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Enchanted April: Love, Hope, and Section 212(c) All Spring Eternal *by Edward R. Grant and Patricia M. Allen*

The month of April, and in particular its final days, bore the air of enchantment. The confluence of the NFL lockout/injunction/draft imbroglio, Passover and Easter, the Royal Wedding, the beatification of a popular Pontiff, and, of course, the 117th Penn Relays, created memories sufficient to carry us through a languid summer. The summer, alas, is never languid in Immigration Court or at the Board. Several newly issued precedents—and the prospect of yet another Supreme Court decision on eligibility for relief under section 212(c) of the Immigration and Nationality Act—will help get us through our own June, July, and August.

Supreme Court: 15 Years Later, Section 212(c) Lives On

Among the cognoscenti, section 212(c) jokes have acquired the character of a stale Henny Youngman routine—two rim shots and a cymbal crash, please. How many times can we liken this 15-year deceased provision of the Act to Dracula or Freddy Kruger?

Prepare for yet one more sequel.

On April 18, 2011, the United States Supreme Court granted certiorari in *Judulang v. Holder*, 79 U.S.L.W. 3344, 79 U.S.L.W. 3585, 79 U.S.L.W. 3591, 2011 WL 1457529 (U.S. Apr. 18, 2011) (No. 10-694), to determine whether a lawful permanent resident ("LPR") with a conviction by guilty plea of an offense that renders him deportable, but not inadmissible, may seek relief under former section 212(c) of the Act. See *Matter of Brievea*, 23 I&N Dec. 766 (BIA 2005); *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), *rev'd sub nom. Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007); see also Sara J. Bergene, *The Current Status of Section 212(c): Considering Abebe v. Holder*, Immigration Law Advisor, Vol. 3, No. 11 (Nov. 2009).

The Court will address a three-way circuit split on the propriety of the holdings in *Blake* and *Brieva*: (1) the majority view upholding the Board's position that, to be waivable under section 212(c), an offense charged as a ground of deportability under section 237 of the Act must have a statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act, *see, e.g., Frederick v. Holder*, No. 09-2607, 2011 WL 1642811 (7th Cir. May 3, 2011); *De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010); *Koussan v. Holder*, 556 F.3d 403, 412-14 (6th Cir. 2009); *Vue v. Gonzales*, 496 F.3d 858, 860-62 (8th Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363, 371-72 (5th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3d Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); (2) the dissenting view of the Second Circuit in *Blake v. Carbone*, 489 F.3d 88; and (3) the distinctive view of the Ninth Circuit, holding that *no* deportable aliens are eligible for section 212(c), *Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam), *cert. denied*, 130 S. Ct. 3272 (2010).

The petitioner, Joel Judulang, entered the United States when he was 8 years old and, apart from one short visit to attend his grandmother's funeral in the Philippines more than 20 years ago, has been continuously present for the past 36 years. In 1988, he pled guilty to voluntary manslaughter under California Penal Code § 192(a) after having been charged as an accessory. For this offense, he received a suspended sentence of 6 years and was released on probation. In 2005, he was placed in removal proceedings, was found removable for having been convicted of a crime of violence, and was found ineligible for all forms of relief. The Board affirmed, holding on the basis of *Blake* and *Brieva* that because Judulang's offense qualified as a crime of violence, it has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act. The Ninth Circuit denied Mr. Judulang's petition for review, following its panel decision in *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007), which had adopted the Board's statutory counterpart approach. Judulang later filed a petition for rehearing and rehearing en banc, which was denied in 2010; it is this denial that is the basis for the now-granted petition for certiorari.

Judulang, not surprisingly, urges the Court to adopt the approach of the Second Circuit, asserting that *Blake* and *Brieva* amounted to a "novel and unprecedented reinterpretation" of the statutory counterpart test

"ostensibly based" on the 2004 regulation designed to implement the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). Petition for Writ of Certiorari, *Judulang*, 2011 WL 4852442, at *17 (No. 10-694). Rather than implement *St. Cyr*, the regulation and the 2005 Board precedents expanded the scope of the statutory counterpart test—which had previously barred from section 212(c) eligibility only those deportable aliens charged with firearms offenses—and resurrected the "arbitrary and capricious distinction" between LPRs who have remained in the United States and thus can be charged only on deportation grounds (those specified in section 237(a) of the Act), and those LPRs who have traveled abroad and, upon their return, are charged with a ground of inadmissibility under section 212(a). *Id.* This distinction, the petitioner contends, was rejected by the Second Circuit in 1976, *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), and since then by the Board when it acquiesced to *Francis*. Redirecting his fire to the Ninth Circuit, the petitioner lambastes *Abebe v. Mukasey* as "a fractured en banc ruling that overturned more than a quarter-century of Circuit precedent" and noted that seven judges dissented from the court's denial of rehearing en banc. Petition, *supra*, at *13.

By granting certiorari, the Court reenters the morass that Congress sought to drain in 1996 by unifying relief for LPRs under the banner of cancellation of removal. Section 240A(a) of the Act, 8 U.S.C. § 1229b(a); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-594 ("IIRIRA"). Aggravated felons, of course, are not eligible for this form of relief—hence the impetus to breathe life into section 212(c), despite its repeal by IIRIRA. *INS v. St. Cyr* established that LPRs who pled guilty to deportable offenses before the amendment of section 212(c)'s eligibility standards on April 24, 1996, and its ultimate repeal on September 30, 1996, remained eligible to apply for relief under the "old" standards of eligibility. Several circuit courts have taken this further, concluding, as did the Ninth Circuit just recently, that any alien in *deportation* proceedings is eligible to obtain a section 212(c) waiver, even for crimes committed after proceedings were commenced and after section 212(c) was repealed. *See Pascua v. Holder*, Nos. 08-71636, 08-72705, 2011 WL 1024434 (9th Cir. Mar. 23, 2011); *Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 408-09 (5th Cir. 2010); *Garcia-Padron v. Holder*, 558 F.3d 196, 201-04 (2d Cir. 2009). The rationale for these

decisions is that a key provision of the 2004 regulations implementing *St. Cyr* applied only to post-IIRIRA removal proceedings. See *Pascua v. Holder*, 2011 WL 1024434, at *3 (“Section 212(c) relief is not available with respect to convictions arising from plea agreements made on or after April 1, 1997,” the effective date of IIRIRA.); 8 C.F.R. § 1212.3(h)(3).

These decisions from the Second, Fifth, and Ninth Circuits point to one direction that the Court may follow—to conclude that the rule in *St. Cyr* applies not merely to those who pled guilty to crimes before the amendment and ultimate repeal of section 212(c), but to anyone placed in deportation proceedings before that repeal, regardless of their date of plea or conviction. This potential resolution, however, is not a clear match to the issue most directly before the Court—for what grounds of deportability (if any) is section 212(c) available. The petitioner contends that prior to the 2004 regulations, the Board generally recognized a “fit” between the 237(a)(2) grounds of deportability and the section 212(a) grounds of inadmissibility. At one time, this “fit” was more evident—the predominant criminal grounds for both inadmissibility and deportability were controlled substance offenses (including trafficking) and crimes involving moral turpitude.

Beginning in the late 1980s, the concept of “aggravated felony” emerged, but solely as a ground of deportability. The aggravated felony ground expanded, as did the importance of other new grounds of deportability such as domestic violence, also without a specific counterpart in section 212(a). The petitioner’s contention that *Blake* and *Brieva* represented a clear break with the past may not fully take into account that the easy “fit” between grounds of deportability and inadmissibility (with the exception of firearms offenses) has eroded over time, and that beginning shortly after the expansion of the list of aggravated felonies in the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, and the IIRIRA, the Board was forced to confront the question of “statutory counterparts” in a new legal environment. See, e.g., *Matter of Jiminez*, 21 I&N Dec. 567 (BIA 1996) (rejecting a claim that the deportation ground for conviction of passport or visa fraud is not comparable to the general inadmissibility ground for fraud, because it involves more specific and serious conduct).

The petitioner is likely to have an easier—perhaps even uncontested—path to persuade the Court to reject the Ninth Circuit’s ruling in *Abebe*. The Board concluded in *Matter of Moreno-Escobosa*, 25 I&N Dec. 114 (BIA 2009), that it must follow the regulations and reject the Ninth Circuit’s holding that section 212(c) is unavailable to waive any ground of deportability. This conclusion was urged on the Board not only by the respondent, but also by the DHS. *Id.* at 116. Assuming that this remains DHS’s position, it may likewise be the position of the Government in *Judulang*.

Oral argument, and a decision, will have to await the October 2011 Term. We have waited for the final word on section 212(c) for 15 years—a wait of a few more months is a mere trifle.

Supreme Court: No Ruling on the Suppression of Identity

Our last issue analyzed recent cases on the suppression of evidence and offered the possibility that the Supreme Court might clarify the issue in a case recently submitted on oral argument. See *People v. Tolentino*, 926 N.E. 2d 1212 (N.Y. 2010), *cert. granted*, *Tolentino v. New York*, 131 S. Ct. 595 (U.S. Nov. 15, 2010) (No. 09-11556). Alas, just days before final publication, the Court dismissed the writ of certiorari as improvidently granted. *Tolentino v. New York*, 131 S. Ct. 1387 (U.S. Mar. 29, 2011) (No. 09-11556). Our apologies for missing this post-editorial ruling.

The Ninth Circuit: An April Shower of Rulings

Consistent with the old adage, the Ninth Circuit has showered us this April with several published decisions addressing core issues relating to eligibility for asylum and protection under the Convention Against Torture. The court addressed the changed circumstances exception to late filing of an asylum application, *Vahora v. Holder*, No. 08-71618, 2011 WL 1238010 (9th Cir. Apr. 5, 2011); whether mistreatment that occurred in the United States may constitute persecution to support a well-founded fear, *Gonzalez-Medina v. Holder*, No. 10-70913, 2011 WL 1313026 (9th Cir. Apr. 7, 2011); the burden of proof on the petitioner to demonstrate a government’s unwillingness or inability to control his attackers where he did not go to the police for assistance, *Castro-Martinez v. Holder*, No. 08-70343, 2011 WL 1441859 (9th Cir.

Apr. 15, 2011); and exceptional circumstances excusing an alien's failure to appear, *Vukmirovic v. Holder*, No. 05-75936, 2011 WL 1318967 (9th Cir. Apr. 6, 2011), *vacating* 621 F.3d 1043 (9th Cir. 2010).

A little more than 18 months after he entered the United States, the petitioner in *Vahora v. Holder*, 2011 WL 1238010, filed an affirmative application for asylum, withholding of removal, and protection under the Convention Against Torture. The Immigration Judge was unconvinced by his argument that changed circumstances excused his tardiness and denied his application for asylum as time-barred. On remand from the Board, the Immigration Judge affirmed this holding but granted the petitioner withholding of removal and protection under the Convention Against Torture. The Ninth Circuit took a different view on the asylum determination and remanded to the Board to consider the merits of the petitioner's asylum application in the first instance.

The main issue in *Vahora* stemmed from the petitioner's asylum claim, based on events occurring both before he left his native India and after he had been living in the United States. Although the petitioner endured three incidents of harassment and beatings by both the police and private citizens because of his religion, he did not apply for asylum within 1 year of his arrival in the United States. The petitioner explains that he did not apply for asylum until conditions in India had deteriorated to the extent that he no longer wished to return. In fact, the petitioner testified that although he feared return to India, "he was not thinking of seeking asylum when he entered the United States." *Vahora*, 2011 WL 1238010, at *2. The Ninth Circuit determined that the Immigration Judge and the Board were incorrect to require the petitioner "to show that, prior to the change in circumstances, [he] could not have filed a meritorious application, and that the change in circumstance resulted in an application that could succeed." *Id.* at *5. The court acknowledged that "[t]he desire to wait for an asylum claim to mature is entirely consistent with a reluctance to abandon one's homeland until conditions at home become substantially more dangerous." *Id.* at *6.

The court stated that Congress did not intend such a "narrow interpretation" but rather intended the exceptions to the 1-year bar to ferret out fraudulent asylum claims while continuing to ensure "that those with legitimate claims for asylum are not returned to

persecution, particularly for technical deficiencies." *Id.* at *5-6. The court also recognized that although the petitioner's asylum claim may have been strong, it might not have been granted in light of a "broad variance in grant rates" among Immigration Judges and asylum officers, as reported in the article, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 333-39 (2007). *Id.* at *6. The court stressed that "applicants should not be required prematurely to take a risk that their applications will be denied." *Id.* at *7.

The petitioner's claim of changed circumstances involved religion-based "attacks on his family home and the arrest and disappearance of one brother and the flight into hiding of the other brother," all occurring within a few months of the respondent's application for asylum. *Id.* The court determined that these experiences constitute changed circumstances qualifying the petitioner for the exception to the 1-year bar, notwithstanding his previous possible eligibility upon entering the United States. Moreover, contrary to the Government's contention, the court held that the time period of 2 months that elapsed between these events and the petitioner's filing for asylum was a "reasonable" period of time, because he had to "ascertain what had happened to his family property and his brothers, to decide whether to remain in the United States, and to consult with an attorney." *Id.*

The petitioner in *Gonzalez-Medina v. Holder*, 2011 WL 1313026, also was confronted with the hurdle of the 1-year filing deadline, having waited 6 years after entry to file her application. She claimed that the 1-year deadline violates the Equal Protection Clause and that incidents of past persecution occurring *in the United States* established a well-founded fear of persecution should she be removed to Mexico. The Ninth Circuit quickly disposed of the first claim, finding that she did not identify a suspect class or show that the discriminatory treatment she alleges lacked a rational basis.

In support of her claim, the petitioner asserted that during the 6 years that she lived in the United States before she filed for asylum, she was physically abused by her husband. Only after her husband was deported to Mexico for selling drugs did she file for asylum, basing her claim on fear of encountering her husband in Mexico and again suffering his abuse. Although the Ninth Circuit recognized that the provisions in the Act "do not establish *where* past persecution may occur,"

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR MARCH 2011

by John Guendelsberger

The United States courts of appeals issued 460 decisions in March 2011 in cases appealed from the Board. The courts affirmed the Board in 412 cases and reversed or remanded in 48, for an overall reversal rate of 10.4% compared to last month's 12.3%. There were no reversals from the Fourth, Sixth, and Eighth Circuits.

The chart below shows the results from each circuit for March 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	0	1	100.0
Second	27	24	3	11.1
Third	31	29	2	6.5
Fourth	15	15	0	0.0
Fifth	13	12	1	7.7
Sixth	6	6	0	0.0
Seventh	7	6	1	14.3
Eighth	5	5	0	0.0
Ninth	329	292	37	11.2
Tenth	4	3	1	25.0
Eleventh	22	20	2	9.1
All	460	412	48	10.4

The 460 decisions included 205 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 111 direct appeals from denials of other forms of relief from removal or from findings of removal; and 144 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	205	179	26	12.7
Other Relief	111	96	15	13.5
Motions	144	137	7	4.9

Of the 26 reversals or remands in asylum cases, 18 were from the Ninth Circuit. These cases involved remand for disfavored group analysis in six Indonesian

cases; past persecution (three cases); internal relocation possibilities (three cases); credibility (three cases); nexus, firm resettlement, and humanitarian asylum (one each).

Of the 15 reversals in the "other relief" category, 14 were from the Ninth Circuit. These covered a variety of issues, including five reversals of removal orders based on pre-November 18, 1988, aggravated felony convictions under *Ledezma-Galicia v. Holder*, 599 F.3d 1055 (9th Cir. 2010). They also addressed aggravated felony crimes of violence and sexual abuse of a minor, section 212(c) eligibility, and failure to fully consider relevant evidence or arguments for cancellation hardship, adjustment of status, and a continuance request.

Of the seven reversals involving motions, six were from the Ninth Circuit. These addressed ineffective assistance of counsel (three cases), as well as rescission of an in absentia order of removal for lack of notice and failure to fully address section 212(c) eligibility. The Eleventh Circuit reversed a motion to reopen denial based on changed country conditions.

The chart below shows the combined numbers from January through March 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
First	7	5	2	28.6
Tenth	9	7	2	22.2
Ninth	578	492	86	14.9
Third	69	62	7	10.1
Eleventh	55	50	5	9.1
Fourth	34	31	3	8.8
Sixth	24	22	2	8.3
Seventh	15	14	1	6.7
Fifth	46	43	3	6.5
Second	153	148	5	3.3
Eighth	8	8	0	0.0
All	998	882	116	11.6

Last year's reversal rate at this point (January through March 2010) was 8.9%, with 1126 total decisions and 100 reversals.

The numbers by type of case on appeal for the first 3 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	508	459	49	9.6
Other Relief	232	188	44	19.0
Motions	258	235	23	8.9

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The Convention Against Torture and Acquiescence: Willful Blindness or Willful Awareness?

by Brea C. Burgie

Introduction

Pursuant to Article III of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), the United States may not remove a respondent to a country where it is "more likely than not" that he or she would be "tortured." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8489, 8890-92 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 1208.16(c), 1208.18 (2003)). "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" to obtain a confession, for punishment, for intimidation or coercion, or "for any reason based on discrimination of any kind." 8 C.F.R. § 1208.18(a)(1). Such acts of torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.*

The regulations require that a "public official, prior to the activity constituting torture, have awareness

of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). When ratifying the Convention Against Torture, the Senate Committee on Foreign Relations noted that it was seeking "to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.'" S. Exec. Rep. No. 101-30 at 9 (1990). This was confirmed by the United States Department of State in its transmission of the Convention Against Torture to the Senate for ratification, which noted that "the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in United States law, it applies to torture inflicted 'under the color of law.'" *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001) (quoting the Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 4 (1988)).

Initially, the Board of Immigration Appeals applied a narrow interpretation of the term "acquiescence" that has since been expanded by the majority of Federal circuit courts. This article will examine the development of the interpretations by the Board, the Attorney General, and the Federal circuit courts of the term "acquiescence" in the CAT context, updating and expanding upon our previous 2007 article. *See* Teresa Donovan, *The Convention Against Torture: When does a Public Official Acquiesce to Torture Committed by a Third Party?*, Immigration Law Advisor, Vol. 1, No. 3 (Mar. 2007).

Acquiescence: Willful Blindness or Willful Awareness?

Board and Attorney General Precedent

In *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000), the Board issued its first precedent decision dealing with the "acquiescence" of a public official or person acting in official capacity. The respondent, a native and citizen of Colombia, applied for protection under the CAT because of "danger from nongovernmental guerrilla, narcotrafficking, and paramilitary groups in Colombia." *Id.* at 1307. The respondent argued that after the Colombian Government's land concession to the guerrillas, the Government could no longer protect its

citizens from kidnappings that were occurring country-wide. The respondent feared that he would be targeted because of his family connections in the United States and his inability to speak fluent Spanish. He alleged that if kidnapped, he would be forced to suffer “subhuman conditions” while in captivity. *Id.* In addition to his own testimony, the respondent submitted reports from the Department of State and newspaper articles detailing the kidnappings and the ongoing civil war in the country.

The Board first noted that the respondent did not allege that he would be tortured by the Colombian Government. Instead, he contended that the torture would be conducted by the guerrillas, which required a demonstration that the torture was “at the instigation of or with the consent or acquiescence of” Colombian officials or persons acting in an official capacity.” *Id.* at 1311 (quoting 8 C.F.R. § 208.18(a)(1)). The Board reviewed the provision of the regulation, stating that a “public official’s acquiescence to torture ‘requires that the public official, prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.’” *Id.* at 1311 (quoting 8 C.F.R. § 208.18(a)(7)) (emphasis added). It then noted that when ratifying the treaty, the United States Senate had included an understanding that added the word “awareness” in the place of “knowledge” in this provision. This was meant to “indicat[e] that actual knowledge of activity constituting torture is not required” and “that both actual knowledge and ‘willful blindness’ fall within the definition of ‘acquiescence.’” *Id.* at 1312. The Board concluded that the Senate intended this substitution to be “limiting” and consequently required that “the respondent do more than show that the officials are aware of the activity constituting torture but are powerless to stop it.” *Id.* Instead, the respondent had to show that the governmental officials “are *willfully accepting* of the . . . torturous activities.” *Id.* (emphasis added).

Two years later, the Attorney General expounded upon *Matter of S-V* in *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). This case dealt with three respondents who were only eligible for CAT protection after the Attorney General found that they had been convicted of “particularly serious crimes.” Agreeing with the Board’s definition of acquiescence from *Matter of S-V*, the Attorney General expanded it further, writing that “[t]he relevant inquiry under the Convention

Against Torture . . . is whether governmental authorities would *approve or ‘willfully accept’* atrocities committed against persons in the respondent’s position.” *Id.* at 283 (emphasis added). In denying the respondent’s CAT claim, the Attorney General stated that the respondent had not proved that “*current government officials acting in an official capacity* would be responsible for such abuse.” *Id.* at 280. Acknowledging evidence in the record that there was “corruption and brutality” within the Jamaican police, the Attorney General also noted that the Jamaican Government had taken “substantial efforts at reform.” *Id.* at 282. As he explained, “To suggest that this standard can be met by evidence of isolated rogue agents engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction’s laws and policies, but are committed despite authorities’ best efforts to root out such misconduct,” would be to “empty the Convention’s volitional requirement of all rational meaning.” *Id.* at 283.

Reaction to Matter of S-V- and Matter of Y-L-, A-G- & R-S-R- by the Circuit Courts

The United States Court of Appeals for the Ninth Circuit rejected the Board’s and the Attorney General’s “willful acceptance” definition the next year. *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). The court reviewed the Board’s determination that the respondent in *Zheng*, who claimed to fear torture by Chinese smugglers or “snakeheads” because he had offered evidence against them to the United States Government, was not protected by the CAT because the Chinese Government was not willfully accepting of the torture. The court analyzed the Senate’s understandings that were drafted during ratification of the CAT and found that the Senate had explicitly rejected the interpretations of the Board and the Attorney General. Instead, the court concluded that the “clearly expressed congressional intent . . . require[s] only ‘awareness,’ not “‘actual knowledge’ or ‘willful[] accept[ance]’ in the definition of acquiescence.” *Id.* at 1189.

Zheng follows a number of cases from the Ninth Circuit that required a lesser form of state interaction than the Board or Attorney General had mandated in *Matter of S-V-* or *Matter of Y-L-, A-G- & R-S-R-*. For example, the court held in *Ochoa v. Gonzales*, 406 F.3d 1166, 1172 (9th Cir. 2005), that a respondent “need only prove the government is aware of a third party’s

torturous activity and does nothing to intervene to prevent it.” Similarly, in *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006), the court had stated, “It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.”

In 2004, the Second Circuit joined the Ninth Circuit and issued *Khouzam v. Ashcroft*, 361 F.3d 161 (2nd Cir. 2004), which expressly disapproved of *Matter of Y-L-, A-G- & R-S-R-*. The respondent in *Khouzam* alleged that he had been charged with murder by Egyptian authorities and would be tortured to extract a confession upon return to that country. The Board rejected the respondent’s appeal, and the Government argued on appeal to the Second Circuit that the police would not be acting within their official capacities or under official direction when committing torture. Citing *Zheng*, the Second Circuit rejected the willful acceptance of torture standard. It also addressed the Senate’s understandings of the CAT and found that the changes noted by the Board in *Matter of S-V-*, namely that “knowledge” had been substituted for “awareness” in the phrase “public officials . . . have awareness of [torturous] activity,” were not meant to be limiting but were “intended to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence.’” *Id.* at 170-71. It found further support in the drafting history of the Convention itself, noting that the Swedish draft had required that torture be performed with the “consent or approval” of the government, while the United States suggested that the language be broadened to include merely the “acquiescence” of the state. *Id.* at 171. Thus, the Second Circuit determined that “the [Board] and Attorney General have erred in adding a requirement of official ‘consent or approval’” to the requirements of the CAT. *Id.*

Most other jurisdictions have followed the Second and Ninth Circuits. First, the Tenth Circuit issued *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005), which quoted *Zheng* with approval. “Congress made its intent clear that actual knowledge, or willful acceptance, is not required for a government to ‘acquiesce’ to the torture of its citizens.” *Id.* at 1192 (quoting *Zheng*, 332 F.3d at 1193) (internal quotation marks omitted). Next, the Sixth Circuit issued *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006), which “explicitly [held] that . . . [*Matter of S-V-* was manifestly contrary to the law,” and thus

that “‘willful blindness’ falls within the definition of ‘acquiescence.’”¹

In 2007, the Third Circuit recognized the general trend of the other circuits in *Silva-Rengifo v. Attorney General of United States*, 473 F.3d 58, 65 (3d Cir. 2007), where it stated, “We cannot accept the Board’s conclusion that the acquiescence that must be established under the CAT requires actual knowledge of torturous activity as required in *Matter of S-V-*.” Further, “The CAT does not require an alien to prove that the government in question approves of torture, or that it consents to it,” but rather that “an alien can satisfy the burden established for CAT relief by producing sufficient evidence that the government in question is willfully blind to such activities.” *Id.* (citing *Zheng*, 332 F.3d at 1194). The court found that in the case at bar, in addition to the Colombian Government possibly engaging in torture itself, “the record establishes that Silva-Rengifo produced evidence that may support a finding that the Colombian government is in a collusive relationship with certain groups that engage in torture.” *Id.* at 69. It concluded that “[e]vidence that officials turn a blind eye to certain groups’ torturous conduct is . . . probative of government acquiescence.” *Id.* at 70.

The Third Circuit elaborated on this holding in *Valdiviezo-Galdamez v. Attorney General of United States*, 502 F.3d 285, 293 (3d Cir. 2007). There, the respondent had fled Honduras after receiving death threats from gang members when he refused to join the gang. He was attacked twice and kidnapped, tied, and beaten. He reported all of the incidents to the police, but “[t]he police would always tell [him] that they were in process, that they were investigating.” *Id.* at 287. Ultimately, the police were unable to do anything to help the respondent. The Third Circuit found that the Immigration Judge “failed to note that the police ignored five reports filed by Galdamez concerning violence and threats by gang members.” *Id.* at 293. It stated that “[t]his could arguably constitute government ‘acquiescence’ to torture as we now know it.” *Id.* It further noted that it had previously rejected *Matter of S-V-* and stated that “acquiescence to torture requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it.” *Id.* (quoting *Silva-Rengifo*, 473 F.3d at 70) (internal quotation marks omitted).

With *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010), issued in 2010, the Fifth Circuit was the latest to overrule the “willful awareness” standard. The case

involved an Israeli citizen who was Greek Orthodox Christian and claimed that he would be tortured by his Muslim neighbors, with the requisite acquiescence of government officials, if he were removed to Israel. The court rejected the Government's argument that it had previously upheld a standard similar to that in *Matter of S-V* and stated, "Accordingly, we agree with our sister circuits in finding that the standard articulated in *Matter of S-V* does not include the willful blindness standard required for CAT protection." *Id.* at 156-57. Therefore, the court found that requiring proof that government officials "willfully accept[]" torture was improper and it remanded the case to the Board for further proceedings consistent with the "willful blindness" standard it had articulated for acquiescence. *Id.* at 157.

Two other interesting cases in which the court considered claims for protection from torture committed by nongovernmental actors are *Aguilar-Ramos v. Holder*, 594 F.3d 701 (9th Cir. 2010), and *Ali v. Reno*, 237 F.3d 591. In *Aguilar-Ramos*, the Ninth Circuit addressed violence by gangs in El Salvador. The petitioner claimed that he feared torture or death at the hands of gangs or the police because of his tattoos and status as a deportee from the United States. *Id.* Reviewing the denial of his applications, the court reiterated its holding in *Zheng* and found that the Board had "erred by construing 'government acquiescence' too narrowly." *Id.* at 705. The court restated that acquiescence "does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice." *Id.* at 705-06. It further noted, "There is evidence in the record that suggests that gangs and death squads operate in El Salvador, and that its government is aware of and willfully blind to their existence." *Id.* at 706. The court ultimately remanded the case for the Board to reexamine the country condition reports and to apply the "appropriate 'awareness and willful blindness' standard to determine whether the government acquiesced in torture." *Id.*

In *Ali v. Reno*, the Sixth Circuit addressed willful blindness in the context of domestic violence. The Sixth Circuit rejected the petitioner's claim for asylum based on domestic violence she feared at the hands of her father and brothers. Because the "Danish police did not breach its 'legal responsibility to intervene to prevent' torture," the court upheld the Board's CAT denial. *Id.* at 598 (quoting 8 C.F.R. § 208.18(a)(7)). The court found that the Danish

police had arrested and incarcerated the individuals who had harmed the petitioner, as well as offered to warn her father and brothers not to harm her, and decided that the Danish Government's "inability to control the activities" of the petitioners family "stem[med] simply from [her] refusal to allow punishment of her brothers." *Id.* (quoting the Board's decision). It noted, however, that under different circumstances, such as a "situation in which the authorities ignore or consent to severe domestic violence, the Convention appears to compel protection for a victim." *Id.*

The major exception to the general trend among the courts is the First Circuit, which has implicitly approved of *Matter of S-V* and *Matter of Y-L, A-G- & R-S-R*. For example, in *Kasneci v. Gonzales*, 415 F.3d 202, 205 (1st Cir. 2005), the First Circuit held that "[g]iven that the IJ found no link between the attacks and the attackers' alleged political or government affiliations, substantial evidence clearly supports the finding that Kasneci did not show that the attacks were carried out by or with the acquiescence of a public official." It based its decision on the principle that "[t]o fall within the ambit of CAT protection, any alleged torture must be 'with the consent or acquiescence of a public official.'" *Id.* (quoting *Elien*, 364 F.3d 392, 398 (1st Cir. 2004)).

Conclusion

With the exception of the First Circuit, the majority of circuit courts have agreed with the Ninth and Second Circuits that the term "acquiescence" encompasses "willful blindness" on the part of the government but does not necessitate "willful acceptance" of torture. In so finding, those courts have rejected the standard articulated by the Board in *Matter of S-V* and the Attorney General *Matter of Y-L, A-G- & R-S-R*. Therefore, claims where the respondent alleges torture at the hands of private individuals, but where the government acquiesces to the torture by turning a blind eye, or is aware but unable or unwilling to intervene in the torture, may generally find support in the established case law in their jurisdiction. This may have particular significance in cases where the respondent has fled domestic violence or violence at the hands of organized crime, such as drug cartels or criminal gangs, and the government turns a blind eye to the torture that these private parties would inflict if the respondent was returned to his or her country of origin.

1. The Fourth Circuit issued *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004), which stated that “awareness includes both actual knowledge and willful blindness.” *Id.* at 240 (quoting *Zheng*, 332 F.3d at 1194). This decision was withdrawn a year later after settlement between the parties.

RECENT COURT OPINIONS

Third Circuit:

Pllumi v. Att’y Gen. of U.S., No. 09-4454, 2011 WL 1278741 (3d Cir. Apr. 6, 2011): The Third Circuit remanded the record to the Board after considering the petition for review of the Board’s denial of a motion for sua sponte reopening filed by an Albanian asylum seeker. In 2007, the Board upheld an Immigration Judge’s denial of asylum. More than 2 years later, the petitioner filed a motion with the Board claiming entitlement to asylum on humanitarian grounds. Specifically, the petitioner argued that substandard medical care in Albania would cause him “other serious harm” because of serious injuries he had sustained in an automobile accident in the United States. The court noted that although it lacked jurisdiction to review a Board decision denying sua sponte reopening, it could nevertheless point out an error of law to the Board, noting that the latter would then be free to grant or deny the motion. The court focused on the statement in the Board’s decision that the petitioner’s health care concerns in Albania “are not relevant to his persecution claim.” The court found that this statement could be interpreted as the Board expressing its belief that it lacked jurisdiction to reopen an asylum case based on medical conditions in the home country. The court noted, however, that 8 C.F.R. § 1208.13(b)(1)(iii)(A) permits a grant of “humanitarian asylum” to an applicant who has suffered past persecution but lacks a fear of future persecution, where the applicant may suffer “other serious harm” on return to his country. Given that the court had previously cited to a Seventh Circuit decision indicating that the absence of medical care may constitute “other serious harm,” the matter was remanded for the Board to consider this possibility.

Fifth Circuit:

Ramos-Torres v. Holder, No. 09-60862, 2011 WL 1226963 (5th Cir. Apr. 4, 2011): The Fifth Circuit upheld an Immigration Judge’s order of removal, which was affirmed by the Board. On appeal, the petitioner challenged the

Immigration Judge’s determination that the petitioner was ineligible for cancellation of removal because he had not been eligible for the lawful permanent resident (“LPR”) status that he had obtained in 1993. The petitioner first entered the United States in 1980, but he departed in March 1982 pursuant to a grant of voluntary departure in lieu of deportation following his conviction for unlawful entry. He soon reentered the United States and obtained LPR status in 1993 under the legalization provisions of the Immigration Reform and Control Act of 1986 (“IRCA”). After a 2006 conviction for illegally transporting aliens, the petitioner was placed into removal proceedings. The Immigration Judge found that the 1982 departure had broken the petitioner’s continuous residence in the United States. Therefore, he found that the petitioner was not eligible for the temporary resident status he subsequently obtained under the legalization provisions of the IRCA or for the LPR status he later derived. On appeal, the petitioner argued that his voluntary departure under the threat of deportation was distinguishable from a departure under an order of deportation, which by statute breaks the period of continuous residence. The court disagreed, finding the circumstances of the petitioner’s departure distinguishable from the case law examples cited by the petitioner. Although the petitioner stated that Congress intended the legalization provisions to be generously construed, the court found that the statute allowed waivers only for absences involving “brief, temporary trip[s] abroad required by emergency or extenuating circumstances.” The court concluded that the petitioner’s departure did not satisfy these requirements.

Seventh Circuit:

Barma v. Holder, No. 09-4135, 2011 WL 1237608 (7th Cir. Apr. 5, 2011): The Seventh Circuit denied the petition for review of a decision of the Board, upholding an Immigration Judge’s order of removal based on the petitioner’s conviction for possession of drug paraphernalia, which the Board held to be a crime relating to a controlled substance under section 237(a)(2)(B)(i) of the Act. The Board thus found the petitioner to be ineligible for the relief of cancellation of removal and rejected his argument that he should be eligible to apply for a waiver under section 212(h) of the Act, holding that the cancellation of removal statute did not incorporate that waiver provision. On appeal, the petitioner argued that the statutory language concerning eligibility for cancellation of removal, which renders one ineligible if convicted of certain crimes listed under section 212(a)(2) of the Act, should be read to incorporate

all of section 212, including the waiver provision of section 212(h). The court rejected this argument as being inconsistent with the plain language of the statute, which does not reference section 212 as a whole, but rather one distinct subsection, 212(a)(2).

Ninth Circuit:

Gonzalez-Medina v. Holder, No. 10-70913, 2011 WL 1313026 (9th Cir. Apr. 7, 2011): The Ninth Circuit denied the petition for review of an Immigration Judge's denial of asylum and withholding of removal to Mexico, which was affirmed by the Board. The petitioner, who entered the United States in January 2001, based her claim on domestic abuse that she suffered in the United States at the hands of her husband, who had been deported to Mexico in 2006. The Immigration Judge denied the asylum claim (which was filed more than 6 years after the petitioner's arrival) as untimely. The Board additionally held that the petitioner did not suffer past persecution, which under 8 C.F.R. § 1208.16(b)(1)(i) must have occurred in the proposed country of removal. The court granted *Chevron* deference to this regulatory construct. The court further rejected the petitioner's claim that the 1-year filing deadline, as interpreted by the Board in *Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008), constituted an equal protection clause violation. The court additionally upheld the Board's ruling that the petitioner failed to meet her burden of proof for withholding of removal because she did not establish that she could not reasonably avoid persecution at the hands of her husband by relocating within the country.

Reyes-Torres v. Holder, Nos. 08-74452, 09-70214, 2011 WL 1312570 (9th Cir. Apr. 7, 2011): The Ninth Circuit granted the petition for review of an order of the Board denying the motion to reconsider filed by a removed alien. An Immigration Judge had found that the petitioner's 1983 conviction for alien transportation was for an aggravated felony, making him ineligible for cancellation of removal. In light of that finding and the petitioner's concession of removability on a 2007 controlled substance conviction, he was ordered removed. The Board affirmed on September 26, 2008. The petitioner was removed from the U.S. a week later. However, on October 22, 2008, the State court vacated the drug conviction, after which the petitioner filed a motion to reconsider and reopen proceedings with the Board. Finding that it lacked jurisdiction following the petitioner's removal, the Board denied the motion. On appeal, the court held that, consistent with the other provisions of the IIRIRA, the physical removal of an alien

did not preclude him from pursuing a motion to reopen, citing its earlier decision in *Coyt v. Holder*. The court further concluded that because the petitioner's conviction for alien transportation occurred before 1988, it could not be for an aggravated felony. It additionally ruled that because the 2007 guilty plea was vacated, it could no longer serve as a basis for removability. The record was thus remanded to the Board to determine in the first instance whether the conviction was vacated for reasons related to the petitioner's immigration status. The court noted that the burden of proof was on the Government to establish that the State court's rationale in vacating was solely for rehabilitative reasons or reasons relating to the petitioner's immigration status. There was one dissenting opinion.

Garfias-Rodriguez v. Holder, No. 09-72603, 2011 WL 1346960 (9th Cir. Apr. 11, 2011): The Ninth Circuit denied the petition for review of the Board's order of removal. The petitioner had applied for adjustment of status under the provisions of section 245(i) of the Act. However, the Immigration Judge found him ineligible for that relief, because the petitioner had reentered the United States without inspection after a previous period of unlawful presence of over 1 year. The Immigration Judge thus found the petitioner inadmissible under section 212(a)(9)(C)(i)(I) of the Act, for which no waiver was available. Although the Board had initially remanded the decision in light of the Ninth Circuit's decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), it subsequently upheld the Immigration Judge's decision in reliance on the intervening Board precedent decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). The court rejected the petitioner's argument that its holding in *Acosta* should take precedence over the Board's holding in *Briones*. Instead, the court granted the latter *Chevron* deference. It further found the petitioner's objection to the retroactive application of *Briones* to be unpersuasive because the decision did not constitute the implementation of a new policy or rule, but rather a statutory interpretation that happened to be at odds with the court's prior interpretation. Lastly, the court held that it lacked the equitable authority to stay the voluntary departure period, which terminated automatically under 8 C.F.R. § 1240.26(i) upon the filing of the petition for review, and found that the Attorney General had the authority to issue that regulation.

Castro-Martinez v. Holder, No. 08-70343, 2011 WL 1441859 (9th Cir. Apr. 15, 2011): The Ninth Circuit

upheld an Immigration Judge's denial of asylum from Mexico, which had been affirmed by the Board. The petitioner based his claim on his membership in a particular social group, in this case, homosexual men. He said that he had suffered past persecution in Mexico as a child when he was brutally raped by teenagers, whose threats caused him to not report the incident to anyone. He further expressed a fear of future persecution if returned to Mexico based on evidence of societal discrimination of gay men, including attacks by police. He lastly claimed that he would suffer harm because he is HIV positive and stated that necessary medication would not be available to him in Mexico because of discrimination against homosexuals. The court recognized the horrendous harm suffered by the petitioner as a child but found that while the attackers' threats may have caused the petitioner to not report the incident, the test is whether, if reported, the government would have been unwilling or unable to control the attackers. The court upheld the Board's conclusion that the petitioner failed to establish that reporting the incident to the authorities would have been futile. The court further ruled that the record did not compel the conclusion that a "pattern or practice" of persecution of homosexual men exists in Mexico, particularly where country reports indicated official efforts to prevent such treatment of homosexuals. Lastly, the court found that the petitioner failed to establish that the lack of HIV treatment available in Mexico was "on account" of membership in a particular social group, because the record indicated that the problem affected the Mexican population as a whole and was the result of the high cost of the drugs, the lack of health insurance by the poor and unemployed, and government mismanagement. The petition was accordingly denied.

BIA PRECEDENT DECISIONS

In *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011), the Board considered whether the respondent's conduct as a platoon leader in the special police brigade for the Republic of Srpska during the Bosnian War constituted assisting or otherwise participating in extrajudicial killing under section 212(a)(3)(E)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(E)(iii). The respondent, a native and citizen of Bosnia-Herzegovina, was admitted to the United States in 1999 as a refugee. In 2002, he adjusted his status to that of a lawful permanent resident of the United States. On March 4, 2008, the respondent was charged under section 237(a)(1)(A) of the Act,

8 U.S.C. § 1227(a)(1)(A), as being inadmissible at the time of entry or adjustment of status under section 212(a)(6)(C) of the Act because of his fraud or willful misrepresentation of a material fact on his refugee application. The DHS lodged an additional charge under section 237(a)(4)(D) of the Act that the respondent was removable for having participated in extrajudicial killings.

The evidence reflected that at the time of the Srebrenica massacre, where, in July 1995, Serbian forces took control of a United Nations safe area in eastern Bosnia and executed between 5,000 and 7,000 Bosnian Muslim men and boys, the respondent's platoon was placed in charge of securing an escape route. About 1,000 Bosnian Muslim men and boys surrendered on the road where the respondent's platoon was stationed. These men and boys were taken to a warehouse and executed. A few days later, another 200 were apprehended about 2 miles away, and the respondent was responsible for loading the men and boys on buses. These men were not heard from again and were likely killed. The respondent argued that he did not order any killings and he did not know what was to happen to any of the captured men.

The Board first agreed that the respondent's omission from his application for refugee status that he served as a special police officer constitutes a willful misrepresentation of a material fact, because it foreclosed a line of inquiry regarding whether the respondent was barred from refugee status as a persecutor and could have affected or influenced the decision to grant him refugee status. The Board then held that in light of the respondent's command responsibility, his presence, and his platoon's active participation in the capture of the Bosnian Muslim men and boys who were ultimately killed, the DHS met its burden to establish that the respondent "assisted or otherwise participated" in the commission of an extrajudicial killing under the color of law. The test for "assistance" is whether an alien with command responsibility knew or should have known that his subordinates committed unlawful acts covered by the statute and failed to prove that he took reasonable efforts to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. The Board found that the Immigration Judge properly made reasonable inferences from the direct and circumstantial evidence in the record as a whole to sustain the charges against the respondent, but it remanded the record to permit the respondent to seek deferral of removal.

In *Matter of Abortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011), the Board considered when, under the methodology set forth in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), an Immigration Judge may consider evidence outside the record of conviction in determining whether an alien has been convicted of a crime involving moral turpitude. The respondent was convicted of assault pursuant to a guilty plea under Texas law. During removal proceedings, the Immigration Judge concluded that the respondent had been convicted of a crime involving moral turpitude after finding that his assault offense involved domestic violence. The Immigration Judge therefore held that the respondent was ineligible for cancellation of removal.

The respondent's conviction records indicated that he was only convicted of simple assault and specifically stated that it did not involve family violence. The Immigration Judge looked to the police report to find that the victim of the assault was the respondent's common law wife. The Board applied *Silva-Trevino* and held that an Immigration Judge may only proceed to the third-stage inquiry to consider evidence outside the record of conviction where the first inquiry, the traditional two-step categorical approach, is inconclusive as to whether the conviction is for a crime involving moral turpitude. Immigration Judges may not leapfrog over this preliminary analysis. The Attorney General's approach not only assures administrative efficiency and prevents retrial of an alien's crime, but it also recognizes and preserves the results of a plea bargain. The Board held that the record in this case conclusively showed that the respondent's conviction did not involve family violence and that the Immigration Judge therefore erred in going beyond the record to find that he was convicted of a crime involving moral turpitude.

REGULATORY UPDATE

76 Fed. Reg. 21,225 (Apr. 15, 2011)

DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 274a

Documents Acceptable for Employment Eligibility Verification

AGENCY: U.S. Citizenship and Immigration Services (USCIS), DHS.

ACTION: Final rule.

SUMMARY: This rule finalizes without change a 2008

interim final rule amending Department of Homeland Security (DHS) regulations governing the types of acceptable identity and employment authorization documents (EADs) and receipts that employees may present to employers for completion of Form I-9, Employment Eligibility Verification.

DATES: This final rule is effective May 16, 2011.

Enchanted April *continued*

in light of the withholding of removal regulations, "[i]t is reasonable to link the past persecution provision to the proposed country of removal." *Id.* at *3. The court then concluded that the petitioner had not suffered past persecution because all of the alleged harm had occurred in this country, not in Mexico. *Id.* at *4.

The court also determined that the petitioner's statements that she would "never be able to escape from [her husband] in Mexico" and that he would "force [her] to be with him again" were insufficient, on their own, to establish that she could not relocate internally in Mexico. *Id.* The court also took into account the lack of contact the petitioner has had with her husband since he was deported to Mexico and the experience her parents, who still live in Mexico, have had working with victims of domestic violence. *Id.*

The petitioner in *Castro-Martinez*, 2011 WL 1441859, a homosexual male from Mexico who was also HIV-positive, was undoubtedly a member of at least one particular social group and, having been brutally and repeatedly raped as a child, had suffered harm rising to the level of persecution. The Ninth Circuit agreed with the Board, however, that the harm was inflicted solely by private actors and that the petitioner failed to show that the Mexican Government was unable or unwilling to control his attackers. His claim of past persecution thus failed, and he also failed to establish a well-founded fear of persecution.

The case is significant because claims based on past infliction of rape by private actors are not infrequent and because of its further development of the law of asylum as it relates to harm suffered by children. The petitioner claimed that it would have been unreasonably dangerous for him, not yet 10-years-old, to have reported the abuse to teachers, neighbors, parents, or the police. His attackers threatened retribution if he reported them,

the events occurred amidst the societal stigma attached to homosexuality, and, he claimed, the police were ineffective in responding to crimes against homosexuals. The Ninth Circuit agreed, however, that the fact that the petitioner's fear of retaliatory threats was not sufficient did not resolve the central inquiry: whether the [authorities] could and would provide protection. *Id.* at *4 (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 923 (9th Cir. 2010)). The court emphasized that while reporting to the police is not required, an asylum applicant must demonstrate the futility of reporting, through evidence of widespread and uncontrolled private persecution or examples of others having made reports to no avail. *Id.* at *4 (citing *Rahimzadeh*, 613 F.3d at 922). The court concluded that neither showing had been made, indicating that the petitioner's youth may have increased the likelihood that the police would have protected him, and citing evidence of Mexican efforts, in law and practice, to combat sexual violence toward homosexuals. *Id.* at *4. Referring to the same evidence, the court concluded that the respondent did not establish a "pattern or practice" of persecution of homosexual men or HIV-positive persons. *Id.* at *5.

April's enchantment did not extend to the petitioner in *Vukmirovic*, 2011 WL 1318967, who, having secured not just one published Ninth Circuit victory on his claim that his 1996 asylum hearing was unfairly "taken over" by the Immigration Judge, *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004), and a second published victory on his claim that "exceptional circumstances" excused his failure to appear at his remanded Immigration Court hearing in 2005, *Vukmirovic v. Holder*, 621 F.3d at 1046-47, learned that, at least in this case, the third time is not the charm. The Ninth Circuit granted rehearing and dismissed his petition for review, concluding that Vukmirovic had failed to exercise due diligence in keeping the Government informed of his address, and further concluding "there does not exist in this record any strong likelihood of relief." *Vukmirovic*, 2011 WL 1318967, at *1.

The sequence can be summarized briefly: Vukmirovic retained counsel for his first Ninth Circuit appeal other than the lawyer he had retained for his appeal to the Board. *Vukmirovic*, 621 F.3d at 1046-47. While that appeal was pending, Vukmirovic moved and failed to inform either counsel or the Government where

he lived. Counsel representing him before the Ninth Circuit, having received the remand order, tried in vain to find him. His previous lawyer before the Board and the Immigration Court, who was served the notice of hearing on remand, was less diligent and made no effort. These circumstances led the Ninth Circuit panel (split 2-1) initially to conclude, under its precedents in *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002), and *Chete Juarez v. Ashcroft*, 376 F.3d 944 (9th Cir. 2004), that exceptional circumstances existed. *Vukmirovic*, 621 F.3d at 1049-50.

On reconsideration, the panel concluded that unlike the petitioners in *Singh* and *Chete Juarez*, the petitioner had shown neither the diligence required of aliens to report their changes of address or a likelihood of success on the merits. In the first decision, the fact that Vukmirovic had never received a proper hearing on his claim for asylum trumped the question whether he had a likelihood of success on that claim. In this latest decision, his lack of diligence in ensuring that he would receive notice of future hearings, coupled with the unlikelihood of success, led the panel, unanimously this time, to a different conclusion.

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