U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 18, No. 2 FEBRUARY 2014

LITIGATION HIGHLIGHTS

Inside

BIA Clarifies The "Particularity" And "Social Visibility" Elements To Establish "A Particular Social Group" Under Asylum Provision

On February 7, 2014, the Board of Immigration Appeals issued two precedential social group decisions, ***Matter of M-E-V-G-***, 26 I&N Dec. 227 (BIA 2014), and ***Matter of W-G-R-***, 26 I&N Dec. 209 (BIA 2014). These decisions reiterate that social group claims have separate "social group," "membership", and "on account of" elements each of which must be separately assessed. These decisions also clarify the "particularity" and "social visibility" (renamed "social distinction") requirements for a "particular social group", giving reasoned and reasonable explanations of their meaning, bases, functions, and origins.

The purpose of these new decisions appears to be to restore national uniformity to social group law. That law is in some disarray because of a split among the circuits and confusion, criticisms, or questions by some courts about the meaning and reasonableness of the "particularity" and "social visibility" criteria and the sufficiency of the Board's explanation of them. By issuing these new precedents clearing up these matters, the Board appears to be reasserting its authority as the final interpreter of ambiguous provisions in our immigration laws -- authority which carries with

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Fifth Circuit Rejects Attorney General's Three-Step Framework for Determining Whether Alien Has Been Convicted of Crime Involving Moral Turpitude

In ***Silva-Trevino v. Holder***, 742 F.3d 197 (5th Cir. 2014) (*Benavides*, Owen, Southwick), the Fifth Circuit vacated *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), and held that the Attorney General's framework for determining whether an alien has been convicted of a crime involving moral turpitude (CIMT) — insofar as it permits extrinsic examination of documents outside of the conviction record — conflicts with the unambiguous language of the INA.

The petitioner was ordered removed as an alien convicted of an aggravated felony on the basis of a Texas conviction of indecency with a child (§ 21.11(a)(1) of the Texas Penal Code). Petitioner then applied for adjustment of status but the IJ denied his application finding that the offense also qualified as a CIMT, thus rendering him inadmissible under § 212(a)(2)(A)(i), and ineligible for discretionary relief. The BIA vacated that the decision, but the Attorney General certified the case for his review.

In *Matter of Silva-Trevino*, the Attorney General established a three-step framework that permitted adjudicators, if necessary, to consider evidence outside the record of conviction to determine whether an alien

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Fifth Circuit Rejects *Silva-Trevino* Methodology

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had been convicted of a CIMT. Following a remand, the IJ applied the new rule and using petitioner's stipulations, testimony, and the victim's birth certificate concluded that petitioner should have known the victim was a minor. This extrinsic evidence, combined with the record of conviction, was sufficient for the IJ to find that petitioner had been convicted of a CIMT. The BIA affirmed.

In vacating the Attorney General's decision, the Fifth Circuit emphasized that it was only considering the means by which judges may determine whether a given conviction qualifies as a CIMT. The court noted that under its prior precedents, "judges may consider only 'the inherent nature of the crime, as defined in the statute,' or, in the case of divisible statutes, 'the alien's record of conviction' . . . We do not permit extrinsic inquiry into the 'circumstances surrounding the particular transgression.'"

The court agreed with the majority of the circuits that the statute is not ambiguous because it includes a list of the seven official documents that may be considered as proof of such a conviction. *See* § 240(c)(3)(B). "There is no mention of any additional evidence; and the introductory phrasing, 'any of the following documents or records,' gives no indication that extrinsic evidence is contemplated," said the court. The court did not find persuasive the government's argument that because there is an inherent lack of clarity in the concept of moral turpitude, the term "convicted of a crime involving moral turpitude" is ambiguous. "The lack of a precise definition of moral turpitude does not infuse ambiguity into the word conviction," said the court

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The court further held that the use of the categorical approach to determine whether a prior conviction qualifies as a certain type of crime under *Taylor v. United States*, 495 U.S. 575 (1990), is implied. In *Taylor*, the Court held that adjudicators may not look beyond the record and associated statutory elements. "The categorical approach has been used [in some version] in the immigration context for at least a century," said the court.

The court distinguished the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. 29, (2009), because in that case the statutory language described a subset of a category of convictions and therefore "Congress necessarily authorize[d] adjudicators to look beyond a conviction record to the circumstances of an underlying offense." In *Nijhawan* the category was crimes of fraud and the subset was those resulting in a loss exceeding $10,000 to the victim. Because the statute at issue here defined no subset, the court said that it had no authority to abandon the categorical approach and look beyond the conviction record.

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TPS Extended for Haitian Nationals

DHS has extended Temporary Protected Status (TPS) for eligible nationals of Haiti for an additional 18 months, effective July 23, 2014 through Jan. 22, 2016. According to the Notice in the Federal Register, "The Secretary has determined that an extension is warranted because the conditions in Haiti that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Haiti based upon extraordinary and temporary conditions in that country that prevent Haitians who have TPS from safely returning." 79 *Fed. Reg.* 11808 (March 3, 2014).

Current Haitian beneficiaries seeking to extend their TPS status must re-register during a 60-day period that runs from March 3, 2014, through May 2, 2014. U.S. Citizenship and Immigration Services (USCIS) encourages beneficiaries to re-register as soon as possible once the 60-day period begins. USCIS will not accept applications before March 3, 2014.

The 18-month extension also allows TPS re-registrants to apply for a new Employment Authorization Document (EAD). Eligible Haitian TPS beneficiaries who re-register during the 60-day period and request a new EAD will receive one with an expiration date of Jan. 22, 2016. USCIS recognizes that some re-registrants may not receive their new EADs until after their current EADs expire. Therefore, USCIS is automatically extending current TPS Haiti EADs bearing a July 22, 2014 expiration date for an additional six months. These existing EADs are now valid through Jan. 22, 2015.

To re-register, current TPS beneficiaries must submit Form I-821, Application for Temporary Protected Status. Re-registrants do not need to pay the Form I-821 application fee, but they must submit the biometric services fee, or a fee-waiver request, if they are age 14 or older. All TPS re-registrants must also submit Form I-765, Application for Employment Authorization.

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it the ability to override court interpretations that differ from the agency's "permissible construction of the statute", *INS v. Aguirre-Aguirre*, 526 U.S. 415, 414 (1999), and to require judicial deference to such an interpretation under *Nat'l Cable & Telecomms. Assn v. Brand X Internet Servs*., 545 U.S. 967, 980 (2005), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

Board's Evolving Interpretation Of "Particular Social Group"

"[M]embership in a particular social group" is one of five statutorily-specified motives for persecution that could qualify an applicant for asylum or withholding. 8 U.S.C. 1101(a) (42); 1158(b); 1231(b) (3). The phrase "particular social group" is not statutorily defined and is ambiguous. If read in its broadest sense, the phrase is "almost completely open-ended" and "[v]irtually any set including more than one person would be described as a 'particular social group.'" *Fatin v. INS,* 12 F.3d 1233, 1238 (3d Cir. 1993).

Further, interpreting "particular social group" as referring to any accumulation of people with a common trait that puts them at risk of persecution – *i.e*., any targeted or persecuted group -- would effectively render the other four grounds of persecution in the statute superfluous, which is not permissible. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("[It] is a cardinal principle of statutory construction that . . . no clause, sentence, or word shall be superfluous, void, or insignificant"). As the Board has observed, it is internationally recognized that "particular social group" is not a "catch all" for any groups or people facing persecution. *Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006) (internal quotation marks and citation to authority omitted).

In the Board's seminal social-group decision, *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), the Board applied the canon of *ejusdem generis* ("of the same kind") to interpret "particular social group" as referring to group of persons who share the same kind of characteristics as those specified by the other grounds of persecution in the statute (race, religion, nationality, political opinion). *Id.* at 233-34. Accordingly, the Board interpreted "particular social group" as referring to a group of persons who share a common "immutable" characteristic, referring to a characteristic that (like race or nationality) "cannot be changed" or (like political opinion or religion) is "fundamental to human dignity or conscience" and should not have to be changed to avoid persecution. *Id.* The Board suggested that an unchangeable characteristic might be "innate", such as "sex," "color," or "kinship ties," which are traits that ordinarily cannot be changed because they are acquired at birth, or "in some circumstances might be a shared past experience, such as former military leadership or [former] land ownership," which are experiences that ordinarily cannot be change because they occurred in the past. *Id*. at 233-34.

Interpreting "particular social group" as referring to any accumulation of people with a common trait that puts them at risk of persecution – *i.e*., any targeted or persecuted group -- would effectively render the other four grounds of persecution in the statute superfluous.

Applying the "immutable characteristics" requirement the Board issued four precedential decisions between 1985 and 1997 identifying the following "particular social groups" in specific countries: i) people in Cuba identified as homosexual by the government; ii) members of the Marehan subclan in Somalia; iii) young women in a specific tribe in Northern Togo who had not had female genital mutilation (FGM); and iv) people with mixed Filipino and Chinese ancestry in the Philippines. *See in the above order Matter of Tobosco-Alfonso*, 20 I & N Dec. 819, 812-23 (BIA 1990); *Matter of* H-, 21 I&N Dec. 337, 341-343 (BIA 1996); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *Matter of V-T-S-,* 21 I&N Dec. 792, 798 (BIA 1997). The Board also suggested that "it is possible," "in appropriate circumstances," that an alien could establish a valid social group claim as a "former member of the national police" in El Salvador. *Matter of Fuentes*, 19 I&N Dec. Dec, 658, 662-663 (BIA 1988). In these decisions the Board considered not only a shared immutable or fundamental group characteristic, but also whether the putative social group was a recognized group in the society of the country at issue. *See, e.g., Tobosco-Alfonso*, 20 I&N Dec. at 820-21; *Kasinga*, 21 I&N Dec. at 365-66; *Fuentes,* 19 I&N Dec. at 659, 661; *H-,* 2 I&N Dec. 342-343.

As time passed, courts began to observe that if taken literally and applied without limits, *Acosta's* suggestion that immutability may be based on a former experience shared by others would mean that virtually any common human experience could establish a social group, since once any human experience occurs it is in the past, and the past cannot be changed. *See, e.g., Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2005). However, such a potentially all-encompassing interpretation could make the social-group ground virtually limitless.

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Board "Particularity" And "Social Visibility" Precedents 2006-2008

By 2006 the Board determined that there was a need for "greater specificity to the definition of a social group." *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008). Accordingly, between 2006 and 2008 the Board issued four precedential decisions providing that in addition to "immutable characteristics," a "particular social group" must meet "particularity" and "social visibility" requirements. *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. at 582-86; *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam); *Matter of C-A-*, 23 I & N Dec. 951, 956 (BIA) , *aff'd sub nom. Castillo-Arias v. United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2005), *cert denied*, 549 U.S. 1115 (2007).

The Board explained that "social visibility" requirement refers to "the extent to which members of a society perceive those with the characteristic in question as members of a social group," and is consistent with the Board's prior precedents which had considered the recognizability of a proposed group in the society. *See E-A-G-*, 24 I&N Dec. at 594; *S-E-G-* , 24 I&N Dec. at 586-587. The Board noted that persecution "may be a relevant factor in determining the [social] 'visibility' of a group in a particular society," but that a social group cannot be "defined exclusively by the fact that [the group] is targeted for persecution." *C-A-*, 23 I&N Dec. at 956-957, 960 (internal quotation marks and citation omitted).

The Board explained that the "particularity" requirement pertains to whether a proposed group "has particular and well-defined boundaries", S-E-G-, 24 I&N Dec. 582; is sufficiently defined to "provide an adequate benchmark for determining group membership," *A-M-E-*, 24 I&N Dec. at 76; or is too "amorphous," "inchoate," "subjective," "ill-defined," "broad," or "diffuse" to establish a "discrete" group. *Id.; S-E-G-*, 24 I&N Dec. 585-586.

Court Positions And Questions About "Social Visibility" And "Particularity" Leading To The Two New Board Decisions

Courts have disagreed about deferring to the "particularity" and "social visibility" requirements. Nine circuits -- the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh -- have deferred to or apply these requirements. *See, e.g., Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013); *Henriquez-Rivas v. Holder*, 70 F.3d 1087-91 (9th Cir. 20130 (*en banc*) (clarifying the "social visibility" requirement while remanding new issues about the meaning "social visibility" and "particularity" for the Board to resolve in the first instance; *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012); *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012); *Zelaya v. Holder*, 668 F.3d 159, 165-55 and n. 4 (4th Cir. 2012) (deferring to the "particularity" requirement); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 659-53 (10th Cir. 2012); *Scatambuli v. Holder*, 558 F.3d 53, 59-61 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 609 F.3d 70 (2d Cir. 2007); *Castillo-Arias v. U.S. Att'y Gen.*, 445 F.3d 1190 (11th Cir. 2005), *cert. denied*, 549 U.S. 1114 (2007).

The Board explained that "social visibility" requirement refers to "the extent to which members of a society perceive those with the characteristic in question as members of a social group."

Two circuits, the Third and Seventh, rejected the "social visibility" requirement. *See Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 604 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). These circuits interpreted the "social visibility" requirement as requiring literal on-sight visibility of a group's characteristics or members and criticized an on-sight visibility requirement as unreasonable. *Valdiviezo-Galdamez,* 663 F.3d at 604; *Gatimi*, 578 F.3d at 15-16. These two circuits also criticized the Board for failing to explain how requiring literal or on-sight visibility is consistent with the Board's prior immutable-characteristics line of precedents, especially the Board precedents recognizing non-visible groups of homosexuals in Cuba, women in Togo who had not had FGM, or former members of the police in El Salvador. *Valdiviezo-Galdamez* 663 F.3d at 604-05; G*atimi v. Holder*, 578 F.3d at 615.

The Third and Seventh Circuits also rejected the "particularity" requirement. The Third Circuit directly rejected the requirement, concluding that there is no difference between the functions of the "particularity" requirement and the "discredited" literal, on-sight "social visibility" requirement. ("[T]hey appear to be different articulations of the same concept"; "'[p]articularity' appears to be little more than a reworked definition of 'social visibility'"). *Valdiviezo-Galdamez,* 663 F.3d at 608. The Seventh Circuit indirectly rejected the "particularity" requirement, appearing to discount it without expressly mentioning it, in *Benitez-Ramos v. Holder*, 589 F.3d 416, 431 (7th Cir. 2009). In that case, the Seventh Circuit expressed a view that a persecutor's persecution "makes . . . a par-

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ticular social group" and establishes the group's boundaries or contours, *id*., dismissing concerns about "ill-defined", "unspecific" or "amorphous" groups (*i.e.*, "particularity" considerations) based on the court's view that the contours of a social group are whatever aggregation of people (group) a persecutor seeks to persecute. *Id*. Applying this view that "particular social group" in effect means a persecuted or at-risk-of-persecution group of people, the Seventh Circuit recently rejected the concept that a proposed collection of people with various attributes who are at risk of persecution could ever be too broad or sweeping to meet the requirements of a "particular" social group. *Cece v. Holder*, 733 F.3d 662, 674-75 (2013) (*en banc*).

The Ninth Circuit declined to defer to the "social visibility" requirement but continues to apply it. That court does not read the requirement as requiring literal or "ocular" visibility but as merely requiring that people are understood or "perceived" to be a group in the society. *Henriquez-Rivas v Holder*, 707 F.3d 1081, 1091-93 (9th Cir. 2013) (*en banc*). However, the Ninth Circuit raised a new question about the meaning of the "social visibility" requirement: whose perception of people as a group controls the "social visibility" issue? The applicant's perception? The persecutor's perception? The country's perception as a whole? The United States' perception? *Id.* at 1089. The Ninth Circuit did not decide this question but instead left it open for the agency to decide, remanding the question to the Board ("[W]e leave it to the BIA to decide this issue in the first instance"). *Id*. at 1089. Nonetheless, in *dicta*, the Ninth Circuit suggested, in a lengthy two-paragraph discussion, that the persecutor's perception should control the "social visibility" issue ("[W]e believe that the perception of the persecutors matters most"; "the persecutor's perceptions are potentially dispositive"). *Id*. at 189-90.

The Ninth Circuit has interpreted "particularity" to be "separate" but expressed the court's view (again in what appears to be *dicta*) that the persecutor's perception ought to control the "particularity" requirement as well. *Id.* at 1091 ("[t]he 'particularity' requirement is . . . relevant in considering whether a group's boundaries are so amorphous that, in practice, *the persecutor does not consider it a group*"; "*if a persecutor does not actually rely on specific boundaries* or definitions to identify the group, it may be . . . difficult to believe that a collection of individuals is in fact perceived as a group") (emphasis added). The Ninth Circuit did not actually decide the "particularity" issue in the case, but instead remanded to the Board, since it was unclear whether the Board had decided the question. *Id*. at 1093, 1094.

The "particularity" and "social visibility" requirements are separate requirements with different functions, although they both take into consideration societal conditions in the country of concern.

The Fourth Circuit deferred to the "particularity" requirement but not to the "social visibility" requirement. *Zelaya,* 668 F.3d 165-55 and n. 4. However, the Fourth Circuit's interpretation or application of the "particularity" requirement appears to be in some disarray. *See Temu v. H*older, 740 F.3d 887, 900-901 (4th Cir. 2014) (Agee, J. dissenting).

Matter of M-E-V-G- and *Matter of W-G-R-* Clarifying "Social Visibility" And "Particularity" Requirements To Re-Establish Uniformity

Given the split among the circuits and confusion about the "social visibility" and "particularity" requirements, the Board issued the two new precedents, *Matter of M-E-V-G-* and *Matter of W-G-R-* in February. In *W-G-R-*, the Board reiterated that an applicant seeking relief based on a claim of persecution on account of membership in a "particular social group" has the burden to establish each of the following separate elements of such a claim: (1) the existence of a "particular social group"; (2) the applicant's membership in that group; and (3) persecution on account of membership in that group. 26 I&N Dec. at 223.

The new decisions also clarify that, in order to prove the existence of a "particular social group," an applicant must establish that a proposed group meets three criteria: (1) members share an immutable characteristic; (2) the group is defined with particularity; and (3) the group is socially distinct within the society in question. *Id*. at 212-18; *M-E-V-G-*, 26 I&N Dec. at 237-41, 244.

The new decisions reiterate or establish the following points.

►The "particularity" and "social visibility" requirements are separate requirements with different functions, although they both take into consideration societal conditions in the country of concern. *M-E-V-G-*, 26 I&N Dec. at 238-40; *W-G-R-,* 26 I&N Dec. at 201, 213-18.

►The principal origin of the "particularity" requirement is the language of the statute. The requirement pertains to delineation of a "discrete" group. The requirement means that the immutable characteristics defining a social group must "provide a clear benchmark" for determining membership and refer to a

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"discrete group" with precise "definable boundaries," that is not "amorphous," "overbroad," "diffuse," "vague," "all encompassing," nor "subjective" (with "subjective" referring to characteristics that do not have a commonly understood meaning in the society at issue). *M-E-V-G-*, 26 I&N Dec. at 238-40; *W-G-R-,* 26 I&N Dec. at 213-14.

►The principal origin of the "social visibility" requirement is the *ejusdem generis* canon of statutory construction. The requirement is principally based on the concept that like the other four grounds in the statute, a "particular social group" refers to persecution aimed at people who have common immutable characteristic or characteristics that create separate and distinct factions within a particular society. The requirement refers to people who are perceived to be a group by the society because of the immutable characteristic(s) the people share. *M-E-V-G-*, 26 I&N Dec. at 236, 240-41; 246-47; *Matter of W-G-R-* 215-16. That is, the society considers people with the characteristics in question to be "meaningfully distinct within [the] society". *M-E-V-G*, 26 I&N Dec. at 242. Such groups often may often be treated differently than others in the society and members may often perceive their affiliation with the group (although the latter is not necessary). *Matter of M-E-V-G-*, 16 I&N Dec. at 236, 240-41; 246-47; *Matter of W-G-R-*, 26 I&N Dec. at 215-16.

►Contrary to the Board's intent, the label "social visibility" has been interpreted by some as requiring literal or "ocular" visibility of a group, its members, or their characteristics. The Board intends, and has always intended, that the "social visibility" requirement refers to "external perception" as a group -- that is, to people who are in fact understood or perceived to be a meaningfully distinct group by their society and are set apart from others. To avoid ongoing confusion, the Board is changing the name of this requirement to "social distinction." This is a change in labels, not substance. The Board would have reached the same results in its prior "social visibility" precedents if it were to apply the "social distinction" label. *M-E-V-G,* 26 I&N Dec. at 236, 240-41, 246-47; *W-G-R-*, 26 I&N Dec. at 212, 216.

To avoid ongoing confusion, the Board is changing the name of this requirement [social visibility] to "social distinction." This is a change in labels, not substance.

►The Board explains how the "social visibility" (now "distinction") and "particularity" requirements evolved out of the agency's prior social group precedents. The Board also explains how its prior precedents recognizing homosexuals in Cuba (*Tobosco-Alfonso*), women in a specific tribe in Togo who had not had FGM (*Kasinga*), and former police in El Salvador (*Fuentes*) are consistent with the "social distinction" requirement, since these groups were perceived to be distinct by the societies in question. *M-E-V-G-*, 26 I&N Dec. at 244-247; *W-G-R-*, 26 I&N Dec. at 218-221.

►The "social distinction" requirement, and what constitutes a "particular social group," is controlled by the perception of the society in question, not by the perspective of the persecutor (or by the persecution). This is for two reasons. First, using the perception of the persecutor to control the "social distinction" requirement conflates the social group issue (whether an applicant has established a valid or cognizable social group) with the separate nexus issue ("on account of"). The "structure of the [statute]" supports preserving this distinction between the two separate issues. *M-E-V-G-*, 26 I&N Dec. at 242; *W-G-R-*, 26 I&N Dec. at 218. Second, relying on the perception of the persecutor would conflict with the Board's interpretation that a social group "must exist independently of the persecution," *Matter of W-G-R-*, 26 I&N Dec. at 215, and "cannot be defined exclusively by the fact that its members have been subject to harm." *Id.* at 218; *M-E-V-G-*, at 242. A persecutor's perception (or persecution) may be relevant to the "social distinction" requirement in assessing if a society considers certain people to be a distinct group. *M-E-V-G-*, 26 I&N Dec. at 242; *W-G-R-*, 26 I&N Dec. at 218. For example, persecution by the government may be a "catalyst that causes the society to distinguish [certain people] in a meaningful way and consider them a distinct group." *M-E-V-G-*, 26 I&N Dec. at 243. However, a persecutor's "perception is not itself enough to make a group socially distinct, and persecutor conduct alone cannot define the group." *Id*. at 242. "Particular social group" does not mean a persecutor's "enemies list." *M-E-V-G-*, 26 I&N Dec. at 242 (internal quotation marks and citation to authority omitted).

Conclusion

The effect of these two new precedents clarifying the Board's "particularity" and "social distinction" requirements remains to be seen. The Board's clarification that literal visibility is not required under the "social distinction" requirement -- and the Board's thorough explanations of i) the origins, function, and meaning of the "particularity" and "social distinction" requirements, ii) the evolution of these requirements in the Board's precedents; and iii) how the Board's prior precedents square with the current interpretation -- should go a long way to ending the circuit split

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FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

The Supreme Court heard argument On December 10, 2013, based on the government's petition for certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio v. Mayorka***s, 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argued that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the BIA reasonably interpreted INA § 203(h)(3).

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Moral Turpitude – Assault with a Deadly Weapon

On December 10, 2013, an *en banc* panel of the Ninth Circuit heard argument on rehearing of its published decision in ***Ceron v. Holder***, 712 F.3d 426, which held that a California conviction for assault with deadly weapon was crime involving moral turpitude, and the alien's conviction was a felony. *En banc* rehearing will address whether assault with a deadly weapon, in violation of California Penal Code Section 245(a)(1), is a categorical crime involving moral turpitude, and whether a sentence of imprisonment for a California misdemeanor conviction can exceed six months.

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BIA Standard of Review

Oral argument on rehearing was heard before a panel of the Ninth Circuit on September 9, 2013, in ***Izquierdo v. Holder,*** 06-74629, addressing the question of whether the Board the engaged in impermissible fact-finding when it ruled that the alien witnessed a human rights crime and made no effort to prevent it.

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Standard of Review Nationality Rulings

On March 17, 2014, an *en banc* panel of the Ninth Circuit heard oral argument in ***Mondaca-Vega v. Holder***. The court had granted *en banc* rehearing over government opposition, and vacated the published prior panel decision, 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same.

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Retroactive Application of Board Decisions

On January 6, 2014, the Ninth Circuit ordered the government to respond to the rehearing petition challenging its September 19, 2013 unpublished decision in ***Diaz-Castaneda v. Holder***, 2013 WL 5274401. The petition contends that petitioners are eligible for adjustment of status because the balancing of the *Montgomery Ward* factors tilts against applying *Matter of Briones* retroactively to their case, and the case should be remanded to develop the record on their reliance and equitable interests relating to the *Montgomery Ward* balancing test. The government opposed rehearing on January 27, 2014, arguing that the panel appropriately determined the *Montgomery Ward* factors in the first instance and therefore the panel decision suffered no error of fact or law to support rehearing.

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Ordinary Remand Rule

On September 12, 2013, the Ninth Circuit withdrew its March 22, 2013 opinion in ***Amponsah v. Holder***, 709 F.3d 1318, requested reports on the status of the BIA's present case reconsidering of the rule asserted in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and stated that the government's rehearing petition is moot. The rehearing petition had argued that the panel violated the ordinary remand rule when it rejected as unreasonable under *Chevron* step-2 the BIA's blanket rule against recognizing state *nunc pro tunc* adoption decrees entered after the alien's 16th birthday.

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Remand Rule - Suppression

The Ninth Circuit has requested a response to the government's petition for panel rehearing challenging the court's unpublished decision in *Armas-Barranzuela v. Holder*, No. 10-70803, which suppressed the alien's admissions and ordered removal proceedings terminated where the admissions were made after he would have been released from criminal custody but for an ICE detainer. The rehearing petition contends that the court misapprehended the issue before it when it decided the merits of the motion to suppress rather than limiting its review to whether the agency correctly determined that the alien failed to establish a *prima facie* case of a Fourth Amendment violation such that ICE should be required to justify how it obtained its evidence of alienage and removability.

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Updated by Andrew MacLachlan, OIL
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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Aliens Failed to Establish Requisite Hardship for Cancellation of Removal

In ***Alvarado v. Holder***, __ F.3d __, 2014 WL 563464 (1st Cir. February 14, 2014) (*Thompson*, Selya, Lipez), the First Circuit sidestepped the issue of its jurisdictional authority to review a discretionary denial of cancellation of removal, and found that the merits of the petitioners' claim did not establish that their removal would result in "exceptional and extremely unusual hardship" to Brian, their U.S. citizen child.

The petitioner, husband and wife from Guatemala, entered the United States illegally in the mid–1990s. They have two sons, one born in the United States in 1998. In 2008, the couple applied for asylum, but their application was not granted. Thereafter they were placed in removal proceedings where they sought cancellation of removal based on the hardship that their departure would cause for their son Brian. Their claim was principally that as a gifted student, Brian would not be able to reach his full potential in Guatemala because of the lack of educational opportunities available there and could become discouraged and develop behavioral problems if not placed in a program that offers the stimulation he requires. The IJ denied cancellation for failure to establish that Brian would suffer "exceptional and extremely unusual hardship" if petitioners were removed to Guatemala. The BIA dismissed the appeal.

Before the First Circuit, petitioners sought to avoid the jurisdictional bar under INA § 242(a)(2)(B)(i) by arguing that the IJ in considering Brian's hardship had ignored relevant case law. The court said that it was "difficult to pigeonhole the issues raised by petitioners as either factual or legal. However, though our jurisdiction turns on this question, we need not resolve it." The court explained that, it could "bypass statutory jurisdiction" because the outcome on the merits was "quite straightforward." The court then determined that the IJ appropriately considered the "exceptional and extremely unusual hardship" standard as applied to Brian. To the extent that petitioners challenged the factual determination, the court said that it lacked jurisdiction.

In its conclusion the court expressed its regret that it could do nothing more for petitioners and their children. "The record amply confirms the IJ's finding that petitioners have established good moral character: they perform community service with their church, have won volunteer awards, and have consistently filed their tax returns and W–2s. Moreover, petitioners' now fifteen-year-old American-citizen son, Brian, has never known life outside the United States. Uprooting him at this stage of his development seems particularly harsh. But the law as it now stands is not on petitioners' side, and so we are duty-bound to find as we do."

"The plain language of the material support bar is inconclusive as to whether a duress exception is implicit in its terms; the statute is silent on the question."

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SECOND CIRCUIT

Second Circuit Remands Case for BIA to Determine Whether Aliens Who Aided Terrorists Under Duress Are Barred from Asylum

In ***Ay v. Holder***, __ F.3d __, 2014 WL 642689 (2nd Cir. February 20, 2014) (Wesley, Hall, Carney (*per curiam*)), the Second Circuit affirmed the BIA denial of CAT protection but remanded the case to permit the BIA to make a precedential ruling on whether a duress exception is implicit in the "material support" to a terrorist organization bar under INA § 242(a)(3)(B)(iv)(VI).

The petitioner, an ethnic Kurd and native and citizen of Turkey, sought asylum and withholding. The agency found, however, that he provided "material support," to a terrorist organization, based on "four or five occasions" when he gave food and, "on at least one occasion," clothing, to individuals whom [petitioner] knew, or had reason to know, to be members of Kurdish terrorist groups, possibly including the Kurdistan Workers' Party ("PKK")—a designated terrorist organization." The agency, therefore found petitioner "statutorily ineligible for asylum and withholding of removal."

The court held that neither it, nor the BIA, had authored a precedential opinion addressing whether the INA's material support bar is subject to a duress exception. The court explained that "the plain language of the material support bar is inconclusive as to whether a duress exception is implicit in its terms; the statute is silent on the question, [ ] the BIA's decision provides no analysis of the statutory question; rather, it appears to presume that there is no duress exception." The court further determined that the BIA's single-member, non-precedential, and unpublished decision below "did not afford a definitive interpretation of the material support statute." Consequently, the court remanded the case to the BIA "for its careful consideration of a whether the statute should be construed to contain a 'duress exception' to the material support bar."

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■ **Second Circuit Holds Alien Was Deportable Based on Concession and Admonishes Alien's Counsel for Twice Declining Prosecutorial Discretion**

In *Fang Li v. Holder*, __ F.3d __, 2014 WL 657935 (Livingston, Carney, Katzmann (concurring)) (*per curiam*) (2d Cir. February 21, 2014), the Second Circuit held that the BIA did not abuse its discretion in affirming the IJ's denial of petitioner's untimely motion to reopen because petitioner had conceded that she was deportable throughout her prior deportation proceedings. The court rejected petitioner's claim that his prior deportation order was invalid because she should have been in exclusion proceedings, rather than deportation proceedings, finding no error and, in any event, no prejudice, as she would have likewise been excludable. Furthermore, the court concluded that it was "unfathomable in view of the weak legal arguments presented" for petitioner's counsel to have twice rejected an offer of remand based on the possibility of prosecutorial discretion.

In a concurring opinion, Judge Katzmann opined as to whether the time had arrived for the court to explore its inherent authority to remand a case back to the BIA over the alien's objections.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds Agency Must Consider "Powerful" Evidence Contradicting State Department Report**

In *Chen v. Holder*, 742 F.3d 171 (4th Cir. February 5, 2014) (*Traxler*, Motz, Keenan), the Fourth Circuit upheld the BIA's finding that a Chinese couple from the Fujian province will not be persecuted on account of their Christian faith if they return to China. The court, however, granted the petition for review as it related to the petitioners' claim of persecution based on China's one-child policy.

An IJ denied petitioners' asylum claim in relevant part, because they failed to prove that their fear of persecution under the family-planning policy was objectively reasonable, and further found that, even if petitioners' children "counted" for purposes of China's family-planning law, they would merely face fines or other economic penalties that do not rise to the level of persecution. The IJ relied on the 2007 State Department Profile of Asylum Claims and Country Conditions, finding it "more persuasive" than the evidence proffered by the petitioners. The BIA adopted and affirmed the IJ's decision.

The BIA erred by failing to account for "powerful" contrary evidence such as the Congressional-Executive Commission on China (CECC), and a screenshot of a Chinese government webpage.

Before the Fourth Circuit petitioners argued that the denial of asylum was unsupported by substantial evidence because the IJ and BIA relied almost exclusively on cherry-picked statements from the 2007 Profile and failed to consider compelling contradictory evidence suggesting that forced sterilizations are still a reality for Chinese nationals in their circumstances.

The court, agreed, holding that the BIA erred by failing to account for "powerful" contrary evidence such as the Congressional-Executive Commission on China (CECC), and a screenshot of a Chinese government webpage. "There may be a perfectly reasonable explanation for favoring one report over the other, or there may be a way to reconcile these seemingly contradictory documents. But the BIA has not revealed its reasoning, and we are not permitted to guess what the BIA or the IJ were thinking," explained the court. "The boilerplate language used by the BIA in discounting [petitioners'] evidence was insufficient to demonstrate that the agency gave it more than perfunctory consideration." Accordingly, the court remanded the case to the BIA to "reevaluate" the claim taking into account the CECC report, the webpage contents, and an affidavit submitted on behalf of petitioners.

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FIFTH CIRCUIT

■ **Fifth Circuit Affirms Dismissal of *Bivens* Claims Against CBP Officer**

In *Castro v. Cabrera*, 742 F.3d 595, 2014 WL 341280 (5th Cir. January 30, 2014) (Stewart, Jolly, *Smith*), the Fifth Circuit affirmed the dismissal of a *Bivens* claims against a United States Customs and Border Protection officer challenging his detention and interrogation of various individuals seeking admission into the United States at a border station.

The three plaintiffs had applied for admission at various times at the Brownsville & Matamoros International Bridge. However, upon presenting a Texas birth certificate indicating a suspicious midwife birth (the particular midwife was on a list for falsely registering birth certificates) they were detained and placed in secondary inspection where they were interrogated regarding the validity of the birth certificates.

The court found that the "entry fiction" doctrine applied, and therefore plaintiffs "were detained as excluded aliens for varying amounts of time — all ten hours or less — as their admissibility was being determined,

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a situation well within the immigration context." "Alien detainees — including those who present facially valid documentation — have no Fourth Amendment rights in the immigration context" said the court.

The court also held that, to the extent any of the plaintiffs were seeking admission as U.S. citizens, the CBP officer was entitled to qualified immunity. "The detainees point to no authority clearly establishing that [CBP officer's] actions in detaining, even for as long as ten hours, individuals who presented facially valid documentation, plus the use of unspecified threats and insults during interrogation, violated the Constitution," said the court.

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■ **Fifth Circuit Court of Appeals Affirms District Court's Finding of Non-Citizenship in Passport Case**

In ***Garcia v. Kerry***, __F.3d__, 2014 WL 575906 (5th Cir. February 14, 2014) (Jones, Elrod, Haynes, J.) (*per curiam*) the Fifth Circuit Court of Appeals affirmed the judgment of the District Court for the Southern District of Texas in favor of the United States Secretary of State (the "Secretary"), declaring that plaintiff is not a United States citizen by birth and that the Secretary did not err in refusing to issue a United States passport to plaintiff. The Fifth Circuit held that the Full Faith and Credit Act did not require the district court to accord the order of the Texas Bureau of Vital Statistics preclusive effect in United States passport proceedings. Similarly, the district court did not err in refusing to give preclusive effect under the principles of comity to a Mexican court's judgment finding that plaintiff was born in Texas and cancelling Garcia's Mexican birth certificate. The court also held that the district court did not err by ignoring the testimony of plaintiff's expert witness because the district court was not obligated to accept or credit expert witness testimony. Finally, the court held that the district court did not err in considering the conviction of the midwife who registered Garcia's birth in Texas because her conviction for falsely registering births was a matter of public record.

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"Successfully deceiving immigration officials into providing one with a new immigration card does not constitute either permission to reenter from the Attorney General or legal reentry."

■ **Fifth Circuit Holds that Alien Did Not Demonstrate His Waiver of Appeal Was Involuntary Due to Ineffective Assistance of Counsel**

In ***Hernandez-Ortez v. Holder***, 741 F.3d 644 (5th Cir. 2014) (*Jolly*, Higginbotham, Southwick), the Fifth Circuit held that detained alien's failure to strictly comply with the procedural requirements of *Matter of Lozada* foreclosed his claim that his counsel's ineffective assistance caused him to unwillingly waive his appeal to the BIA. The court rejected petitioner's argument that the Ninth Circuit's substantial compliance standard be applied to his case and reiterated that in order to succeed on a claim for ineffective assistance of counsel, an alien must strictly comply with the procedural requirements of *Matter of Lozada*.

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■ **Fifth Circuit Holds Alien Failed to Demonstrate Legal Reentry**

In ***Martinez v. Johnson***, 740 F.3d 1040 (5th Cir. January 24, 2014) (Jolly, *Smith*, Clement), the Fifth Circuit held it lacked jurisdiction over petitioner's claim that a prior deportation order must be rescinded as unconstitutional. The petitioner had been deported in 1993 and, following his illegal reentry in 1997, he obtained a new alien registration card. In 2000, INS officials recognized petitioner as having been previously deported and detained him as he attempted reentry into the United States. His removal order was reinstated and he was deported again in 2002. Petitioner subsequently reentered illegally. In 2013, the 1993 order was again reinstated.

Petitioner argued principally that because he had used an alien registration card to enter the U.S. in 2000, his 1993 order could not be reinstated. The court rejected that argument because "successfully deceiving immigration officials into providing one with a new immigration card does not constitute either permission to reenter from the Attorney General or legal reentry."

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■ **Fifth Circuit Holds Stop-time Rule Applies for Domestic Violence Crime Involving Moral Turpitude and Firearms Offense**

In ***Miresles-Zuniga v. Holder***, __ F.3d __, 2014 WL 593587 (5th Cir. February 14, 2014) (*Smith*, DeMoss, Higginson), the Fifth Circuit concluded that the alien an LPR was not statutorily eligible for cancellation of removal because the "stop-time rule" in INA § 240A(d)(1) was triggered when the alien's conviction for aggravated assault of a family member rendered him removable under INA § 237(a)(2) as a crime of domestic violence. The court held that the plain reading of the stop-time provision requires a two-step analysis – determining first whether the offense committed is "an offense referred to in section 212(a)(2)," regarding inadmissible aliens,

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and second, whether the offense renders the alien inadmissible or removable.

The court rejected plaintiff argument that the stop-time rules requires the removable offense under § 237(a)(2) to also have to constitute an inadmissible offense under § 212 (a)(2), finding this claim contradicted by the plain language of § 240A(d)(1)

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■ **Fifth Circuit Affirms Dismissal of Challenge to EOIR's Rules Governing Law Student Practice in Immigration Court**

In ***Romero v. Holder***, No. 13-cv-20464 (5th Cir. February 24, 2014) (*per curiam*), the Fifth Circuit upheld the EOIR's regulation governing the practice of immigration law before immigration courts by law students and law graduates not yet admitted to the bar in the United States.

The plaintiff, a graduate of a Venezuelan law school, at the time of the facts giving rise to this lawsuit was not licensed to practice law before any United States jurisdiction. Following some complaints, EOIR determined that, throughout 2010 and 2011, she had repeatedly held herself out as an attorney when appearing before the EOIR representing individuals in removal proceedings. EOIR concluded that plaintiff had also entered pleadings, examined witnesses, and submitted documentation indicating that she was an attorney. After completing its investigation, the EOIR sent plaintiff a letter informing her that it had determined she did not meet the requirements in the regulations to practice before the EOIR. Specifically, the EOIR informed plaintiff that, pursuant to 8 C.F.R. § 1292.1(a)(2), law students and unlicensed law graduates must be students and graduates of an accredited United States law school in order to appear before the EOIR under the supervision of a licensed attorney. The EOIR ordered plaintiff to cease and desist.

Plaintiff then filed a complaint alleging that the EOIR had violated the APA when it amended the rules governing who can appear before the EOIR. The district court ultimately dismissed all claims.

EOIR's modification of 8 C.F.R. § 1292.1 to preclude foreign law graduates not yet admitted to the bar from practicing immigration law did not violate the APA.

On appeal, the Fifth Circuit concluded that EOIR's modification of 8 C.F.R. § 1292.1 to preclude foreign law graduates not yet admitted to the bar from practicing immigration law did not violate the APA because the agency properly followed notice and comment procedures, because the agency was fully within its authority in promulgating rules governing immigration law practice, and because the agency provided a reasoned explanation for its action.

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■ **Fifth Circuit Vacates District Court's Decision Ordering Three Children to Return to Mexico to Their Mother**

In ***Sanchez v. R-G-L,*** __ F.3d __, 2014 WL 684606 (5th Cir. February 21, 2014) (Jolly, DeMoss, *Southwick*), the Fifth Circuit vacated and remanded a Hague Convention case to the district court to consider evidence that three minor children feared return to Mexico. The children, who had come to the United States as unaccompanied alien minors, were placed in foster care and applied for asylum with USCIS. The children's mother brought a Hague Convention lawsuit against the foster care agency, petitioning for their return to Mexico. Before the children's asylum applications were granted, the district court ordered the foster care agency to return the children. The children appealed the district court's order, asking for legal representation and seeking a remand to consider evidence of their fear of return. The government filed a brief as *amicus curiae*, arguing that the district court should consider evidence underlying USCIS's asylum grants as they relate to exceptions to the Hague Convention's return mandate. The court agreed, finding that the children had standing in the case, directing the appointment of *guardian ad litems*, and remanding the case to district court to consider the asylum grants and the evidence supporting the asylum grant.

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■ **Conviction for Cocaine Delivery Does Not Bar an Alien from Being Eligible for Cancellation of Removal**

In ***Sarmientos v. Holder***, __ F.3d __, 2014 WL 552760 (5th Cir. February 12, 2014) (Reayley, Prado, *Owen*), the Fifth Circuit vacated the BIA's finding that a conviction under Fla. Stat. Ann. § 893.13(1)(a)(1) for delivering cocaine constituted an aggravated felony rendering alien ineligible for cancellation of removal. The court employed the categorical approach, comparing the Florida statute to 21 U.S.C. § 841(a)(1), and concluded that the statutes were not analogous because only the federal law required the defendant to know that the substance at issue was controlled.

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■ **Fifth Circuit Holds Current Asylum Status Unnecessary to Apply for Adjustment of Status**

In ***Siwe v. Holder***, __ F.3d __, 2014 WL 476508 (5th Cir. February 6, 2014) (Jones, *Wiener*, Graves), the Fifth Circuit reversed and remanded the BIA's removal order and denial of adjustment of status. The court concluded that § 209(b) of the INA is not ambiguous and does not require an alien to have a current asylum status to apply for an adjustment of status.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that Substantial Evidence Supported Agency's Determination that Lebanese Alien Was Inadmissible for Divorce Fraud**

In ***Bazzi v. Holder***, __ F.3d __, 2013 WL 6670791 (6th Cir. December 19, 2013) (*Boggs*, Sutton, Cleland), the Sixth Circuit held that substantial evidence supported the agency's determination that a Lebanese alien divorced his wife solely to render himself eligible for a visa petition as the unmarried child of a lawful permanent resident and, therefore, was inadmissible as an alien who misrepresented a material fact in order to obtain an immigration benefit. The court rejected the alien's claim that a "sham divorce" is not a legally cognizable basis for a finding of misrepresentation. The court explained that the only relevant question is whether the alien willfully misrepresented a material fact, and the evidence showed that, "while [the alien's] divorce may have borne the imprimatur of the Republic of Lebanon, he and his wife were not truly divorced [and] continued to conduct their affairs together as man and wife."

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■ **Sixth Circuit Upholds REAL ID Act Adverse Credibility Determination Based on Multiple Inconsistencies**

In ***Slyusar v. Holder***, __ F.3d __, 2014 WL 321873 (6th Cir. January 30, 2014) (*Keith*, Guy, Gibbons), the Sixth Circuit deemed the aliens' appeal "conclusory" and held that the many inconsistencies cited by the agency sufficiently supported an adverse credibility determination under the REAL ID Act. In dicta, the court expressed concerns that the REAL ID Act allows the agency to consider inconsistencies unrelated to an asylum claim in a credibility analysis and urged the agency to take "due care in evaluating such inconsistencies." Also, while denying a stay of removal as moot, the court, also *in dicta*, stated that "removal would be an irreparable injury."

The INA requires a stateless person to show the same well-founded fear of persecution as an alien with a nationality.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds Petitioner's Claims of Discrimination and Statelessness Do Not Support Relief or Protection**

In ***Agha v. Holder***, __ F.3d __, 2014 WL 62757 (8th Cir. February 19, 2014) (*Webber* (by designation), Manion, Shepherd), the Eighth Circuit held that the agency correctly denied the petitioner's applications for relief and protection as they were premised on "general, widespread discrimination in Lebanon." The court also rejected petitioner's argument that his "statelessness" was a separate ground through which he was eligible for asylum. The court observed that such an argument was contrary to the plain language of INA § 101(a)(42)(A), which requires a stateless person to show the same well-founded fear of persecution as an alien with a nationality.

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FIFTH CIRCUIT

■ **Ninth Circuit Holds BIA Properly Considered Alien's Guilty Plea in Overturned Conviction by Finding Reason to Believe He Engaged in Illicit Trafficking**

In ***Chavez-Reyes v. Holder***, 741 F.3d 1 (9th Cir. January 27, 2014) (*Graber*, O'Scannlain, Nguyen), the Ninth Circuit held that there was reason to believe an alien had engaged in illicit trafficking in a controlled substance.

In 1989, police stopped petitioner who was the driver and sole occupant of a truck containing almost 900 pounds of cocaine valued at $28.7 million, in a hidden compartment. Subsequently petitioner pleaded guilty to possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1). That conviction was overturned on appeal on the ground that the officers lacked sufficient suspicion to make a traffic stop. *United States v. Chavez–Reyes*, 921 F.2d 281 (9th Cir. 1990) (unpublished decision).

Petitioner was charged with removability under INA § 212(a)(2)(C)(i) on the basis that DHS had a "reason to believe" that petitioner engaged or assisted in illicit trafficking of drugs. The BIA held that there was "reason to believe" that petitioner had engaged or assisted in illicit

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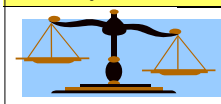

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trafficking given that the circumstantial evidence suggested that he knew that the drugs were in the truck, and that the amount of cocaine was "too large for personal use," and suggested that he was either a drug trafficker himself, or was trusted by the drug traffickers. Moreover, the BIA held that petitioner's guilty plea also supported its conclusion, reasoning that although his conviction "was subsequently overturned due to a finding that the agents lacked legal reasonable cause to stop the truck [petitioner] was driving, this does not change the fact that [petitioner] pled guilty to engaging in drug trafficking."

In his petition for review, petitioner argued that the BIA violated his due process rights by considering his guilty plea, because the resulting conviction was overturned on appeal. The Ninth Circuit concluded that the BIA had not violated petitioner's due process rights, explaining it had overturned petitioner's conviction solely because the police officers lacked reasonable suspicion to conduct the traffic stop — a reason unrelated to the voluntariness of the guilty plea. The court noted that petitioner had not suggested any other particularized reason why his guilty plea was so unreliable that the BIA's reliance on it rendered his proceedings "fundamentally unfair."

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Ninth Circuit Denies Rehearing Holding That Asylum Applicant Failed to Establish Imputed Political Opinion

In *Garcia-Milian v. Holder*, __ F.3d __, 2014 WL 555138 (9th Cir. February 13, 2014) (*Ikuta*, O'Scannlain, Paez), the Ninth Circuit withdrew its September 18, 2013 decision, published at 730 F.3d 996, and issued a new opinion holding that the petitioner, a native and citizen of Guatemala, did not establish that she had been persecuted on account of a protected ground. The court concluded that the two masked men who attacked the petitioner did so to extract information regarding her former common-law husband, who was allegedly a member of a guerilla group, and that the evidence did not compel the conclusion that the men targeted her for punishment on account of her political opinion or that she was attacked with the acquiescence of the Guatemalan government.

The evidence did not compel the conclusion that the men targeted her for punishment on account of her political opinion or that she was attacked with the acquiescence of the Guatemalan government.

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■ **Ninth Circuit Holds that BIA Abused Its Discretion Denying Timely Motion to Reopen Based on Pending I-130**

In *Tadevosyan v. Holder*, __ F.3d __, 2014 WL 747306 (*Berzon*, Pregerson, Murphy) (9th Cir. February 26, 2014), the Ninth Circuit held that the BIA abused its discretion in denying petitioner's timely motion to reopen, based on his then-pending Form I-130 petition.

After petitioner had been ordered removed from the United States for an immigration violation, he married an American citizen, applied for a visa and adjustment of status, and filed a motion to reopen. DHS opposed reopening claiming that petitioner had not shown that the I-130 petition had been approved and that there was a visa immediately available for petitioner. DHS also contended that petitioner failed to show he would not become a public charge. The BIA agreed and denied the motion to reopen. While the case was pending before the Ninth Circuit, USCIS approved the I-130.

In reversing the BIA's denial of the motion, the court found the decision to "be one of those in which the BIA improperly accorded controlling weight to the fact that DHS opposed the motion, without regard to whether the basis of that opposition was correct."

The court further explained that "had the BIA examined the merits of the motion and applied the correct standard, it could not have denied that motion, and its decision would still have been an abuse of discretion." The court also held that petitioner had made a *prima facie* showing that he was unlikely to become a public charge by submitting an affidavit establishing his joint sponsor's income and concluded that the BIA abused its discretion by failing to provide a reasoned explanation for its decision. Accordingly, the court remanded the case to the BIA for reconsideration.

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■ **Ninth Circuit Holds that Petitioner's Conviction Was Not Offense Relating to a Controlled Substance**

In *Ragasa v. Holder*, __ F.3d __, 2014 WL 700458 (9th Cir. February 24, 2014) (Hawkins, McKeown, Bea), the Ninth Circuit held that it would deny the petitioner's citizenship claim in a forthcoming decision, but granted the petition for review because his Hawaii state conviction does not constitute a predicate offense for purposes of removability under INA § 237(a)(2)(B)(i).

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DISTRICT COURTS

■ **Central District of California Upholds Denial of H-1B Visa after Finding Health Services Manager Job Was Not a Specialty Occupation**

In ***Ajit Healthcare, Inc. v. U.S. Department of Homeland Security***, No. 2:13-cv-01133 (C.D. Cal., February 7, 2014) (Feess, J.), the District Court for the Central District of California upheld the denial of a petition for an H-1B visa after finding the petitioners had failed to establish that the prospective job was a specialty occupation. The petitioners had argued that their health services manager position was so complex or specialized that the knowledge required to perform its duties is usually associated with the attainment of a college degree. The court held that the petitioners had failed to demonstrate that the position was more complex or specialized than similar positions not requiring a college degree.

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■ **Court Denies Government's Motion to Dismiss Supervisor in Constitutional Tort Action Against a Border Patrol Supervisor**

In ***Vazquez-Mentado v. Buitron***, No. 5:12-cv-797 (N.D.N.Y., January 31, 2013) (Kahn S.J.), the District Court for the Northern District of New York denied the defendant Border Patrol supervisor's motion to dismiss *Bivens* claims against him. The court held that supervisor liability claims are still viable after *Iqbal v. Ashcroft*, absent guidance from the Second Circuit to the contrary. The court also found that the plaintiff stated a plausible claim that the Border Patrol sector's reward policy led to unconstitutional arrests. The court also found plausible the plaintiff's claims that defendant failed to properly train and supervise Border Patrol agents because he knew or should have known that agents were arresting legal permanent residents and U.S. citizens. The court denied the defendant's qualified immunity defense.

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■ **Southern District of California Denies Challenge to Visa Denial, Citing Doctrine of Consular Nonreviewability**

In ***Castaneda v. Burciaga***, No. 13-cv-00624 (S.D. Cal. February 20, 2014) (Bencivengo, J.), the Southern District of California dismissed a complaint challenging a visa denial by the U.S. consulate in Juarez, Mexico. The consular office denied the visa after finding the Mexican citizen inadmissible because the officer had reason to believe that he sought to enter the country to engage in unlawful activity due to his tattoo stating, "Brown Pride," which is the name of a gang. The alien's wife, a U.S. citizen, sued, claiming that the visa denial violated her due process rights. The court found that the consular officer had offered a factually legitimate reason for the denial by citing an inadmissibility statute and factual elements that support inadmissibility, as required in *Din v. Kerry*, 718 F.3d 856, 861 (9th Cir. 2013). The court then held the doctrine of consular nonreviewability prevented the court from examining the consular officer's decision any further, and dismissed the complaint for failure to state a claim.

The court found that the consular officer had offered a factually legitimate reason for the denial by citing an inadmissibility statute and factual elements that support inadmissibility.

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■ **USCIS Lawfully Revoked Immigrant Visa Petition Filed on Behalf of Alien Spouse**

In ***Koth v. USCIS***, No. 12-cv-996 (WD Wa. February 14, 2014) (Zilly, J.), the Western District of Washington held that USCIS lawfully revoked an immigrant visa petition filed by a United States citizen on behalf of her alien spouse. The court indicated that USCIS did not abuse its discretion because the alien could not prove the *bona fides* of his marriage as required by 8 C.F.R. § 204.2(a)(2). Specifically, the alien failed to explain why he had not seen his spouse for nearly five years after their wedding, failed to produce written correspondence or phone records between him and his spouse, failed to produce physical evidence of the marriage, and failed to recall the name of his purported child.

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■ **Western District of Michigan Upholds Denial of Employment-Based Visa Petition Because the Petitioner Lacked the Ability to Pay the Beneficiary**

In ***Woody's Oasis v. Rhew***, No. 1:13-cv-367 (W.D. Mich., February 4, 2014) (Quist, J.), the District Court for the Western District of Michigan granted judgment in favor of the government on the plaintiffs' claim that USCIS erred when it denied the I-140 visa petition at issue. The plaintiff employer filed the visa petition seeking to employ a specialty cook. The district court upheld as reasonable USCIS's determination that the plaintiffs failed to demonstrate the ability to pay the proffered wage.

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DHS Announces Chile's Designation Into the Visa Waiver Program

Secretary of Homeland Security Jeh Johnson, has announced that starting May 1, 2014, eligible Chilean passport holders with both an approved Electronic System for Travel Authorization (ESTA) and an e-passport will be able to visit the United States without nonimmigrant visitor visas.

"This announcement furthers our important partnership with Chile and will benefit the security and the economies of both our nations," said Secretary Johnson. "The addition of Chile to the Visa Waiver Program will enable us to work together to maintain the highest standards of security, while also facilitating travel for Chileans visiting the United States."

Chile will join 37 participants in the VWP—which permits visa-free travel to the United States for eligible travelers visiting the United States for 90 days or fewer for business or tourism. In Fiscal Year 2013, the VWP accounted for about 19.6 million visits to the United States, or approximately 60 percent of tourist and business travelers entering the United States by air.

In accordance with the VWP designation process, DHS in consultation with the Department of State, determined that Chile complies with key security and information-sharing requirements—such as enhanced law enforcement and security-related data sharing with the United States; timely reporting of lost and stolen passports; and the maintenance of high counterterrorism, law enforcement, border control, aviation and document security standards.

Like other VWP travelers, eligible Chilean passport holders will be required to apply for advanced authorization through the ESTA, a DHS Web-based system.

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BIA ON SOCIAL GROUP DEFINITION

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regarding deference to these requirements. To the extent that the Seventh and Ninth Circuits have expressed views that the persecutor's perception (or targeting for persecution) controls the "particular social group" issue, these are the court's own views and not the interpretation of the Board. Under *Chevron* and *Brand X,* the Board is the final interpreter of the ambiguous phrase "particular social group." The Board's interpretation that "particular social group" is determined by a society's perception of people as a group, not by the persecutor's perceptions or by the persecution, is reasoned and reasonable and should prevail

(This article represents the work of several OIL attorneys including Manning Evans, Susan Green, Carol Federighi, Andrew MacLachlan, Ted Hirt, and Margaret Perry)

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

OIL TRAINING CALENDAR

March 28, 2014. Brown Bag Lunch & Learn with ***Claudia Bernard***, Chief Mediator for the ninth circuit court of Appeals.

April 8, 2014. Brown Bag Lunch & Learn with ***Michael J. Fisher***, Chief U.S. Border Patrol, Department of Homeland Security.

PROTECTING THE BORDERS: A TYPICAL DAY FOR CUSTOMS AND BORDER PROTECTION (CBP)

On a typical day in 2013, Customs and Border Protection employees:

- Processed:
  - -992,243 passengers and pedestrians
  - -280,059 incoming international air passengers and crew
  - -48,994 passengers and crew on arriving ship/boat
  - -663,190 incoming land travelers
  - -67,337 truck, rail, and sea containers
  - -269,753 incoming privately owned vehicles
- Conducted 1,153 apprehensions between U.S. ports of entry
- Arrested 22 wanted criminals at U.S. ports of entry
- Refused 366 inadmissible persons at U.S. ports of entry
- Discovered 440 pests at U.S. ports of entry and 4,379 materials for quarantine
- Seized:
  - -11,945 pounds of drugs
  - -$291,039 in undeclared or illicit currency
  - -$4.7 million dollars' worth of products with Intellectual Property Rights violations
- Identified 137 individuals with suspected national security concerns
- Intercepted 48 fraudulent documents
- Employed 59,969 CBP employees, including:
  - -21,650 CBP officers
  - -2,382 CBP Agriculture specialists
  - -20,979 Border Patrol agents
  - -766 Air Interdiction agents (pilots)
  - -343 Marine Interdiction agents
  - -116 Aviation Enforcement officers
- Deployed more than 1,500 canine teams and 250 horse patrols
- Flew 169 hours of enforcement missions over the United States
- Conducted operations at:
  - -328 ports of entry within 20 field offices
  - -136 Border Patrol stations and five substations within 20 sectors, with 35 permanent checkpoints
  - -22 Air and Marine branches, five National Security Operations, and one Air and Marine Operations Center.

Assistant Attorney General Stuart Delery and Senior Counsel for Immigration August Flentje presented posthumously the Civil Division Dedicated Service Award to the late James Hunolt, OIL Senior Litigation Counsel. Accepting the award were his surviving spouse and children, shown above.

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

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

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

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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