reports reflected mostly positive developments in treatment of homosexuals in Mexico since 1994.

After a credible-fear interview in January 2011, an asylum officer determined that petitioner had a reasonable fear of persecution or torture in Mexico, and his case was referred to an immigration judge. The IJ considered his applications for restriction on removal and for protection under the CAT under 8 C.F.R. § 1208.16. The IJ found petitioner to be a member of the particular social group of homosexual males from Mexico, and that he had established past persecution on account of his homosexuality. But the IJ also decided that DHS met its burden, by a preponderance of the evidence, to rebut the regulatory presumption of future persecution based on evidence of past persecution.

According to the 2009 and 2010 Department of State Country Reports, homosexual conduct had experienced growing social acceptance in Mexico; gay pride marches were occurring in cities across the country, including one in Mexico City in which 400,000 people participated; Mexico City had legalized both gay marriage and adoption by gay couples; and the Mexican Supreme Court required all Mexican states to recognize gay marriages performed in those states where it was permitted.

On appeal, the BIA adopted the IJ's reasoning regarding DHS's rebuttal of the presumption of future persecution and his conclusion that petitioner failed to show he would likely be tortured if he returned to Mexico.

The Tenth Circuit concluded that "based on the Country Reports relied on by the BIA, a reasonable adjudicator would not be compelled to conclude that [petitioner] would be threatened upon his removal to Mexico because he is gay. He has not shown the BIA's analysis of the Country Reports was flawed or that its conclusion regarding fundamental changes in the treatment of gays in Mexico is not supported by substantial evidence."

The court also agreed with the BIA' conclusion that petitioner's "twenty-seven-year-old evidence of torture did not establish likely torture if he returned to Mexico today.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

■ **November 29, 2012.** Brown Bag Lunch & Learn on "Transgender Issues" with Civil Rights attorney, Sharon McGowan.

■ **December 14, 2012.** Brown Bag Lunch & Learn with professor Patrick Weil, author of the just-published book: *The Sovereign Citizen: Denaturalization and the Origins of the American Republic.*

For additional information about these training programs contact Francesco Isgro at:

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OTHER UPCOMING EVENTS

■ **December 14, 2012.** OIL celebrates the Holiday Season with its Annual White Elephant affairs

INSIDE OIL

At Fall Training: David McConnell, Ernie Molina, Papu Sandhu

OIL's trick-or-treaters stopped by for some treats

Attorney General Eric Holder welcomes trick-or–treaters to his office

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

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