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The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals. It is intended only to be an educational resource for the use of employees of the Executive Office for Immigration Review.

In this issue...

Bond Proceedings Before Immigration Judges and the Board of Immigration Appeals

by Amanda J. Adams

Under the present statutory and regulatory scheme, the Attorney General and Secretary of Homeland Security share authority over the detention and release of aliens.[1] *See generally* sections 103(a) and (g) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1103(a) and (g); 8 C.F.R. §§ 236.1, 1236.1. Authority over the enforcement and administration of the immigration laws lies with the Secretary of Homeland Security, whereas authority over questions of law arising under the immigration laws lies with the Attorney General. *See* section 103(a)(1) of the Act; *see also* section 103(g) of the Act. While most decisions relating to the detention of aliens are made by the Department of Homeland Security (DHS) pursuant to the Secretary of Homeland Security's authority, certain DHS custody determinations are subject to "redetermination" by Immigration Judges and subsequent appellate review by the Board of Immigration Appeals pursuant to authority delegated by the Attorney General. *See generally* 8 C.F.R. §§ 236.1, 1236.1.

This combined discretionary authority exercised by the Attorney General and Secretary of Homeland Security over immigration detention matters is not open-ended. Congress has carved out an important exception to the general detention authority by providing for mandatory detention of certain aliens, in particular those who have committed specified crimes or engaged in terrorist activities. *See* section 236(c) of the Act, 8 U.S.C. § 1226(c). As a result, DHS is required to detain aliens falling within the mandatory detention categories, and the review authority of Immigration Judges and the Board over the detention of such aliens is limited.

This paper summarizes the procedures for bond redeterminations before Immigration Judges and the Board. It also discusses substantive law issues relating to discretionary bond determinations and mandatory detention, with particular attention paid to decisions of the Board from 1996 until the present.[2]

The Statute

Section 236 of the Act provides general authority over the arrest, detention, and release of aliens.[3] The statute provides that on the issuance of a warrant, an alien "may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Section 236(a) of the Act. Except for criminal and terrorist aliens whose detention is mandatory under section 236(c), section 236(a) provides that pending a decision on whether an alien, who has been arrested and detained, will be removed from the United States, the alien may: (1) continue to be detained; or (2) be released on "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General," or on conditional parole.[4] *Id.*

Pursuant to section 236(b) of the Act, an alien's bond or parole, as authorized under section 236(a) may be revoked at any time and the alien may be rearrested and detained under the original warrant. Additionally, section 236(e) of the Act precludes judicial review of discretionary decisions relating to the application of section 236.[5]

Procedures for Bond Redeterminations Before Immigration Judges

Initial decisions relating to the detention and release of aliens are made by the DHS. The regulations provide that at the time the DHS issues the Notice to Appear (NTA), or any time thereafter, prior to completion of the alien's removal proceedings, the alien may be arrested and taken into custody by the DHS. 8 C.F.R. §§ 236.1(b)(1), 1236.1(b)(1). The governing regulations specify how the DHS is to administer its authority relating to the detention of aliens. Specifically, the regulations outline the detention process for particular groups of aliens, including criminal aliens and juveniles, as well as the general detention procedures to be followed by DHS officers. *See id*. §§ 236.1 to 236.5, 1236.1 to 1236.5.

With certain exceptions, Immigration Judges have general authority to review the custody and bond determinations originally made by the DHS pursuant to 8 C.F.R. §§ 236 and 1236. *Id.* § 1003.19(a). In doing so, an Immigration Judge may decide to continue the alien's detention, or may order the alien's release and set a bond. *Id*. §§ 236.1(d) and 1236.1(d). Such review takes place in the context of bond proceedings, which the regulations require to be "separate and apart" from the alien's removal proceedings. *Id*. § 1003.19(d); *see also Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977).

Bond proceedings are generally less formal than removal and other immigration court proceedings. *See generally Matter of Chirinos*, *supra*. A charging document is not required to be filed with the Immigration Court before the Immigration Judge may begin bond proceedings. 8 C.F.R. § 1003.14(a). All that is required is that the alien be in the actual physical custody of the DHS. *See Matter of Sanchez*, 20 I&N Dec. 223, 225-26 (BIA 1990).

An initial application for a redetermination of bond by an Immigration Judge must be made: (1) if the alien is detained, to the Immigration Court that has jurisdiction over the alien's place of detention; (2) to the Immigration Court that has administrative control over the case; or (3) to the Office of the Chief Immigration Judge for designation of the appropriate Immigration Court to accept and hear the application. 8 C.F.R. § 1003.19(c). The application may be made either orally or in writing. *Id.* § 1003.19(b).

The general procedures for background and security investigations or examinations set forth at 8 C.F.R. § 1003.47 do not apply in bond proceedings before Immigration Judges conducted pursuant to section 236 of the Act, 8 U.S.C. § 1226. However, in accordance with 8 C.F.R. § 1003.47(k), in scheduling an initial bond redetermination hearing, Immigration Judges are required, "to the extent practicable consistent with the expedited nature of such cases," to consider the brief initial period of time DHS needs to conduct the automated portions of its background and security checks on the detained alien. *Id.* § 1003.47(k). Additionally, the Immigration Judge may grant the DHS one or more continuances "for a limited period of time which is reasonable under the circumstances" if the DHS, at the time of the bond hearing, and "in an appropriate case," seeks a brief continuance based on unresolved issues relating to the alien's background and security investigation or examination. *Id*.

After an alien's initial bond hearing, the Immigration Judge may conduct subsequent hearings regarding the alien's custody status, where requested in writing and upon a showing that the alien's circumstances have changed materially since the prior redetermination hearing. 8 C.F.R. § 1003.19(e).

The regulations provide that an Immigration Judge's custody or bond decision shall be entered on the appropriate form at the time the decision is made and that the parties shall be informed orally or in writing of the reasons for the Immigration Judge's

decision. *Id*. § 1003.19(f). In practice, Immigration Judge bond decisions are generally rendered orally. *See* Immigration Court Practice Manual, Chapter 9.3(e)(vii)(April 1, 2008). Thereafter, if either party appeals, the Immigration Judge prepares a written memorandum setting forth the reasons for the Immigration Judge's decision. *See id*. Pursuant to a 1996 Operating Policies and Procedures Memorandum (OPPM) from the Office of the Chief Immigration Judge, once an Immigration Judge is notified that an appeal has been filed, he or she has five business days to prepare and submit a bond memorandum to the Board, unless an extension has been requested.[g] In automatic stay cases, discussed *infra*, the regulations require that an Immigration Judge prepare a written decision within five business days from the date the Immigration Judge is advised of DHS's filing of an appeal, or as soon as practicable, and not more than five additional business days (with the Board's approval) based on exigent circumstances. 8 C.F.R. § 1003.6(c)(2). The Immigration Court, in automatic stay cases, is required to prepare and submit the record of proceedings to the Board without delay. *Id*.

The regulations provide for important exceptions to an Immigration Judge's custody jurisdiction. Specifically the regulations provide that an Immigration Judge has no bond authority over: (1) aliens in exclusion proceedings, *Id*. § 1003.19(h)(2)(i)(A); (2) "arriving aliens," as defined in 8 C.F.R. § 1001.1(q), including those paroled after arrival pursuant to section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5),[7] *Id*. § 1003.19(h)(2)(i)(B); (3) aliens described in section 237(a)(4) of the Act, 8 U.S.C. § 1227(a)(4), which renders deportable aliens on security and related grounds, such as terrorist activity, *Id*. § 1003.19(h)(2)(i)(C); (4) certain criminal aliens, in particular those subject to mandatory detention under section 236(c)(1) of the Act, 8 U.S.C. § 1226(c)(1), *Id.* § 1003.19(h)(2)(i)(D); *see also id*. § 1003.19(h)(2)(i)(E) (providing that Immigration Judges have no bond authority over criminal aliens who are in deportation proceedings subject to section 242(a)(2) of the Act, as that section existed prior to April 1, 1997, as amended by section 440(c) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996));[8] (5) persons with final orders of removal (with the exception of the limited jurisdiction provided by 8 C.F.R. §§ 241.14(a)(2) and 1241.14(a)(2)),[9] *Id*. §§ 236.1(d)(1), 1236.1(d)(1). Despite these limitations on the Immigration Judge's custody jurisdiction, an alien is not precluded from seeking a determination by an Immigration Judge that he or she is not "properly included" in certain categories for which redetermination is barred, in particular those categories represented in the third and fourth exceptions discussed above. *Id*. § 1003.19(h)(2)(ii); *see also Matter of Joseph*, 22 I&N Dec. 799, 802-03 (BIA 1999).

In *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005), the Board held that unless an alien falls within one of the aforementioned exceptions, an Immigration Judge's custody jurisdiction extends to "certain other aliens" who are initially screened for expedited removal under section 235(b)(1)(A) of the Act, 8 U.S.C. § 1225(b)(1)(A), but are deemed to have a credible fear of persecution and placed in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a.[10] The Board rejected the DHS's contention that such aliens remain within their exclusive custody jurisdiction, holding that DHS's jurisdiction under section 235 of the Act terminates once a final positive credible fear determination is made by an asylum officer or an Immigration Judge. The Board noted that although section 235(b)(1)(B)(iii)(IV) of the Act, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), provides for mandatory detention of aliens subject to expedited removal proceedings under section 235(b)(1) of the Act pending a final credible fear determination and until removed if no credible fear is found, the statute and regulations are silent regarding the custody jurisdiction over "certain other aliens" once a positive credible fear determination is made and removal proceedings under section 240 of Act, 8 U.S.C. § 1229a, are initiated. The Board reasoned that because of this statutory and regulatory gap, and because such aliens do not fall within any of the classes of aliens specifically excluded from the Immigration Judge's custody jurisdiction, Immigration Judges have jurisdiction over such aliens pursuant to the Immigration Judge's general custody authority, set forth at section 236 of Act, 8 U.S.C. § 1226.

Appeals of Immigration Judge Bond Decisions

Pursuant to 8 C.F.R. §§ 236.1(d)(3)(i) and 1236.1(d)(3)(i), an Immigration Judge's bond decision may be appealed to the Board.[11] *See also* 8 C.F.R. §§ 1003.1(b)(7), § 1003.19(f). Bond appeals are required to be filed with the Board in accordance with the procedures set forth at 8 C.F.R. § 1003.38. *Id*. at § 1003.19(f). Among other requirements, 8 C.F.R. § 1003.38 provides that appeals must be filed within thirty days of the Immigration Judge's decision.[12] *Id*. § 1003.38. Appeals of bond decisions are processed and briefed in the same manner as other appeals

from Immigration Judges decisions, except that bond appeals are generally not transcribed.[13] *See* BIA Practice Manual, Chapter 7.3(b)(July 30, 2004).

The filing of an appeal with the Board does not act to divest the Immigration Judge of jurisdiction to entertain subsequent bond redetermination requests involving the same alien. *See Matter of Valles*, 21 I&N Dec. 769, 771-72 (BIA 1997). An appeal of an Immigration Judge's bond decision similarly does not act to stay the alien's removal proceedings. 8 C.F.R. §§ 236.1(d)(4); 1236.1(d)(4). In some cases, however, a subsequent bond redetermination order by an Immigration Judge or an Immigration Judge's decision in an alien's removal proceedings may result in a bond appeal being rendered moot.

The Board's Practice Manual states that a bond appeal before the Board is deemed moot when the alien (1) departs the United States, whether voluntarily or involuntarily; (2) is granted relief by the Immigration Judge and DHS does not appeal; (3) is granted relief by the Board; (4) is denied relief by the Immigration Judge and the alien does not appeal; (5) is denied relief by the Board; (6) is released on the conditions requested in the appeal; or (7) is released on conditions more favorable than those requested in the appeal. BIA Practice Manual, Chapter 7.4 (July 30, 2004).

The filing of an appeal with the Board does not automatically stay an Immigration Judge's bond redetermination order. 8 C.F.R. §§ 236.1(d)(4), 1236.1(d)(4). Pursuant to 8 C.F.R. § 1003.19(i)(1), however, the Board may grant a stay of an Immigration Judge's bond order where the DHS is the appealing party or on its own motion. The regulations provide that the DHS is entitled to seek a discretionary stay in conjunction with its appeal of an Immigration Judge's bond decision at any time regardless of whether the stay is sought on an emergency basis. *Id*. § 1003.19(i)(1).

The regulations additionally provide for an automatic stay of any order of an Immigration Judge authorizing the release of an alien from custody after DHS initially determined that the alien should not be released or set a bond of $10,000 or more, and where the DHS files an EOIR-43 (Notice of Service Intent to Appeal Custody Redetermination) within one business day of the Immigration Judge's order. *Id.* § 1003.19(i)(2) The stay remains in effect pending the Board's decision on appeal subject to the provisions of 8 C.F.R. § 1003.6(c). The regulations at 8 C.F.R. § 1003.6(c) provide for a lapse of the automatic stay if (1) the DHS fails to file a Notice of Appeal (Form EOIR-26) within ten business days of the Immigration Judge's order,[14] *Id*. § 1003.6(c)(1); or (2) if the Board has not yet acted on the appeal ninety days after filing, unless the Board grants an alien's motion for an extension of the twenty-one day briefing period provided by 8 C.F.R. § 1003.6(c), in which case the Board's order acts to toll the ninety-day period of the automatic stay. *Id.* § 1003.6(c)(4).

DHS may file a motion for a discretionary stay in accordance with the provisions of 8 C.F.R. § 1003.19(i)(1), discussed *supra*, within a reasonable period of time prior to the expiration of the automatic stay. *Id.* § 1003.6(c)(5). If no decision on the bond appeal has been issued within the ninety-day period of the automatic stay, the regulations require the Board to decide the DHS's motion for a discretionary stay. *Id*. In the event that the Board does not render a decision within the ninety-day period, the regulations provide that the automatic stay will remain in effect for up to thirty days, until the Board adjudicates the DHS's motion. *Id*.

If the Board denies the DHS's motion for a discretionary stay, fails to adjudicate the DHS's motion prior to the expiration of the automatic stay, or authorizes the alien's release from custody, release is automatically stayed for five business days pursuant to 8 C.F.R. § 1003.6(d). During this five-day period, the DHS may refer the case to the Attorney General pursuant to 8 C.F.R. § 1003.1(h)(1). *Id.* § 1003.6(d). If the case is referred, the automatic stay remains in effect for fifteen days from the date of referral. *Id*. § 1003.6(d). In accordance with 8 C.F.R. § 1003.6(d), the DHS may also seek a discretionary stay in conjunction with its referral of the case to Attorney General. Additionally, 8 C.F.R. § 1003.6(d) explicitly provides that the Attorney General may order a discretionary stay in *any* custody case pending a decision by either the Board or the Attorney General.

Discretionary Bond Determinations Under section 236(a) of the Act

In cases falling within the Immigration Judge's custody jurisdiction, discussed *supra*, the Immigration Judge determines whether the alien merits a discretionary release from custody pursuant to section 236(a) of the Act; 8 U.S.C. § 1226(a), as well as the amount of bond necessary to provide an incentive for the alien to appear for future immigration proceedings.[14] The regulations place the burden on the alien to establish, by clear and convincing evidence that his or her release "would not

pose a danger to property or persons, and that [he or she] is likely to appear for any future proceeding." 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *see Matter of Adeniji*, 22 I&N Dec. 1102, 1113 (BIA 1999). It is well established that section 236(a) of the Act does not confer on aliens a right to release on bond. *See Carlson v. Landon*, 342 U.S. 524, 534 (1952); *Matter of Guerra*, 24 I&N Dec. 37, 39 (BIA 2006); *Matter of D-J-*, 23 I&N Dec. 572, 575 (A.G. 2003).

The regulations provide that the Immigration Judge's custody or bond determination may be based on "any information that is available to the Immigration Judge or that is presented to him or her by the alien or the [DHS]." 8 C.F.R. § 1003.19(d). In determining whether an alien merits a discretionary release on bond, as well as the amount of bond necessary to secure the alien's appearance, Immigration Judges have traditionally considered some or all of the following factors developed in Board precedent decisions over the years: (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they are such that they may entitle the alien to reside permanently in the United States at a future date; (4) the alien's employment history, including its length and stability; (5) the alien's record of appearance at court proceedings; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of activity, and the seriousness of the crimes, all of which may indicate the level of the alien's disrespect for the law and ineligibility for relief from removal; (7) the alien's history of immigration violations; (8) any attempts by the alien to escape from authorities or flee to avoid prosecution; and (9) the alien's manner of entry into the United States. *Matter of Guerra*, *supra*, at 40; *see, e.g.*, *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000); *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994); *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987); *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981); *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *see also Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995) (holding that the Immigration Judge properly ordered the alien detained without bond as a poor bail risk, where the alien was subject to criminal proceedings for alleged terrorist activities in the country to which INS sought to deport him).

Recent decisions by the Attorney General and the Board have clarified and expanded on the factors that may be considered by an Immigration Judge in determining whether an alien merits release from custody under section 236(a) of the Act, as well as the amount of bond that is appropriate. In *Matter of D-J-*, *supra*, the Immigration Judge considered the traditional factors discussed above in granting release on bond to a Haitian asylum seeker who arrived in the United States by sea aboard a vessel carrying two hundred and seventeen undocumented aliens. *See Matter of D-J-*, *supra*, at 572-73, 577. The DHS appealed the Immigration Judge's decision to the Board, arguing that the respondent's release would encourage future surges of illegal migration by sea and threaten national security. *Id.* at 573, 577-79. While acknowledging the seriousness of the DHS's concerns, the Board dismissed the DHS's appeal. *Id.* at 573, 581. The Board determined that, absent contrary direction by the Attorney General, the broad national security interests raised by the DHS were not proper considerations for the Immigration Judge or the Board, except where individual considerations demonstrate that the alien presents a danger to persons or property or is not likely to appear at future proceedings. *Id.* at 573, 581. Reviewing the Board's decision on referral pursuant to 8 C.F.R. § 1003.1(h)(1)(iii), the Attorney General vacated the Board's decision and ordered the respondent detained without bond. *Id.* at 573, 585.

The Attorney General emphasized that he exercises broad discretion in determining whether an alien should be released under section 236(a) of the Act and that the INA does not limit the discretionary factors that the Attorney General may consider in determining whether an alien's release from custody is warranted. *Id.* at 575-76. Additionally, he indicated that even where the alien meets the threshold requirement of establishing that he or she does not pose a danger to persons or property and is likely to appear for future proceedings pursuant to 8 C.F.R. §§ 236.1(c)(8) and 1236.1(c)(8), the decision to release an alien under section 236(a) of the Act is discretionary. *Id.* at 581.

The Attorney General determined that "releasing respondent, or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy." *Id.* at 579. Specifically, he concluded that declarations presented by the DHS from relevant national security agencies established a substantial likelihood that the release of aliens, such as the respondent in *Matter of D-J-*, into the

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CIRCUIT COURT DECISIONS FOR JUNE 2008

by John Guendelsberger

The United States Courts of Appeals issued 244 decisions in June 2008 in cases appealed from the Board. The courts affirmed the Board in 206 cases and reversed or remanded in 38 for an overall reversal rate of 15.6% compared to last month's 16.5% There were no reversals from the First, Fourth, Fifth, Eighth and Eleventh Circuits.

The chart below provides the results from each circuit for June 2008 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	7	7	0	0.0
2nd	64	53	11	17.2
3rd	34	33	1	2.9
4th	6	6	0	0.0
5th	11	11	0	0.0
6th	8	7	1	12.5
7th	10	8	2	20.0
8th	6	6	0	0.0
9th	79	57	22	27.8
10th	6	5	1	16.7
11th	13	13	0	0.0
All:	**244**	**206**	**38**	**15.6**

The circuits issued relatively few decisions this month, about half the number we sometimes see. Decisions from the Ninth and Second circuits, in particular, were far below the usual levels. For the month, these two circuits together issued 59% of total decisions and 87% of the total reversals or remands.

The Ninth Circuit reversed or remanded in 22 of its 79 decisions (27.8%). Reversals in asylum cases involved adverse credibility (6 cases), level of harm for past persecution (5), nexus, a frivolousness determination, and protection under the Convention Against Torture. Other cases were remanded for further consideration by the Board of a variety of issues including continuous physical presence under *Tapia-Ibarra*, adjustment of status under the "arriving alien" regulation, and the right to counsel.

The Second Circuit reversed in 11 of its 64 decisions (17.2%). All but one of the Second Circuit reversals involved claims for asylum, including adverse credibility (2), past persecution (3), well-founded fear (3), firm resettlement, and appearance of bias by an Immigration Judge.

The Third Circuit issued 34 decisions and reversed in just one in which it found that the Board erroneously overturned an Immigration Judge's grant of withholding of removal. The Seventh Circuit remanded two cases to further address the well-founded fear determination in one and the reasonableness of relocation in the other.

The chart below shows the combined results for the first six months of 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total Cases	Affirmed	Reversed	% Reversed
7th	50	39	11	22.0%
9th	911	732	179	19.6%
2nd	615	521	94	15.3%
6th	50	43	7	14.0%
3rd	279	257	22	7.9%
11th	106	98	8	7.5%
10th	32	31	1	3.1%
5th	69	67	2	2.9%
4th	69	67	2	2.9%
1st	44	43	1	2.3%
8th	37	37	0	0.0%
All :	**2262**	**1935**	**327**	**14.5%**

By way of comparison, at the halfway point of calendar year 2007 there were 407 reversals or remands out of 2708 total decisions (15.0%).

John Guendelsberger is Senior Counsel to the Board Chairman, and is currently serving as a temporary Board Member.

The Action Heats Up: REAL ID Act in the Circuit Courts

by Edward R. Grant

Like an old-fashioned pennant race, the action has heated up in the federal circuit courts on perhaps the most substantial developments in immigration law of this decade: the application of the REAL ID Act, Div. B of Pub. L. No. 109-13, 119 Stat. 231, 303 (effective May 11, 2005) (codified at section 208(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)), to claims for asylum.

As explained in a previous *Immigration Law Advisor* feature article, the REAL ID amendments to section 208(b)(1) of the Immigration and Nationality Act ("Act"), 8 U.S.C 1158(b)(1), were designed in large part to override circuit court precedent on three critical questions: (1) whether credible testimony standing alone, without the need for further corroboration, was sufficient to meet an alien's burden of proof; (2) whether identified discrepancies in an alien's account, in order to support an adverse credibility finding, must go to the "heart" or "core" of the claim; and (3) whether an alien could establish the requisite "nexus,"in "mixed motive" cases, by showing that the alleged persecutor was motivated, at least in part, by a desire to punish the alien on account of one of the five grounds enumerated in the definition of "refugee." Section 101(a)(42) of the Act, 8 U.S.C § 1101(a)(42).

Several circuits, most notably the Ninth, answered all three questions in the affirmative. Congress sought to redress this in three ways: (1) codifying Board of Immigration Appeals precedent, and federal regulations, that corroborative evidence could be required of an asylum applicant even in the absence of an adverse credibility determination, *see* section 208(b)(1)(B)(ii) of the Act, (2) specifying that an asylum applicant enjoys no presumption of credibility, and that discrepancies can support an adverse credibility finding without regard to whether they go to the heart of the claim, *see* section 208(b)(1)(B)(iii) of the Act, and (3) specifying that the applicant's race, religion, nationality, membership in a particular social group, or political opinion "was or will be at least one central reason for persecuting the applicant" *see* section 208(b)(1)(B)(i) of the Act.

In several recent decisions, the Second, Seventh, and Ninth Circuits have addressed these issues, have recognized the impact of these statutory amendments on their pre-REAL ID Act precedents, and have held that these precedents do not apply to cases under the REAL ID Act. While not unforeseen, *see, e.g.*, *Jibril v. Gonzales*, 423 F.3d 1129, FN 1 (9th Cir. 2005) (REAL ID amendments "are a welcome corrective, which. . . will mean that in the future only the most extraordinary circumstances will justify overturning an adverse credibility determination"), these new precedents constitute a small revolution in immigration law which will affect the adjudication of an increasing number, and eventually, all asylum cases addressed by Immigration Judges and the Board.

The Seventh Circuit: Here's What the Real ID Act Really Means

Two recent Seventh Circuit decisions address one of the most complex, and oft-confused, issues under the REAL ID Act: the relationship between credibility and corroboration in determining whether an alien has met his or her burden of proof. *See Mitondo v. Mukasey*, 523 F.3d 784 (7th Cir. 2008); *Rapheal v. Mukasey*, _ F.3d _, 2008 WL 2600798 (7th Cir. July 2, 2008). In so doing, the Court again displayed its inimitable jurisprudential verve, placing its own gloss upon critical aspects of the REAL ID amendments.

Mitondo: Details, Details – But Not Demeanor?

Mitondo was the Court's first published foray into the REAL ID thicket. The alien was found not credible because of glaring problems with his account of how he escaped from the Democratic Republic of the Congo to Zambia, traveled to Scotland, and thence to the United States on a French passport. It turned out, the passport blank had been stolen. Further, it was determined that a voucher for a youth hostel in Chicago, issued in the respondent's name, had been created prior to the date on which he allegedly escaped from prison in the Congo. At this point, the hearing was adjourned for the respondent to generate further evidence regarding his travel documents. He then returned with an explanation that the French passport had originally been issued to someone with his same surname, and his photo was substituted into the document. Trouble was, a forensic examination concluded that the passport had *not* been photo-substituted and thus had been created specifically for the respondent. The respondent also could not give details regarding the identity of the priests who helped him escape from the Congo and then travel onward from Zambia.

The respondent argued to the Seventh Circuit that these discrepancies did not go to the heart of his claim and thus could serve as a legitimate basis for an adverse credibility determination. The Court was candid regarding the intent and impact of the REAL ID Act: "[d]issatisfied with judicial reluctance to accept immigration judges' credibility decisions, Congress enacted [the provisions now codified at section 208(b)(1)(B)(iii) of the Act]." *Mitondo,* 523 F.3d at 787. That provision, the Court noted, "abrogates" the "heart of the claim" requirement imposed by many circuit courts, and requires federal courts "to use in immigration proceedings the same deferential approach traditionally applied to credibility determinations in labor cases and other administrative controversies." *Id* at 788.

Judge Easterbrook, the opinion's author, then took time to indicate to what *type* of credibility factors the Court was likely to defer. In so doing, he sent a clear signal that despite the REAL ID Act's inclusion of "demeanor" as a factor, the Seventh Circuit might be distrustful of negative credibility findings so grounded.

Asylum cases, he stated, "pose thorny challenges in evaluating testimony." *Id.* The stories are often horrific, and those responsible for such misdeeds do not record their efforts, and in some countries, make it difficult to obtain corroborative evidence from other sources. In such cases, the "oral narration must stand or fall on its own terms" – but this is complicated by the fact that there is a strong motivation to manufacture a claim in order to remain in the United States. *Id.*

"Clause (iii)" of the REAL ID amendments – addressing credibility determinations – provides a list of factors that may be relied upon by an Immigration Judge in assessing the reliability of such oral narrations. Notable among these – in no small part because it is the *first* listed factor – is the *demeanor* of the applicant or witness. *See* section 208(b)(1)(B)(iii) of the Act. Despite this clear Congressional intent, Judge Easterbrook was not buying it. Witness demeanor, he concluded, is not a reliable factor in "sift[ing] honest, persecuted aliens from those who are feigning." *Id.* at 788. Citing social science research, he stated that subjective demeanor findings are "the method of the lie detector without the polygraph machine." *Id.* Rather, "if you want to find a liar you should close your eyes and pay attention to *what* is said, not *how* it is said or what the witness looks like while saying it." *Id.* What gives the liar away, he concluded, is details: those being dishonest avoid giving more information because of the risk that some of it will boomerang. Similarly, if working from a script, liars will display an uncanny memory for a certain memorized level of detail, but then stumble when asked questions beyond the periphery of the script. *Id.* at 788-89.

Judge Easterbrook's comments on demeanor-based findings, while technically dicta, are a likely signal as to how the Court will review such findings when the issue is squarely presented. The comments are also curious. He starts with the presumption that most people – based on television and movies – assume that a criminal's or witness's credibility often collapses because of demeanor. Personally, based on my addiction to re-runs of *Law & Order* – plus 10 years of reviewing Immigration Court proceedings – I do not enter with this assumption at all. Details, and not sweaty palms, are always what trips up the bad guys on TV, and almost always what Immigration Judges rely upon in making credibility determinations. Demeanor is often a clue that something is amiss, but rarely if ever the decisive factor. In the case before Judge Easterbrook – presenting an adverse credibility determination grounded squarely on the asylum applicant's failure to present a consistent and detailed account – is far more representative of the work of Immigration Judges than the hypothetical demeanor-only finding he admonishes against.

Still, Judge Easterbrook's observations have value. First, they indicate the type of approach that certain federal judges will take if they conclude that an Immigration Judge or the Board has isolated a *single* factor listed in "clause (iii)" to the exclusion of other, perhaps more reliable factors. Second, they stress the importance of the first operative words of the clause (iii) – "[c]onsidering the totality of the circumstances…" A finding based solely on demeanor, or on some other single factor, may be vulnerable because it fails the *statutory* obligation established by the REAL ID Act. Third, the decision signals that where a credibility determination *is* based on the totality of the circumstances, and does rely on discrepancies in details, the Court will apply a high degree of deference. Judge Easterbrook concluded that the Immigration Judge, provided he or she relies on "the details of an alien's story to make an evaluation of its truth," is permitted to make a credibility finding "using whatever combinations of considerations seems best to the situation at hand." *Id.* at 789. The Judge may not make irrational assumptions regarding how foreign governments operate or harm their citizens, but within those boundaries, the REAL ID Act "permits

the [Immigration Judge] to make a decision *despite the irreducible uncertainty in any evaluation of oral testimony.*" *Id.* (emphasis supplied). In other words, the circuit court under the REAL ID Act will act as a referee to determine that these boundaries of rationality have been observed but will not itself re-try the issue of credibility. Time will tell how well that bargain holds.

Rapheal: Credibility First, Then Corroboration

While *Mitondo* clearly identified the type of credibility determination the Seventh Circuit expects under the REAL ID Act, the subsequent decision in *Rapheal* focused attention on "clause (ii)" of the REAL ID amendments: those pertaining to how a respondent can sustain the burden of proof. *See* section 208(b)(1)(B)(ii) of the Act.

The respondent, from Liberia, was found not credible by the Immigration Judge because of evidence – disputed by the respondent – that she had given a particular maiden name in an earlier immigration interview. The statement was made in a handwritten notation and was signed by the respondent. Since the basis of the respondent's claim was that her family name was associated with those supporting the ex-dictator Charles Taylor, the Immigration Judge found it to go to the heart of her claim. The Immigration Judge also found that the respondent had not explained the lack of corroborative evidence in her case. The Board affirmed, not reaching the issue of credibility but agreeing that the respondent had failed to meet her burden of proof due to her failure to provide corroborative evidence.

The Seventh Circuit quickly dismissed the respondent's principal argument, based on prior circuit precedent that the Board could not deny her claim based on lack of corroboration because it has not made an explicit credibility determination, had not explained why it is reasonable to expect additional evidence, and had not accounted for why the respondent's explanation for failure to produce such evidence was not reasonable. *See Gontcharova v. Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004). The REAL ID Act superseded *Gontcharova*, as well as rulings in other circuits that had departed from the Board's precedent in *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997) (where it is reasonable to expect corroborative evidence, such evidence should be provided, or an explanation given as to why it was not). The so-called "corroboration rule" is also reflected in 8 C.F.R. §§ 208.13 and 1208.13 and, according to *Rapheal*, now endorsed and codified by Congress. "The REAL ID Act, thus, changed the framework for reviewing cases in which the Board rejects a petition for asylum based on the lack of corroborating evidence." *Rapheal,* 2008 WL 2600798 at *4.

The Court nevertheless reversed the Board's ruling, holding that in this circumstance, the Board had presumed the respondent not credible without explicitly deciding so. Citing a reference made by the Immigration Judge to the respondent's "uncorroborated inconsistent testimony," the Court concluded that the Immigration Judge had required corroboration specifically because he had found the respondent not credible. *Id.* at *5. Since the Board did not resolve the issue of credibility, the Court stated that it could not resolve whether the corroboration requirement had been properly imposed. Noting that the REAL ID Act *permits* asylum to be granted on the basis of credible testimony standing alone, the Court found that if the Board had found the respondent credible, he might not have had to provide corroboration. Thus, before relying on the lack of corroboration, the Board needed to decide whether the respondent was credible. The Court ordered a remand for this purpose.

Rapheal also addressed the respondent's argument that it was unreasonable for the Immigration Judge and the Board to expect her to provide corroboration of her father's relationship with Charles Taylor. While acknowledging the difficulties in obtaining documents from Liberia, the Court noted that the respondent had made no effort to do so, nor indicated that such documents did not exist. The Court posited that Liberian newspapers or broadcasts might be available in a library, and that because of the credibility issues in her case, "there is a need for Rapheal to explore every possible avenue for corroborative evidence." *Id.* at *6, note 2. Thus, the Court concluded that the Immigration Judge and the Board did not err in holding that corroborating evidence was reasonably attainable.

Rapheal: Documentary Evidence in Video Conference Hearings

The final issue addressed by the Court was respondent's claim that her hearing, conducted by video conference, violated her due process and statutory rights to counsel. The Court dismissed the respondent's facial constitutional claim, noting that other circuits had found no due process violations, and that video conference

hearings provide an adequate opportunity "to be heard in a meaningful manner and at a meaningful time." *Id.* at *7. The respondent also made an "as-applied" constitutional claim, which the Court dismissed as "flabby." The Court also dismissed the argument that, as applied to her case, the video conference violated her right to consult with counsel. (Rapheal's lawyer appeared in the Immigration Court, not at the remote video location.) Attorneys have a choice, the Court reasoned, to appear with their clients at their clients' locations, or to appear in person before the Immigration Judge. While attorneys prefer not to have to make that choice, the requirement does not violate the alien's right to counsel in a given case. Here, the Court noted that neither the respondent nor her attorney requested during the hearing to talk in private; thus, she could not claim on appeal that her right to such confidential communication was frustrated.

In the end, however, the Court concluded that the respondent's hearing violated her statutory right to confront all of the evidence against her. The reason? The record of her earlier interview, containing the handwritten notation regarding her disputed maiden name, was not made available to her at her location. Her counsel (who did not object to its admission) could examine it but she could not. Thus, on remand, the Court urged that provision be made for documents adverse to the respondent to be made available to her at her location.

The upshot of these rulings will be of no surprise to seasoned observers of the Seventh Circuit. While it acknowledged the changes wrought by the REAL ID Act, the Court was quick to place its own gloss on those provisions and to require rigorous adhesion to procedural standards that it has gleaned from those provisions. The "reading out" of demeanor in *Mitondo* already has been noted. *Rapheal* poses a similar conundrum: the REAL ID Act explicitly states that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." Section 208(b)(1)(B)(iii) of the Act. Since the Board made no such explicit adverse finding, the Seventh Circuit was obligated, it seems, to treat the respondent as credible and, concomitantly, to address the legal sufficiency of the conclusion that the respondent had failed to corroborate her claim. Since the Court concluded that a corroboration requirement was reasonable under the circumstances, and that the respondent had failed to fulfill that requirement, that might have been sufficient to end the case. Adopting the statutory presumption of credibility also would have rendered moot the issue of whether the respondent had a fair opportunity to review the statement containing her disputed maiden name. *Compare Uli v. Mukasey*, _ F.3d _, 2008 WL 2777416 (July 18, 2008) (while Board was "less than explicit" in past persecution and rebuttal evidence findings, decision sufficiently clear to conclude that proper legal standard applied).

As in *Mitondo*, however, there are lessons to be learned from the Seventh Circuit's choice of emphasis, lessons that may well carry over to other circuits. Credibility and corroboration *are* related, but in a complex way. The best way to resolve that complexity is to understand the priority given by the REAL ID Act to the question of *burden of proof*. Credible testimony, standing alone, *may* be sufficient to meet an alien's burden of proof. Yet, more can be required by the trier of fact, and if that requirement is reasonable and unmet, the Immigration Judge and Board may conclude that the respondent has not met the burden of proof. There is no statutory "trigger" for an Immigration Judge to require corroboration – for example, there is no requirement that the Immigration Judge first identify testimonial deficiencies or problems with credibility. A failure to present credible testimony can be fatal the alien's burden of proof; equally, a failure to present corroborative evidence can be fatal. Credible, persuasive testimony and corroborative documentary evidence are two separate but non-mutually exclusive means to assess whether the burden of proof has been met.

In practice, however, it is more likely that a trier of fact will require corroboration if he or she determines that there is a problem with the credibility or persuasiveness of an applicant's testimony. This sometimes leads to a blurring of the lines between the issues of credibility and corroboration. To the extent this occurs, federal courts are more likely to follow the path set forth in *Rapheal*. The presumption of credibility on appeal is insufficient, they may conclude, because that presumption does not allow us to "go back" to the mind of the Immigration Judge or the Board and determine if they *would have* imposed a corroboration requirement after having found the applicant credible. Predictions are always hazardous when a new statute is in play, but it is not difficult to see that at least certain judges on the Second and Ninth Circuits, and perhaps elsewhere, would be sympathetic to the approach in *Rapheal*.

The lesson here is that the REAL ID Act makes it even more important for Immigration Judges and the Board to enter clear findings regarding credibility. This is consistent with the Board's own precedents such as *Matter of S-M-J-*. In addition, REAL ID should prompt Immigration Judges and the Board to be clear regarding requirements for corroborative evidence, and be specific as to whether (and why) such requirements were met or not met. Since the template for such determinations is now set forth in statute, federal courts will likely expect the template to be followed.

The Ninth Circuit: "Bye-Bye Borja" (and Briones)

So-called "mixed-motive" cases present some of the most vexing questions for Immigration Judges, and some of the best opportunities for expansive judicial interpretations of eligibility for asylum. *See, e.g., Silaya v. Mukasey* 524 F.3d 1066 (9th Cir. 2008) (finding imputed political opinion nexus in rape by New People's Army guerrillas based on fact that respondent's father was a veteran of World War II, thus tying him to Philippine government); *compare Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001) (finding no nexus in NPA rape where applicant appeared to be a random victim). As *Silaya* and *Ochave* illustrate, much of the "action" on this issue has taken place in the Ninth Circuit, and the touchstones for "mixed motive" cases over the past decade were the Court's decisions in *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (NPA extortion efforts and threats had requisite nexus because there was reason to believe they were motivated "at least in part" by imputed anti NPA political opinion); *Briones v. INS*. 175 F.3d 727 (9th Cir. 1999) (NPA death threats in retaliation for alien having turned his cousin over to authorities motivated by imputed political opinion, not simply civil conflict or personal dispute).

The "one central reason" provision in "clause (i)" of the REAL ID Act amendments was clearly aimed at these precedents, and in *Parussimova v. Mukasey*, _ F.3d_, 2008 WL 2841153 (9th Cir. July 24, 2008), the Court recognized that the arrow had hit its mark. To receive asylum or withholding under the "one central reason" standard, the Court held that the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment; it "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Parussimova,* 2008 WL 2841153 at * 4-5 (citing *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). The Court further explained that a "central" reason is one of primary importance to the persecutors, and a motive is a "central reason" if the persecutor would not have harmed the applicant if such motive did not exist. The Court clarified, however, that if there is more than one central reason, the applicant need not prove which was dominant.

The alien in this case, a native of Kazakhstan, sought asylum based on religion (Christian Orthodox) and ethnicity (Russian). She suffered prior harassment, not rising to the level of persecution, based on her ethnicity. The central event of her claim, a brutal street attack in January 2005, was perpetrated by Kazakh men who first told her that she should not be working for the American company whose lapel pin she wore, and then called her a "Russian pig" who should leave the country. The Ninth Circuit found that this scenario presented three possible motivations for the attack: (1) that, as a young woman walking alone, she was a vulnerable target for sexual assault; (2) that she worked for an American company; or (3) that she was a Russian, which would be the only ground protected by the Act. The Court found that the evidence could not compel a finding that this third reason was the "central reason" for the attack. The attackers were clearly aware of her ethnicity and used it to degrade her, but there was no evidence (such as prior contact or threats from these attackers) that this established a "causal connection between this characteristic" and the attack. *Id*. at *6. The Court noted that the attackers first mentioned her work for the American company, suggesting that as a cause, and that their final act – attempted rape – signaled a purely criminal intent.

Parussimova is notable for its sheer pith, and lack of effort to put a gloss on the new REAL ID Act requirements. The case illustrates how burden of proof is the fulcrum on which the analysis of asylum claims now turns. Not only must race, religion, nationality, political opinion, or particular social group be "one central reason" for the alleged persecution; the *applicant* also "must establish" that this is the case. This should curtail the functional scope of review in mixed motive cases, in which courts have *inferred* a political motivation due to the context in which a claim arose. *See, e.g.*, *Briones*, 175 F.3d at 728-29 (applicant's role as a government informant in civil war "leads us inexorably to the conclusion . … that the NPA surely attributed to him an adverse political point of view") *and Briones*, 175 F.3d at 731-32 (O'Scannlain, dissenting) ("Briones was motivated to save his home

town from the destruction caused by the NPA . . . [and] did not present any evidence suggesting that the guerillas erroneously believed that his informant service was politically based"). It might fairly be said that in *Briones*, the majority of the panel *imputed* to the respondent an "imputed political opinion" that "must have" been the basis for the NPA's threats against him. *Parussimova* signals that this type of "imputation" will no longer be a substitute for more concrete evidence provided by the applicant of a persecutor's motivation.

Second Circuit: Driving a Stake Through the "Heart of the Claim"

The "heart of the claim" rule was, if anything, more ensconced in asylum jurisprudence than the "mixed-motive" analysis of *Borja* and *Briones*. *See, e.g., Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). Its demise in REAL ID Act cases has been both predictable and inexorable. *See, e.g. Qun Lin v. Mukasey*, 521 F.3d 22 (1st Cir. 2008); *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 23, n.3 (1st Cir. 2007)(en banc) (pre-REAL ID Act case; noting that *falsus in uno, falsus in omnibus* rule would apply in REAL ID case); *Chen v. U.S. Att'y Gen'l*, 463 F.3d 1228 (11th Cir. 2006) (REAL ID Act case, rejecting argument that discrepancy was trivial). The Seventh Circuit, though, might be a holdout. *See Kadia v. Gonzales*, 501 F.3d 817, 821-22 (7th Cir. 2007) (in dicta, expressing skepticism that REAL ID Act revives the "discredited" *falsus in uno* doctrine).

Now, the Second Circuit joins those courts recognizing the demise of the former rule. *Xiu Xia Lin v. Mukasey*, _ F.3d _, 2008 WL 2789141 (2d Cir. July 21, 2008). The discrepancies in the case were three: (1) the lack of mention, in both the respondent's asylum application and the affidavit of a friend, that the friend was in hiding to avoid persecution based on the friend's Falun Gong activity; (2) the omission in the application and in the affidavit of the respondent's father that the respondent was detained for 12 hours on account of her own Falun Gong activity; and (3) the omission of mention in the application and affidavits of the bribe allegedly paid to secure the applicant's release. All of these omitted points were testified to by the respondent in Immigration Court, leading the Judge to enter an adverse credibility determination.

Reasonable minds might disagree as to whether these discrepancies were at the "heart" of the respondent's claim. The Second Circuit held that they were not, because they did not contradict the fact that the respondent was detained (the only issue being the length of the detention). Thus, under prior circuit precedent, these discrepancies "were ancillary or collateral to [the respondent's] claim of past persecution." *Id.* at *4. But, the Court observed, this no longer matters. "Squarely presented" with the issue for the first time, the Court held that the rule that such discrepancies cannot be the basis of an adverse credibility finding has been abrogated by the REAL ID Act. Thus, the rule established in *Secaida-Rosales* will no longer apply.

Rulings such as *Lin*, however, should not be interpreted to permit *any* discrepancy, no matter how trivial or inconsequential, to support an adverse credibility finding. As noted earlier, the "totality of the circumstances" standard in "clause (iii)" of the REAL ID amendments takes priority. The Seventh Circuit, for one, will closely examine whether "non-core" discrepancies can, under the "totality" standard, support an adverse finding. The Second Circuit in *Lin* states that it will defer to an adverse credibility determination "unless, from the totality of the circumstances, it is plain that no reasonable fact-finder could make such [a] . . . ruling." *Id.* at *4. The First Circuit, in its *Lin* case, quoted extensively from the legislative history of the REAL ID Act, and concluded that the "reasonableness" test remains viable: "The requirement of reasonableness in the conference report could be read to imply a rationality requirement that is less stringent than the old heart of the claim rule, but stops short of allowing credibility decisions based on inconsistencies that no rational person could consider relevant to a witness's truthfulness." *Qun Lin,* 521 F.3d at 28, n.3.

Conclusion

This month's featured cases demarcate some clear holdings on the application of the REAL ID Act, and also indicate the types of issues that will be addressed in future cases. If the lessons to be learned here can be briefly summarized, they might reduce to this: Keep the focus on an applicant's burden of proof and, in doing so, keep in mind the totality of the circumstances. Determinations based on evidence viewed in isolation have always been problematic in the world of asylum and refugee law, and despite the heightened deference to trial-level determinations that was codified by the REAL ID Act, such determinations will remain vulnerable. As more REAL ID cases are decided by the circuits, close attention

to a court's rationale, as well as to its holdings, will be critical.

Edward R. Grant has been since January 1998 a Member of the Board of Immigration Appeals.

RECENT COURT ACTIVITY

First Circuit:

Bakuaya v. Mukasey, __ F. 3d __, 2008 WL 2719887 (1st Cir. July 14, 2008): The First Circuit dismissed the respondent's appeal from the Board's denial of her asylum application and her motion to reopen. At her hearing, the respondent admitted that key elements of her claim were fabricated. The Immigration Judge nevertheless granted asylum, noting "atrocious" conditions in Cameroon, targeting of family members based on political and tribal affiliations, and the chance that the respondent could be targeted upon return due to her family ties and long residence in the U.S. The Board reversed, and respondent appealed to the circuit. The respondent then filed a motion to reopen with the Board based on changed country conditions and new information regarding a tribal-based attack on her brother. The Board denied the motion, which was also appealed to the circuit, which consolidated the two appeals. The Court noted that the respondent had never been harmed herself in Cameroon, and had never been politically active. It held that the Board did not abuse its discretion in refusing to credit the respondent's affidavit about the attack on her brother, in light of her past fraud and the unexplained absence of an affidavit from the brother himself. The Court stated that it might have credited the affidavit if hearing the case *de novo*, but would have found it simply proved that random tribal-motivated violence occurs in Cameroon.

Second Circuit:

Lin v. Mukasey, __ F.3d __, 2008 WL 2789141 (2d Cir. July 21, 2008): The Second Circuit dismissed the respondent's appeal from the Immigration Judge's denial of her asylum application based on an adverse credibility determination. The Board had affirmed the Immigration Judge's decision. The Court held that the new asylum credibility standard created by the REAL ID Act allows the Immigration Judge to rely on omissions and inconsistencies that do not relate directly to the applicant's claim of persecution; provided that the totality of the circumstances establish that the respondent is not credible. The Court held that the REAL ID Act abrogated the 2d Circuit's holding in *Secaida-Rosales v. INS*, 331 F. 3d 297 (2d Cir. 2003), which did not allow an adverse credibility determination to rely on ancillary or collateral omissions or inconsistencies.

Llanos-Fernandez v. Mukasey, __ F.3d __, 2008 WL 2797009 (2d Cir. July 22, 2008): The Court granted the petition and vacated the Board's decision upholding the Immigration Judge's denial of a motion to reopen. The respondent was taken into Immigration and Naturalization Service custody and served with a Notice to Appear when he was 14 years old. He was subsequently released to his uncle. The respondent was served by mail with a notice of hearing after he had turned 15; the uncle was not served. The respondent failed to appear, and was ordered removed *in absentia*. Two days short of his 21st birthday, the respondent moved to reopen, claiming that he did not receive proper notice of the hearing. He relied on a favorable Ninth Circuit case, *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004), requiring service on the custodial adult. The Immigration Judge denied the motion, stating that he was not bound by Ninth Circuit case law. The Court chose to remand as the Board's decision was a conclusory, non-precedential single member decision which the Court found lacked meaningful interpretation of the statute or regulation, and which failed to explain its basis for rejecting the Ninth Circuit's reasoning. The case was remanded to the Board to clarify and interpret the statute and regulations relating to service on minors, particularly minors who were released to the custody of a responsible adult pursuant to 8 C.F.R. § 236.3(a).

Third Circuit:

Hashmi v. Att'y Gen'l, __ F. 3d __, 2008 WL 2640110 (3d Cir. July 7, 2008): The Third Circuit vacated the Board's decision upholding the Immigration Judge's denial of a motion for continuance to allow for adjudication of a pending I-130 spouse petition by DHS. A determination on the petition was delayed by a pending overseas investigation of a Pakistani divorce decree relating to a prior marriage of the respondent. After granting adjournments totaling 18 months, the Immigration Judge denied a further request for a continuance, citing the Department of Justice's case completion goals. The Court found that the Immigration Judge abused his discretion. The Court noted that case-completion goals are guidelines only, and that in applying them, the Immigration Judge failed to take into account the unique circumstances of the particular case, which the Court held to be impermissibly arbitrary. The case was remanded for further proceedings.

Seventh Circuit:

Rapheal v. Mukasey, __ F. 3d __, 2008 WL 2600798 (7th Cir. July 2, 2008): The Seventh Circuit remanded for a new hearing where it was not clear from the record whether the respondent, whose hearing was held by video conference, was afforded the opportunity to examine a document relied upon by the Immigration Judge in finding the respondent to be not credible. Although the Board issued its own opinion, upholding the denial of asylum due to the lack of corroborating evidence, the Court found remand warranted because the Board presented certain facts as if the respondent were not credible. The Court upheld the constitutionality of video conference removal hearings, but on remand encouraged the Immigration Judge to consider anew the respondent's request for an in person hearing, given the logistics of this particular case. The Court also cautioned the Board to exercise greater care in the future in identifying whether its decisions are intended to be "stand-alone," or merely a supplement to the Immigration Judge's decision.

Eighth Circuit:

Davila-Mejia v. Mukasey, __ F. 3d __, 2008 WL 2630085 (8th Cir. July 7, 2008): The Eighth Circuit upheld the Board's determination that "family business owners" in Guatemala did not constitute a "particular social group" for purposes of asylum and withholding of removal. The Court agreed with the Board, relying on *Matter of A-M-E & J-G-U-*, that the claimed social group lacked sufficient social visibility. The Court found no evidence presented to establish that group members are at greater risk, or that the incidents suffered by the respondent were on account of their group membership. The Court also found the term "family business owners" "too amorphous to adequately describe a social group."

Ninth Circuit:

Loho v. Mukasey, __ F. 3d __, 2008 WL 2651157 (9th Cir. July 8, 2008): The Ninth Circuit affirmed the Immigration Judge's reliance on the asylum applicant's voluntary return to Indonesia in reaching an adverse credibility determination. The Court noted that the respondent, an ethnic Chinese Christian, twice visited the U.S. subsequent to claimed incidents of past persecution. In spite of claiming to be "especially fearful" of return, the respondent nevertheless returned voluntarily to Indonesia each time, once because her employer had given her only ten days leave. The Court also noted that the respondent was actually informed by her cousin of the possibility of remaining in the U.S., yet failed to take any additional steps because her cousin was too busy to assist her. The Court concluded that the minimal steps taken by the respondent to avoid return to Indonesia after leaving for the safety of the U.S. provided adequate support for the Immigration Judge's negative credibility finding.

Dela Cruz v. Mukasey, __ F. 3d __, 2008 WL 2669690 (9th Cir. July 9, 2008): The Court dismissed the appeal from the Board's denial of the respondent's motion to reopen as untimely. The Court agreed with the Board's holding that the filing of a petition for review with the circuit court does not toll the statutory time limit of section 240(c)(7)(C)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(I), requiring that the motion be filed within 90 days of the entry of a final administrative order. The Court rejected the respondent's argument that there was no final administrative order because of the timely filing of the petition for review, relying on the Supreme Court's holding in *Stone v. INS,* 514 U.S. 386 (1995) that a removal order is "final when issued," and "remains final, even if the petitioner files a motion to reopen or reconsider."

BIA PRECEDENT DECISIONS

The Board addressed recognition and accreditation standards in two decisions, *Matter of EAC, Inc.*, 24 I&N Dec. 556 (BIA 2008), and *Matter of EAC, Inc.*, 24 I&N Dec. 563 (BIA 2008). The Board discussed the requirement that the organization have at its disposal knowledge, information, and experience in immigration law and procedure. Previously the Board had required access to a library, but access to adequate information may now be shown via electronic or internet access to immigration legal resources. An organization must show that it has either a licensed attorney on staff, offering pro bono services, or providing consultation, or an accredited representative or partially accredited representative with access to additional services. The Board does not require an organization that offers a limited range of immigration services to have a staff with a full range of experience, but the organization should be able to recognize when to seek other assistance. The Board approved the application for recognition of EAC, Inc. (Education and Assistance Corporation) which demonstrated access to immigration source books and the internet, an arrangement with a licensed, experienced immigration attorney, and submitted the resumes of its legal consultant and nonattorney employee with substantial training in immigration law.

The Board also approved the request for partial accreditation of EAC, Inc.'s nonattorney employee. The Board noted that all accredited representatives must have a broad knowledge of immigration law, even if they only provide limited services, so that the accredited representative is able to identify immigration issues outside the services provided and refer an alien elsewhere where necessary. EAC Inc. submitted recommendations and a resume showing the employee's many years of experience providing naturalization and citizenship services and completion of 10 training sessions in various aspects of immigration law.

In *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008), the Board found that the respondent's 13 months as an applicant for adjustment of status or applicant for asylum does not count toward establishing that he has "lawfully resided" in the United States continuously for 7 years before the initiation of removal proceedings for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The respondent was admitted to the United States as a B2 nonimmigrant in June 1995. Prior to expiration of that status, he filed an asylum application with the Department of Homeland Security (DHS). In May 1996, DHS denied the application and issued an order to show cause. During proceedings, the respondent filed for adjustment of status based on an immediate relative petition. The petition was approved, proceedings were terminated in May 1997, and respondent adjusted in August 1997. In May 2002, respondent was convicted of criminal possession of a forged instrument. In November 2002, upon return from a trip abroad, he was placed in proceedings, and he filed for a 212(h) waiver of the removal charge.

The Board first found that the phrase "lawfully resided" is ambiguous as it could encompass a wide range of possible constructions. Because of the breadth of possible issues, the Board limited its holding to the facts before it. The Board found that the phrase connotes more than simple presence, and is not something that can be achieved through self-action, although an alien need not be in "status." The Board found some support in legislative history through reference to section 240A(a) of the Act, 8 U.S.C. § 1229b(a), which includes admission in *any status*. The Board rejected the respondent's argument that the phrase would allow lawful residence to arise from any legal impediment to removal because such residence is not lawful and could encompass the vast majority of aliens entitled to a removal hearing. Lawful residence requires authorization. The respondent argued that the phrase should be the equivalent of being "not unlawfully present" as in section 212(a)(9) of the Act, but the Board concluded that tolling or exempting a category from added sanctions for staying in the country does not transform presence into lawful residence. The Board drew a distinction between permitting an alien's presence in the country for a limited purpose and legalizing his or her stay.

The Board addressed claims based on resisting gang recruitment in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) . The respondents presented asylum claims based on membership in a particular social group in both cases. The first case presented the social group of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal moral and religious opposition to the gang's values and activities or family members of the above group. The respondents were a sister and two brothers from El Salvador. The respondents testified that MS-13 controlled their neighborhood and they all received threats, the youngest was beaten and money was stolen. A child in their neighborhood was killed for refusing to join the gang. An expert witness testified at the hearing about gangs in El Salvador. *Matter of S-E-G-*, *supra*.

The Board found that the social group presented fails for lack of particularity and social visibility, referring to the Board's recent decision in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007). Turning to particularity first, the Board found that the proposed group does not meet the essence of particularity, which is whether the group can be accurately described in a manner sufficiently distinct that the group would be recognized in the society in question as a discrete class of persons. The respondent further defined the group, but the characteristics, male children without stable families and adult protection in middle to low income classes, is still amorphous because different people in the society might define those terms differently. Further, the evidence does not show that gang recruitment is limited to children with these characteristics. The other proposed group, family members, is likewise too amorphous as it could include any number of relationships. The social visibility requirement must be considered within the context of the country. Here, there is little background evidence to indicate that Salvadoran youth who are recruited but

refuse to join would be perceived as a group, or that they suffer from a higher incidence of crime than the rest of the population. The Board also considered whether a refusal to join is a political opinion, and found that under *INS v. Elias-Zacarias,* 502 U.S. 478 (1992), the respondent failed to show a political motive in resisting gang recruitment or that the gang has imputed a political opinion to him.

In *Matter of E-A-G-*, *supra,* the social group was presented as persons resistant to gang membership or young persons who are perceived to be affiliated with gangs. The respondent was an Honduran male. He testified that two of his brothers were members of MS-13 and were killed, one by a rival gang, the other by MS because he became a Christian and tried to leave the gang. Police reports and investigations did not lead to anything. The respondent's mother received oral and written threats although the respondent did not. *Matter of E-A-G-*, *supra*.

The Board found again that the first proposed social group lacks social visibility for reasons similar to *Matter of S-A-G-* above. The Board noted that the focus of analysis is on the existence and visibility of the group in the society in question, the importance of the pertinent group characteristic to the members of the group, and that the persecution is on account of the group's identifying characteristics. The second group, persons perceived to be affiliated with gangs, is less clear-cut. While gang membership entails some social visibility, the Board rejected the social group for reasons discussed in *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), that treating affiliation with a criminal organization as being a protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior. While the respondent has not been a member of a gang, the claim nevertheless fails because membership in a gang cannot form a basis for a particular social group.

REGULATORY UPDATE

73 Fed. Reg. 44178
DEPARTMENT OF JUSTICE

Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances

AGENCY: Executive Office for Immigration Review
ACTION: Proposed rule with request for comments.
SUMMARY: This rule proposes to change the rules and procedures concerning the standards of representation and professional conduct for attorneys and other practitioners who appear before the Executive Office for Immigration Review (EOIR), which includes the immigration judges and the Board of Immigration Appeals (Board), and to clarify who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges. Current regulations set forth who may represent individuals in proceedings before EOIR and also set forth the rules and procedures for imposing disciplinary sanctions against attorneys or other practitioners who engage in criminal, unethical, frivolous, or unprofessional conduct before EOIR. The proposed revisions would increase the number of grounds for discipline and improve the clarity and uniformity of the existing rules while incorporating miscellaneous technical and procedural changes. The changes proposed herein are based upon the Attorney General's recent initiative for improving the adjudicatory processes for the immigration judges and the Board, as well as EOIR's operational experience in administering the disciplinary program since the current process was established in 2000.
DATES: Written comments must be submitted on or before September 29, 2008.

ADDENDUM: **Calculating "Loss to Victim or Victims" under section 101(a)(43)(M)...**

The United States Court of Appeals for the Ninth Circuit recently addressed the issue of determining loss to a victim or victims under section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M). In *Kawashima v. Mukasey*, _F.3d._ 2008 WL 2579212 (9th Cir., July 1, 2008), the petitioners challenged the finding that they were removable as aliens convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act. The court found that the removal charge could not stand because the petitioners were convicted under federal statutes (false statement on a tax return/aiding and assisting in the preparation of a false tax return) which did not require the government to prove an amount of loss (in other words, the elements of the underlying crime did not include a loss component). To reach this conclusion, the court relied on *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(en banc), which held that when the petitioner's crime of conviction is missing an element of the generic crime altogether (in this case, a CIMT), the record of conviction cannot be examined to determine whether the petitioner was in fact convicted of acts fitting the generic crime. The *Kawashima* court recognized that other circuits interpreted the loss requirement in 101(a)(43)(M)(i) as a limiting provision/qualifier on the unitary generic offense rather than as an "element" of the offense,

but the court found that it was precluded from this route by *Navarro-Lopez*. Judge O'Scannlain, in a specially concurring opinion (joined by J. Callahan), found that the result compelled by *Navarro-Lopez* was illogical, and that the Ninth Circuit should reconsider that case en banc.

For the original article Calculating "Loss to the Victim or Victims"..., see the Immigration Law Advisor Vol 1 No 4. Additional updates can be found in Vol. 1 No. 6, Vol. 1 No. 11, Vol. 2 No. 1, Vol. 2 No. 3, Vol 2 No. 4, and Vol. 2 No. 5.

Bond Proceedings *con't*

United States "would come to the attention of others in Haiti and encourage future surges in illegal migration by sea." *Id*. He additionally determined that "the release on bond of undocumented seagoing migrant aliens from Haiti without adequate background screening or investigation presents a risk to national security." *Id*. at 580.

The Attorney General held that in future bond proceedings, the Immigration Judges and the Board are required to apply the standards set forth in *Matter of D-J-* as binding precedent, including consideration of national security interests. *Id*. at 581. He further held that in future bond proceedings involving aliens seeking to enter the United States illegally, Immigration Judges and the Board are required to consider government evidence from Executive Branch sources with relevant expertise establishing that significant national security interests are implicated. *Id*.

The Attorney General further determined that the respondent did not meet his threshold burden under 8 C.F.R. §§ 236.1(c)(8) and 1236.1(c)(8), concluding that there were "strong indications in the record that respondent was among those aliens who sought to evade Coast Guard and law enforcement officers in a determined effort to effect illegal entry into the United States." *Id*. He determined that such "evasive behavior" does not evidence a likelihood that the respondent will appear for future proceedings. *Id*. He additionally noted that the fact that the respondent was denied asylum increases the risk that he will flee if released from custody. *Id.* at 582; *see also Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (stating that "[a] respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation hearing than one who, based on a criminal record or otherwise, has less potential of being granted such relief.")

Subsequently, in *Matter of Guerra*, *supra*, the Board reiterated that an Immigration Judge may look to the traditional factors (listed above) in determining whether to release an alien, and the appropriate amount of bond. However, relying on the broad discretion afforded the Attorney General under section 236(a) of the Act, the Board clarified that an Immigration Judge has broad discretion in deciding the factors that he or she may consider in determining whether a discretionary release on bond is warranted and that an Immigration Judge may decide to give greater weight to one factor over others as long as such decision is reasonable.

The Immigration Judge in *Matter of Guerra* relied on evidence in the record, including a criminal complaint indicating that the respondent was facing charges for his involvement in an alleged drug trafficking scheme. Given the large quantity and dangerous nature of the controlled substances involved, the Immigration Judge determined that he failed to meet his burden of establishing that he was not a danger to the community and denied his release on bond. The respondent in *Matter of Guerra*, argued that the Immigration Judge erred in relying on information contained in the criminal complaint. The respondent emphasized that he pled not guilty to the charges contained in the criminal complaint and was awaiting trial, and therefore he had not yet been convicted of a drug trafficking crime.

The Board in *Matter of Guerra* agreed with the Immigration Judge's decision denying the respondent's release on bond. The Board clarified that in assessing whether an alien is a danger to the community, Immigration Judges are not limited to considering only criminal convictions and may, in fact, consider any evidence in the record as long as it is probative and specific. The Board specifically agreed with the Immigration Judge that the evidence of the respondent's alleged involvement in a drug trafficking scheme was specific and detailed and sufficient to conclude that the respondent posed a risk to the community, even in the absence of a conviction. Furthermore, the Board determined that given the scope and seriousness of the respondent's alleged criminal activity, the Immigration Judge's decision to afford this evidence considerable weight compared to other factors of record, including the respondent's marriage to a United States citizen, was reasonable.

Mandatory Detention Under Section 236 of the Act

Since 1988, Congress has been active in strengthening the immigration laws aimed at removing from the United States aliens who engage in serious criminal activity. A significant component of this effort has been expanding the classes of criminal aliens who must be detained without bond. This process culminated in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Division C of Pub. L. No. 104-208, 110 Stat. 3009 (1996).

Following changes made by AEDPA and IIRIRA, the immigration laws now require the detention of virtually all aliens who have committed crimes, as well as aliens charged under the immigration laws as being terrorists.[15] Section 236(c) of the Act mandates the detention of any alien: (1) who is inadmissible on criminal grounds, as provided under section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2); (2) who is deportable for having committed multiple criminal convictions (section 237(a)(2)(A)(ii) of the Act), an aggravated felony (section 237(a)(2)(A)(iii) of the Act, a controlled substance violation (section 237(a)(2)(B) of the Act, a firearms offense (section 237(a)(2)(C) of the Act) or miscellaneous crimes, including espionage, sabotage, treason and others (section 237(a)(2)(D) of the Act; (3) who is deportable for having committed a crime involving moral turpitude under section 237(a)(2)(A)(i) of the Act, if the alien was sentenced to at least one year in prison;[16] and (4) who is inadmissible or deportable for terrorist activities (sections 212(a)(3)(B) or 237(a)(4)(B) of the Act.

The statute requires the DHS to take into custody any alien falling into these categories "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." *See* section 236(c)(1) of the Act. The only exceptions are for individuals who are part of the witness protection program or similar considerations. *See* section 236(c)(2) of the Act.

The regulations explicitly prohibit Immigration Judges from redetermining the custody status of aliens subject to mandatory detention under section 236(c) of the Act. 8 C.F.R. § 1003.19(h)(2)(i)(D). However, an alien is not prohibited from seeking a determination by an Immigration Judge that he is not properly included in any category of aliens subject to mandatory detention. *Id*. § 1003.19(h)(2)(ii); *see also Matter of Joseph*, 22 I& N Dec. 799, 802-03 (BIA 1999).

The detention mandate created by Congress under section 236(c) of the Act resulted in a substantial increase in the detention responsibilities of the former INS. Recognizing that this would pose a burden for the INS immediately after passage of the IIRIRA, Congress provided for a "transitional" period during which the INS could certify that it did not have the detention space necessary to detain all the criminal aliens specified under section 236(c)of the Act. These "Transition Period Custody Rules" (TPCR) required the detention of aliens in the four above-described categories upon the alien's release from criminal custody. However, the TPCR allowed the release of certain criminal aliens if the alien was lawfully admitted to the United States and demonstrated that he or she would not pose a danger to the safety of other persons or of property and was likely to appear for any scheduled proceeding. Alternatively, if the alien was not lawfully admitted for permanent residence, release was allowed under the TPCR if the country of removal would not accept the alien, and the alien demonstrated that he or she would not pose a danger to others. *Matter of Noble*, 21 I&N Dec. 672 (BIA 1997).

The TPCR were in place for only two years. They expired on October 8, 1998. Still, much discussion centered around whether particular aliens were eligible to be considered as having been released from criminal custody prior to the expiration of the TPCR, and thus were eligible to be released from detention on bond. Those questions are still relevant, since aliens might be placed in removal proceedings based on criminal activities, and criminal sentences, that were completed before the expiration of the TPCR. *See Matter of West*, 22 I&N Dec. 1405 (BIA 2000), discussed *infra*. The majority of Board precedent decisions relating to the issue of bond since 1996 have dealt with some aspect of the applicability of the TPCR.

Decisions of the Board of Immigration Appeals Relating to Mandatory Detention

Just three months after its passage, the Board first considered the IIRIRA's detention regime for criminal aliens in *Matter of Noble*, 21 I&N Dec. 672 (BIA 1997).

The case involved a permanent resident alien who was convicted in New York of criminal sale of a controlled substance. In 1994, the respondent was charged with deportability as one convicted of a controlled substance violation and an aggravated felony. The INS initially released the respondent from custody in 1994 on a bond of $8,000. In May 1996, he completed his prison sentence and was released to INS custody. The INS then canceled the respondent's prior bond and determined that he should be detained without bond. The respondent requested a bond redetermination before an Immigration Judge.

The Immigration Judge held that the respondent was subject to the mandatory detention provisions that had recently been enacted by AEDPA, due to his drug trafficking conviction. The respondent appealed to the Board. While the appeal was pending, IIRIRA (including the TPCR) became law. The Board held that bond redeterminations of detained aggravated felons are governed by the TPCR, regardless of how or when the alien came into immigration custody. It also held that such aliens are eligible for release from custody under the TPCR, provided that the alien can establish that he or she was either lawfully admitted or cannot be removed because the designated country will not accept him or her, will not pose a danger to the safety of persons or of property, and will likely appear for any scheduled proceeding. The Board held that the TPCR applied to the respondent, and remanded the case to the Immigration Judge for a determination of whether he met the requirements for release under the transitional rules.

In subsequent decisions, the Board elaborated on the scope of the TPCR and the mandatory detention provisions of section 236(c) of the Act. For example, in *Matter of Valdez*, 21 I&N Dec. 703 (BIA 1997), the Board, drawing on its decision in *Matter of Noble*, *supra*, held that the TPCR govern bond redeterminations of aliens who fall within the nonaggravated felony criminal grounds of removal covered under the TPCR, irrespective of when the criminal offenses and convictions occurred.

In *Matter of Melo*, 21 I&N Dec. 883 (BIA 1997), the Board further refined the considerations governing release of an alien under the TPCR. The respondent was a native of the Dominican Republic who was admitted as a permanent resident in 1978. He was charged with deportability for a 1987 drug trafficking offense. The Board noted, in accordance with *Matter of Noble*, *supra*, that the respondent's bond redetermination was governed by the TPCR. As a lawfully admitted alien, he was eligible for release from custody under the TPCR, provided he could show that he was not a danger to the community or a flight risk. The Board held that in bond proceedings under the TPCR, the standards set forth by the Board in *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994), apply to the determination of whether an alien's release pending deportation proceedings will pose a danger to the safety of persons or property and whether the alien is likely to appear for any scheduled proceeding.[18] The Board added that the "is deportable" language used in the TPCR does not require that an alien have been charged and found deportable on that ground of deportation.[19] Moreover, the Board stated that the TPCR do not limit consideration of whether an alien is a "danger to the safety of persons or of property" to the threat of direct physical violence. Rather, the Board found that the risk of continued distribution of drugs also constitutes a danger to the safety of persons. Thus, the Board held that, particularly in light of his recidivist criminal background, the respondent had not rebutted the presumption that his release would pose a danger to the community.

In *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999), the respondent was first served with an NTA in April 1997, charging him with removability as an alien who was inadmissible at the time of his entry as a lawful permanent resident. Later, in December 1997, the INS also charged the respondent as an aggravated felon, based on his 1996 conviction for conspiracy to commit bank fraud. He was released from criminal custody, however, before the expiration of the TPCR. An Immigration Judge found the respondent removable as an aggravated felon, but granted him withholding of removal and, at the bond hearing that followed, ordered the respondent released on his own recognizance.

On appeal, the Board held that section 236(c) of the Act does not apply to an alien whose most recent release from custody by an authority other than the INS occurred before the expiration of the TPCR. The Board also made clear that the general custody provisions set forth at section 236(a) of the Act, and 8 C.F.R. § 1236.1(c)(8), govern custody determinations of aliens in removal proceedings who are not subject to the provisions of section 236(c) of the Act, and the criminal alien must establish to the satisfaction of the Immigration Judge and the Board that he or she does not present a danger to persons or property. Finally, the Board stated that when an Immigration Judge's bond determination is based on evidence presented in the alien's underlying merits case,

the parties and the Immigration Judge are responsible for ensuring that the bond record establishes the nature and substance of the factual information considered by the Immigration Judge in reaching a determination on the bond request. The Board remanded the case for additional proceedings to give the respondent an opportunity to supplement the record and to allow the Immigration Judge to explain the basis of his bond ruling.

In *Matter of Joseph*, 22 I& N Dec. 799 (BIA 1999), the Board held that for purposes of determining a lawful permanent resident's custody status under section 236 of the Act, and 8 C.F.R. § 1003.19(h)(2)(ii), an LPR will not be considered "properly included" in a mandatory detention category if an Immigration Judge or the Board finds, on the basis of the bond record as a whole, that the INS is substantially unlikely to prevail on a charge of removability specified in section 236(c) of the Act. The Board also held that while a conviction document may provide a sufficient basis for the INS to believe that an alien is removable under one of the mandatory detention grounds for purposes of the INS charging the alien and making an initial custody determination, neither the Immigration Judge nor the Board is bound by the INS's determination in deciding whether an alien is "properly included" within one of the regulatory provisions that would deprive the Immigration Judge and the Board of jurisdiction to redetermine the conditions of the alien's custody.

In *Matter of West*, 22 I&N Dec. 1405 (BIA 2000), the Board addressed a case in which the respondent was arrested and charged in April 1997 with various offenses, including possession of marijuana with intent to distribute. The respondent was indicted for these offenses in December 1997, and, after posting bond, was released from state custody three days later. In September 1998, the respondent pled guilty to the drug charge and to a charge of receiving stolen property. The respondent served no prison time for his offense. Rather, in February 1999, he was sentenced to one year of probation for each offense. In August 1999, the INS took the respondent into custody and served him with an NTA. The Immigration Judge determined that the respondent was not subject to mandatory detention because he was free from physical restraint prior to the expiration of the TPCR, when he posted bail following his arrest in December 1997. The Board agreed. It held that the mandatory detention provisions of section 236(c) of the Act do not apply to an alien who was convicted following the expiration of the TPCR, where the alien's last release from the physical custody of state authorities was *prior* to the expiration of the TPCR and where the alien was not physically confined or restrained as a result of that conviction.

By contrast, in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), the Board held that an alien who is released from criminal custody *after* the expiration of the TPCR is subject to the mandatory detention provisions of section 236(c) of the Act, even if the alien is not taken into custody by the INS immediately upon his release from incarceration. In *Rojas*, the respondent was taken into custody by the INS a day after he was released from criminal custody after serving a sentence for a controlled substance crime.

Most recently, in *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007), the Board held that an alien who served no prison time and was apprehended from his home while on probation, rather than when he was released from criminal custody, is subject to mandatory detention pursuant to section 236(c) of the Act, where the record reflected that the alien was released from criminal custody following the expiration of the TPCR. In reaching this determination, the Board relied on its holdings in *Matter of Rojas* and *Matter of West*, as well as the language of section 236(c)(1) of the Act, which provides that an alien falling into the mandatory detention categories shall be taken into custody "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." Section 236 (c)(1) of the Act.

The Board, in *Matter of Kotliar*, rejected the respondent's argument that he should not be subject to mandatory detention under section 236(c)(1)(B) of the Act, as an alien who is deportable under section 237(a)(2)(A)(ii) of the Act, for having committed two crimes involving moral turpitude, where the Notice to Appear did not charge him with being removable on the basis his criminal convictions. Relying on its holding in *Matter of Melo*, *supra*, the Board held that the "is deportable" language used in section 236(c) of the Act does not require that an alien be charged with the particular ground of removal on which the alien's detention is based.

Finally, comparing the facts of the respondent's case with those in *Matter of Joseph*, *supra*, the Board held that in order to determine whether an alien is "properly

included" in a mandatory detention category where he or she is not charged with one of the grounds of removability enumerated in section 236(c) of the Act, the Board looks to whether the record establishes that the alien has committed an offense that would give rise to a charge of removability enumerated in section 236(c) of the Act. The Board determined, however, that an alien in such a case must be given notice of the circumstances or convictions on which the alien's detention is based and that the alien must be given the chance to challenge his or her detention in a bond redetermination hearing before an Immigration Judge.

The State of Mandatory Detention in the Federal Courts

Following years of federal court litigation regarding the constitutionality of mandatory detention under section 236(c) of the Act, the United States Supreme Court, in *Demore v. Kim*, 538 U.S. 510 (2003), rejected a lawful permanent resident respondent's argument that his detention under section 236(c) of the Act violated his Fifth Amendment right to due process. The respondent in the case had conceded deportability as an aggravated felon and did not seek to challenge whether he was properly detained pursuant to section 236(c) of the Act. The Supreme Court held that, "[c]ongress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the] respondent be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. In so holding, the Supreme Court reversed the rulings of a number of courts of appeals, which had held that mandatory detention of lawful permanent residents was unconstitutional.[20]

Although the Supreme Court's decision in *Demore v. Kim* has reduced the amount of federal court litigation regarding the constitutionality of section 236(c) of the Act a number of courts have recognized that questions regarding the constitutionality of mandatory detention remain. For example, in *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004), the United States Court of Appeals for the Seventh Circuit addressed the case of an alien who argued that section 236(c) of the Act violated his constitutional right to due process because he raised a good-faith argument that he was not deportable. The Seventh Circuit noted that the Supreme Court's decision in *Demore* was premised on the fact that the respondent had conceded his deportability and thus left open the question of whether mandatory detention under Section 236(c) of the Act violates an alien's due process where the alien raises a colorable claim that he is not deportable. The Seventh Circuit did not ultimately reach the issue, however, because it determined that the petitioner's challenge to deportability was not a colorable one, and thus the petitioner's detention pursuant to section 236(c) of the Act did not violate due process.

Furthermore, in *Haong Minh Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), the United States Court of Appeals for the Sixth Circuit noted that although the Supreme Court indicated in *Demore* that detention of criminal aliens pending a final order of removal is generally brief, the Supreme Court did not specify what amount of time would be unreasonable or unconstitutional under section 236(c) of the Act. *Ly v. Hansen* involved a native and citizen of Vietnam who had been detained for a year and a half waiting for a final order of removal prior to being released by DHS on his own recognizance, subject to certain conditions. The Sixth Circuit noted that unlike the respondent in *Demore*, for whom deportation to South Korea was foreseeable, the petitioner's deportation was not foreseeable due to the lack of a repatriation agreement between the United States and Vietnam. The Sixth Circuit determined that the Supreme Court's decision in *Demore* was not controlling. Instead, the Court held that the DHS may detain an alien who is *prima facie* removable on criminal grounds pursuant to section 236 of the Act for "a reasonable period of time required to initiate and conclude removal proceedings," but where removal is not "reasonably foreseeable," such aliens may not be detained indefinitely absent "a showing of a 'strong special justification,' constituting more than a threat to the community, that overbalances the alien's liberty interest." *Ly*, 351 F.3d at 273. In arriving at this standard, the Sixth Circuit relied, in part, on the reasoning set forth by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a case concerning post-removal-period detention pursuant to section 241(a)(6) of the Act, 8 U.S.C. § 1231(a)(6). The Sixth Circuit affirmed the district court's grant of habeas corpus with respect to the petitioner based on its conclusion that the period of time required to conclude the petitioner's proceedings was unreasonable, the petitioner's removal was not foreseeable, and the government had not demonstrated a "strong special justification" for the petitioner's continued detention. *Id.* at 273.

Additionally, in *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit considered an appeal of a district court's denial of a habeas corpus petition in a case involving an alien who had been detained for a period of two years and eight months. In a three-paragraph opinion, the Ninth Circuit stated that "it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted resident aliens who are subject to removal." *Tijani*, 430 F.3d at 1242. The Ninth Circuit cited the Supreme Court's decision in *Demore* but distinguished the case based on the fact that the alien in *Demore* conceded deportability. Without reaching the constitutional question and with little explanation, the Ninth Circuit interpreted the authority conferred by section 236(c) of the Act "as applying to expedited removal of criminal aliens" and determined that the petitioner's detention of two years and eight months was not expeditious. *Id*. The Ninth Circuit remanded the case to the district court with instructions to grant the writ of habeas corpus unless the government, within sixty days, provides the petitioner with a hearing before an Immigration Judge with the authority to grant the petitioner bond "unless the government establishes that he is a flight risk or will be a danger to the community." *Id*. The dissent in *Tijani* observed that *Demore* left open the question of what the constitutional limit is, if any, to the duration of an alien's detention under section 236(c) of the Act. *Id*. at 1252.

While a detailed analysis of all federal court cases challenging the constitutionality of section 236(c) of the Act is beyond the scope of this paper, the preceding cases demonstrate that questions regarding mandatory detention under section 236(c) of the Act continue to be litigated in the federal courts. These cases will likely continue to have an impact on decisions of the Immigration Judges and the BIA.

Conclusion

It has been more than twelve years since the significant expansion of immigration detention in 1996. Although much of the litigation and case law over this time has focused on the constitutionality of mandatory detention and applicability of the TPCR, the number of cases involving these issues has significantly decreased in recent years. The Immigration Judges and Board, however, continue to adjudicate cases involving these issues, as well as cases involving jurisdictional issues, including the applicability of the mandatory detention categories to individual aliens, and discretionary issues concerning the release of aliens under INA § 236(a). Undoubtedly, as the Immigration Judges, the Board, and federal courts continue to grapple with the implications of increased immigration detention and respond to legislative and regulatory changes, the case law governing bond proceedings before the Immigration Judges and the Board will continue to evolve.

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1. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, transferred the functions of the former Immigration and Naturalization Service (INS) from the Department of Justice to the Department of Homeland Security (DHS). The transfer was effective March 1, 2003. *See Matter of D-J-*, 23 I&N Dec. 572, 573 n.1 (A.G. 2003).

2. This paper discusses bond decisions before Immigration Judges and the Board of Immigration Appeals prior to the entry of a final order of removal. It does not discuss the Department of Homeland Security's policies and procedures relating to bond and detention. It also does not discuss federal court litigation regarding the detention mandates created in 1996, including the mandatory detention provisions of section236(c) of the Act, 8 U.S.C. § 1226(c), except to the extent that such litigation affects bond proceedings before Immigration Judges and the Board (*see* Part G). Also not discussed are the special detention provisions for suspected terrorists set forth at section 236A of the Act, 8 U.S.C. § 1226A. Finally, not discussed is the limited jurisdiction provided to Immigration Judges and the Board by 8 C.F.R. §§ 241.14(a)(2) and 1241.14(a)(2) over cases involving the continued detention of aliens, who are subject to a final order of removal, on account of "special circumstances."

3. Section 236 of the Act, references the "Attorney General." As discussed in the introductory remarks, however, the Attorney General and Secretary of Homeland Security now share authority over the detention and release of aliens. The Attorney General exercises authority under section 236 of the Act in accordance with the provisions of sections §§ 103(a) and (g) of the Act.

4. Although not explicitly set forth in section 236(a) of the Act, the section is presumably subject to the provisions of section § 236A of the Act, relating to mandatory detention of suspected terrorists.

5. The federal courts, however, are not barred from considering constitutional challenges to the statutory framework of section 236 of the Act, in the context of a habeas corpus action. *See Demore v. Kim*, 538 U.S. 510, 517 (2003). It is generally accepted that changes made by section 106(a)(1)(B) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005), transferring habeas jurisdiction over removal orders to the federal courts of appeals do not preclude federal district court review over challenges to detention that are independent of challenges to removal orders. *See* section 242(a)(5) of the Act; 8 U.S.C. § 1252(a)(5), *see also* H.R. Conf. Rep. No. 109-72, at 175 (2005); *see*, *e.g.*, *Kellici v. Gonzales*, 472 F.3d 416, 419-20 (6th Cir. 2006); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir.2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006); *Bonhometre v. Gonzales*, 414 F.3d 442, 446 n.4 (3d Cir.2005); *Hernandez v. Gonzales*, 424 F.3d 42, 42-43 (1st Cir.2005).

6. *See* OPPM 96-4, Processing of Motions and Appeals, at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

7. An Immigration Judge is without authority to determine whether an alien is properly classified as an "arriving alien" for purposes of 8 C.F.R. § 1003.19(h)(2)(i)(B). *Id.*§ 1003.19(h)(2)(ii); *see generally Matter of Oseiwusu*, 22 I&N Dec. 19, 20 (BIA 1998) (holding that because an Immigration Judge has no authority over the apprehension, custody and detention of arriving aliens, the Immigration Judge's consideration of an arriving alien's

bond request was improper).

8. This exception is the most wide-ranging in that it affects large numbers of aliens who are removable for having committed a crime, and is discussed in more detail *infra*.

9. *But see Prieto-Romero v. Clark*, _ F.3d_, 2008 WL 2853396 (9th Cir. Jul 25, 2008); *Casas-Castrillon v. Department of Homeland Security*, _ F.3d_, 2008 WL 2902026 (9th Cir. Jul 25, 2008). The Ninth Circuit's decisions in *Prieto-Romero* and *Casas-Castrillon* were issued following the submission of this article for publication. A discussion of these cases will be included in a supplement to this article in next month's Immigration Law Advisor.

10. Pursuant to 8 C.F.R. § 1235.3(b)(1)(ii), the Secretary of Homeland Security designates the class of aliens subject to expedited removal as "certain other aliens" by publication of a notice in the Federal Register. *See Matter of X-K-*, 23 I&N Dec. 731, 732 (BIA 2005). *See* Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004) (including within the class of aliens designated under section 235(b)(1)(A)(iii) of the Act, 8 U.S.C. § 1225(b)(1)(A)(iii) (2004), "[a]liens who are inadmissible under sections 212(a)(6)(C) or (7) of the Act, who are physically present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of any U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter"); Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002) (including within the class of aliens designated under section 235(b)(1)(A)(iii) of the Act aliens who arrive in the United States by sea, have not been admitted or paroled, and do not have 2 years of continuous physical presence).

11. The regulations further provide the Board with appellate jurisdiction over bond decisions made by the DHS pursuant to 8 C.F.R. §§ 236.1(d)(2) and 1236.1(d)(2). *Id.* §§ 236.1(d)(3)(ii), 1236.1(d)(3)(ii); *see also Matter of Saelee*, 22 I&N Dec. 1258, 1260-61 (BIA 2000) (holding under a prior version of the regulation, 8 C.F.R. § 236.1(d)(2) (1999), that the BIA had jurisdiction over an appeal from an INS custody determination under 8 C.F.R. § 236.1(d)(2) regardless of whether the custody review was initiated by the alien or the INS).

12. A bond appeal from an Immigration Judge's decision must be filed on its own Notice of Appeal (Form EOIR-26) and cannot be combined with an appeal of an Immigration Judge's decision in an alien's removal or deportation proceedings. *See* BIA Practice Manual Chapter 7.3(a)(i)(July 30, 2004). If the bond decision is made by the DHS pursuant to 8 C.F.R. §§ 236.1(d)(2), 1236.1(d)(2), the appeal deadline is ten days from the date of the DHS's decision. 8 C.F.R. §§ 236.1(d)(3)(ii), 1236.1(d)(3)(ii). An appeal of a bond decision made by DHS must be filed on Form EOIR-29. *See* BIA Practice Manual, Chapter 7.3(a)(i)(July 30, 2004). No filing fee is required for a bond appeal filed pursuant to 8 C.F.R. § 1003.1(b)(7). 8 C.F.R. § 1003.8(a)(2)(i).

13. Appeals of bond decisions made by DHS are processed and briefed in the same manner as visa petition appeals before the Board. *See* BIA Practice Manual, Chapter 7.3(b)(July 30, 2004).

14. The regulations provide that the DHS should identify an appeal as an automatic stay case and in order to preserve the automatic stay, must file in conjunction with the Notice of Appeal a certification by a senior DHS legal official that: 1) "[t]he official has approved the filing of the notice of appeal according to review procedures established by DHS;" and 2) "[t]he official is satisfied that the contentions justifying the continued detention of the alien have evidentiary support, and the legal arguments are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing precedent or the establishment of new precedent." 8 C.F.R. § 1003.6(c)(1).

15. An Immigration Judge's focus in determining the amount of bond that is appropriate is not on an alien's ability or inability to pay but rather securing the alien's appearance at future proceedings. *See generally Matter of Drysdale*, 20 I&N Dec. 815, 818 (BIA 1994).

16. Although not explicitly discussed in this paper, detention of suspected terrorists is also mandated under section 236A of the Act.

17. The statute does not explicitly mandate the detention of: (1) aliens convicted of crimes involving moral turpitude under section 237(a)(2)(A)(i) of the Act, who were not sentenced to at least one year in prison; (2) aliens convicted of an offense involving "high speed flight" under section 237(a)(2)(A)(iv) of the Act; and (3) aliens convicted of a crime of domestic violence, stalking, violation of a protective order, or a crime against children, under section 237(a)(2)(E) of the Act. An alien who falls within these categories, however, while not subject to mandatory detention under section 236(c) of the Act, may still be denied bond if the DHS, an Immigration Judge, or the Board determines that the alien is a danger to others or is a flight risk.

18. In *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994), a case involving the pre-1996 deportation statute, the Board held that: (1) in bond proceedings held pursuant to former section 242(a)(2)(B) of the Act, there exists a statutory presumption against the release of an alien from INS custody, where the alien has been convicted of an aggravated felony, unless the alien establishes that he or she is was lawfully admitted to the United States, does not pose a threat to the community, and is likely to appear for any scheduled proceeding; (2) if a lawfully admitted alien cannot rebut the presumption of dangerousness, the alien should be detained in the custody of the INS; (3) if the alien rebuts the presumption of dangerousness, the likelihood that the alien will appear for future proceedings then becomes relevant in determining the amount of bond needed to motivate the alien to appear.

19. The precise statutory language reads in relevant part: "[T]he Attorney General shall take into custody any alien who . . . *is deportable* by reason of having committed any offense covered in" the specified grounds of deportability. Section 236(c)(1) of the Act (2004) (emphasis added).

20. The Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510, 513 (2003), overturned the United States Court of Appeals for the Ninth Circuit's decision in *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), and expressly abrogated the decisions of the United States Courts of Appeals for the Third, Fourth, and Tenth Circuits in *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002); and *Hoang v. Comfort*, 282 F.3d 1237 (10th Cir. 2002).

21. The Ninth Circuit recently expanded its reasoning in *Tijani v. Willis,* 430 F.3d 1241 (9th Cir. 2005) in *Casas-Castrillon*, *supra*. A discussion of *Casas-Castrillon* will be included in a supplement to this article in next month's Immigration Law Advisor. *See supra* note 9.