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The Supreme Court's Decision in *Padilla v. Kentucky*

by Micah N. Bump

Introduction

On March 31, 2010, the Supreme Court issued a Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The Supreme Court granted certiorari to answer two specific questions: (1) whether providing effective assistance of counsel in accord with the Sixth Amendment requires defense counsel to investigate and advise alien defendants about the deportation consequences of a guilty plea; and (2) whether affirmatively misadvising a client that a plea will not result in deportation constitutes ineffective assistance. Both questions form part of the inquiry into whether criminal defense attorneys must research and give accurate advice to their clients on the subject of collateral consequences of a guilty plea.

The 7-2 decision expanded the scope of a criminal defense counsel's duties by holding that counsel engages in constitutionally deficient performance when he or she fails to inform an alien client of any "truly clear" immigration consequences of pleading guilty to a criminal offense. *Id.* at 1483. The ruling immediately affects aliens in criminal proceedings and has ramifications for immigration proceedings as well.

Facts

The Supreme Court case involved Mr. Jose Padilla, a lawful permanent resident, Vietnam War veteran, and 40-year resident of the United States. On October 4, 2002, Mr. Padilla pled guilty to three drug charges in the State of Kentucky, one of which involved the felony trafficking of more than 5 pounds of marijuana, an offense resulting in mandatory removal. *See Padilla*, 130 S. Ct. at 1477-78; Brief of Respondent, 2009 WL 2473880, at *4; *see also* sections 237(a)(2)(A)(iii), (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i).

Mr. Padilla maintained that he pled guilty based upon the affirmative misadvice of his attorney that he "'did not have to worry about immigration status since he had been in the country so long.'" *Padilla*, 130 S. Ct. at 1478 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008)). Had his attorney provided accurate advice, Mr. Padilla asserted, he would have insisted on going to trial instead of pleading guilty.

While Mr. Padilla was serving his criminal sentence, the Department of Homeland Security ("DHS") placed an immigration detainer on him. Upon learning of the detainer, Mr. Padilla filed a pro se motion to vacate his guilty plea. The Hardin Circuit Court of Kentucky denied the motion and Mr. Padilla appealed to the Kentucky Court of Appeals. The court of appeals reversed the circuit court decision and remanded the claim for an evidentiary hearing. The Commonwealth of Kentucky sought discretionary review before the Supreme Court of Kentucky, which was granted.

The Supreme Court of Kentucky denied Mr. Padilla post-conviction relief. The court stated that because collateral consequences were outside the scope of the guarantee of the Sixth Amendment right to counsel, it followed that neither defense counsel's failure to advise Mr. Padilla about the potential for deportation as a consequence of his guilty plea nor counsel's act of advising him incorrectly provided a basis for vacating or setting aside his sentence. *Commonwealth v. Padilla*, 253 S.W.3d 482.

Holding

The five-Justice majority decision, authored by Justice Stevens, began with an overview of nearly a century's worth of developments in immigration law to highlight the fact that changes during the last 90 years have dramatically raised the stakes of an alien's criminal conviction. The majority emphasized that although earlier immigration provisions created a relatively narrow class of deportable offenses and gave judges broad discretionary authority to prevent deportation, reforms during the last three decades have expanded the class of removable offenses and left only "limited remnants" of discretion for the Attorney General to alleviate the removal of an alien. *Padilla*, 130 S. Ct. at 1480. Given that removal is "virtually inevitable" for a vast number of aliens convicted of removable crimes, the *Padilla* majority reasoned that the importance of accurate legal advice for aliens accused of crimes has never been more essential. *Id.* at 1478. Thus, the Supreme Court noted that as a matter of Federal law, removal is an integral part, "sometimes the most important part," of the penalty that may be imposed on alien defendants who plead guilty to specified crimes. *Id.* at 1480.

In the second part of its decision, the majority analyzed whether advice concerning deportation fell within the "ambit" of the Sixth Amendment right to counsel. *Id.* at 1482. The Supreme Court of Kentucky had deemed immigration consequences of a criminal conviction to be collateral consequences and therefore outside the scope of the guarantee of the Sixth Amendment right to counsel. The Supreme Court majority, however, indicated that it had never distinguished "between direct and collateral consequences [in defining] the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Id.* at 1481 (quoting *Strickland v. Washington,* 466 U.S. 668, 689 (1984)). Nevertheless, it determined that it need not decide whether the distinction between collateral and noncollateral issues was appropriate, because deportation was unique. The majority recognized that removal proceedings are civil but stressed that deportation is intimately related to the criminal process, making it difficult to classify as either a direct or a collateral consequence. Therefore, the Court concluded "that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" and that *Strickland* applied to Mr. Padilla's claim. *Id.* at 1482.

The Court then proceeded to analyze whether Mr. Padilla's claims satisfied the two-prong inquiry set forth in *Strickland*. The first prong, requiring that representation fail to meet "'an objective standard of reasonableness,'" is determined based on the prevailing standards of professional practice and the expectations of the legal community. *Id.* (quoting *Strickland*, 466 U.S. at 688).

The Court stated that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 1482. The *Padilla* decision also recognized that "'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.* at 1483 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). Therefore, the Court determined that it was not difficult to find deficiency in Padilla's case. The fact that the deportation consequences in this case were

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particularly straightforward further underscored counsel's deficiency in advising Mr. Padilla. In situations involving less straightforward deportation consequences of a plea, the majority stated that defense counsel has nothing more than an affirmative responsibility to advise an alien client of the possible adverse immigration consequences inherent in a guilty plea.

Strickland's second prong requires that there be "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 1482 (quoting *Strickland*, 466 U.S. at 694). The Court did not engage in the second prong analysis of whether Padilla was actually prejudiced by his defense counsel's actions, leaving it instead to the Kentucky courts to consider on remand.

The Court also considered the Solicitor General's request that the *Strickland* test only be applied in cases where defense counsel provides affirmative misadvice to alien clients. The majority found unpersuasive the view that "'counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case.'" *Id.* at 1484 (quoting the Solicitor General's Brief for United States as Amicus Curiae). The Court reasoned that limiting the *Strickland* test to the narrower ground of affirmative misadvice would result in "two absurd results":

> First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." . . . Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.

Id. at 1484 (quoting *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)). The majority also addressed the concern that its ruling would result in a flood of criminal aliens attempting to contest the finality of their convictions obtained through guilty pleas. Noting *Strickland*'s high bar, Justice Stevens dismissed this concern by indicating that the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. The majority also stated that informing defendants of possible deportation consequences was beneficial to both the State and alien defendants during the plea-bargaining process. This reasoning is based on the notion that "bringing deportation consequences into [the plea-bargaining] process," will afford both the defense and the prosecution the opportunity "to reach agreements that better satisfy the interests of both parties." *Id.* at 1486.

Implications for the Immigration Adjudication System

Higher Scrutiny in Criminal Courts of the Immigration Consequences of Criminal Offenses

The *Padilla* ruling immediately affects criminal defense attorneys and their alien clients. All criminal defense attorneys now have the affirmative duty to research and advise on the consequences of a given plea, or they will risk an ineffective assistance of counsel claim. Although the *Padilla* decision differentiated between situations where the immigration consequences of criminal offenses are "succinct, clear and explicit" and those that are not, it is plausible that the majority of post-conviction motions to vacate filed in the post-*Padilla* era will argue that the immigration consequences of a guilty plea fall into the first category. *Id.* at 1483. In such a situation, defense attorneys erring on the side of caution will provide detailed advice. Moreover, judges presiding over plea colloquies will most likely ensure on the record that defendants have been advised of the immigration consequences of their guilty plea.

Retroactivity of the Padilla Decision

Although the majority did not explicitly state that the decision was retroactive in effect, it inferred retroactivity and contemplated the level of activity the decision would generate. The majority wrote:

> It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation

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CIRCUIT COURT DECISIONS FOR JUNE & JULY 2010

by John Guendelsberger

The United States courts of appeals issued 447 decisions in June 2010 in cases appealed from the Board. The courts affirmed the Board in 389 cases and reversed or remanded in 58, for an overall reversal rate of 13.0% compared to last month's 16.5%. There were no reversals from the Eighth and Tenth Circuits.

The chart below shows the results from each circuit for June 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	3	2	1	33.3
Second	65	60	5	7.7
Third	49	43	6	12.2
Fourth	12	11	1	8.3
Fifth	19	15	4	21.1
Sixth	14	13	1	7.1
Seventh	4	2	2	50.0
Eighth	4	4	0	0.0
Ninth	249	212	37	14.9
Tenth	4	4	0	0.0
Eleventh	24	23	1	4.2
All	447	389	58	13.0

The 447 decisions included 206 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 105 direct appeals from denials of other forms of relief from removal or from findings of removal; and 136 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	206	177	29	14.1
Other Relief	105	88	17	16.2
Motions	136	124	12	8.8

The 29 reversals in asylum cases included 7 adverse credibility determinations; 6 assessments of level of harm for past persecution; 6 Ninth Circuit remands to address "disfavored group" analysis in Indonesian cases; 3 nexus calls; 2 well-founded fear determinations; a 1-year bar miscalculation; a serious nonpolitical crime issue; and a Convention Against Torture claim.

Several of the 16 reversals in the "other relief" category involved criminal grounds of removal, including 2 aggravated felony "crime of violence" offenses and 2 *Carachuri-Rosendo* remands by the Fifth Circuit. The other reversals involved cancellation of removal and covered a wide range of issues, including credibility, Board standard of review in reversing a grant of cancellation, good moral character, physical presence, and opportunity to present evidence.

The 12 reversals in motions cases included 4 motions to reissue Board decisions; 3 motions to reopen for ineffective assistance of counsel; 2 motions to reopen to present new evidence; 1 motion to apply for asylum based on changed country conditions; and 1 motion to reconsider.

Circuit	Total	Affirmed	Reversed	% reversed
Seventh	23	18	5	21.7
Ninth	960	805	155	16.1
Tenth	21	19	2	9.5
Fifth	75	68	7	9.3
Eighth	35	32	3	8.6
Third	236	217	19	8.1
Sixth	50	46	4	8.0
Second	491	455	36	7.3
First	14	13	1	7.1
Eleventh	132	123	9	6.8
Fourth	76	73	3	3.9
All	2113	1869	244	11.5

The numbers by type of case on appeal for the first 6 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	1110	985	125	11.3
Other Relief	438	374	64	14.6
Motions	565	510	55	9.7

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CIRCUIT COURT DECISIONS FOR JULY 2010

The United States courts of appeals issued 466 decisions in July 2010 in cases appealed from the Board. The courts affirmed the Board in 410 cases and reversed or remanded in 56, for an overall reversal rate of 12% compared to last month's 13%. There were no reversals from the First, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for July 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	9	9	0	0.0
Second	89	86	3	3.4
Third	53	46	7	13.2
Fourth	14	12	2	14.3
Fifth	12	10	2	16.7
Sixth	11	11	0	0.0
Seventh	13	10	3	23.1
Eighth	2	2	0	0.0
Ninth	240	205	35	14.6
Tenth	4	4	0	0.0
Eleventh	19	15	4	21.1
All	466	410	56	12.0

The 466 decisions included 244 direct appeals of denials of asylum, withholding or protection under the Convention Against Torture; 92 direct appeals from denials of other forms of relief from removal or from findings of removal; and 130 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	244	209	35	14.3
Other Relief	92	82	10	10.9
Motions	130	119	11	8.5

The 35 reversals in asylum cases included 7 adverse credibility determinations (5 from the Ninth Circuit and 2 from the Fourth Circuit); 7 assessments of the level of harm for past persecution; 6 Ninth Circuit remands to apply "disfavored group" analysis in Indonesian cases; 5 nexus determinations; 2 well-founded fear determinations; 2 Convention Against Torture claims; and 1 particularly serious crime bar to asylum, as well as several remands to consider issues not fully addressed on appeal.

The 10 reversals in the "other relief" category involved criminal grounds of removal, the cancellation of removal hardship standard, section 212(c) eligibility, a continuance request, fingerprint requirements, voluntary departure, and 1 *Carachuri-Rosendo* remand from the Fifth Circuit.

The 11 reversals in motions cases included 4 motions to reopen for ineffective assistance of counsel, all from the Ninth Circuit; 2 motions to reconsider; a motion to reopen to present new evidence of hardship for cancellation of removal; a motion to rescind an in absentia order of removal for lack of notice; and a motion to reissue a Board decision.

The chart below shows the combined numbers for the first 7 months of 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Seventh	36	28	8	22.2
Ninth	1200	1010	190	15.8
Fifth	87	78	9	10.3
Third	289	263	26	9.0
Eleventh	151	138	13	8.6
Eighth	37	34	3	8.1
Tenth	25	23	2	8.0
Second	580	541	39	6.7
Sixth	61	57	4	6.6
Fouth	90	85	5	5.6
First	23	22	1	4.3
All	2579	2279	300	11.6

The numbers by type of case on appeal for the first 7 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	1354	1194	160	11.8
Other Relief	530	456	74	14.0
Motions	695	629	66	9.5

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

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Undercard or Main Event?: Courts Assess the Jurisdiction Provisions of the REAL ID Act

by Edward R. Grant and Patricia M. Allen

Jurisdictional rules for Federal court review of immigration matters expand and contract like a buckling roadway in our intense Summer 2010 heat wave. Just in the past 15 years, the trajectory from AEDPA to IIRIRA to *INS v. St. Cyr* to the REAL ID Act has sent courts scurrying to referee questions anent their own jurisdiction that seem forever unsettled.

These bouts over jurisdiction, far from being a mere "undercard" to the "main event" of ruling on the merits, will in some cases dictate the outcome of the case. These "undercard" bouts also have created a colorful lexicon all their own, including the infamous "Zipper Clause," the quest for "historical facts," the definition of "pure" questions of law, and the relentless counting of bites at the proverbial apple. *See* H.R. Rep. No. 109-72, at 171-75 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 297-300, 2005 WL 1848528 (Conference Report on REAL ID Act of 2005, Div. B of Act of May 11, 2005, Pub. L. No. 109-13, 119 Stat. 231, 302).

For our purposes this month, the extensive reach of the REAL ID Act boils down to a single provision—section 106(a)(1)(A)(iii), which clarified that nothing in section 242(a)(2) of the Immigration and Nationality Act, specifically its limitations on judicial review of denials of discretionary relief and of removal orders entered against criminal aliens, precluded review of "constitutional claims or questions of law" raised in a petition for review. Section 242(a)(2)(D) of the Act.

This provision was explicitly designed to end the flood of district court habeas litigation that arose in response to the jurisdictional limitations imposed by AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996) and IIRIRA (the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) and was encouraged by the Supreme Court's decision in *St. Cyr*, 533 U.S. 289 (2001).

As stated in the Conference Report to the REAL ID Act, AEDPA and IIRIRA were congressional attempts to tighten existing limitations on habeas and other district court review of orders of deportation and removal. Nevertheless, those aliens (especially criminal aliens) barred from circuit court review under the post-IIRIRA provisions of section 242(a)(2) of the Act sought recourse in habeas corpus. When the Supreme Court in *St. Cyr* green-lighted this approach—finding that IIRIRA's bar to district court review was not a "zipper clause" precluding habeas review under 28 U.S.C. § 2241—the race was on to the (district) courthouse door, and criminal aliens wound up with a "second bite of the apple" not available to aliens who were confined to the single bite of a petition for review in the court of appeals.

In repairing this situation, however, Congress presented the circuit courts—particularly those of a more generous legal imagination—with the opportunity to define for themselves exactly what constitutes a "constitutional" or "legal" claim. Furthermore, the REAL ID Act amendments have raised the question whether other matters apparently insulated from Federal court review, such as the time deadline for filing an asylum application, are likewise "question[s] of law" that should be subject to judicial review. *See* section 208(a)(3) of the Act, 8 U.S.C. § 1158(a)(3) (precluding judicial review of "any determination" that an alien is ineligible to apply for asylum because of, inter alia, late filing of the application).

Five years after the enactment of the REAL ID Act, a significant divide now exists over what constitutes a "question of law." Two decisions from the Seventh and Ninth Circuits, both issued, coincidentally, on June 28, 2010, define the debate. While neither case breaks new ground in its own circuit, together they present an opportunity to review the state of the circuit law relating to the claims under the exceptions for the 1-year deadline for asylum applications. *Lin v. Holder*, 610 F.3d 1093 (9th Cir. 2010); *Restrepo v. Holder*, 610 F.3d 962 (7th Cir. 2010).

The long shadow cast by *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007), *reh'g en banc denied sub nom. Ramadan v. Keisler*, 504 F.3d 973 (9th Cir. 2007), compelled the court in *Lin* to hold fast to the doctrine that "questions of law" extend beyond "'"pure" issues of statutory interpretation'" to include circumstances where the law is applied to "'undisputed facts, sometimes referred to as mixed questions of law and fact.'" *Lin*, 610 F.3d at 1096 (quoting *Ramadan*, 479 F.3d at 648). Lin was found ineligible for asylum by the Immigration Judge because he gave conflicting dates for his arrival in the United States and presented no clear and convincing corroborative evidence of his actual date of arrival. The Board affirmed,

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but the Ninth Circuit reversed, as it had done under almost identical facts in *Khunaverdiants v. Mukasey*, 548 F.3d 760, 765 (9th Cir. 2008), holding that under *its* precedents, Lin's testimony regarding his date of arrival (both dates given were within 1 year of his application) sufficed for "clear and convincing evidence." In other words, the Board and the Immigration Judge committed an error of *law* by requiring a higher quantum of proof for this (ostensibly) nonreviewable determination than that which the Ninth Circuit has found sufficient. *See Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) (finding an alien's credible testimony sufficient, without corroboration, to establish facts given in testimony).

Neither *Lin* nor *Khunaverdiants* involved aliens who were subject to the revised credibility and corroboration rules of the REAL ID Act because their asylum applications were filed prior to May 11, 2005. Thus, in future cases that are fully governed by the REAL ID Act, the rule stated in *Kaur* will not apply. *See Singh v. Holder*, 602 F.3d 982, 986 (9th Cir. 2010). However, this will not alter the jurisdictional rule—which means that Ninth Circuit review of the 1-year issue may expand further to include the reasonableness of an Immigration Judge's requirements for corroborative evidence of the date of arrival. This is not to be alarmist—in *Ramadan*, for example, the court held that alleged changed circumstances in Egypt did not "compel" a finding that the petitioner had established an exception to the 1-year deadline.

Still, the Ninth Circuit, and not for the first time, like "the cheese," stands alone. Judge O'Scannlain's concurrence in *Lin* noted that "[b]y now, nine other courts of appeals have rejected [the] view" that a reviewable "question of law" includes mixed questions of law and fact. *Lin*, 610 F.3d at 1098; *see also Gomis v. Holder*, 571 F.3d 353, 358 (4th Cir. 2009) ("Nearly every circuit . . . has held that even after the REAL ID Act, the federal courts continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing."). Judge O'Scannlain also expressed concern that *Ramadan* was overextended to "determinations involving factual uncertainty, as long as the petitioner meets the statutory standard under any view of the facts." *Lin*, 610 F.3d at 1099.

Ironically, the dispute was adumbrated within the Ninth Circuit itself, when it denied rehearing en banc in *Ramadan*. Led by Judge O'Scannlain, the nine dissenting judges deemed the panel's assertion of jurisdiction over the "changed circumstances" question one of interpretive creativity that they were bound to reject because "[t]he statutory text makes clear that the decision to consider an untimely application for asylum based on changed circumstances is solely a discretionary one, and is not reviewable as a 'mixed question of law and fact.'" *Ramadan v. Keisler*, 504 F.3d 973, 974 (9th Cir. 2007) (footnote omitted).

The *Ramadan* dissenters also recognized that "*all* of our sister circuits that have considered the issue [have] conclude[d] that a changed circumstances determination is one of discretion [and not reviewable]." *Id.* at 975. The dissenters specifically rejected the panel's reliance on dicta in *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) ("*Chen*"), and concluded that it was a misinterpretation to imagine that it would support the view that "questions of law" may include the review of factual and discretionary circumstances inherent in a "changed circumstances" determination. Indeed, while *Chen* posited that "questions of law" may, in fact, be broader than strict questions of statutory interpretation, it declined to fully define the term. *Id.* at 328-29. Instead, the court held that it remained "deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding or the wisdom of his exercise of discretion and raises neither a constitutional claim nor a question of law." *Id.* at 329.

Subsequently, the Second Circuit has clarified that jurisdiction could exist under the rubric of "question of law" in two circumstances—where the Immigration Judge or Board stated the incorrect legal standard, or where the correct legal standard was *stated*, but the incorrect legal standard was *applied*. *Liu v. INS*, 508 F.3d 716 (2d Cir. 2007). Nevertheless, as stated in *Chen*, a petitioner's use of the term "erroneous application" of the statute does not immediately "convert [the] quarrel over an exercise of discretion into a question of law." *Chen*, 471 F.3d at 331. Thus, the narrow exceptions in *Liu* remain a far cry from the approach adopted by the Ninth Circuit in *Ramadan*, *Lin*, and *Khunaverdiants*.

The Seventh Circuit, in *Restrepo*, restated its previous position that it lacks jurisdiction to review the Board's determination on the 1-year deadline and emphasized that under the rule enunciated in *Kucana*

v. Holder, 130 S. Ct. 827 (2010), the 1-year bar is "a statutory grant of discretion" to the Attorney General and thus further insulated from judicial review. *Restrepo*, 610 F.3d at 964. The court also refused to follow *Ramadan*'s expansion of the "question of law," noted that "nine other courts of appeals have [also] rejected it," and held that it would limit its jurisdiction to "strictly legal controversies." *Id*. at 965. This phrase seems to resuscitate the term "pure"—as in, "pure question of law"—which was dispatched as "superfluous" in the proposals leading up to the REAL ID Act. *See* H.R. Rep. No. 109-72, at 175, *reprinted in* 2005 U.S.C.C.A.N. at 300.

Before concluding, it is worth noting another significant foray into the question of jurisdiction. Last year, the Ninth Circuit attempted to clarify the reviewability of determinations of hardship in claims for cancellation of removal—determinations that, like the 1-year asylum bar, are subject to an explicit jurisdiction-stripping provision. *See* section 242(a)(2)(B) of the Act. The petitioner in *Mendez-Castro v. Mukasey*, 552 F.3d 975 (9th Cir. 2009), echoing the arguments in *Ramadan*, as well as one of the narrow exceptions stated by the Second Circuit in *Liu*, claimed that the Immigration Judge had applied the wrong legal standard for exceptional and extremely unusual hardship. Writing for the panel, Judge O'Scannlain concluded that since the petitioner's claim was "clearly colorable," the court had jurisdiction so long as it was not frivolous. *Id.* at 979. However, his opinion just as promptly determined that the court is constrained solely to the determination whether the Immigration Judge had applied the correct legal standard, and it may not consider the manner in which the standard was applied. *Id.* In this highly limited review, the court was satisfied that the Immigration Judge had "expressly cited and applied" *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), considered the cumulative effect of hardship by "discuss[ing] the children as a group," and had contemplated the speech impediment of one of the petitioner's children. *Mendez-Castro*, 552 F.3d at 979-80.

The court also concluded that it did not have jurisdiction over the petitioner's argument that the Immigration Judge had not considered the "strong case" of hardship recognized in *Monreal* because "such an argument is inherently intertwined with the [Immigration Judge's] assessment of the facts." *Id*. at 979. Moreover, the petitioner's argument that the Immigration Judge's finding was inconsistent on a factual basis with prior determinations by the agency was similarly dissolved. *Id*. at 980. The court responded to this argument by stressing the highly subjective nature of the exceptional and extremely unusual hardship analysis, which "depends on the 'identity' and the 'value judgment of the person or entity examining the issue.'" *Id.* (quoting *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003)). The court then added that this would be the case even if the facts were undisputed. *Id.*

One may scratch the old bean, wondering if this is the same circuit that decided *Ramadan*. The same circuit, perhaps, but the same panel, decidedly not. Aware of the tension, Judge O'Scannlain attempted to distinguish *Mendez-Castro* from *Ramadan* by noting the different factors at work in the determination of hardship from those relevant to application of the 1-year deadline. The court had jurisdiction in *Ramadan* because the analysis involved a standard that did "'not depend[] upon the identity of the person or entity examining the issue, but rather is less value-laden and does not reflect the decision maker's beliefs in and assessment of worth and principle.'" *Mendez-Castro*, 552 F.3d at 980-81 (quoting *Ramadan*, 479 F.3d at 656). Calculations of exceptional and extremely unusual hardship, on the other hand, are fraught with such factors.

Conclusion

While we have focused here on the work of two circuits, others have obviously addressed these issues. Indeed, there are the nine decisions referenced both by Judge O'Scannlain and by *Restrepo* regarding the 1-year issue. *See Gomis v. Holder*, 571 F.3d 353, 359 (4th Cir. 2009); *Viracacha v. Mukasey*, 518 F.3d 511, 515-16 (7th Cir. 2008); *Zhu v. Gonzales*, 493 F.3d 588, 596 n. 31 (5th Cir. 2007); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 747-48 (6th Cir. 2006); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 153-54 (2d Cir. 2006); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 956-57 (11th Cir. 2005) (per curiam).

Regarding jurisdiction over cancellation cases, the Second and Third Circuits recently identified specific claims relating to the hardship determination that presented a "question of law." *See Padmore v. Holder*, 602 F.3d 62 (2d Cir. 2010) (holding that impermissible fact

finding by the Board on an application for cancellation of removal presented a "question of law"); *Pareja v. Att'y Gen. of U.S.*, __F.3d__, 2010 WL 2947239 (3d Cir. July 29, 2010) (whether the Board's factoring of the number of qualifying relatives was a misinterpretation of the statute and whether the legal standard in *Monreal* was contemplated by IIRIRA are questions of law). For an in-depth discussion on how other circuits have treated this particular issue, see Nina Elliot and Greta Hendricks, *Cancellation of Removal: When Is Exceptional and Extremely Unusual Hardship a Question of Law?*, Immigration Law Advisor, Vol. 4, No. 2 (Feb. 2010). *See generally* Edward R. Grant, *Nonreviewable Calls: Courts Limit Their Jurisdiction on Matters of "Agency Discretion,"* Immigration Law Advisor, Vol. 3, No. 1 (Jan. 2009).

As for recent circuit activity regarding jurisdiction over other types of claims, on June 28 (again, coincidentally), the Fifth Circuit held that it lacked jurisdiction to review the adequacy of notice to an alien of biometric requirements; this is clearly contrary to the Ninth Circuit's rule on the same question. *Compare Ogunfuye v. Holder*, 610 F.3d 303 (5th Cir. 2010), *with Cui v. Mukasey*, 538 F.3d 1289 (9th Cir. 2008). Other recent activity has included *Aguilar-Mejia v. Holder*, __F.3d__, 2010 WL 3063155 (7th Cir. Aug. 6, 2010) (stating that whether the agency erred in not making a finding on a claim of individualized risk of persecution may present a question of law, while a fact-based pattern or practice claim does not); *Villegas de la Paz v. Holder*, __F.3d__, 2010 WL 2977622 (6th Cir. July 30, 2010) (joining Tenth, Third, and Fifth Circuits in asserting jurisdiction where a petition to review the reinstatement of a prior removal order raises a constitutional claim or question of law); *Zajanckauskas v. Holder*, __F.3d__, 2010 WL 2740012 (1st Cir. July 13, 2010) (finding no jurisdiction where a petition contesting the discretionary denial of a waiver did not present a question of law); *Iliev v. Holder*, __F.3d __, 2010 WL 2802819 (10th Cir. July 19, 2010) (providing a thorough discussion on the jurisdictional limitations concerning circuit court review of hardship waiver determinations).

Finally, there is the curious decision of the Eighth Circuit in *Ochoa v. Holder*, 604 F.3d 546 (8th Cir. 2010). As noted by Judge Colloton in dissent, the petitioner's motion to reopen to the Board had been timely filed and was so treated by the Board. Nevertheless, the panel majority determined that the petitioner had asked the Board to reopen on its own motion, or sua sponte, and the record was at best ambiguous on this point. The majority, applying the for-now-settled rule among the circuits, determined that it lacked jurisdiction to review the "sua sponte" denial. Judge Colloton would have addressed the order as a timely filed, but denied, motion to reopen, and he reversed the Board for abuse of discretion in failing to properly consider the evidence of substantial medical and educational hardship resulting from lead poisoning.

As stated at the outset, sometimes the "undercard" can dictate the outcome of the main event. For that reason alone, the rules of circuit court jurisdiction may not come to a fully settled repose.

Edward R. Grant has been a Board Member of the Board of Immigration Appeals since January 1998. Patricia M. Allen is an Attorney-Advisor to the Board and a former Judicial Law Clerk assigned to the Oakdale and Phoenix Immigration Courts.

RECENT COURT OPINIONS

First Circuit:

Nako v. Holder, __F.3d__, 2010 WL 2674506 (1st Cir. July 7, 2010): The First Circuit upheld an Immigration Judge's holding (affirmed by the Board) that fundamental changes in Albania since the petitioner's 2001 departure rebutted the presumption of a well-founded fear of persecution by the Socialist Party that arose from the petitioner's past persecution. The court noted the Immigration Judge's and Board's careful examination of specific facts in the Department of State ("DOS") Country Report and Asylum Profile, which directly related to the petitioner's claim. Specifically, the DOS report established that the Democratic Party (of which the petitioner was a member) now controls Albania. It also thoroughly documented a decline in politically motivated violence or persecution by either party, as well as a decline in police abuse. The court found that the petitioner failed to offer sufficient evidence on appeal to rebut the conclusion that "politically motivated persecution and intimidation is no longer a serious problem anywhere in Albania."

Second Circuit:

Costa v. Holder, __F.3d__, 2010 WL 2632186 (2d Cir. July 2, 2010): The Second Circuit upheld an Immigration

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Judge's decision (affirmed by the Board) that the offense of sexual assault in the second degree under § 53a-71 of the Connecticut General Statutes was categorically an aggravated felony as a crime of violence under section 101(a)(43)(F) of the Immigration and Nationality Act. The Immigration Judge relied on the Second Circuit's 2003 decision in *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003), which reached the same conclusion. The court dismissed the petitioner's argument that changes to the applicable Connecticut statute since the time of the court's decision in *Chery* rendered the statute divisible and therefore subject to the modified categorical approach.

Nen Di Wu v. Holder, __F.3d__, 2010 WL 3023810 (2d Cir. Aug. 4, 2010): The court held in abeyance the Government's motion to dismiss an asylum seeker's petition for review under the fugitive disentitlement doctrine. In appealing the Board's denial of asylum, the petitioner moved the court to stay deportation during the pendency of the petition for review. The Government opposed the motion, prompting a request for a supplemental memorandum regarding its intent to enforce the removal order, and the court issued a temporary stay. The Government issued a "bag and baggage" letter and filed the motion to dismiss with the court some 16 days after the petitioner failed to appear for deportation. Noting its broad discretion to grant or deny a motion to dismiss under the fugitive disentitlement doctrine, the court added that such a decision "should be informed by the reasons for the doctrine and the equities of the case." The court then discussed the traditional justifications for the doctrine. It also noted the need to consider the equities of the case (including whether the party provided an explanation for its fugitive status), and "the extent to which a party has truly evaded the law." While the court found that the petitioner "technically" was "seemingly" a fugitive from justice, the record did not provide sufficient evidence to consider the relevant factors mentioned above. The court thus held its decision on the motion in abeyance pending briefing, and possibly oral argument, on the merits.

Third Circuit:

Bhargava v. Att'y Gen. of U.S., __F.3d__, 2010 WL 2607256 (3d Cir. July 1, 2010): The Third Circuit upheld an Immigration Judge's determination (affirmed by the Board) that he lacked jurisdiction to review a decision by the Government to terminate asylum under 8 C.F.R. § 208.24(a)(1). As part of a plea agreement, the preparer of the petitioner's successful asylum application admitted that the claim was fraudulent and that corroborating documents submitted with the application were counterfeit. After a hearing, the Government terminated the petitioner's asylum status and placed him in removal proceedings. In denying the petitioner's motion to terminate proceedings, the Immigration Judge stated that he could find no authority in the Act or regulations granting jurisdiction to an Immigration Judge to review de novo a decision terminating an asylum grant and concluded that if either Congress or the Attorney General had intended to extend this authority to Immigration Judges, they would have included such language in the statute or regulations. The court found this ruling reasonable and pointed to specific examples in other sections of the statute and regulations expressly granting Immigration Judges de novo review authority. The court contrasted these examples with the silence in the specific sections in question. Therefore the court deferred to the agency's interpretation and dismissed the petition for review.

Leslie v. Att'y Gen. of U.S., __F.3d__, 2010 WL 2680763 (3d Cir. July 8, 2010): The court vacated the decision of an Immigration Judge (affirmed by the Board) ordering the removal of a lawful permanent resident ("LPR") convicted of the aggravated felony of conspiracy to possess and distribute 50 grams of "crack" cocaine, for which he was sentenced to 168 months of incarceration. The sole basis for vacating was the court's finding that the Immigration Judge failed to advise the petitioner of the availability of free legal services, as required by 8 C.F.R. § 1240.10(a)(2). The court emphasized that an agency must comply with its own regulations "protecting a fundamental statutory or constitutional right of parties appearing before it" and that the failure to do so will invalidate the agency's action, even where no prejudice is shown. The court found that the regulation in question falls within this category, because it protects the right to counsel in removal proceedings and derives from the due process right to a fundamentally fair hearing.

Seventh Circuit:

Marin-Rodriguez v. Holder, __F.3d__, 2010 WL 2757321 (7th Cir. July 14, 2010): The court granted a petition for review challenging the Board's decision that it lacked jurisdiction to consider the alien's motion subsequent to his removal from the United States. The Board had previously granted the petitioner's motion to reopen, but it vacated the order pursuant to the Government's motion to reconsider stating that the petitioner had been deported 19 days prior to its grant of the motion. The

court noted that although statutory law long deprived the Board of jurisdiction subsequent to an alien's departure, the statute in question was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The court therefore disagreed with the Board's conclusion in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), that the jurisdictional bar survived the repeal. The court further dismissed the regulatory jurisdictional bar of 8 C.F.R. § 1003.2(d), citing the Supreme Court's 2009 decision in *Union Pacific Railroad v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009), prohibiting an agency from contracting its own jurisdiction by regulation.

Eighth Circuit:

Sanchez v. Holder, __F.3d__, 2010 WL 2990916 (8th Cir. Aug. 2, 2010): The Eighth Circuit denied the petitioner's petition for review of an order of the Board finding him statutorily ineligible for cancellation of removal for certain LPRs ("cancellation A"). The petitioner did not contest his removability as an alien convicted of two or more crimes involving moral turpitude and a controlled substance violation. He challenged, however, the Board's finding that his State conviction for theft in the third degree under section 714.1 of the Iowa Code constituted an aggravated felony conviction, claiming that the Government had failed to meet its burden of proof on the issue. The court rejected this argument, finding no support for the assertion that the Government bore the burden of proof where the petitioner was removable on other grounds. The court affirmed that under both section 240(c)(4)(A)(i) of the Act and 8 C.F.R. § 1240.8(d), a removable alien bears the burden of proving that he is not an aggravated felon and is thus eligible for relief. Noting that the petitioner had conceded two of the three grounds for removability contained in the Notice to Appear, the court held that the relevant inquiry is not whether the Government also established the third ground, but rather whether the petitioner met his burden of establishing eligibility for relief, a point which, for tactical reasons, the petitioner chose not to pursue.

Ninth Circuit:

Padilla-Romero v. Holder, __F.3d__, 2010 WL 2700106 (9th Cir. July 9, 2010): The Ninth Circuit denied a petition for review from an alien challenging the Immigration Judge's determination that he was statutorily ineligible for cancellation of removal for certain LPRs ("cancellation A"). In 1998, the petitioner (who was an LPR at the time) was removed from the U.S. after being caught three separate times for attempted alien smuggling (and for twice falsely claiming U.S. citizenship). At a separate removal hearing in 2006, the petitioner claimed that because he had been an LPR for at least 5 years at the time of his 1998 removal, he remained eligible for cancellation A relief. The petitioner based this argument on the wording of section 240A(a) of the Act, requiring that an applicant "*has been* an alien lawfully admitted for permanent residence for not less than 5 years." According to the petitioner, the language "has been" should be interpreted to mean "at any time," but not necessarily at present. However, the court rejected this "strained reading" of the statute, finding that it ran counter to Congress's intent (as expressed in section 101(a)(20) of the Act) that an alien may lose the benefits of LPR status. The court also looked to the caption to section 240A(a) of the Act, which, although not part of the statute, was instructive in providing context. The caption, "Cancellation of Removal for Certain Permanent Residents," suggests that an applicant must currently be in LPR status. The court also rejected the petitioner's argument that the "stop time" provision of section 240A(b)(2)(B) of the Act would render it impossible for any applicant for cancellation A to be presently in LPR status. The court noted that the "stop time" provision does not terminate LPR status, "but rather simply establishes the point at which an alien's residence . . . will stop counting towards" the statutory 7-year continuous residence requirement.

Perdomo v. Holder, __F.3d__, 2010 WL 2721524 (9th Cir. July 12, 2010): The court granted the petition for review of a Guatemalan woman whose application for asylum had been denied by the Immigration Judge. The petitioner claimed to fear persecution as a member of a particular social group ("PSG") consisting of Guatemalan women who, she argued, ran a greater risk of being murdered. The Immigration Judge rejected the proposed PSG and the Board affirmed, finding the proposed group to be overly broad. On appeal, the Ninth Circuit noted that although it had not previously held that females alone constitute a PSG, it had found in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005), that female members of a particular clan met this definition and, in so doing, held gender to be an innate characteristic fundamental to one's identity. The court also recognized in a footnote that the Third Circuit in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), held that gender constitutes a PSG and that Australia, Canada, and the U.K. had done likewise. The court found that the Board erred in its analysis, noting that it had found innate characteristics to be sufficient for PSG status in

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cases involving homosexuals and Gypsies. The court also stated that it had rejected proposed groups as overly broad in the absence of a unifying relationship or characteristic to narrow an otherwise diverse and disconnected group. The court pointed out that it had previously rejected the proposition that a group could not be a PSG solely because it constitutes too large a segment of society. Therefore the court remanded for the Board to consider in the first instance whether Guatemalan women constitute a PSG and, if so, whether the petitioner had established a well-founded fear on account of that characteristic.

Fernandes v. Holder, __F.3d__, 2010 WL 3274502 (9th Cir. Aug. 20, 2010): The court denied the petition for review of an asylum seeker from India who challenged the Board's decision upholding an Immigration Judge following a remand to reopen proceedings and consider new evidence. The Immigration Judge had initially denied asylum. Noting the Immigration Judge's failure to make a specific credibility finding, the Board found past persecution and remanded for the Immigration Judge to consider whether the presumption of a well-founded fear was rebutted by changed conditions. However, on remand the Immigration Judge granted the Government's motion to reopen to consider new evidence relating to the petitioner's credibility. After a further hearing, the Immigration Judge issued a second decision denying asylum based on an adverse credibility finding and, furthermore, found the asylum application to be frivolous. In a matter of first impression, the Ninth Circuit agreed with the Third Circuit and the Board (in *Matter of M-D-* and *Matter of Patel*) in holding that an Immigration Judge's jurisdiction on remand is only limited in scope where the Board specifically retains jurisdiction and limits the scope of remand to a specific purpose.

BIA PRECEDENT DECISIONS

In *Matter of Sanchez-Cornejo*, 25 I&N Dec. 273 (BIA 2010), the Board found that the offense of delivery of a simulated controlled substance under Texas law is not an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). The definition of an aggravated felony under section 101(a)(43)(B) includes both illicit trafficking, as defined in the Controlled Substances Act ("CSA"), and a drug trafficking crime, as defined in 18 U.S.C. § 924(c). The first clause does not apply because a simulated controlled substance is not a federally controlled substance. Furthermore, the Board reasoned, the offense is not a "drug trafficking crime" because it is not punishable under the CSA. Although a counterfeit substance is included in the CSA, a simulated controlled substance under Texas law does not qualify as such. In this case, the respondent conceded that he was deportable under former section 241(a)(2)(B)(i) of the Act, 8 U.S.C. § 1251(a)(2)(B)(i), but sought special rule suspension of deportation. The Board found that his conviction did not render him ineligible and remanded for consideration of his application for relief.

In *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010), the Board considered whether a misdemeanor offense of assault and battery against a family or household member in violation of section 18.2-57.2(A) of the Virginia Code Annotated is categorically a crime of violence under 18 U.S.C. § 16(a) and therefore a crime of domestic violence under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i). At issue was whether the respondent's offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another under § 16(a). Under Virginia law, a violation of section 18.2-57.2(A) requires both assault and battery. In *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010), the Supreme Court found that in order to constitute a "violent felony" under the relevant provisions of the Armed Career Criminal Act, which is identical in pertinent part to § 16(a), the level of physical force required for a conviction must be "violent force—that is, force capable of causing physical pain or injury to another person." The Court found that simple battery under Florida law was not a violent felony because under the pertinent statute, a conviction would only require an actual and intentional touching involving physical contact, no matter how slight. The Supreme Court specifically acknowledged that its ruling could make it difficult to find an alien removable under section 237(a)(2)(E)(i) of the Act, but indicated that there was recourse in the modified categorical approach. The Board noted that the Fourth Circuit recently applied *Johnson* to find that a Virginia assault and battery conviction was not for a crime of domestic violence. *United States v. White*, 606 F.3d 144 (4th Cir. 2010). The Board held that a misdemeanor conviction under the Virginia assault and battery statute is not categorically a conviction for a crime of violence and remanded for a determination under the modified categorical approach.

In *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), the Board considered whether the respondent

was "admitted" to the United States, i.e., whether she made a "lawful entry" after inspection and authorization by an immigration officer under section 101(a)(13)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13)(A), where her admission was procedurally regular, but it was not in compliance with substantive legal requirements. The Board found that an alien need only prove procedural regularity in his or her entry, which does not require the alien to be questioned by immigration authorities or be admitted in a particular status.

In 2001, the respondent approached the United States/Mexico border as a passenger in a car being driven by her United States citizen friend. At that time, she was not in possession of a valid entry document. She testified that the immigration inspector asked her friend, the driver, whether he was an American citizen but did not ask the respondent any questions. The officer then waved the car through the port of entry. In 2005, the respondent was served with a Notice to Appear charging her with inadmissibility as an alien who entered without inspection and who had no valid entry document. The Immigration Judge found her to be inadmissible as charged and statutorily ineligible for adjustment of status because she had not been "admitted" to the United States withing the meaning of section 101(a)(13)(A) of the Act, which defines the terms "admission" and "admitted" to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

Previously, in *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), the Board had found that the term "admitted" demanded only procedural regularity and held that an alien who physically presents herself for questioning and makes no knowing false claim to citizenship is "inspected" even though she volunteers no information and is asked no questions by the immigration authorities. Considering whether Congress intended to change this interpretation with the 1996 amendments to the Act, the Board concluded that it did not and reaffirmed *Matter of Areguillin*. The Department of Homeland Security agreed but argued that the respondent did not establish procedural regularity at the port of entry because she had not shown that she was admitted in a particular nonimmigrant or immigrant status. The Board rejected that contention and remanded the case for adjudication of the respondent's adjustment application.

In *Matter of Reza*, 25 I&N Dec. 296 (BIA 2010), the Board considered whether a grant of Family Unity Program ("FUP") benefits is an "admission" for purposes of establishing the 7-year period of continuous residence after having been "admitted in any status" required for cancellation of removal under section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2). In this case, the respondent was granted lawful permanent resident status in 2001, but a few months later he committed a criminal offense that stopped the accrual of his time in continuous residence pursuant to section 240A(d)(1) of the Act. The respondent argued that he was granted benefits under the FUP in 1994, which constituted an admission and gave him the requisite time in residence. The Board followed the relevant language of section 101(a)(13)(A) of the Act defining the term "admitted" as the lawful entry of the alien after inspection and authorization by an immigration officer, and it declined to treat a grant of FUP benefits as an "admission."

In *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010), and *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), the Board clarified its decision in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), and explained how to determine whether an alien who has been convicted of a crime involving moral turpitude ("CIMT") is eligible for cancellation of removal. The two cases involved the question whether misdemeanor CIMT convictions fell within the provisions of section 240A(b)(1)(C) of the Act, which bars eligibility for aliens who have been convicted of an offense "described under" either section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act. In *Matter of Cortez*, the respondent was convicted of welfare fraud in violation of section 10980(c)(2) of the California Welfare and Institutions Code, for which she was sentenced to 60 days' imprisonment. The alien in *Matter of Pedroza* was convicted of petty theft in violation of section 484(a) of the California Penal Code, with a sentence of 10 days in the county jail.

The Board held that when determining whether a conviction is "described under" the enumerated statutes in section 240A(b)(1)(C), only language specifically pertaining to the criminal offense, such as the offense itself and the sentence imposed or potentially imposed, should be considered. Language pertaining only to aspects of immigration law, such as the requirement that an alien's crime be committed within 5 years after the date of admission, is not to be considered. Therefore, an alien

convicted of a CIMT that is punishable by a sentence of "one year or longer" is not eligible for cancellation because the offense would be "described under" section 237(a)(2). However, a CIMT for which the maximum possible sentence is less than a year, and which qualifies under the petty offense exception, would not be an offense "described under" either section 212(a)(2) or 237(a)(2) and would therefore not render the alien ineligible for cancellation of removal.

In finding its interpretation to be consistent with the plain meaning of section 240A(b)(1)(C) of the Act, the Board relied on the Ninth Circuit's opinion in *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004). Further, comparing the statutory language of the "stop-time rule," the Board noted that Congress did not include language requiring that an alien be inadmissible or removable in section 240A(b)(1)(C), so it did not intend for the immigration-related elements of section 212(a)(2), 237(a)(2), or 237(a)(3) to be considered in evaluating an alien's conviction. The Board also reviewed its prior cases interpreting these provisions and found them not to be in conflict with its interpretation. Applying its clarified rule to the two cases, the Board held that the respondent's conviction in *Matter of Cortez* rendered her ineligible for cancellation because her offense was punishable by a sentence of "one year or longer," even though it qualified for the petty offense exception. The respondent's crime of petty theft in *Matter of Pedroza*, however, was punishable by imprisonment for a period of less than a year and qualified for the petty offense exception, so it did not render him ineligible for cancellation.

REGULATORY UPDATE

75 Fed. Reg. 39,556
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

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

ACTION: Notice.
SUMMARY: This Notice announces that the Secretary of Homeland Security has extended the designation of El Salvador for temporary protected status (TPS) for 18 months from its current expiration date of September 9, 2010, through March 9, 2012. This Notice also sets forth procedures necessary for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of El Salvador and whose applications have been granted or remain pending. Certain nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

New EADs with a March 9, 2012, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on September 9, 2010. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of El Salvador for 6 months, through March 9, 2011, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

DATES: The extension of the TPS designation of El Salvador is effective September 10, 2010, and will remain in effect through March 9, 2012. The 60-day re-registration period begins July 9, 2010, and will remain in effect until September 7, 2010.

75 Fed. Reg. 39,957
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Extension of the Initial Registration Period for Haitians Under the Temporary Protected Status Program

ACTION: Notice.
SUMMARY: On January 21, 2010, the Secretary of the Department of Homeland Security designated Haiti under the Temporary Protected Status (TPS) program for a period of 18 months. DHS established a 180-day registration period (from January 21, 2010, through July 20, 2010). This notice extends the registration period through January 18, 2011. This extension is necessary to provide applicants more time to register for TPS.

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DATES: DHS designated Haiti for TPS on January 21, 2010. The registration period that was to expire on July 20, 2010, will be extended for 180 days, with a new filing deadline of January18, 2011.

Padilla v. Kentucky *continued*

> consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

Id. at 1485 (citation omitted). Thus, it appears that the majority believes that some, but not many, criminal aliens will retroactively challenge past convictions as a result of this decision. In addition to the reasons set forth by the Justices, the fact that many criminal aliens have already been deported is a significant block against such activity because of the inherent difficulties of fighting a past conviction from abroad.

Challenging Pre-Padilla Convictions While in Immigration Proceedings

After *Padilla*, criminal aliens may question the validity of their convictions in the context of removal proceedings. It is, however, well established that neither Immigration Judges nor the Board of Immigration Appeals can go behind the record of conviction to determine an alien's guilt or innocence. *See Paredes v. Att'y Gen. of U.S.*, 528 F.3d 196, 198 (3d Cir. 2008); *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999); *Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996); *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). *See generally* section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

The fact that a respondent may be pursuing post-conviction relief in the form of a collateral attack on his or her conviction in State criminal court does not affect the finality of the conviction for Federal immigration purposes. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). Thus, the *Padilla* decision notwithstanding, a respondent would have to present evidence that an attack on the conviction has resulted in a vacatur. Speculation that a conviction may be invalid does not change its finality for immigration purposes, unless and until it is overturned by a criminal court. *See Matter of Ponce De Leon*, 21 I&N Dec. 154 (A.G. 1997; BIA 1997, 1996).

Even if post-conviction relief has not yet been procured, a respondent may attempt to file a motion for continuance, postponement, or adjournment of a hearing in order to pursue such relief. *See* 8 C.F.R. §§ 1003.29, 1240.6 (2010). The decision to grant or deny a continuance is within the discretion of the Immigration Judge, and good cause must be shown for a continuance. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983); 8 C.F.R. § 1003.29. Thus, Immigration Judges will have to decide if the individual characteristics of a respondent's case warrant a continuance for post-conviction relief.

Conclusion

The Supreme Court's decision in *Padilla* explains that the Sixth Amendment guarantees criminal alien defendants the competent advice of an attorney regarding the immigration consequences of a guilty plea. The decision therefore transforms the scope and duties of criminal representation and adds an additional consideration to the plea-bargaining process. Immigration Judges can expect some respondents who entered guilty pleas prior to the *Padilla* decision to request continuances or adjournment of their immigration proceedings. Nevertheless, the *Padilla* decision does not change the well-established notion that for immigration purposes, a criminal conviction remains final unless and until it is overturned by a criminal court.

Micah N. Bump is the Attorney Advisor at the York, Pennsylvania, Immigration Court.