



# Immigration Law Advisor

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## The 2010 Top Twenty: Few Easy Choices

by Edward R. Grant

Selecting the two teams (Oregon and Auburn; sorry, Horned Frog fans) to play for college football's 2010 championship turned out to be easy; no such luck for those assigned to select the top 20 Federal appellate decisions on immigration. A few cases had clear national impact from the get-go; the full impact of others may not be felt for years to come. In addition, many decisions, especially those involving whether particular offenses constitute crimes involving moral turpitude or aggravated felonies, gain less attention but nevertheless have profound impact on the work of the immigration courts, not to mention those who appear before them.

With these factors in mind, and with the usual annual disclaimer that these selections are ultimately guided by the author's whim (or whimsy), here from the bottom up is the Immigration Law Advisor's 2010 Top Twenty.

**20. Does Citizenship Survive Death? Or Predate Birth?** *Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010), *rev'g Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), and *Partap v. Holder*, 603 F.3d 1173 (9th Cir. 2010): The Ninth Circuit, in reversing *Matter of Federiso*, held that for purposes of determining eligibility for a waiver under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H), an applicant continues to be the "son of a United States citizen" even when that citizen has departed this life. To belabor an old joke, the question may revolve around the meaning of "is." But the Ninth Circuit saw no ambiguity and thus no warrant to go past the first step of analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*). "Neither the Government nor the BIA disputes that Federiso is the son of a citizen of the United States. That alone is enough to resolve this case." *Federiso*, 605 F.3d at 698.

The court took a similar plain language approach in *Partap*, rejecting the petitioner's claim that the Immigration Judge erred in not

considering his unborn child to be a “qualifying relative” for purposes of cancellation of removal, and that the Board erred in not granting a motion to remand after the child had been born. For these purposes, a qualifying relative must be a “citizen” of the United States, *see* section 240A(b)(1)(D) of the Act, 8 U.S.C. § 1229b(b)(1)(D), and the Fourteenth Amendment plainly states that all persons “born or naturalized” in the United States are citizens. The court also affirmed the Board’s determination that the petitioner offered insufficient evidence of hardship to the newly born child to warrant a remand.

The Eleventh Circuit, in a somewhat related matter, concluded that the death of the principal beneficiary of an I-140 visa petition precluded the child of the beneficiary from claiming “following to join” status. *Ward v. U.S. Att’y Gen.*, 608 F.3d 1198 (11th Cir. 2010). The court distinguished the line of cases holding that the beneficiary of a spousal petition can pursue permanent residence even after the death of the spouse. *See Lockhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009); *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (both discussed in Edward R. Grant, *The Top Twenty: Cases To Remember from 2009*, Immigration Law Advisor, Vol. 3, No. 12 (Dec. 2009) [hereinafter Grant, *The Top Twenty*]).

**19. Can “All Women” Constitute a Particular Social Group?** *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010): Clearly a case whose ultimate impact remains to be seen, *Perdomo* presents the possibility that large swaths of a society—in this case all women in Guatemala—may be recognized as a “particular social group” (“PSG”). The court determined that the Board erred in rejecting the petitioner’s claim—set against the backdrop of widespread, uncontrolled “femicide” and other violence against Guatemalan women—because it failed to heed Ninth Circuit precedent that an innate defining characteristic, such as gender, may be sufficient to define a PSG, even if that group is large or diverse. *Id.* at 668-69 (citing *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (finding gender to be an “innate characteristic”; females or young girls of a particular clan can constitute a PSG); and *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)). The court specifically rejected the Board’s determination that “all women” is merely a demographic segment of society, as opposed to a group bound in identity by an innate characteristic, and remanded to the Board for further consideration of the question whether the proffered group is cognizable as a PSG. *Perdomo*, 611 F.3d at 669.

The Sixth Circuit, addressing a narrower PSG claim, held that women in China who have been subject to forced marriage and involuntary servitude constitute a PSG. *Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010).

**18. Does a Vacated Guilty Plea Constitute a “Reason To Believe” That an Alien Is a Drug Trafficker?** *Garces v. U.S. Att’y Gen.*, 611 F.3d 1337 (11th Cir. 2010): The contours of the “reason to believe” standard—which appears in section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C) (illicit drug trafficking), and sections 212(a)(2)(H) (significant trafficker in persons), 212(a)(2)(I) (money laundering), and 212(a)(3)(A) and (B) (national security and terrorism)—are controversial simply because the standard does not require a conviction to sustain the ground of inadmissibility. In effect, the “trial” of the question may take place in Immigration Court. *Garces* further defines the contours of the standard, rejecting the Immigration Judge’s reliance on a vacated guilty plea-based conviction for cocaine trafficking, where there was no evidence that the petitioner made a factual admission of guilt when entering his plea, and Florida rules at the time permitted a defendant to plead guilty while maintaining his innocence.

The conviction in *Garces* was quite old—1984—and records and memories understandably unclear. It was vacated in 2000 based on the failure to advise the petitioner of the immigration consequences of his plea. A series of Immigration Judge and Board decisions eventually resulted in the Board’s 2009 determination that police reports of the 1984 incident, coupled with the petitioner’s admission that he had originally pled guilty to the offense, constituted “reasonable, substantial, and probative evidence” supporting the Immigration Judge’s determination that there was “reason to believe” the respondent engaged in drug trafficking and that he was thus ineligible to adjust status under the Cuban Adjustment Act.

The Eleventh Circuit confirmed that a vacated conviction can meet the “reason to believe” standard and, further, that the petitioner had the burden of proof to establish his admissibility. However, that burden does not impose a requirement to prove a negative by “clear and convincing evidence”; rather, there must already be some reasonable, substantial, and probative evidence that the drug-trafficking ground applies. *Id.* at 1346; *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977). The petitioner’s

guilty plea did not meet this standard, because there was no record that he made a factual admission of guilt and Florida law, then and now, permitted the entry of a guilty plea by one who continues to maintain his innocence. *Garces*, 611 F.3d at 1347-48. “If the record established that Garces had indeed stood up in court and admitted the facts of the offense under oath, or that Florida procedural rules would necessarily have required him to do so, this would be a different case and the result might well be different.” *Id.* at 1348.

The court also rejected the Immigration Judge’s and Board’s reliance on arrest reports, which would have been inadmissible hearsay at any criminal trial, and which the court characterized as stating the arresting officers’ conclusions regarding the petitioner’s guilt, as opposed to precise facts establishing such guilt. For example, the reports did not indicate that drugs were found on the petitioner’s person or in his car. *Id.* at 1349-50. In closing, the Eleventh Circuit stressed that published Board decisions upholding “reason to believe” determinations were typically based on evidence far more reliable than that offered in this case.

While somewhat constricted in application because of the particularity of guilty plea rules in Florida, *Garces* is a useful reminder of the limitations inherent in relying on vacated convictions and subjective, as opposed to objective, police reports in meeting the “reason to believe” standard. The standard is best met by evidence establishing plain evidence of guilt or a reliable admission by the alien to facts constituting the ground of inadmissibility.

**17. Ninth Circuit Provides Some Clarity on “Crime of Domestic Violence.”** *Banuelos-Ayon v. Holder*, 611 F.3d 1080 (9th Cir. 2010): Mapping the intersection of criminal and immigration law in the Ninth Circuit requires a GPS device of prodigious accuracy and foresight. The ever-present possibility of following an abandoned road into a swamp, coupled with the court’s own ambivalence regarding the reach of some of its own precedents, *see* #2, *infra*, makes one long for the occasional moment of decisional and linguistic clarity. Such moments, happily, dotted the map of Ninth Circuit jurisprudence in 2010. Owing to the unhappy frequency of domestic violence crimes, *Banuelos-Ayon* was probably the most significant example.

At issue, whether a violation of section 273.5 of the California Penal Code, which criminalizes the willful infliction of corporal injury on a spouse or cohabitant, constitutes a “crime of violence” under 18 U.S.C. § 16(a) and thus is a “crime of domestic violence” under the deportation ground in section 237(a)(2)(E)(i) of the Act. The court’s answer: a section 273.5 offense is a *categorical* crime of violence, because it requires the willful infliction of corporal injury upon a person. The court rejected the petitioner’s argument that the statute can be violated by conduct that is accidental or involves a “least offensive touching,” citing California cases (including those relied on by the petitioner) that clarify the reach of section 273.5 to intentional, violent conduct. Finally, the court cited its earlier ruling that an offense in violation of section 273.5 constitutes a crime of violence for purposes of applying the Sentencing Guidelines. *United States v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010).

One word of caution on the “clarity” of *Banuelos-Ayon*: the Ninth Circuit held last year that a conviction under the same statute is *not* categorically for a crime involving moral turpitude (“CIMT”) because the potential range of victims includes former cohabitants and those who share living quarters on a casual basis. *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). The question immediately arises: now that *Banuelos-Ayon* resolves that a section 273.5 violation is a categorical crime of violence, does it not stand that a conviction thereunder is for harmful (if nonfraudulent) conduct, thus classifying it as a CIMT? In other words, does the precise “domestic” status of the victim matter? *See Saavedra-Figueroa v. Holder*, \_\_F.3d\_\_, 2010 WL 4367047 (9th Cir. Nov. 5, 2010) (finding that misdemeanor false imprisonment under section 236 is not a categorical CIMT because it requires only unlawful restriction of liberty, without an element of force or violence). Conversely, could an alien charged under section 237(a)(2)(E)(i) based on a conviction under section 273.5 contend that the statute is overboard as to the “domestic” status of the victim? (The status of the victim in *Banuelos-Ayon* was not contested; she was the girlfriend and mother to the children of the petitioner.)

Perhaps the best that can be said is that, in this area, clarity is a relative thing. But for most cases involving domestic violence charges based on convictions under section 273.5(a), *Banuelos-Ayon* remains a step forward.

**16. Is Sexually Motivated Indecent Exposure Turpitudinous?** *Nunez v. Holder*, 594 F.3d 1124 (9th Cir.

2010): The petitioner was convicted of indecent exposure under section 314(1) of the California Penal Code, which was construed by the California courts to require “proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for the purposes of sexual arousal, gratification, or affront.” *Id.* at 1130 (quoting *In re Smith*, 497 P.2d 807, 810 (1972)). In a bitterly divided decision, a Ninth Circuit panel held that this does not constitute a categorical CIMA, thus adding further to the circuit’s patchwork of cases on the immigration consequences of sex offenses. Judge Reinhardt, writing for the majority, set the stage:

Once again we face the question of what is moral turpitude: a nebulous question that we are required to answer on the basis of judicially established categories of criminal conduct. Although that may not be a satisfactory basis for answering such a question, it is the role to which we are limited by precedent as a court of law. Furthermore, any answer based on other considerations would in all probability be unacceptable to one or another segment of society and could well divide residents of red states from residents of blue, the old from the young, neighbor from neighbor, and even males from females. There is simply no overall agreement on many issues of morality in contemporary society.

Morality is not a concept that courts can define by judicial decrees, and even less can it be defined by fiat issued by the Board of Immigration Appeals, to whose decisions the courts must give great deference. Yet, for the purpose of our immigration laws we are required to follow those determinations and to start by applying categories of offenses that the judiciary or the Board members appointed by the Attorney General have deemed morally turpitudinous in all of their applications. We call this the categorical approach. How sensible those decisions are and how close to rational concepts of morality they may come can be seen by

considering one of the offenses involved in the case before us. While under our law numerous felonies are deemed not to be morally turpitudinous, all acts of petty theft automatically qualify for that label and the drastic legal consequences that may follow. As some in today’s society might say, and with good reason, “Go figure.”

*Id.* at 1127-28.

The majority proceeded to a lengthy exegesis of circuit and Board case law on moral turpitude, labeling this collective *oeuvre* “inconsistent and incoherent.” *Id.* at 1131 n.4. But turning to the question at hand, the majority found that the construction imposed by the California courts on section 314—limiting it to “sexually motivated” exposure—was not sufficient to narrow the reach of the statute solely to conduct that is morally turpitudinous. It concluded that a number of cases affirming convictions under section 314 did not involve turpitudinous conduct, including nude dancing at a bar, a road rage incident in which the driver exposed himself and simultaneously made a vulgar suggestion to another driver, and (in an unpublished case) a classroom incident where a 12-year-old exposed himself to female classmates. *Id.* at 1135-38.

The majority concluded that since nude dancing is now constitutionally protected “speech,” at least in some circumstances, it cannot be turpitudinous. It classified the road-rage incident as “crass” and the classroom incident “inappropriate,” but it concluded that both actions were relatively harmless, with only the element of sexuality separating them from other “provocative insults and tasteless pranks.” *Id.* at 1137-38.

[O]ur society is past the point where transitory nudity or a brief reference to sex necessarily transforms an otherwise de minimus provocation into a morally turpitudinous offense. There are obviously circumstances under which unwanted, sexually motivated exposure would be highly threatening, intrusive, and psychologically damaging to viewers. However, as our two examples make clear, § 314 reaches far beyond such



harmful conduct to encompass mere acts of provocation, bad taste, and failed humor. Although inappropriate and offensive, these acts are not “base, vile, and depraved,” nor do they shock the conscience.

*Id.* at 1138.

Judge Bybee, in dissent, vigorously disputed the majority’s characterization of whether section 314 could realistically be applied to nonturpitudinous conduct. Wryly noting that “there is nude dancing going on in California bars even as I write this, and no one is being arrested under § 314,” he concluded that the single appellate decision cited by the majority (which was later criticized in a separate decision of the California Supreme Court) had fallen into desuetude. *Id.* at 1139. Finding a clearer pathway through the fog of cases delineating “moral turpitude” than did the majority, Judge Bybee anchored his argument in two lines of cases: one, from the Board and circuits, consistently holding that lewd conduct is morally turpitudinous regardless of actual harm inflicted; and the second, from the California courts, establishing that section 314 is only applied to lewd conduct.

There is no “realistic possibility,” he concluded, that section 314 would currently be applied either to nude dancers in an entertainment venue, or to merely provocative and prankish behavior with sexual overtones. He concluded, in part, that if the majority “means to remove lewd conduct from the category of crimes involving moral turpitude, its discussion is a wholesale assault on sex crimes as crimes involving moral turpitude. As our cases demonstrate, it is too late for the majority to take that position, but one reads the majority opinion wondering how any sex crimes will satisfy its standards.” *Id.* at 1148.

**15. Can *Silva-Trevino* Require Reversal of Existing Board CIMT Precedents?** *Mata-Guerrero v. Holder*, \_\_F.3d\_\_, 2010 WL 4746189 (7th Cir. Nov. 24, 2010): It is broadly assumed that the impact of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), will be to expand the categories of offenses categorized as CIMTs; no indication had been given in that decision, or elsewhere, that earlier Board precedents declaring certain offenses to be CIMTs are called into question. That is, however, until the recent decision in *Mata-Guerrero*, which deferred

fully to all three “stages” of the *Silva-Trevino* analysis but also concluded that because of that analysis, it could not defer to the Board’s precedent that the offense of failing to register as a sex offender is a CIMT. See *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007).

The petitioner, convicted of failure to register under a Wisconsin statute, appealed the Board’s determination that under *Tobar-Lobo*, he had been convicted of a CIMT. The Board rejected his argument that under *Plascencia-Ayala*, 516 F.3d 738 (9th Cir. 2008), *rev’d in part on other grounds*, *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc), his crime should not be regarded as a CIMT. The Board followed (and stated) the unremarkable principle that until the Seventh Circuit had spoken, the Board’s precedent, and not the Ninth Circuit’s, must control.

From this, the Seventh Circuit concluded that the Board “did not actually adjudicate” the question of moral turpitude and thus was owed no deference under *Chevron*; further, the court concluded that because *Tobar-Lobo* had been decided under the “no longer valid” categorical approach that preceded *Silva-Trevino*, it was also not worthy of *Chevron* deference. *Mata-Guerrero*, 2010 WL 4746189, at \*3.

The take-away here is two-fold: First, *Mata-Guerrero* fully endorsed all stages of the analysis in *Silva-Trevino*, specifically the “third stage” permitting consideration of evidence outside the record of conviction. *Id.* at \*4. Second, and just as important, the Seventh Circuit appears to require that an individualized analysis of an alien’s conviction be conducted *in every case*. Speaking of the third stage of the *Silva-Trevino* analysis, the court stated that “the ultimate purpose of this analysis is to look at the actual crime committed by the individual alien.” *Id.* But the court’s interpretation of *Silva-Trevino* is clearly not limited to cases that reach the “third stage” analysis. Rather, the first-stage, the categorical approach, includes the alien’s own conduct in determining whether there is a “reasonable probability” that the conduct applies to nonturpitudinous conduct. *Id.* at \*4; *Silva-Trevino*, 24 I&N Dec. at 697, 704.

As an aside, *Mata-Guerrero* is complicated by the question of what provision of Wisconsin law the petitioner was convicted under: the record of conviction apparently cited only to the provisions establishing what information

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR OCTOBER 2010

by John Guendelsberger

The United States courts of appeals issued 390 decisions in October 2010 in cases appealed from the Board. The courts affirmed the Board in 357 cases and reversed or remanded in 33, for an overall reversal rate of 8.5%, compared to last month's 8.6%. There were no reversals from the First, Fourth, Sixth, and Seventh, Tenth, and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% reversed
First	2	2	0	0.0
Second	145	144	1	1.0
Third	35	30	5	14.3
Fourth	8	8	0	0.0
Fifth	20	17	3	15.0
Sixth	4	4	0	0.0
Seventh	4	4	0	0.0
Eighth	4	3	1	25.0
Ninth	156	133	23	14.7
Tenth	1	1	0	0.0
Eleventh	11	11	0	0.0
All	390	357	33	8.5

The 390 decisions included 149 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 78 direct appeals from denials of other forms of relief from removal or from findings of removal; and 163 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	149	134	15	10.1
Other Relief	78	67	11	14.1
Motions	163	156	7	4.3

There were 15 reversals or remands in asylum cases—11 from the Ninth Circuit, 3 from the Third, and 1 from the Eighth. These cases involved a variety of issues, including credibility (three); nexus (three); level of harm for past persecution (two); well-founded fear

(three); lack of “disfavored group” analysis in the Ninth Circuit (two); consideration of a humanitarian grant of asylum (one); and whether the Board overstepped its clear error standard in reviewing the Immigration Judge’s findings of fact (one).

Of the 11 reversals in the “other relief” category, most involved criminal grounds for removal and the proper application of the categorical and modified categorical approaches. There were also two *Carachuri-Rosendo* remands from the Fifth Circuit, a section 212(c) comparable grounds remand from the Second Circuit, and a remand for the Board to reinstate the correct number of days for voluntary departure.

The seven reversals involving motions included a variety of issues, including three motions to rescind in absentia orders based on lack of notice or exceptional circumstances; motions to reopen for ineffective assistance of counsel and changed country conditions for asylum; and a motion to reissue a Board decision.

The chart below shows the combined numbers from January through October 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Seventh	54	43	11	20.4
Ninth	1689	1433	256	15.2
Fifth	142	123	19	13.4
Third	382	341	41	10.7
Eighth	56	51	5	8.9
Sixth	90	82	8	8.8
Eleventh	187	173	14	7.5
Tenth	31	29	2	6.5
First	33	31	2	6.1
Second	872	828	44	5.0
Fourth	114	109	5	4.4
All	3650	3243	407	11.2

Last year’s reversal rate at this point (January through October 2009) was 11.5%, with 4009 total decisions and 460 reversals.

The numbers by type of case on appeal for the first 10 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	1774	1566	208	11.7
Other Relief	781	670	111	14.2
Motions	1095	1007	88	8.0

## CIRCUIT COURT DECISIONS FOR NOVEMBER 2010

The United States courts of appeals issued 234 decisions in November 2010 in cases appealed from the Board. The courts affirmed the Board in 200 cases and reversed or remanded in 34, for an overall reversal rate of 14.5%, compared to last month's 8.5%. There were no reversals from the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% reversed
First	0	0	0	0.0
Second	15	14	1	6.7
Third	21	18	3	14.3
Fourth	15	13	2	13.3
Fifth	11	11	0	0.0
Sixth	8	8	0	0.0
Seventh	5	3	2	40.0
Eighth	3	3	0	0.0
Ninth	142	116	26	18.3
Tenth	3	3	0	0.0
Eleventh	11	11	0	0.0
All	234	200	34	14.5

The 234 decisions included 130 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 64 direct appeals from denials of other forms of relief from removal or from findings of removal; and 40 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	130	111	19	14.6
Other Relief	64	51	13	20.3
Motions	40	38	2	5.0

Of the 19 reversals or remands in asylum cases, 16 were from the Ninth Circuit. The cases involved credibility determinations (six cases); nexus (two cases); remand for "disfavored group" analysis (six cases); level of harm for past persecution; the 1-year bar; internal relocation; and a frivolousness determination.

The 13 reversals in the "other relief" category covered a variety of issues, including 3 cases addressing crimes involving moral turpitude; eligibility for section 212(c) and 209(c) waivers; adjustment eligibility under section 245(i); physical presence and hardship for cancellation of removal; and suppression of evidence obtained in violation of the Fourth amendment. The two reversals involving motions addressed ineffective assistance of counsel and changed country conditions.

The chart below shows the combined numbers from January through November 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Seventh	59	46	13	22.0
Ninth	1831	1549	282	15.4
Fifth	153	134	19	12.4
Third	403	359	44	10.9
Eighth	59	54	5	8.5
Sixth	98	90	8	8.2
Eleventh	198	184	14	7.1
First	33	31	2	6.1
Tenth	34	32	2	5.9
Fourth	129	122	7	5.4
Second	887	842	45	5.1
All	3884	3443	441	11.4

Last year's reversal rate at this point (January through November 2009) was 11.2%, with 4291 total decisions and 480 reversals.

The numbers by type of case on appeal for the first 11 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	1904	1677	227	11.9
Other Relief	845	721	124	14.7
Motions	1135	1045	90	7.9

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

## RECENT COURT OPINIONS

### ***Second Circuit:***

*Duarte-Ceri v. Holder*, \_\_F.3d\_\_, 2010 WL 4923559 (2d Cir. Dec. 6, 2010): The Second Circuit held in abeyance the petition for review of the Board's order declining to reopen removal proceedings to address a claim to U.S. citizenship and remanded the matter to the district court. The Immigration Judge had found the petitioner to be a noncitizen who was removable because he had been convicted of a controlled substance violation and an aggravated felony. The Immigration Judge and the Board rejected the petitioner's argument that he was, in fact, a U.S. citizen by virtue of his mother's naturalization prior to the time he reached the age of 18. It was uncontested that the petitioner was born on the evening of June 14, 1973, and that his mother naturalized on the morning of June 14, 1991. The court found an unresolved question of law as to whether the statutory requirement that the naturalization occur while the petitioner is "under the age of 18 years" meant that his mother had to have naturalized before midnight on the date of his 18th birthday, or before the hour that marked 18 years from the time of his birth. The court ruled in favor of the latter interpretation, noting Supreme Court precedent for looking into fractions of a day when it becomes important to the ends of justice, and disagreeing with the dissent's argument to the contrary by concluding that the petitioner should not be made to suffer such a great loss based on a law of convenience. The court observed that its holding created an issue of material fact regarding the precise time of the petitioner's birth that necessitated remand to the district court pursuant to the requirements of section 242(b)(5)(B) of the Act.

### ***Third Circuit:***

*Delgado-Sobalvarro v. Att'y Gen. of U.S.*, \_\_F.3d\_\_, 2010 WL 4292020 (3d Cir. Nov. 2, 2010): The Third Circuit denied a petition for review of a Board decision affirming an Immigration Judge's denial of adjustment of status, citing *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010). The alien argued that because she was conditionally paroled from detention shortly after arriving in the United States, she was eligible to adjust her status as one who was paroled into the country. The court disagreed. Observing that section 245 of the Act allows adjustment of status only where the applicant has been "admitted or paroled," the court noted that the alien had not been admitted. The court next granted *Chevron* deference to the Board's distinction in *Castillo-Padilla* between "parole" under section 212(d)(5) of the Act

and "conditional parole" under section 236 and found reasonable its conclusion that the language of section 245 did not extend adjustment eligibility to the latter. The court further rejected as speculative the alien's claims that the absence of taped proceedings, the failure to provide a transcript, and a 5-year delay in adjudicating a Form I-130 visa petition filed on her behalf constituted due process violations.

### ***Sixth Circuit:***

*Camaj v. Holder*, \_\_F.3d\_\_, 2010 WL 4398519 (6th Cir. Nov. 8, 2010): The Sixth Circuit dismissed the petition for review of the Board's denial of a motion to reopen and rescind an Immigration Judge's in absentia order of removal. The alien first attended two hearings at a location in Detroit, in which the Immigration Judge appeared by telephone from Chicago. A merits hearing date was set, and notice of that hearing was mailed to the alien, indicating a different hearing location. When the alien failed to appear on time for his scheduled hearing at the new location, he was ordered removed in absentia. The court dismissed the alien's first argument that the service of the hearing notice by mail did not constitute proper notice, concluding that under the regulations in effect at the time in question, service by mail was permitted where personal service was not practicable. A hearing had earlier been held pursuant to a remand in which the Immigration Judge found that personal service was impracticable under the circumstances at the time. The court held that the alien's unsupported assertions to the contrary were insufficient to carry his burden. The court further found that it lacked jurisdiction to consider the alien's more compelling argument that his subsequent late arrival at the correct location only 6 minutes after entry of the order did not amount to a failure to appear under 8 U.S.C. § 1229a(b)(5)(A). It urged, however, that in the future, an alien's slight tardiness to a hearing should not be considered a failure to appear.

### ***Seventh Circuit:***

*Champion v. Holder*, \_\_F.3d\_\_, 2010 WL 4702452 (7th Cir. Nov. 22, 2010): The Seventh Circuit granted, in part, a petition for review of the denial of an alien's application for cancellation of removal for certain nonpermanent residents. The court dismissed the alien's claims that she was denied due process by (1) the Immigration Judge's refusal to allow a closing statement; and (2) the Immigration Judge's reference in his decision to an unsubstantiated charge of visa fraud by the alien. The court first noted that no liberty or property interest is afforded in immigration



proceedings involving discretionary forms of relief, such as cancellation of removal. It further found no due process violation because of (1) the wide discretion afforded to Immigration Judges by regulation to receive and consider evidence and other material and to regulate the course of the hearing; and (2) the absence of any indication that the fraud allegation was relied on in reaching the final decision. However, the court found that although it lacked discretion to review discretionary decisions, the question whether the Board erred in ignoring evidence concerning exceptional and extremely unusual hardship to the alien's children was a question of law within its jurisdiction. As the Board based its finding in large part on its assumption of the continued presence of the children's father in the United States, the failure to consider the possibility of the father's removal constituted legal error that warranted remand.

*Mata-Guerrero v. Holder*, \_\_\_F.3d\_\_\_, 2010 WL 4746189 (7th Cir. Nov. 24, 2010): The court granted the petition for review of the Board's affirmance of an Immigration Judge's order finding the lawful permanent resident alien ineligible for a section 212(c) waiver because he had been convicted of two crimes involving moral turpitude ("CIMT"). The alien argued that only one of his convictions was for a CIMT. The court concluded that the matter should be remanded to the Board, which had applied a categorical approach in finding that the second conviction was for a CIMT. The court found that the categorical approach had been abandoned by the Attorney General in his precedent decision in *Matter of Silva-Trevino* and held that on remand, the conviction in question should be reexamined pursuant to the individualized three-step inquiry established in *Silva-Trevino*.

#### ***Ninth Circuit:***

*Dent v. Holder*, \_\_\_F.3d\_\_\_ 2010 WL 4455877 (9th Cir. Nov. 9, 2010): The Ninth Circuit found that a pro se alien's due process rights had been violated where he was not provided with material documents contained in the DHS's A-file. The alien was found removable as an aggravated felon but argued that he was a U.S. citizen because he was adopted by a U.S. citizen when he was 14 years old. He was granted several adjournments by the Immigration Judge to provide evidence. Although he was able to document his adoption, he was unable to provide proof of his adoptive mother's U.S. citizenship, in part because the records of her birth were destroyed by fire. Long after a removal order was issued against him, it emerged that the DHS A-file contained documents

relevant to his citizenship status, but that such documents were not made known to the alien, the Immigration Judge, or the Board. No reason was offered by DHS for the failure to furnish such documents. The court thus agreed with the alien's claim that as a result of DHS's failure to furnish the documents, he was prevented from fully and fairly presenting his claim. Because a factual issue now existed concerning the alien's claim of nationality, the court transferred the case to the district court pursuant to the requirements of section 242(b)(5)(B) of the Act.

### **BIA PRECEDENT DECISIONS**

In *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010), the Board considered whether the crime of child endangerment under section 18-6-401(1) of the Colorado Revised Statutes, which punishes a person who permits a child to be unreasonably placed in a situation that poses a threat of injury to a child's life or health, is categorically a crime of child abuse under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §1227(a)(2)(E)(i). The respondent argued that this offense, which involves only a "threat of injury," is not a crime of child abuse because the statute does not require, at a minimum, actual harm to the child. In *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 518 n.2 (BIA 2008), the Board included a footnote indicating that it is unclear whether "child abuse" extends to this kind of statute. Clarifying *Matter of Velazquez-Herrera*, the Board first noted that 38 States include in their civil definition of "child abuse" or "child neglect" acts or circumstances that threaten a child with harm or create a substantial risk of harm to a child's health or welfare. Because the level of threat is described variously in these statutes, the Board found that a State-by-State analysis is appropriate to determine whether the risk of harm required by a specific statute is sufficient to bring the offense within the definition of "child abuse" under the Act. Analyzing the Colorado statute, the Board pointed to the facts that the State courts have interpreted the "threat of injury" provision to require that there be a *reasonable probability* that the child's life or health *will be* endangered, and that the statute requires a "knowingly or recklessly" mental state. Also noted was the importance of the statute's use of the word "unreasonably," which the Colorado courts have emphasized means acting "without justifiable excuse." The Board found that the offense of endangerment under the Colorado statute falls squarely and categorically within the definition of a "crime of child abuse," and it affirmed the Immigration Judge's decision.

In *Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010), the Board considered whether termination of removal proceedings is proper when an alien has been granted Temporary Protected Status (“TPS”). The respondent is a native and citizen of El Salvador who was placed in proceedings and charged under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien who is in the United States without being admitted. While the respondent was in proceedings, she was granted TPS. Both parties requested administrative closure, but the Immigration Judge terminated proceedings with prejudice. The Board found that there is nothing in the language of the statute to indicate that a grant of TPS renders an alien admissible. On the other hand, an alien’s presence without admission, or his or her inadmissibility based on that illegal presence, will normally not preclude a grant of TPS. However, a waiver of the grounds of inadmissibility is required to qualify for TPS. Section 244(c)(2)(A)(ii) of the Act, 8 U.S.C. §1254a(c)(2)(A)(ii). The Board reasoned that because the respondent had been granted TPS, her inadmissibility was waived for the specific purposes of the TPS statutory scheme, but the waiver was limited and only served to temporarily protect the respondent from deportation or removal. The Board remanded the case for the parties to pursue either administrative closure or any relief for which the respondent may be eligible, or for the Immigration Judge to enter a removal order, which cannot be executed during the period in which the respondent’s TPS status is valid.

## REGULATORY UPDATE

### 75 Fed. Reg. 67,383

DEPARTMENT OF HOMELAND SECURITY  
U.S. Citizenship and Immigration Services

#### **Extension of the Designation of Somalia for Temporary Protected Status**

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Somalia for temporary protected status (TPS) for 18 months, from its current expiration date of March 17, 2011 through September 17, 2012. The Secretary has determined that an 18-month extension is warranted because conditions in Somalia prompting the TPS designation continue to be met. Armed conflict in Somalia is ongoing and, due to such conflict and other extraordinary and temporary conditions, requiring the return of eligible individuals with TPS to Somalia would

pose a serious threat to their personal safety. This Notice also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Somalia and whose applications have been granted or remain pending. Certain nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. Information on late initial registration can be found on the USCIS Web site at <http://www.uscis.gov> on the “Temporary Protected Status” homepage. USCIS will issue new EADs with a September 17, 2012 expiration date to eligible TPS beneficiaries who timely re-register and apply for EADs.

DATES: The extension of the TPS designation of Somalia is effective March 18, 2011, and will remain in effect through September 17, 2012. The 60-day re-registration period begins November 2, 2010 and will remain in effect until January 3, 2011.

### 75 Fed. Reg. 68,017

DEPARTMENT OF STATE

**Designation of Jundallah, Also Known as People’s Resistance Movement of Iran (PMRI), Also Known as Jonbeshi Moqavemat-i-Mardom-i Iran, Also Known as The Popular Resistance Movement of Iran, Also Known as Soldiers of God, Also Known as Fedayeen-e-Islam, Also Known as Former Jundallah of Iran, Also Known as Jundullah, Also Known as Jondullah, Also Known as Jundollah, Also Known as Jondollah, Also Known as Jondallah, Also Known as Army of God (God’s Army), Also Known as the Baloch Peoples Resistance Movement (BPRM), as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter “INA”) (8 U.S.C. 1189), exist with respect to Jundallah, also known as People’s Resistance Movement of Iran

(PMRI), also known as Jonbesh-i Moqavemat-i-Mardom-i Iran, also known as The Popular Resistance Movement of Iran, also known as Soldiers of God, also known as Fedayeen-e-Islam, also known as Former Jundallah of Iran, also known as Jundullah, also known as Jondullah, also known as Jundollah, also known as Jondollah, also known as Jondallah, also known as Army of God (God's Army) and also known as the Baloch Peoples Resistance Movement (BPRM).

Therefore, I hereby designate the aforementioned organization and its aliases as a Foreign Terrorist Organization pursuant to section 219 of the INA.

This determination shall be published in the Federal Register.

Hillary Rodham Clinton, Secretary of State.

**75 Fed. Reg. 74,127**

DEPARTMENT OF STATE

**In the Matter of the Review of the Designation of Islamic Movement of Uzbekistan (IMU and Other Aliases) as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 redesignation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the Federal Register.

James B. Steinberg, Deputy Secretary of State.

**75 Fed. Reg. 78,336**

DEPARTMENT OF STATE

**Review of the Designation of Gama'a al-Islamiyya, (IG and Other Aliases); as a Foreign Terrorist Organization**

**Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 redesignation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the Federal Register.

James B. Steinberg, Deputy Secretary of State.

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**The Top Twenty *continued***

must be maintained in the sex offender registry, as opposed to the later subsection establishing criminal penalties for failing to register. While the latter provision clearly has a mens rea of "knowingly," the provision cited in the record of conviction obviously has no mens rea at all. *Mata-Guerrero*, 2010 WL 4746189, at \*2 n.1.

**14. REAL ID Act Embraced by Ninth Circuit.** *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010); *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009): These two cases not only accepted those provisions of the REAL ID Act aimed straight at the heart of older Ninth Circuit jurisprudence on burden of proof, credibility, and corroboration, but they fully embraced the new standards. See Edward R. Grant, "A Little More Like Other Litigation": *The Ninth Circuit Embraces the REAL ID Act*, Immigration Law Advisor, Vol. 4, No. 2, at 6 (Feb. 2010). The salient points, as emphasized in our previous article: while not giving a "blank check" to Immigration Judges to seize upon minor inconsistencies or impose burdensome corroboration requirements, both decisions signal that immigration hearings will now be viewed as "a little more like other litigation," with deference accorded to the evidentiary judgments made by the person best qualified and best



positioned to render those judgments—the Immigration Judge. *Shrestha*, 590 F.3d at 1041; *Aden*, 589 F.3d at 1045.

**13. Can Forced Abortion of a Spouse Still Constitute Persecution of an Applicant?** *Nai Yuan Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010): *Jiang* joined the litany of cases from other circuits deferring to the Attorney General’s determination that an alien whose spouse has been subjected to a forced sterilization or abortion is not thereby presumptively eligible for asylum based on the 1996 “coercive family planning” amendment to the definition of a “refugee.” *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), *overruling Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006), and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). A spouse’s or putative spouse’s abortion, however, is not irrelevant in determining whether the applicant has engaged in “other resistance” to enforcement of a coercive family planning policy. *Nai Yuan Jiang*, 611 F.3d at 1093.

*J-S-* . . . stands only for the limited proposition that INA § 101(a)(42) cannot be read to confer “*automatic or presumptive*” refugee status on the spouses of persons who have physically been subjected to a forced abortion or sterilization procedure pursuant to a foreign government’s coercive population program.” Indeed, the Attorney General concluded in *J-S-* that applicants may “present proof, of which their spouse’s treatment *may be a part*, of persecution for refusing to undergo forced abortion or sterilization procedures or for engaging in ‘other resistance’ to a coercive population control program.” We thus consider a spouse’s forced abortion or sterilization as “proof” that an applicant resisted a coercive population control policy, and in analyzing whether persecution occurred as a result. However, an applicant must provide evidence of resistance in addition to the spouse’s forced abortion or sterilization to avoid what the Attorney General described as the “fatal flaw” in the per se eligibility analysis: “Some spouses may not have ‘resisted,’ and in fact may have affirmatively supported, the forced abortion or sterilization procedure that

was performed on the spouse who remains in China. Such applicants should not . . . [be permitted to] use the sole fact of their spouse’s persecution automatically to qualify for political asylum under the statute’s coercive population control ‘resistance’ provisions.”

*Id.* at 1094 (citations omitted) (quoting *Matter of J-S-*, 24 I&N Dec. at 521, 534-35).

The Ninth Circuit found the petitioner to have suffered persecution on account of “other resistance” to the Chinese family planning policy based on several factors: his defiance of laws banning early marriage by cohabiting with his girlfriend and taking part in an unsanctioned, traditional wedding ceremony; the violent disruption of that ceremony by family planning officials; the seizure of his girlfriend and her subjection to forced abortion of their unborn child; and his own 1-day detention and expulsion from school. *Id.* at 1095-96.

This conclusion presents two possibilities: that a latent ambiguity in *Matter of J-S-* permits the forced abortion or sterilization of a spouse to constitute evidence that an asylum applicant himself has been persecuted; or that the Ninth Circuit has independently created a loophole, allowing claims formerly recognized under *Matter of S-L-L-* and *Matter of C-Y-Z-* to be successful if presented in slightly different guise. The two possibilities may not be mutually exclusive—the Attorney General did not limn the contours of “other resistance” in *Matter of J-S-*, and the Ninth Circuit may thus have been engaged in judicial “gap-filling” when it determined that the act of cohabitation, coupled with a failed attempt to officially register a marriage, constitutes “other resistance.” The Ninth Circuit also is clearly correct that higher minimum ages for marriage are part and parcel of China’s coercive family planning program; however, under standard definitions of “persecution,” the only harm in this case remotely rising to that level was the forced abortion of the petitioner’s girlfriend. By essentially defining this as persecution of the petitioner, is it possible that the Ninth Circuit, while professing to follow *Matter of J-S-*, has emptied the decision of much of its effect? Would, for example, a married man whose wife became pregnant with an “out-of-plan” birth be considered to have engaged in “other resistance” and to have suffered persecution if he is both fined and sees his wife undergo a forced abortion?



(Keep in mind that the Board decisions overturned in *Matter of J-S-* never extended to the unmarried partner of a woman forced to undergo an abortion of his child—a point emphasized by the Attorney General as a logical conundrum of those decisions. *Matter of J-S-*, 24 I&N Dec. at 535 n.8).

Further development in the case law, in the Ninth Circuit and elsewhere, will be required to resolve these questions.

**12. When Can Federal Courts Review Denials of Discretionary Relief?** *Padmore v. Holder*, 609 F.3d 62 (2d Cir. 2010); *Garcia v. Holder*, 621 F.3d 906 (9th Cir. 2010); and *Rosario v. Holder*, \_\_ F.3d \_\_, 2010 WL 4923557 (2d Cir. Dec. 6, 2010): While it is well established that Federal courts have no general jurisdiction to review decisions to deny discretionary relief such as cancellation of removal, waivers of inadmissibility or deportability, and adjustment of status, courts have claimed jurisdiction where constitutional or legal issues are present—including mixed questions of law and fact. See Edward R. Grant and Patricia M. Allen, *Undercard or Main Event?: Courts Assess the Jurisdiction Provisions of the REAL ID Act*, Immigration Law Advisor, Vol. 4, No. 7, at 6 (July-Aug. 2010). Several decisions in 2010 clarified that the application of this standard to applications for cancellation of removal under section 240A of the Act may cut very far indeed into the Board’s ability to make independent discretionary assessments based on its own review of the record.

*Padmore* reversed a Board decision that had reversed an Immigration Judge’s grant of cancellation under section 240A(a); the Board determined that the petitioner did not merit relief in the exercise of discretion based on the facts surrounding his two convictions for criminal possession of marijuana. By relying on factual allegations in an arrest report and affidavit that had not been considered by the Immigration Judge, the Board improperly engaged in fact-finding, contrary to its own regulations. *Padmore*, 609 F.3d at 68. The petitioner had contested the allegations in the arrest report, and the Immigration Judge had made no specific findings regarding them. *Id.* Thus, this is not a case where the Board reversed factual findings made by the Immigration Judge; rather, the Board went beyond those findings to consider for itself evidence pertaining to the level of the petitioner’s criminal conduct. This, the court concluded, is beyond the Board’s brief.

Whether the BIA may review all evidence in the record, however, is not at issue. While the BIA may *consider* such affidavits and arrest reports, it may not base its decision denying relief upon the assumption that the facts contained in such documents are true. If after considering such documents the BIA concludes that findings should be made as to the truth of the matters asserted in them, *it must remand to the IJ for that purpose*. To the extent that the BIA made its own findings here, the Board’s conclusions were reached in contravention of its precedent.

*Id.* at 69 (citation omitted) (emphasis added).

The Ninth Circuit later reiterated that its jurisdiction to review the Board’s denial of a motion to reopen a prior denial of cancellation of removal is bound by the same strictures as its review of a denial of cancellation on the merits; otherwise, petitioners could “‘make an end-run around the bar to review of their direct appeals simply by filing a motion to reopen.’” *Garcia v. Holder*, 621 F.3d at 910 (quoting *Fernandez v. Gonzales*, 439 F.3d 592, 601 (9th Cir. 2006)). However, the bar does not apply when a motion to reopen addresses a new ground of hardship—and in *Garcia*, the court determined that the new and “non-cumulative” evidence of hardship to one of the petitioners’ lawful permanent resident mother presented was ignored in the Board’s decision denying the motion to reopen. The court held that it could correct this error, because “this court has jurisdiction to review BIA decisions on motions to reopen to present evidence that is ‘so distinct from that considered previously as to make the motion to reopen a request for new relief, rather than for reconsideration of a prior denial.’” *Id.* at 911 (quoting *Fernandez*, 439 F.3d at 603).

The Second Circuit also extends its jurisdiction to claims that the Board has applied a legally erroneous standard in denying a claim for cancellation. *Rosario*, 2010 WL 4923557, at \*3 (stating that jurisdiction to review the application of law to facts when based on a wrong statute or incorrect legal standard, an error of law affecting an underlying factual determination, or a conclusion that is “without rational justification”); see also *Argueta v. Holder*, 617 F.3d 109, 112-13 (2d Cir. 2010); *Mendez v. Holder*, 566 F.3d 316, 322 (2d Cir. 2009). While accepting jurisdiction over the “legal” claims presented in both

cases, the Second Circuit ultimately denied the petitions for review: *Argueta* rejected the petitioner’s “novel” claim that in an application for special-rule cancellation under NACARA, convictions outside the 7-year continuous presence window for establishing “good moral character” could not be considered in deciding whether to grant such relief in the exercise of discretion, *Argueta*, 617 F.3d at 113; *Rosario* determined that in ruling that the petitioner had not been battered or subject to extreme cruelty, and thus was not eligible for cancellation of removal under section 240A(b)(2)(A) of the Act, the Board applied the correct law and the correct legal standard, made no legal errors in regard to the underlying factual findings, and rendered a decision with rational justification. *Rosario*, 2010 WL 4923557, at \*5.

**11. Is There a “Right” To File a Motion To Reopen? And How Broad?** *Kucana v. Holder*, 130 S. Ct. 827 (2010): The answer to the first question, as our astute readers know, is yes. See Edward R. Grant, *The Right To File a Motion To Reopen: An Intended Consequence of IIRIRA?*, Immigration Law Advisor, Vol. 4, No. 1, at 5 (Jan. 2010) [hereinafter Grant, *Right To File*]. The answer to the second is yet unknown. *Kucana* is weighty enough to merit its own entry on the 2010 list; but higher placement is given to cases, discussed below, that illustrate the contours of coming debates on how far the “right” to file a motion—and to have it considered on its merits, even if filed out of time—should extend.

**10. How Serious, and How Nonpolitical, Must a Crime Be To Bar Asylum?** *Berhane v. Holder*, 606 F.3d 819 (6th Cir. 2010): A singular case involving a less frequently invoked bar to asylum and related relief may seem a curious choice. However, *Berhane* makes the list because it illustrates the delicate balance that must be struck when a person engaged in illegal (albeit nonterroristic and nonpersecutory) opposition to a repressive government seeks refugee protection. At issue in *Berhane* was the act of rock-throwing in the context of violent protest—the violence being inflamed by the repressive actions taken by Ethiopian authorities. Substitute any number of countries in the world for “Ethiopia,” and the potential reach of the issue is apparent. Further discussion of the case appeared in our April issue. See Edward R. Grant and Patricia M. Allen, “*The Wrong Side of the Rock-Throwing Line?*”: *New Looks at an Old Bar to Refugee Protection*, Immigration Law Advisor, Vol. 4, No. 6, at 7 (June 2010).

**9. The Force Must Be “Violent.”** *Johnson v. United States*, 130 S. Ct. 1265 (2010): In holding that a “generic” assault and battery offense is not a categorical crime of violence under 18 U.S.C. § 16(a), *Johnson* endorsed the majority view that had emerged in the circuits. Notably, while addressing the issue in the context of sentencing enhancement, the Court specifically acknowledged, but was not moved by, the difficulty that its decision would impose on efforts to remove aliens who have committed violent crimes but have been prosecuted under statutes that are broadly drawn to include merely “offensive touchings,” or under statutes that incorporate the similarly broad common-law definitions of assault and battery. See Edward R. Grant, *Dynes and Newtons: “Crime of Violence” Standards in the Wake of Johnson v. United States*, Immigration Law Advisor, Vol. 4, No. 3, at 5 (Mar. 2010).

**8. “When Released” Must Be Connected to a Ground of Removability.** *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), *rev’g Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008): Few circuit court decisions that are the first to reject a precedent of the Board prompt the Board to abandon its decision. *Saysana*, holding that the language “when released” from custody in section 236(c) of the Act, 8 U.S.C. § 226, refers only to custody that is directly tied to one of the grounds for mandatory detention set forth in that provision, is an exception. Granted, *Saysana* was not the first Federal court to reject the Board’s contrary ruling in *Matter of Saysana*, since several district courts had done likewise in habeas corpus petitions. Nevertheless, mindful of the First Circuit’s ruling, which affirmed the reasoning of the Immigration Judge who had originally granted release to the petitioner, the Board reconsidered its position and issued its decision in *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010).

**7. Defining the Limits of “De Novo” Review.** *Huang v. Att’y Gen of U.S.*, 620 F.3d 372 (3d Cir. 2010), *abrogating Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); *Kaplun v. Att’y Gen. of U.S.*, 602 F.3d 260 (3d Cir. 2010), *rev’g in part Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008): *Huang* and *Kaplun*, discussed at length in our last issue, constitute the most detailed construct to date of the Board’s authority of de novo review regarding ultimate questions of eligibility for asylum and withholding of removal. See Edward R. Grant and Patricia M. Allen, *Phair or Phoul in Philadelphia?: Third Circuit Speaks on De*

6. “*They Say It’s Your Birthday*”— *Oh, Hold on*—“*They Say It’s Your Birth-Second*.” *Duarte-Ceri v. Holder*, \_\_\_F.3d\_\_\_, 2010 WL 4968689 (2d Cir. Dec. 6, 2010): White Album fans, take note: at least when it comes to derivative naturalization, it’s not your *birthday* that matters, but your birth *moment*—then, and only then, have you turned 18 and thus become ineligible to derive citizenship from the naturalization of your parent.

Ramon Antonio Duarte-Ceri was born in the Dominican Republic on June 14, 1973, 18 years to the day before his mother naturalized as a United States citizen. Convictions for a controlled substance violation and an aggravated felony resulted in deportation proceedings and denial of his application for relief under former section 212(c) of the Act, a decision affirmed by the Board in 2001. The Board later granted his motion to reopen so that he could pursue his claim for derivative citizenship. However, the claim was denied by the Immigration Judge, and the Board again affirmed, stating that the precise timing of Duarte’s birth was not relevant: “in computing the child’s age for derivative citizenship purposes under the applicable statute, the designated age of maturity will be attained at 12:01 a.m. on the applicable anniversary day.” *Id.* at \*2 (quoting the Board’s decision). The U.S. Citizenship and Immigration Services also denied his application for citizenship, and the Board denied a further motion to reopen sua sponte.

The Second Circuit majority reversed, finding a statutory ambiguity that must be resolved by adopting the interpretation that preserves, rather than extinguishes, citizenship. The relevant phrase “under the age of eighteen years” in former section 322(a)(4) of the Act could mean two things: an applicant “who has not reached the eighteenth anniversary of his birth,” in which case Duarte would lose out; or an applicant “who has not yet lived in the world for eighteen years.” *Id.* at \*3. “[O]n the assumed facts [that Duarte was born on the evening of June 14, 1973, while his mother naturalized in the morning], Duarte’s claim prevails, for, as a matter of biological fact, on the morning of June 14, 1991, Duarte had not yet lived for eighteen years. Rather, he had lived approximately seventeen years, 364 days, and twelve hours.” *Id.* The Board’s position would deny citizenship on a “legal fiction”—that Duarte “turned eighteen

years of age at the stroke of midnight on the eighteenth anniversary of his birth.” *Id.* Citing two Supreme Court decisions from the 19th century—both involving the question of when a statute went into effect—the court concluded that “whenever it becomes important to the ends of justice, . . . the law will look into fractions of a day.” *Id.* at \*4 (quoting *Louisville v. Portsmouth Sav. Bank*, 104 U.S. 469, 474 (1881)). Here, it is most important to “parse the day into hours” because “‘the most precious right’ of citizenship is at stake”—perhaps begging the question whether that right could be conferred consistent with the common understanding of the term “under the age of eighteen years.” *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963)).

The Second Circuit cited a 1952 Board precedent offering tangential support for its interpretation: the Board held that two children who arrived in the U.S. on their 16th birthday had met the requirement for *retention* of citizenship that they take up residence in this country “by the time [they reach] the age of 16 years.” *Matter of L-M- & C-Y-C-*, 4 I&N Dec. 617 (BIA 1952) (quoting section 201(g) of the Nationality Act of 1940). However, the cases are different in a critical respect: the appellants in the 1952 case were *citizens at birth*, and thus the question before the Board was whether they should lose that status because they arrived on the day of, not the day before, their 16th birthday. “It is apparent that by thus arriving in the United States they have evidenced an intention to retain their citizenship and to show that their real attachment is to this country. A divestiture of American citizenship should not be predicated upon an ambiguity. Where the language of the statute is capable of more than one construction, that construction is favored by law which will best preserve a right or prevent a forfeiture.” *Id.* at 621.

Judge Livingston, in lengthy dissent, expressed dismay at the majority’s “novel and utterly implausible reading of the statute.” *Duarte-Ceri*, 2010 WL 4968689, at \*7. Citing numerous circuit court precedents, including *Poole v. Mukasey*, 522 F.3d 259, 265 (2d Cir. 2008), Judge Livingston concluded that the courts have always given “under the age of eighteen” its commonly understood meaning—before one reaches one’s 18th birthday. *Duarte-Ceri*, 2010 WL 4968689, at \*8. “Duarte was eighteen years old the morning of June 14, 1991, not only for the purposes of derivative citizenship, but for *every other purpose* recognized by law, from momentous to trivial”—



everything from teaching in a public school to purchasing State lottery tickets. *Id.* at \*9. “I am aware of no reported case—anywhere, ever—in which a court interpreted the phrase ‘under the age of—’ in a statute to mean ‘before the exact time the relevant person was born—years ago.’” *Id.* Citing many examples, from the right to vote to the eligibility of a criminal defendant to be treated as a juvenile, Judge Livingston noted the anarchy that would prevail if the Government—or an individual—bore the burden to prove the exact time of birth. “I know of no principle of statutory construction suggesting that we may depart from the common understanding of statutory terms—statutory terms that are clear and unambiguous—simply because we are confronted with a case in which we believe it is important to do so. Respectfully, to apply such a principle, as the majority does, is not an act of statutory construction but judicial draftsmanship.” *Id.* at \*11.

Other significant naturalization decisions in 2010:

In *United States v. Forey-Quintero*, \_\_F.3d\_\_, 2010 WL 4830004 (11th Cir. Nov. 30, 2010), the court held that a criminal defendant who was born in Mexico but lived in the U.S. continuously since the age of 3 did not derive citizenship upon his mother’s naturalization, because he never resided in the U.S. pursuant to a lawful admission for permanent residence.

In *Dent v. Holder*, \_\_F.3d\_\_, 2010 WL 4455877 (9th Cir. Nov. 9, 2010), the court held that the DHS’s failure to provide a copy of the petitioner’s A-file relating to his application for naturalization violated his due process rights.

**5. & 4. (Multiple Tie). Does the “Departure Bar” Apply to Those Involuntarily Removed?** *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); and *Toora v. Holder*, 603 F.3d 282, 288 (5th Cir. 2010): Our January issue highlighted *Coyt* and assessed the state of play among the circuits on whether the Board retains jurisdiction over a motion to reopen after an alien has been removed from the United States. See Grant, *Right To File*, *supra*, at 7; see also 8 C.F.R. §§ 1003.2(d), 1003.23(b) (“departure bar” regulations). Subsequent decisions illustrate that the Supreme Court’s determination, in *Dada* and *Kucana*,

that Congress conferred a “right” to file a motion to reopen or reconsider when it codified the 1996 regulatory *limitations* on such motions will have consequences yet to be determined. *Id.* at 6-7.

*Marin-Rodriguez* gave a cautious thumbs-up to *Coyt*: there, as in *Coyt*, the petitioner had been removed while a timely motion was pending before the Board, and the Seventh Circuit expressed its understanding, if not its agreement, with the Ninth Circuit’s rationale that an *involuntary* removal while a motion to reopen is pending presents a different case from that of an alien who voluntarily departs. *Marin-Rodriguez*, 612 F.3d at 594-95 (citing *Coyt*, 593 F.3d at 905-07). However, in its principal holding, the Seventh Circuit took things a step further: noting recent Supreme Court decisions limiting the ability of administrative agencies to contract their own jurisdiction by regulation or administrative decision, see, e.g., *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009), it concluded that “[a]s a rule about subject-matter jurisdiction, § 1003.2(d) is untenable.” *Id.* at 593; see also *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). The court noted that the Board’s more recent decision in *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009), permitting filing of a motion to reopen by a departed alien who claims lack of notice of his removal proceeding, may indicate an abandonment of the Board’s “jurisdictional” approach—although the *Bulnes* decision addressed an issue specifically reserved by *Armendarez* and gave no indication that the prior decision was being abandoned. The Board, the Seventh Circuit suggested, may recast the “departure bar” as a factor in denying a motion to reopen in the exercise of discretion, but it cannot declare that it lacks jurisdiction to consider such motions if timely filed.

The Second Circuit’s decision in *Zhang* held that the departure bar does deprive the Board of jurisdiction to consider an alien’s *untimely* motion to reopen pursuant to the Board’s sua sponte authority. The lengthy decision, well worth the effort if one is interested how we came to this pass, found logical difficulty with the notion that an involuntary act—forced removal from the U.S.—can equate to a voluntary one—the “withdrawal” of a motion. However, the court recognized that was not “presented with a blank slate,” and that *Matter of Armendarez* had resolved the ambiguities in a manner that was not clearly erroneous. *Zhang*, 617 F.3d at 660. Focusing on the specific question before it, the court concluded that it



was reasonable to read the departure bar as a limitation on the Board's sua sponte authority to grant a motion to reopen—the Attorney General, having granted this authority, could also set limits for its exercise. *Id.* at 661. The court expressly declined to reach the issue addressed in *Marin-Rodriguez*, concluding that the Board had not improperly contracted its jurisdiction in this instance because the “Attorney General’s power to limit this aspect of the BIA’s jurisdiction is subsumed within his more expansive power to create it.” *Id.* at 664. The court distinguished this situation from that in *Union Pacific*, finding that this was not an instance where Congress had created broad authority that an agency simply declined to exercise.

The court also held that the respondent, having filed his motion to reopen years after the Board in 2003 affirmed a decision denying his asylum application and finding it to be frivolous, also could not claim that he was entitled to nunc pro tunc consideration of this motion to reopen as of the day the Board denied his 2008 motion for stay of removal. *Id.* at 665-66.

To summarize, then, the Ninth Circuit holds that the departure bar cannot apply to forced removal during the pendency of a timely motion to reopen; the Seventh Circuit holds that while the Ninth Circuit may be correct, the larger problem is the Board’s misapplication of a rule of jurisdiction to a matter that can be addressed, if at all, on grounds of discretion; and the Second Circuit, while not embracing the view of either the Ninth or Seventh, will not extend their holdings to the case of a late motion to reopen. And if that is not enough confusion, consider the decision of the Fifth Circuit holding that the departure bar is *both* jurisdictional and mandatory, and thus the position taken by the Board in *Bulnes* is improper. *Toora*, 603 F.3d at 287-88.

Toora initially departed the United States after being served an order to show cause in 1995; his deportation hearing proceeded without him and he was ordered deported in absentia. He returned the same year, under an assumed name, and was granted asylum by the INS. In 2007, made aware of the ruse, the DHS rescinded the grant of asylum; Toora responded by filing a motion to reopen his deportation proceedings on grounds of lack of notice. The Board held that the Immigration Judge had jurisdiction to entertain the motion, despite the departure bar, and that he correctly denied the motion on the merits.

Rejecting the Board’s assertion of jurisdiction, the court determined that the departure bar regulation is unambiguous and the Board’s interpretation therefore not subject to the deference accorded under *Chevron* to an agency’s interpretation of an ambiguous statute or regulations. “The regulation clearly states that the bar applies to an alien who departs after the initiation of the deportation proceedings. The regulation does not limit the application of the departure bar to aliens who leave the country before the deportation order is issued. In this case, Toora departed after the initiation of the deportation proceedings.” *Toora*, 603 F.3d at 287. Judge Southwick, in a concurring opinion, criticized the Board for issuing such an interpretation in a single-member decision, without adequate reasoning. It is evident from his comments, and from the remainder of the decision, that the Fifth Circuit was not aware of the Board’s ruling in *Bulnes*, issued while the petition for review was pending. Perhaps *Chevron* deference will be due the next time the Fifth Circuit addresses this question.

**3. “The Paradigm of Fraud”—But the Applicant May Still Be “Credible.”** *Tijani v. Holder*, \_\_\_F.3d\_\_\_, 2010 WL 4925449 (9th Cir. Dec. 6, 2010): *Nunez v. Holder* (#16) and *Mata-Guerrero v. Holder* (#15) are but two reminders that one of the oldest concepts in immigration law—moral turpitude—remains one of the most unsettled, providing fertile ground for dispute and dissent. Seventy-five years ago, being named the correspondent in a divorce case could prompt immigration authorities to bar admission. See Edward R. Grant, *Crimes Involving Moral Turpitude: Categorical Approach or Evolving Moral Standards?*, Immigration Law Advisor, Vol. 1, No. 11, at 4 (Nov. 2007) (describing the case of Vera, Countess Cathcart). *Tijani* tests the extent to which more contemporary peccadilloes—in this case, using false information to obtain credit cards—can be classified as CIMTs. See also *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010) (holding that misuse of a social security number in violation of 42 U.S.C. § 408(a)(7)(B) is a CIMT); *Lateef v. DHS*, 592 F.3d 926 (8th Cir. 2010) (holding that unlawfully obtaining a social security number in violation of 42 U.S.C. § 408(a)(7)(A) is a CIMT; declining to follow *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000)). *Tijani* earned its lofty ranking, however, because of the juxtaposition of its clear-as-a-bell finding that the petitioner engaged in massive fraud and its determination that he may still be regarded as credible for purposes of his application for asylum.

Not to be outdone by Judge Reinhardt's overture in *Nunez*, Judge Noonan commenced *Tijani* with characteristic eloquence:

Monsuru Olasumbo Tijani, a native and citizen of Nigeria, petitions for a review of a decision of the Board of Immigration Appeals (the BIA), affirming a decision by an immigration judge ordering his removal and denying him asylum. Central to the case is the place of credit in our economy. To the unsophisticated and sometimes to the sophisticate, the nature of credit is a mystery. It is not animal, mineral or vegetable. It is not real property. It is not a chattel. It is not money. Yet it is not a vapor. The one who uses it becomes a debtor, but becomes a debtor empowered to acquire wealth. The one who grants it, the creditor, puts his own wealth at risk.

Credit comes into existence through confidence—confidence that one human being may rely on the representations of another human being. On this utterly unmechanical, uniquely human understanding, a credit economy is formed and wealth is created. To exploit, pervert and destroy the confidence that creates credit is a vicious act. The abuse of the distinctively human capacities to reason and to engage in rational speech, using these capacities to harm another human, may well be considered an act of moral turpitude.

That, at least, is the conclusion most people in this country would reach once they knew the facts. Credit is today the most widespread means of acquiring wealth in this country. To suppose that it is not fraud to try to tap into this wealth by lies is to ignore the economic elements of the modern world. Credit card fraud not fraud? No, in the modern United States it is the paradigm of fraud.

*Tijani*, 2010 WL 4925449, at \*1.

As clear as the issue was to Judge Noonan, his conclusion drew a vigorous dissent from Judge Tashima. He asserted that both the Ninth Circuit and the Board were bound to follow the Board's 1964 determination that a conviction for procuring credit under false pretenses is not morally turpitudinous. *Matter of Kinney*, 10 I&N Dec. 548 (BIA 1964). The brief analysis in *Kinney*—issued well before the era of ubiquitous plastic—concluded that since one obtaining credit through false statements might nevertheless intend to pay for the goods he purchases by the ill-gotten credit—seems as quaint as the 1926 charge against Countess Cathcart. However, until overruled, it is binding law, Judge Tashima concluded, and could not be vitiated by the single-member decision that affirmed the Immigration Judge's decision against Tijani.

Tijani's "string of crimes" indicates how far we have come from the halcyon days when "credit," for most folks, was something extended by the shops on Main Street. He was convicted multiple times of violation of section 532(a)(1) of the California Penal Code—"a modern form of swindle particularly tempting because of the ease and impersonality with which the crime may be carried out." *Id.* at \*3. The court rejected the dissent's view of section 532(a)(1) as a "benevolent interpretation" divorced from the reality of modern-day credit transactions. *Id.* at \*4. "No court would accept such a defense [that the defendant intended to pay back the bank, which would thereby benefit from the transaction]. The intent of the fraudster is evil: to get what he has no right to get." *Id.* Even if the dissent were correct, the majority concluded that Tijani's crime would be classified as turpitudinous under the modified categorical approach, because it was clear that his actions procured the extension of credit, not goods or cash. *Id.*

Creditors, like investors, transact in risk. An investor who, as a result of a person's misrepresentations, receives a riskier asset than he bargained for, has suffered measurable and foreseeable economic harm, and is the victim of fraud. Similarly, the creditor who is induced through misrepresentations to give credit suffers measurable and foreseeable harm the moment the creditor enters into the transaction with the fraudster.

The harm is inflicted regardless of whether the customer intends to make

timely payments or whether or not he eventually makes them. The creditor's contract with the customer has more than one parameter. Creditors extend a particular line of credit, including a specific credit limit, a specific interest rate, and particular provisions for late fees and penalties, based on the calculated credit-worthiness of a specific customer. A credit-seeker who misrepresents his credit-worthiness does so precisely with the intent of receiving a higher credit limit, a lower interest rate, lower monthly payments, and more favorable late-fee and penalty provisions than he otherwise would—at the expense of the creditor. The creditor, in this situation, receives a riskier and less valuable investment than that bargained for, and therefore suffers measurable and foreseeable economic harm. He has been defrauded.

The current economic crisis highlights the full impact of the misrepresentation of risk in the credit market. The impact is on creditors, consumers, and on the economy. When creditors take on too many risky contracts, whether due to their own carelessness or the misrepresentations of their customers, they are likely to suffer enormous economic harm, and the resulting effects on society can be devastating. Any assessment of the pecuniary harm suffered by the creditor of a fraudster will be incomplete if it is divorced from these economic realities.

*Id.* at \*5. *Kinney*, the majority concluded, rested upon an inaccurate proposition because it rests upon an erroneous interpretation of the elements of the offense, failing to recognize the inherent fraud in obtaining credit under false pretenses.

Tijani, despite his multiple CIMTs, has an additional chance at relief. Judges Noonan and Tashimi agreed that since the Immigration Judge explicitly did not find Tijani incredible in denying his claim for asylum, the record must be remanded for proper application of pre-REAL ID Act circuit law, which forbids the requirement of corroborative evidence when testimony is credible. *Id.*

at \*8-9. (Judge Tashima would hold the Immigration Judge bound to find Tijani credible; Judge Noonan was not explicit on this in the opinion for the court).

Judge Callahan penned a concurrence/dissent disagreeing with the remand for asylum, adopting as the core of his opinion the sprightly assessment of the Immigration Judge. Noting that Tijani had claimed, in separate immigration proceedings, two widely divergent dates for his alleged conversion from Islam to Christianity, the Immigration Judge observed:

The respondent is claiming that he would be persecuted and tortured upon return to Nigeria because of the fact that he [has] changed his religion. This time the respondent is not crying wolf. Instead on this occasion the respondent is crying an alligator is present. The respondent would like the United States and its Government to run and give him the necessary relief and believe him. The Court, however, finds that after a conviction for perjury, after false statements have been submitted to an Immigration Judge regarding the respondent in the past, the fact that the record contains conflicting evidence as to when the respondent did become [a] Christian, even if [he] did and based upon this case that the Court has reason not to believe the respondent this time. The 9th Circuit Court of Appeals has held that it is not necessary to corroborate one[s] testimony if it is specific, credible and direct. This Court, however, finds for the reasons set forth above that there are a number of deficiencies in the respondent's testimony. The Court also finds that when the little boy comes 16 times and cries wolf and each time it is verified beyond a doubt that he is telling a lie, the 17th time that he cries [that] he is afraid of an alligator, that it is reasonable for the trier [of] fact, in this case myself, not to [believe] him. This Court is not going to specifically find for the record that the respondent is not credible because the Court cannot point to a single inconsistency in the record other than the fact that the respondent claims that in 1994 he was a Christian, although

it appears that it has been represented to an Immigration Judge before, that occurred in 1987. But the Court finds based upon the respondent's past lengthy detailed record of lying in this country, which has occurred on [a] continuous and regular basis that the words of this respondent simply deserve no weight. This Court is not, after 16 occasions of crying wolf, going to believe the respondent at this time when he claims a different harm that necessitating [sic] asylum without requiring some type of corroboration. In essence what the Court is saying then is while it cannot find an inconsistency in the respondent's testimony at this time to say that he is not credible, it finds that the weight of his words is not sufficient to carry his burden of proving eligibility for asylum. If the boy comes and claims alligator, this Court cannot say that after 16 prior lies that there is any way to deem the statement [that] there is an alligator to be inconsistent. The Court, however, finds that the weight of those words, there is an alligator after 16 occasions of finding beyond a doubt that there is [a] lie sufficient to say to the boy[,] well[,] if there is an alligator this time, you need to prove it to me and demonstrate that your words are true. The Court simply finds that the respondent has not done so and has failed to meet his burden of proof.

*Tijani*, 2010 WL 4925449 at \*16 (Callahan, J., concurring and dissenting) (quoting the Immigration Judge's decision).

These findings, Judge Callahan concluded, were sufficient to constitute an explicit adverse credibility determination. "The majority . . . seems to hold that because the IJ fails to find a more specific inconsistency in Tijani's claim of religious persecution in Nigeria, we are bound by our precedent to accept Tijani's representations as true. In other words, if an applicant spins a sufficient clever yarn for which there is no direct contrary evidence, it must be accepted as true. I do not read our precedent as compelling this conclusion." *Id.* at 17 (footnote omitted). The Immigration Judge's reasons for doubting Tijani's

credibility did not rest on speculation or conjecture, but on a well-established pattern of fraud and deceit. Nor, Judge Callahan stated, does Ninth Circuit precedent bar the requirement of corroborative evidence from an applicant with such a record of lying. *Id.* at 18.

For more from Judge Noonan, work up the list.

**2. *Will Kucana Lead to Judicial Review of Denial of Sua Sponte Motions?*** *Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010): Another tripartite decision lands the runner-up spot on the 2010 list. *Gor* involved a long procedural history—and a simple question: in the wake of *Kucana v. Holder*, can all decisions denying a request that the Board exercise its sua sponte authority to grant a late or number-barred motion to reopen remain insulated from judicial review. While the panel held that it was bound by circuit precedent—consistent with that of circuits nationwide—to find that it lacked jurisdiction, the judges divided on whether, and to what extent, *Kucana* undermines the no-jurisdiction rule on sua sponte denials. See *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) (finding no jurisdiction to review sua sponte denial); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004) (same).

The petitioner, a lawful permanent resident since the age of four (1985), was convicted of four counts of felony nonsupport under Ohio law and at a 2007 hearing, where he appeared pro se, was found removable for child neglect or abandonment pursuant to section 237(a)(2)(E)(ii) of the Act. A pro se appeal to the Board was dismissed. The petitioner later retained counsel, who filed an untimely motion to reopen asking the Board to exercise its sua sponte authority because the respondent's convictions should not be regarded as "child abuse or neglect," and because the Immigration Judge had failed to provide the required list of free legal services at the master calendar. The Board found neither to constitute an exceptional situation, since both claims could have been raised on direct appeal.

The lead opinion, penned by District Judge Lawson (sitting by designation), concluded that although *Barry* and *Harchenko* controlled, neither could be reconciled with the determination in *Kucana* that while the Board has broad discretion to grant or deny a motion to reopen, "courts retain jurisdiction to review, with due respect, the Board's decision." *Gor*, 607 F.3d



at 187 (citing *Kucana*, 130 S. Ct. at 838). Echoing the Seventh Circuit’s reasoning in *Marin-Rodriguez*, the lead opinion asserted that *Barry* and *Harchenko* “stand on the . . . tenuous foundation that an agency acting on its own can insulate its decisions from judicial review.” *Id.* at 191. The opinion also stated that the rationale given by most circuits to forego jurisdiction over sua sponte motions—the lack of a meaningful standard in the regulation against which to judge an Immigration Judge’s or the Board’s rejection of a sua sponte motion—also fails in light of *Kucana*. *Id.* at 189-90. The Board’s authority to grant or deny *any* motion in the exercise of discretion “is no less broad” than its authority over sua sponte motions. *Id.* at 190. “If courts nonetheless retain jurisdiction to review the BIA’s discretionary decision not to grant a motion to reopen, it is difficult to understand how the BIA’s equally broad discretion not to reopen proceedings sua sponte entirely bars judicial review.” *Id.* at 191.

Chief Judge Batchelder, in concurrence, vigorously dismissed the majority’s view on the continued viability of *Barry* and *Harchenko*.

[T]his case differs from *Kucana* . . . [because] there is a world of difference between the immigrant’s *statutory* right to file a motion to reopen, which was at issue in *Kucana*, and the discretionary right of the BIA—a right neither granted by nor addressed by Congress—to reopen *sua sponte*. The *Kucana* Court recognized this difference when it expressly declined to express any opinion “on whether federal courts may review the Board’s decision not to reopen removal proceedings *sua sponte*.” The lead opinion goes to great lengths to show why the Supreme Court’s express refusal to opine on the issue decided by our prior holdings in *Barry* and *Harchenko* should be viewed as an indication that the time has come to abandon those holdings. In doing so, the lead opinion ignores the huge gulf that separates a statutory *right* to move to reopen and a purely discretionary non-statutory *power* to reopen *sua sponte*.

*Id.* at 194 (citation omitted). The Board’s sua sponte authority arises solely from its own regulations, and in contrast to the case of a timely filed motion to reopen,

Congress has not established any “right” to such relief. The lead opinion wrongly concluded, therefore, “that once an agency determines that it will, on occasion, bend the rules in helpful ways, every person who might benefit from a bending of the rules has the right to challenge the agency’s decision not to do so.” *Id.* at 195. A final concurrence by Judge Cole agreed with the lead opinion that the denial of sua sponte motions should be subject to judicial review, albeit with a higher degree of deference to the Board than in the case of a timely filed motion. *Id.* at 198.

Everything written in *Gor* was dicta, perhaps making it a curious choice for the runner-up spot. The debate it portends, however, is likely to be taken up in other cases and in other circuits, with no clear certainty as to the outcome. Either way the question is resolved—through an expansion or “cabining” of the rights declared in *Kucana*—the impact on judicial oversight of motions practice before Immigration Courts and the Board will be profound. See Edward R. Grant, “*I Second That (E) Motion*: How EOIR Motions Practice Is Increasingly Governed by the Federal Courts, Immigration Law Advisor, Vol. 1, No. 6, at 4 (June 2007).

### **1. Sexual Abuse of a Minor—Yet Another Look?**

*United States v. Farmer*, \_\_\_F.3d\_\_\_, 2010 WL 4925441 (9th Cir. Dec. 6, 2010): We end this year precisely where we ended the last: further perplexed by the Ninth Circuit’s jurisprudence on what constitutes sexual abuse of a minor. See Grant, *The Top 20*, *supra*, at 18-19 (discussing *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009), and *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009)). *Farmer*, while breaking no new ground on the narrow issue before the court, features a concurrence by Judge Bybee, joined by Judge Noonan, suggesting that the Ninth Circuit revisit the “awkward result” created by its application of competing definitions of “sexual abuse” to different classes of sexual offenses. *Farmer*, 2010 WL 4925441, at \*5.

*Farmer* ruled that the petitioner, convicted of child pornography, was subject to a mandatory minimum enhancement of his sentence because of a prior conviction for lewd and lascivious acts upon a child in violation of section 288(a) of the California Penal Code. See 18 U.S.C. § 2252A(b)(2) (providing a mandatory 10-year term for previous conviction for any law relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward); *United States v. Baron-Medina*,

187 F.3d 1144 (9th Cir. 1999) (holding that conduct described in section 288(a) is categorically “sexual abuse of a minor” for purposes of section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A)). The court determined that it was bound by prior precedent in determining that, under the common, ordinary meaning of the terms, a violation of a statute such as section 288(a)—which punishes acts upon the body of a child less than 14 years of age—is categorically a crime of sexual abuse of a minor. *United States v. Sinerius*, 504 F.3d 737, 741 (9th Cir. 2007) (applying 18 U.S.C. § 2252A(b)(2) to a Montana statute where the “least egregious conduct” was consensual sexual contact between a 16-year-old offender and a 13-year-old victim); see also *United States v. Medina-Villa*, 567 F.3d at 515-16. The court rejected the petitioner’s argument that his offense under section 288(a) should be analyzed consistent with *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc)—a position rejected, for purposes of the aggravated felony definition, in *Medina-Villa*.

The concurring opinion, however, expressed sympathy with at least the structure of the petitioner’s argument. The Ninth Circuit’s enterprise, at least since *Baron-Medina* in 1999, has been to fix a “generic” concept of “sexual abuse of a minor,” both in immigration and sentence-enhancement cases. The enterprise has been at best a mixed success: on the question before it in *Farmer*, for example, the Ninth Circuit follows a “common meaning” approach, while the language of 18 U.S.C. § 2252A itself strongly suggests that the courts should be looking to the precise definitions of three sexual offenses—aggravated sexual abuse, sexual abusive, and abusive sexual conduct involving a minor or ward—that are set forth in 18 U.S.C. §§ 2241, 2242, and 2243. In other words, the logical place to look for the “generic” definition for purposes of interpreting the sentence enhancement statute is the Federal criminal code itself; not only because the sentence enhancement provisions are part of the criminal code, but because the language in that provision clearly refers to three specific offenses in the code. *Farmer*, 2010 WL 4925441, at \*5-6.

Second, that part of the enterprise reflected in *Estrada-Espinoza*—which *did* look to the criminal code (18 U.S.C. § 2242) to define the “generic” offense of “sexual abuse of a minor”—is no less counterintuitive. The phrase as used in section 101(a)(43)(A) of the Act is most amenable to a “common meaning” approach, as opposed

to the rigid formula imposed by *Estrada-Espinoza*—a formula that led to the puzzling outcome in *Pelayo-Garcia*. The ink was barely dry on *Estrada-Espinoza* when the Ninth Circuit issued its critical clarification in *Medina-Villa*: that *Estrada-Espinoza* applies only to statutory rape offenses, and that other sex crimes involving child victims would be assessed under the “common meaning” standard.

In sum, Judge Bybee concluded, this means that the legally incorrect standard is being applied to the sentence-enhancement provisions of 18 U.S.C. § 2252A, while *two* standards, one of which is a poor fit, are applied to the interpretation of section 101(a)(43)(A) of the Act. The better approach, he suggested, is to apply the standards in 18 U.S.C. § 2242 to define sexual abuse of a minor for purposes of sentence enhancement, and the common meaning approach for purposes of immigration law. Were the latter invitation followed, the Ninth Circuit would join every other circuit to have considered the question, the most recent being the Third Circuit. See *Restrepo v. Att’y Gen. of U.S.*, 617 F.3d 787, 797-78 (3d Cir. 2010) (rejecting *Estrada-Espinoza* and discussing circuit cases in agreement).

And, so to quote our 2009 conclusion: “[*Farmer*], one suspects, is not the last we will hear of this issue; the [Ninth Circuit’s] split with the [Third] Circuit may, in time, require resolution by a higher authority.”

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