Immigration Law Advisor

November 2007 A Monthly Legal Publication of the Executive Office for Immigration Review Vol 1. No.11

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.

In this issue...

"World, Take Good Notice"[1]: The Circuits' View of Administrative Notice

by Audra E. Santucci and Judith K. Hines

Administrative notice is a form of evidence in which the adjudicator takes as established fact something not in evidence. An agency may consider evidence other than that adduced in the context of an adversary hearing to simplify the process of proof. It is considered to be broader in scope than judicial notice. [2] *See Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992); *see Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (holding that the Board is not limited, as are courts, to considering extra-record adjudicative facts that are not subject to reasonable dispute). It is well settled that the Board of Immigration Appeals (Board) may look beyond the evidence contained in the record to take administrative notice of current events or the contents of official documents, such as the country condition reports prepared by the Department of State (DOS) or by other governments, news reports or established economic or scientific facts.[3] *See, e.g., Yang v. McElroy*, 277 F.3d 158, 163 n.4 (2d Cir. 2002); *Gebremichael v. INS*, 10 F.3d 28, 37 (1st Cir. 1993); *Rivera-Cruz v. INS*, 948 F.2d 962, 967-68 (5th Cir. 1991); *Kaczmarczyk v. INS*, 933 F.2d 588, 593 (7th Cir. 1991); *McLeod v. INS*, 802 F.2d 89, 93 n. 4 (3d Cir.1986); *see also* 8 C.F.R. § 1003.(d)(3)(iv) (2007). One circuit has held that the Board may also draw reasonable inferences from the evidence which comport with common sense. *Kapcia v. INS*, 944 F.2d 702 (10th Cir. 1991); *accord, Gebremichael v. INS*, *supra* at 37 & n.26; *but see Galina v. INS*, 213 F.3d 955 (7th Cir. 2000) (finding that the Board misapplied administrative notice when it gave conclusive weight to parts of the DOS Country Report on Latvia that were not facts).

Importantly, to satisfy the demands of due process, an alien must, in some ways, be given notice of and an opportunity to respond to potentially dispositive administratively noticed facts. *See Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007); *de la Llana-Castellon v.*

INS, 16 F.3d 1093, 1099 (10th Cir. 1994); *Gebremichael v. INS*, *supra* at 37-38; *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992); *Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, *supra* at 968; *Kaczmarczyk v. INS*, *supra* at 596. No United States Circuit Court of Appeals has concluded otherwise. However, the circuits are divided over whether due process requires the Board or an Immigration Judge to provide an alien with advance notice of its intent to take administrative notice of extra-record facts.

The Fifth, Seventh, and District of Colombia Circuits have held that a motion to reopen disputing the administratively noticed facts suffices to satisfy due process in this context. The practical reality is that the Board is not required to alert an alien that it is taking administrative notice of extra-record facts prior to rendering a decision. Department of Justice (DOJ) regulations agree that post-decision motions to reconsider and reopen under 8 C.F.R. § 1003.2 (2007), alleging a specific error of the administratively noticed fact, are sufficient to preserve an alien's constitutional due process rights. *See* 67 Fed. Reg. 54878 (August 26, 2002). Note that the regulations take the position that in any case in which the Board takes administrative notice of a specific fact by reference to any documentary evidence not in the record of proceedings, either party may file, as part of a motion to reopen, any contradictory documentary evidence which shall be considered, for the purpose of this section, "to have been not available and which could not have been discovered and presented at the former hearing." 67 Fed. Reg. at 54893. In other words, for the purpose of rebutting administrative notice taken without prior notice and the opportunity to be heard (in those circuits that allow this practice), *the alien need not show that evidence in support of a motion to reopen was previously unavailable and could not have been discovered* before the Board will remand to the Immigration Judge for additional factfinding.

However, the Second, Ninth, and Tenth Circuits have held that due process requires the Board to provide an alien with notice and an opportunity to be heard *before* taking administrative notice. Thus, in those circuits, the Board may have to remand the case to the Immigration Judge *prior* to taking administrative notice of new facts on appeal. The First Circuit falls somewhere in between, generally adhering to the "no advance notice" position, but recognizing that specific circumstances might require departure from such general rule. The Eighth and Eleventh Circuits have generally approved of taking administrative notice, but have not weighed in on the advance notice issue. Lastly, the Third, Fourth, and Sixth Circuits have not meaningfully addressed the issue, providing only clues in either unpublished cases or in dicta.[4]

The Board has frequently taken administrative notice in its decisions. In *Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992), the Board took administrative notice that the Sandinista Party no longer controls the Nicaraguan Government and that military conscription had ended. In *Matter of H-M-*, 20 I&N Dec. 683 (BIA 1993), the Board addressed the requirement set forth by the Ninth Circuit in *Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992), that an alien must have the opportunity to respond to administrative notice and concluded that the respondent had such an opportunity when he acknowledged the Board's authority to take notice and discussed changed circumstances in Nicaragua in his brief. The Board distinguished *Castillo-Villagra v. INS*, *supra,* by noting that, in that case, the elections that ousted the Sandinistas had taken place after the briefing to the Board was complete, and, thus, the alien had not been able to comment on them. *See Matter of Gomez-Gomez,* 23 I&N Dec. 522, 525 & n.2 (considering, without deciding, whether the Immigration Judge may take notice of other cases or the general practices of DHS in cases involving minors); *see also Matter of Mejia-Andino*, 23 I&N Dec. 533, 534 n.2 (BIA 2002). In *Matter of S-K-*, 23 I&N Dec. 936, 945 n.13 (BIA 2006), the Board took notice of the value in dollars of donations to a militant group. In *Matter of C-C-* , 23 I&N Dec. 899, 902 n.3 (BIA 2006), the Board took notice of reports published by the United Kingdom and Canada. *See Matter of J-H-S-*, 24 I&N Dec. 196, 198 n.1 & 202 n.3 (BIA 2007); *Matter of J-W-S-*, 24 I&N Dec. 185, 189 (BIA 2007).

No advance notice

The Court of Appeals for the District of Columbia only has one published case addressing this issue. *Gutierrez-Rogue v. INS*, 954 F.2d 769 (CA DC 1992), holds that it would be premature to find a violation of due process to take official notice of a change in government in Nicaragua where the alien has an opportunity to file a motion to reopen. The Second Circuit and Tenth Circuit specifically have declined to follow this precedent. *Burger v. Gonzales*, 498 F.3d 131 (2d Cir. 2007); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1099.

Fifth Circuit

In the Fifth Circuit, a motion to reopen disputing the administratively noticed facts suffices to satisfy due process. *See Rivera-Cruz v. INS*, 948 F.2d 962, 966-67 (5th Cir.1991). In *Rivera-Cruz v. INS*, taking administrative notice of a change in government, the Board reversed an Immigration Judge's grant of asylum and withholding of deportation. The Court concluded that the availability of a post-decision motion to reopen is sufficient to satisfy due process in this context. *Id.*

Seventh Circuit

The Seventh Circuit's position on administrative notice has been evolving in the past few years, but it does not require that the alien have prior notice and an opportunity to challenge the taking of official notice where the alien could file a motion to reopen instead. On the other hand, the Court has stated that the noticed DOS reports are not to be given more weight than the word of the alien.

In *Medhin v. Ashcroft*, 350 F.3d 685 (7th Cir. 2003), the Seventh Circuit approved of the Immigration Judge's taking notice of the conditions in Eritrea reported in the *New York Times* and took notice itself of the DOS Country Report on Eritrea. *Accord Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005). In *Useinovic v. INS*, 313 F.3d 1025 (7th Cir. 2002), the Court of Appeals found that the Board properly took notice of changed conditions in Yugoslavia relying on a DOS report where the Board had made an individualized review of the case. *See also Petrovic v. INS,* 198 F.3d 1034, 1038 (7th Cir. 2000) (affirming the Board's administrative notice of changed country conditions in Yugoslavia and Croatia); *Kaczmarczyk v. INS,* 933 F.2d 588, 593-94 (7th Cir.), *cert. denied*, 502 U.S. 981 (1991) (validating the Board's administrative notice of the change of government in Poland, rendering unlikely the possibility that Solidarity members would be persecuted upon return to Poland); *Toptchev v. INS*, 295 F.3d 714 (7th Cir. 2002) (Board can take note of Country Report as evidence of changed country conditions where decision contains particularized review).

Nevertheless, administrative notice must be applied with care. In regard to the use of Country Reports, in *Dong v. Gonzales*, 421 F.3d 573, 578 (7th Cir. 2005), the Court of Appeals held that: "an IJ should not rely on generalized Profiles or Country Reports to refute an applicant's personal experience." *Accord Lin v. Ashcroft,* 385 F.3d 748, 754 (7th Cir. 2004); *Bace v. Ashcroft*, 352 F.3d 1133 (7th Cir. 2003); *Galina v. INS*, 213 F.3d 955 (7th Cir. 2000) (the Board misapplied administrative notice when it gave conclusive weight to parts of the DOS Country Report on Latvia that were not facts). *See Vujisic v. INS*, 224 F.3d 578 (7th Cir. 2000) (Board may take administrative notice, but erred in ignoring other evidence). The Seventh Circuit later distinguished *Galina, supra*, taking notice of the most recent DOS Latvian Background Notes, citing to the DOS website, and also noting that no past persecution of the alien had been found below. *Fedosseeva v. Gonzales*, 492 F.3d 840 (7th Cir. 2007). In *Huang v. Gonzales*, 453 F.3d 942, 947 (7th Cir. 2006) the Seventh Circuit distinguished *Dong v. Gonzales, supra*, noting the information in the DOS Profile specifically contradicted the testimony of the alien.

In *Rhoa-Zamara v. INS*, 971 F.2d 26 (7th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993), the Court of Appeals found that the alien's due process rights were not violated by the Board's taking notice that the Sandinistas no longer ruled Nicaragua, because the alien had filed a motion to reopen challenging that finding with the Board. In another case, *Gonzalez v. INS*, 77 F.3d 1015, 1024 (7th Cir. 1996), *citing to Kaczmarczyk v. INS, supra*, the Court of Appeals did not find a due process violation where the Board took administrative notice of changed conditions in Nicaragua without allowing the alien to respond. The Court noted that the alien had not availed himself of the option to file a motion to reopen.

The Seventh Circuit has found no merit to an alien's argument that the Board erred in not taking administrative notice. *Brucej v. Ashcroft*, 381 F.3d 602, 608 (7th Cir. 2004) (the Board is not required to *sua sponte* take administrative notice of the most recent Country Report). *Accord Meghani v. INS*, 236 F.3d 843, 848 (7th Cir. 2001). Note, however, that in an unpublished opinion, *Yakimchuck v. INS*, 191 F.3d 457 (7th Cir. 1999) (Table), the Court of Appeals remanded a case to the Board to take administrative notice of legislative facts found in the Lautenberg Amendment.

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR OCTOBER 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeals in cases reviewing Board decisions in October 2007 was 11.8 % compared to last month's 14.2 %. The chart below provides the results from each circuit for October 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	11	11	0	0.0
2nd	123	115	13	10.2
3rd	31	29	2	6.5
4th	14	12	2	14.3
5th	21	18	3	14.3
6th	12	11	1	8.3
7th	9	8	1	11.1
8th	9	9	0	0.0
9th	125	105	20	16.0
10th	1	1	0	0.0
11th	11	9	2	18.2
All:	372	328	44	11.8

This month saw a moderate number of decisions with a relatively low rate of reversal. As usual, most reversals came from the Second and Ninth Circuits, but the rate of reversal was lower than usual in the Second Circuit.

Ninth Circuit reversals covered a wide range of issues. Several asylum cases were reversed on *nexus* or *past persecution* findings and one involved the proper standard for a humanitarian grant of asylum. Another decision remanded the *frivolousness finding* for further consideration under the Board's decision in *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007). Only one of the Ninth Circuit reversals found fault with an adverse credibility determination. Several reversals involved aggravated felony determinations. Others involved ineffective assistance of counsel, whether there was a break in presence for cancellation of removal eligibility, and whether notice of hearing was effective.

The Second Circuit reversed in a number of asylum cases, four involving credibility, three involving whether harm inflicted amounted to past persecution, and one each on nexus, relocation, and confidentiality. Other reversals addressed limits on taking administrative notice and equitable tolling of the time limits on motions to reopen.

The chart below shows numbers of decisions for January through October 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	91	64	27	29.7
8th	73	60	13	17.8
2nd	1048	868	180	17.2
9th	1901	1594	307	16.1
6th	99	85	14	14.1
3rd	285	256	29	10.2
11th	238	217	21	8.8
5th	172	158	14	8.2
4th	152	140	12	7.9
10th	55	51	4	7.3
1st	69	66	3	4.3
All:	4183	3559	624	14.9

Last year at this point (January through October 2006), we had a total of 4431 decisions with 781 reversals for a 17.6 % overall reversal rate.

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Crimes Involving Moral Turpitude Categorical Approach or Evolving Moral Standards?

by Edward R. Grant

Fans of the tortuous jurisprudence involving the concept of "crime involving moral turpitude" (CIMT) may appreciate this sidebar from *Time*, published exactly 70 years ago:

> *In 1926, "moral turpitude" became a national catch-phrase when U. S. immigration authorities used it as grounds for barring entrance into the U. S. of Vera, Countess Cathcart. Countess Cathcart's moral turpitude consisted of having*

been named as corespondent in a divorce case. Last week, "moral turpitude" suddenly popped up in U. S. headlines again for the first time in more than a decade. Occasion was the arrival in New York of Mme Magdeleine La Ferriére ("Magda de Fontanges"), Parisian journalist and actress who last spring pinked France's one-time Ambassador to Italy Count Charles Pineton de Chambrun for breaking up her self-confessed romance with Benito Mussolini (TIME, March 29).

Object of Magda de Fontanges' visit to the U. S. was to capitalize on her misbehavior by appearing as a show girl at New York's French Casino cabaret. When the Normandie, on which she had saved part of her first-class expense money by traveling tourist, docked in New York, immigration officials refused to let her disembark. Next day, Magda de Fontanges was whisked to Ellis Island where, in an interview with ship news reporters she declared, "My only interest is to obtain a gainful occupation for the purpose of making an honorable living." Same day the Board of Special Inquiry, making a delicate distinction between her case and that of Countess Cathcart, excluded her not because of her amours but "because of an admission of a crime involving moral turpitude, to wit, assault with a dangerous weapon." Unless Secretary of Labor Frances Perkins reverses the Board's ruling on her fellow working woman, Magda de Fontanges will be sent back to France this week.

Several points are clear. First, the difficulty of interpreting the meaning of CIMT has been with us a very long time – and standards of "turpitudinous" definitely evolve. Second, when the Board (as well as its predecessor) has faced a difficult CIMT question, and alternate grounds of resolution present themselves, that other road will often be chosen. And third, issues were decided far more promptly by our predecessors in the Department of Labor. (Equally clear is that *Time* in 2007 would never refer to current Labor Secretary Elaine Chao as a "fellow working woman" of a latter-day Mme. La Ferriere.)

"Moral turpitude" may not be a national catch-phrase, but it is a nagging, persistent trip-wire for Immigration Judges and Board Members. The reasons are complex, but can be distilled as statements of two particular problems: First, moral turpitude is "a nebulous concept" that often requires inquiry into whether an offense involves conduct which is "inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed" between persons and to society at large. *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980). Second, while common experience teaches us to assess turpitude on the basis of an actor's specific conduct, the "categorical approach" generally dictates that we examine the "conduct prohibited by the statute," and only find moral turpitude if the conduct so prohibited is turpitudinous. *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007). Coupled with these required inquiries is the fact that "moral turpitude" is not a static concept – a point well-illustrated by the vignette from the November 22, 1937, edition of *Time*. As one reads contemporary CIMT jurisprudence, it is not always entirely clear whether the results are controlled by newfound rigor in applying the so-called "categorical approach," or by evolving standards of what is deemed turpitudinous.

Space does not permit a full treatment of CIMT caselaw, even that of recent vintage. But a sampling of recent decisions, chiefly from the U.S. Court of Appeals for the Ninth Circuit reminds us of the durable nature of these two questions, as well as the sometimes curious results that may flow from attempting to faithfully answer them.

Accessory After the Fact: Accessory "after the fact" offenses (misprision, harboring, obstruction) present some of the same analytical difficulties as their mirror-image opposites, the inchoate crimes of attempt, conspiracy, and solicitation. The trick is to assess not only the culpability present in the crime itself, but also in the underlying offense that has been completed (accessory) or left incomplete (inchoate). That, at least, is the view of the Ninth Circuit – which recently issued a four-way split decision holding that the California offense of accessory after the fact (California Penal Code § 32) is not a CIMT. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc).

California Section 32 penalizes as an accessory any person who harbors, conceals, or aids a principal in the commission of a felony, knowing that said principal committed the felony, and with the specific intent that the principal avoid arrest, trial, conviction, or punishment.

Previously, the Seventh and Eleventh Circuits found similar offenses to constitute CIMTs. *See Padilla v. Gonzales*, 397 F.3d 1016, 1021 (7th Cir. 2005)(Illinois obstruction of justice statute); *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (18 U.S.C. §3, misprision of felony). *Cf. Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (accessory after the fact under 18 U.S.C. §3 is an "(S)" aggravated felony – obstruction of justice); *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999) (federal misprision offense *not* an "(S)" aggravated felony). A majority of the Ninth Circuit, dismissing the "flawed" analysis in *Padilla* and *Itani*, concluded that "[t]here is nothing inherent in the crime of accessory after the fact that makes it a crime involving moral turpitude in all cases." *See Navarro-Lopez* at 1072.

To comprehend this result, several paths of analysis must be trod. These paths are present in all but the most straightforward CIMT questions now facing Immigration Judges and the Board.

The initial path is the now-familiar "categorical approach." As stated earlier this year by the Board, it is the "inherent nature of the crime" of conviction that determines the CIMT issue. "[W]e look not to whether the actual conduct constitutes a crime involving moral turpitude, but rather, whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude." *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 144 (BIA 2007) (citations omitted). Seeds of this approach were planted long ago; within a year of its creation, the Board held that the offense of driving without the consent of the owner was not a CIMT because, due to the breadth of the statute at issue, moral turpitude was not the essence of the crime. *Matter of D-*, 1 I&N Dec. 143 (BIA 1941). However, its further development and application – influenced heavily by the decision of the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990) has not been without controversy. In the *Navarro-Lopez* case, that controversy played itself out in the very first step of the categorical analysis: defining the generic elements of the offense. On this point, both the majority and the dissents were split.

Two of the six judges in dissent (Bea, joined by O'Scannlain) concluded that the categorical approach as defined by *Taylor* is inapplicable to the CIMT question because there is no "generic" or "federal" *crime* to define in this context – only the *term*: moral turpitude. Since there is no such crime, there are no general elements against which to compare a given state offense. "One has to have a *crime*, such as burglary, to use the *Taylor* categorical approach." *Navarro-Lopez* at 1085. Rather than look to the elements of the offense, Judge Bea concluded, the inquiry should be directed to "the manner in which the term 'moral turpitude' has been applied by judicial decision." *Id.* at 1086, *citing Jordan v. DeGeorge*, 341 U.S. 223, 227 (1951) (reversing judgment of Seventh Circuit and finding that conspiracy to evade tax on alcoholic beverages is a CIMT). Looking to the decisions of the Seventh and Eleventh Circuits in *Padilla* and *Itani*, as well as a California Supreme Court decision finding that an offense under Section 32 "necessarily" involves moral turpitude, and the fact that no judicial decision has concluded otherwise, Judge Bea would have found the offense to be a CIMT. (Application of this approach to Section 32-type offenses might be questioned on grounds that the body of precedent is too thin and recent to represent a settled judicial approach.)

The majority, meanwhile, split 8-1 on an equally fundamental question: whether an offense involving fraud is inherently a CIMT. Judge Pregerson, author of the principal majority opinion, stood alone in concluding that fraud offenses are not inherently CIMTs, but must be independently scrutinized to determine if they prohibit conduct that meets the general definition of moral turpitude: "inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow man or to society in general." *Id.* at 1068; *See Matter of Tobar-Lobo*, 24 I&N Dec. 143, 144 (BIA 2007). Crimes involving fraud "depend on the circumstances," according to Judge Pregerson, and can range from complex Enron-type frauds to the illicit cashing of a welfare benefits check. *Id.* at 1069. Accordingly, the proper inquiry is not whether the crime of accessory after the fact involves fraud, but whether it involves base, vile, and depraved conduct. *Id.* (As the concurring opinion of Judge Reinhardt and the dissent of Judge Tallman both noted, the Pregerson approach to fraud appeared contrary to settled Ninth Circuit precedent, as well as the Supreme Court's conclusion in *Jordan* that criminal offenses with the element of fraud are "without exception . . .within the scope of moral turpitude." *Jordan* at 229.)

Thus divided, the Court's analysis whether Section 32 offenses meet the definition of a CIMT involved two paths: whether the offense involves fraud, and assuming

it does not, whether it can otherwise be classified as prohibiting turpitudinous conduct.

Taking first the "fraud" path: the Court split 8-5 (Pregerson and Bea both abstaining from this discussion) to find that Section 32 neither contains an element of fraud – a point not in dispute – nor prohibits actions which by their nature are inherently fraudulent. To be "inherently fraudulent," according to the majority, a crime must involve a knowing false representation to gain something of value. Neither factor is necessarily present in a conviction under Section 32: while a conviction may result from a false misrepresentation, it may also result from concealment or assistance in evading authorities, actions that "do not involve false representations or affirmative deceit." *Navarro-Lopez* at 1077. In addition, even where a false representation is involved, "the defendant will often not gain something of value." *Id.* at 1077. Fraud cases typically involve acquiring a tangible good, such as money, and not something intangible, such as freedom from authorities or evasion of criminal penalties.

The lead dissent, by Judge Tallman, would find that the *deception* inherent in the crime of accessory after the fact rises to the level of fraud because the intent is to "assist a felon in evading detection and prosecution" through the "overt and affirmative assistance," as opposed to, for example, mere failure to disclose the location of the felon. *Id*. at 1082. Furthermore, benefit, in the form of prolonged liberty, and potential erosion over time of evidence against the principal, does result from the deception. Relying on *Itani* and *Padilla*, the dissent concluded that with or without the presence of an affirmative misrepresentation to authorities – which would involve an element of fraud – the action of concealment also involves moral turpitude. "Regardless of the exact benefit to the principal . . . the help of an accessory impedes the swift administration of justice, a result which is morally reprehensible." *Id*. at 1081. The majority, responding to the dissent's reliance on *Itani* and *Padilla*, concluded that both cases improperly conflated the crimes of "dishonesty" with crimes of fraud, a move that would sweep numerous other criminal offenses into the category of CIMT.

On the broader question of whether a Section 32 offense is "inherently base, vile, or depraved", Judge Pregerson spoke for the majority. He noted that the motivation underlying many accessory crimes is "often protection of a friend or of a family member *during a time of trouble*, and such actions, while criminal, do not necessarily evidence moral depravity. *Navarro-Lopez* at 1071 (emphasis supplied). Noting that "many" states (one is listed, Nevada) exempt family members from accessory liability, the majority concluded that it would be "illogical" to label as turpitudinous conduct that states other than California did not even consider criminal. *Id*. at 1072. Judge Pregerson acknowledged the Supreme Court's recent admonition that in applying the categorical test, courts should not employ "legal imagination" when determining whether a state statute falls into the generic definition of an offense; a decision to exclude a crime must be based on a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id., citing Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007). Nevertheless, he noted (citing no cases) that a person could be convicted under Section 32 for merely providing food and shelter to a felon. He also noted (citing case examples) that "people are regularly convicted" under Section 32 for offenses that are not in themselves CIMTs, such as possession of a weapon, assault, and burglary. *Navarro-Lopez* at 1072-73. Since aiding and abetting such crimes would not constitute moral turpitude, the majority conclude that acting as an accessory after the fact should not either. *Id.* at 1073.

The dissent criticized this approach as "exactly the type of creative hypothesizing in *Taylor* categorical cases that the Supreme Court recently condemned." *Id.* at 1082-83. "Let us be clear here: the statute does not punish those who merely provide food and shelter to a felon; it punishes those who do so *with the specific intent that the felon escape arrest or trial*." *Id.* at 1082. After citing its own list of Section 32 prosecutions that involved crimes such as armed robbery, arson, and rape, the dissent stated that focusing on the underlying crime of the principal "completely ignores the analytically distinct and morally reprehensible nature of a conviction under Section 32. . . . [A]ny attempt to assist in the evasion of the due administration of justice merits society's reprobation." *Id.* at 1084.

The final path of analysis that follows, as night does day, the categorical approach: namely, the "modified categorical approach (MCA)" (Any rhetorical resemblance to the "Triple Dog Dare" challenge in Jean Shepherd's *A Christmas Story* is purely coincidental.) MCA is employed where a statute is divisible into some crimes which may involve moral turpitude, and others which may not.

However, *Navarro-Lopez* cautions again that even the modified categorical approach is not an inquiry into the *conduct* that led to the conviction, but only applies "when the *particular elements* in the crime of conviction are broader than the generic crime." *Id.* at 1073. In applying the MCA, therefore, it must be shown that the jury convicted the defendant of (or the defendant plead to) elements that would make the crime fit the generic definition. Since Section 32 "lacks the element of the generic crimes – i.e., the moral turpitude – the crime can *never* be narrowed to conform to the generic crime because the jury is not required . . . to find all the elements of the generic crime." *Id*. Thus, *no* conviction under section 32 – even if the alien respondent admits to "depraved" conduct – can satisfy the "generic definition" of CIMTs. On this point – that the MCA is not applicable to this particular offense – the majority and dissent agreed. Not surprisingly, though, the dissent would not apply the MCA because of its belief that *any* conviction under Section 32 is a CIMT.

Navarro-Lopez merits the extended treatment given here because of the range of issues – and opinions on those issues – that it presents. Understanding the issues in the categorical analysis of alleged CIMTs – and even why the categorical analysis presents irresolvable difficulties due to the lack of a *defined* generic or federal "crime" involving moral turpitude – should assist us in addressing those issues as they arise, and caution us that almost any result we reach may not be entirely satisfactory. Certainly *Navarro-Lopez* presents anything but a tidy bundle. Now, onto a briefer examination of the CIMT issue in other recent cases.

Statutory Rape: In a more-publicized, yet more succinct, precedent, the Ninth Circuit ruled 2-1 in October that the offense of statutory rape is not categorically a CIMT. *Quintero-Salazar v. Keisler*, _ F.3d _, 2007 WL 2916162 (9th Cir., Oct. 9, 2007). The statute at issue – § 261.5(d) of the California Penal Code – criminalizes intercourse with a minor under 16 when the perpetrator is 21 years or older. Citing *Navarro-Lopez*, the Court stated that for a crime to be a CIMT, it "must be a crime that (1) is vile, base, or depraved and (2) violates societal moral standards." *Quintero-Salazar* at *2. The Court's analysis is then reduced to two points, one an anecdote, one a comparison with the law of other states. The anecdote is a hypothetical relationship between a hypothetical 21 year-old college sophomore and a 15 year, 11 month-old high school junior which began when the pair were, respectively, a senior and freshman in high school, but did not involve intercourse until they reached their current ages. Such behavior may be "unwise or socially unacceptable," but it is not inherently base, vile, or depraved. *Id.* at *3. The comparison – noting that some states set the age of consent at 14 – led the Court to conclude that §261.5(d) proscribes some conduct that is *malum prohibitum* as opposed to *malum in se* – a frequent touchstone in resolving the CIMT question.

In dissent, Judge Kozinski noted that as recently as 1995, the Ninth Circuit had cited with approval a prior holding that intercourse with a 15-year-old female was a CIMT, and that more recently, the Court has held that the offense constitutes both sexual abuse of a minor and a crime of violence. *See United States v. Lopez-Solis*, 447 F.3d 1201, 1205-06 (9th Cir. 2006); *United States v. Gomez-Mendez*, 486 F.3d 599, 603-604 (9th Cir. 2007). While finding the majority's argument "strong," the dissent concluded that the implications arising from analogous cases – such as the Ninth Circuit's ruling that spousal abuse is not a CIMT in the absence of a "wilfulness" element – should not trump its more direct precedents regarding statutory rape. *Quintero-Salazar* at *5; *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006).

Solicitation to Possess Marijuana for Sale: Just over a year after adjusting to LPR status, an alien pled guilty under Arizona statutes regarding solicitation and possession of marijuana for sale. The Board upheld the CIMT charge against the alien, reasoning that the underlying offense of possession for sale is a CIMT, and that immigration law recognizes no distinction between his inchoate offense (solicitation) and the completed crime. The alien appealed, arguing that it was improper for the Board to look beyond the inchoate offense of solicitation to the underlying offense. The Ninth Circuit rejected this argument, holding that since the alien was not convicted of solicitation for *unspecified* criminal conduct, but rather, for soliciting possession of more than four pounds of marijuana, it was permissible for the Board to consider the underlying (incomplete) offense. *Barragan-Lopez v. Mukasey*, _F.3d_, 2007 WL 4125266 (9th Cir. Nov. 21, 2007). Since the possession with intent offense is undeniably a CIMT, the alien's solicitation conviction was likewise a CIMT. The Court distinguished its holding in *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997), in which it held that solicitation to possess cocaine was not an offense "relating to a controlled substance" because the ground of deportability at issue explicitly included

only the inchoate offenses of conspiracy and attempt. The Court also distinguished a later case, similarly holding that solicitation to possess marijuana for sale was not an aggravated felony, because the definition of aggravated felony likewise included as inchoate offenses only attempt and conspiracy. *Barragan-Lopez* at *4.

Possession of a Forged Instrument: Oregon criminalizes the possession of a forged instrument, including a public record such as a resident alien card, "knowing it to be forged and with intent to utter same." An alien respondent was found ineligible for cancellation of removal by the Immigration Judge and the Board based on the conclusion that this offense was a CIMT. In an unpublished decision, the Ninth Circuit disagreed. *Hernandez-Perez v. Gonzales*, 2007 WL 2099121 (9th Cir. July 23, 2007). The Court noted that "intent to defraud" is not an element of the crime of which the alien was convicted, but rather, was an element of the crime of forgery itself under Oregon law. The Court also concluded that an "intent to defraud" is not inherent in the crime of "uttering" a known forged instrument; for example, if the forged resident alien card contains truthful information and is used to prove to a bartender that the alien is old enough to buy a drink, no intent to defraud has occurred. Thus, the offense is not "categorically" a CIMT. Turning to the MCA, the Court found no evidence that the alien had plead guilty to "fraudulent" use of her forged resident alien card.

Aggravated Driving Under the Influence: The Board held in *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) that a conviction under Arizona Revised Statutes § 28.1383(A)(1) for aggravated DUI (DUI while license is suspended or revoked) is a CIMT. The Board concluded that while simple DUI does not involve moral turpitude, the crime does involve moral turpitude when "committed by an individual who knows that he or she is prohibited from driving." *Id.* at 1196. The Board later held that an aggravated DUI conviction under the same Arizona statute based on prior multiple DUI convictions was not a CIMT. *Matter of Torres-Varela*, 23 I&N Dec. 78, 83-85 (BIA 2001).

The Ninth Circuit first addressed this issue in *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), holding that the Arizona "license-suspended" aggravated DUI offense could not be a "categorical" CIMT because of the possibility that a defendant could be convicted even if he or she was not actually driving a vehicle. However, the Court did not overrule the conclusion in *Lopez-Meza* that actual *driving* without a license, while intoxicated, constituted a CIMT.

Recently, the Ninth Circuit affirmed *Lopez-Meza* in a case, involving the identical statute, where the defendant admitted in his plea colloquy to driving with knowledge that he had no license to do so, and running a red light with a blood alcohol level of .233. *Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007). The Court, giving deference to the Board's interpretation of the ambiguous concept of "moral turpitude," concluded that drunk driving when "one has been specifically forbidden to drive... reflects a willful disregard for the law and a reckless indifference to the safety of others." *Id*. at 926. The Court further noted that this offense is not, as the dissenting opinion was to allege, "a mere combination of two simple and independent regulatory offenses," but an "innately reprehensible act" involving two criminal offenses perpetrated at the same time. *Id.*

The dissent of Judge Nelson, in addition to noting the paradox that neither driving without a license, nor DUI, standing alone, constitute CIMTs, also labeled as "specious" the Board's reliance in *Lopez-Meza* on the putative "knowledge" of the offender that he was not supposed to drive. The same applies to anyone convicted of DUI, Judge Nelson stated, and the dangers inherent in repeat drunk driving are the same regardless of whether the offender does so with or without a license. While the latter crime may be "despicable," as stated in *Hernandez-Martinez*, that characterization does not necessarily equate with turpitudinous behavior. While actual driving may be *necessary* for a finding of moral turpitude, Judge Nelson concluded, it is not *sufficient* to support such a finding. *Marmolejo-Campos* at 928, 931.

Concluding Thoughts: The decisions discussed here reflect the varying views of 22 judges of the Ninth Circuit. No wonder that the sparring can get a little heated. Judge Reinhardt's concurring opinion in *Navarro-Lopez* lamented that words such as "moral turpitude" and "aggravated felony" are being deprived of their "ordinary meaning" through expansive interpretation. What is lost is a precision of language necessary for well-functioning legal system. "As guardians of the rule of law, we should be careful not to contribute to the deterioration of the English language, with the loss of respect for the law that inevitably results." *Navarro-Lopez* at 1076.

Dissenters in the Ninth Circuit might have a field day with that one, and Judge Bea took up the challenge. Criticizing the majority opinions for secondary, indirect, and speculative reasoning, Judge Bea put forward a different role for judges: "[We] are not platonic guardians appointed to wield authority according to [our] own personal moral predilections. *Jordan* tells judges to determine whether a crime involves moral turpitude not from the philosopher's seat, but from a less elevated location: by sitting in the law library and reading the cases." *Navarro-Lopez* at 1086.

In the more humble ranks in which we sit, such is our task. I hope this essay has made it a bit easier by providing a departure point for your work on these vexing questions.

Edward R. Grant is a Board Member with the Board of Immigration Appeals

RECENT COURT DECISIONS

Supreme Court:

Ali v. Achim, 128 S. Ct. 29 (Mem) (Sept. 25, 2007): cert. granted to review the Seventh Circuit decision in *Ali v. Achim*, 468 F. 3d 462 (7th Cir. 2006). In that case, the Court of Appeals upheld the Board's right to apply the heightened standard of *Matter of Jean*, 23 I&N Dec. 373 (AG 2002), to an application for a waiver under section §209(c) of the Act, 8 U.S.C. § 1159(c) filed by a refugee who was convicted of a violent or dangerous crime. Secondly, the Court found that the Board had broad discretion in determining what constitutes a "particularly serious crime" barring asylum and withholding of removal relief, and is not limited to crimes specifically designated by statute as being "particularly serious" *per se*. Lastly, the Court did not find that the Board's determination that petitioner had failed to meet his burden of proof for deferral of removal pursuant to the Convention Against Torture was supported by substantial evidence, and remanded for further consideration. The briefing schedule will be completed on December 28, 2007.

Dada v. Keisler, 128 S. Ct. 36 (Mem) (Sept. 25, 2007): cert. granted, limited to the following question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." In an unpublished decision, the Fifth Circuit had upheld the Broad's denial of petitioner's motion to reopen to apply for adjustment of status. *Dada v. Keisler,* 2006 WL 3420124 (5th Cir. Nov. 28, 2006). The Board had ruled that the petitioner was ineligible to adjust, because he had failed to timely depart the U.S. pursuant to a grant of voluntary departure. The briefing schedule will be completed on December 28, 2007.

Keisler v. Gao, 128 S. Ct. 345 (Oct. 1, 2007): cert. granted; judgment summarily vacated and remanded for further consideration in light of *Gonzales v. Thomas*, 547 U.S. 183 (2006). In *Gao v. Keisler*, 440 F. 3d 62 (2d Cir. 2006), the Court of Appeals for the Second Circuit reversed the decision of an Immigration Judge denying asylum to a young woman who feared repercussions for fleeing China to avoid a forced marriage arranged by her parents for monetary consideration. The Court determined that the applicant was a member of a particular social group, which the Court defined as "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable". The case was published a month before the Supreme Court's decision in *Thomas*, in which the Court held that circuit courts cannot consider social group determinations *de novo*, but must remand to the Board for the initial determination.

The Department of Justice recently published a purposed regulation pertaining to this issue. See "Regulations Update" in the Immigration Law Advisor.

Second Circuit:

Rhodes-Bradford v. Keisler, __ F. 3d __, 2007 WL 3284706 (2d Cir. Nov. 7, 2007): The Court vacated and remanded, holding that the Board lacks the authority to issue a removal order in the first instance, absent an Immigration Judge decision to that effect. An Immigration Judge had terminated proceedings after ruling that the government failed to establish that respondent's conviction rendered him removable as an aggravated felon. The Board reversed such finding, and noting that respondent had filed no application for relief, ordered him removed. The Court rejected the government's argument that remanding to the Immigration Judge for such purpose would be a waste of time and resources, noting that removal is not an automatic result of a finding of removability, as a variety of reliefs are often available to the respondent. The Second Circuit joins the Ninth and Fifth Circuits. *See Noriega-*

Lopez v. Ashcroft, 335 F.3d 874 (9th Cir. 2003); *James v. Gonzales*, 464 F.3d 505, 514 (5th Cir. 2006).

Ucelo-Gomez v. Mukasey, __F. 3d __, 2007 WL 4139343 (2d Cir. Nov. 21, 2007): The Court dismissed the appeal and affirmed the Board's precedent decision *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), holding that "affluent Guatemalans" failed to satisfy the definition of "particular social group" for asylum purposes. In finding that "affluent Guatemalans" failed to meet two of the requirements identified in *Matter of C-A-, i.e.* "social visibility" and "well-defined boundaries", the Court found the Board's decision to be consistent with its own precedent decisions.

Fifth Circuit

Giri v. Keisler, __ F. 3d __, 2007 WL 3276110 (5th Cir. Nov. 7, 2007): The Court dismissed the appeal, citing the fugitive disentitlement doctrine. The Court noted that such doctrine was created by the Supreme Court over 100 years ago, and in a case of first impression within the circuit, finds it appropriate to apply in the immigration context. Noting that the petitioners had become, and remain up to present, fugitives who have evaded custody, the Court found petitioners to have engaged in a game of what the Ninth Circuit termed "heads I win, tails you'll never find me." The Court joined five other circuits in finding the fugitive disentitlement doctrine to apply to appeals from the Board under similar facts. *See Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007) (affirming precedent established in *Bar-Levy v. INS,* 990 F.2d 33 (2d Cir. 1993)); *Garcia-Flores v. Gonzales,* 477 F.3d 439 (6th Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir. 2004); *Antonio-Martinez v. INS,* 317 F.3d 1089 (9th Cir. 2003); *Arana v. INS,* 673 F.2d 75 (3d Cir. 1982).

Seventh Circuit

Mekhael v. Mukasey, __ F. 3d __, 2007 WL 3403646 (7th Cir. Nov. 16, 2007): The Court vacated the Board's denial of a motion to reopen based on changed country conditions and remanded. In his motion, the petitioner, a Lebanese Christian, argued that country conditions had materially changed in Lebanon since the denial of his asylum application, citing the war between Israel and Hezbollah and increased violence against Christians following the publication in Denmark of cartoons caricaturing the Prophet Mohammad. The Board dismissed the appeal, finding the claimed new evidence to be "merely cumulative, and as such, not persuasive." The Court disagreed, finding the new evidence to present "dramatic, portentous events that had occurred after the administrative record was closed". Although the petitioner had testified to tensions between Muslims and Christians at his hearing, evidence such tensions later escalated into "full-scale warfare and deadly street riots was no more 'cumulative' ...than our Civil War was merely 'cumulative' evidence of tensions between North and South that dated back to the constitutional convention of 1787."

Eighth Circuit

Ixtilco-Morales v. Keisler, __ F. 3d __, 2007 WL 3225541 (8th Cir. Nov. 2, 2007): The Court dismissed the appeal from the Board's denial of asylum to an HIV-positive adult homosexual who was abused as a boy by his family due to his sexual orientation. The Court ruled that the Board did not engage in impermissible fact finding by recognizing that petitioner was no longer a child where petitioner's age was undisputed. Furthermore, the Court found no legal error by the Board in concluding that petitioner's age progression constituted a fundamental change in circumstances sufficient to rebut his fear of future persecution arising from his past persecution as a child. The Court "found no law suggesting that country conditions are the exclusive type of 'circumstances' envisioned by the regulation." *see*3.* The Court also upheld the Board's conclusions that the evidence of attacks on HIV positive homosexuals in Mexico failed to establish that such attacks were so widespread as to give rise to a well-founded fear of persecution; and that the petitioner failed to establish that the inadequate health care for HIV-positive individuals in Mexico resulted from an attempt to persecute those with HIV.

Ninth Circuit

Rebilas v. Keisler, __ F. 3d. __, 2007 WL 3226503 (9th Cir. Nov. 2, 2007): The Court granted the petition and reversed the Board's holding that petitioner's convictions for two counts of "attempted public sexual indecency to a minor" under Arizona Revised Statutes §§ 13-1001 and 13-1403(B) met the aggravated felony definitions of sexual abuse of a minor and attempted sexual abuse of a minor pursuant to sections §§ 101(A)(43)(A) and (U) of the act. The Court found that the Arizona statute failed to constitute an aggravated felony, as the state statute only required a minor to be present during, but not aware of, the offender's conduct. The Court found such statute to be broader than the federal definition of sexual abuse of a minor.

BIA PRECEDENT DECISIONS

In *Matter of C-W-L-*, 24 I7N Dec. 346 (BIA 2007), the Board held that an alien who is subject to a final order of removal is barred by both statute and regulation from filing an untimely motion to reopen removal proceedings to submit a successive asylum application based on changed personal circumstances. The alien, a native and citizen of China who sought to file a new asylum application based on the birth of his third child almost two years after the entry of a final administrative removal order, had argued that section 208(a)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(D), standing alone, is a basis for filing an additional asylum application, regardless of the time and number restrictions. The Board found that by the plain terms of the statute and regulations, it is not permitted to consider a "successive" asylum application after a final administrative order of removal that is not based upon changed country conditions. Section 208(a)(2)(D) does not apply to a situation where an alien has already been ordered removed. The Board reasoned that to hold 208(a)(2)(D) as an independent basis for filing an asylum application would render the motions provisions in section 240(c)(7)(C)(ii) of the Act superfluous. The interim regulations make clear that the statutory bars exempted by section 208(a)(2)(D) are separate from and apply principally at an earlier stage in proceedings than the 90-day reopening provisions.

In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) and *Matter of Lemus-Losa*, 24 I&N Dec. 373 (BIA 2007), the Board considered whether adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), is available to an alien inadmissible under two grounds of inadmissibility relating to unlawful presence: section 212(a)(9)(C)(i)(I)(alien who departs the United States after accruing aggregate period of unlawful presence of more than 1 year and reenters without being admitted) and section 212(a)(9)(B)(i)(II)(alien unlawfully present in the United States for a period of 1 year and then seeks admission within 10 years). The Board held that it is not.

The respondents argued in both cases that there is a contradiction in 245(i) in that entry without inspection is both a qualifying and disqualifying condition for adjustment of status. An INS General Counsel Memorandum in 1997 addressed this conflict, stating that section 245(i)(1)(A) of the Act falls within the prefatory language of section 212(a), which states "[E]xcept as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible...to be admitted to the United States." The respondents argued that sections 212(a)(9)(C)(i)(I) and (B)(i)(II) also fell within this savings clause particularly as inadmissibility under this section arises from the circumstance that section 245(i) was intended to forgive, that is, unlawful presence. The Board found that 245(i) remains available to aliens inadmissible under section 212(a)(6)(C)(i) because a contrary interpretation would render 245(i) superfluous, but 212(a)(9)(C)(i) and (B)(i)(II) are a much smaller subsection of aliens who entered without inspection, and apply to recidivists. To include these grounds would be to make aliens eligible who were not eligible before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Congress specifically provided for waivers of 212(a)(9)(C) grounds in other analogous contexts. The prefatory language denotes an explicit proviso or stipulation which is not present in this case. Lastly, these inadmissibility grounds were specifically enacted to compound the consequences of immigration violations.

In *Matter of Lemus-Losa*, the Board also found that an alien is inadmissibility under section 212(a)(9)(B)(i)(II) even if the alien's departure was not made pursuant to an order of removal and was not a voluntary departure in lieu of being subject to removal proceedings or at the conclusion of removal proceedings.

REGULATORY UPDATE

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
Filing Location for H–2A Petitions
ACTION: Notice.
SUMMARY: This Notice announces that employers petitioning for temporary or seasonal agricultural workers coming to the United States under the H–2A nonimmigrant classification must file their petitions at U.S. Citizenship and Immigration Service's California Service Center. Receiving all H–2A petitions at the designated California Service Center will enable U.S. Citizenship and Immigration Services to reduce overall petition processing times and better monitor the adjudication of H–2A petitions.
DATES: This Notice is effective December 10, 2007.

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
Cuban Family Reunification Parole Program
ACTION: Notice.
SUMMARY: This Notice announces U.S. Citizenship and Immigration Services' Cuban Family Reunification Parole Program. Under this program, U.S. Citizenship and Immigration Services is offering beneficiaries of approved family-based immigrant visa petitions an opportunity to receive a discretionary grant of parole to come to the United States rather than remain in Cuba to apply for lawful permanent resident status. The purpose of the program is to expedite family reunification through safe, legal, and orderly channels of migration to the United States and to discourage irregular and inherently dangerous maritime migration.
DATES: This Notice is effective November 21, 2007.

DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
8 CFR Parts 1240 and 1241
Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review
SUMMARY: The immigration laws provide that an alien may request and receive a grant of voluntary departure in certain cases; such a grant allows an alien to depart voluntarily during a specified period of time after the order is issued, in lieu of being removed under an order of removal. Voluntary departure is an agreed upon exchange of benefits between the alien and the government that provides tangible benefits for aliens who do depart during the time allowed. There are severe statutory penalties, however, for aliens who voluntarily fail to depart during the time allowed for voluntary departure. This proposed rule would amend the Department of Justice (Department) regulations regarding voluntary departure to allow an alien to elect to file a motion to reopen or reconsider, but also to provide that the alien's filing of a motion to reopen or reconsider prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure. Similarly, the rule also provides that the alien's filing of a petition for judicial review shall automatically terminate the grant of voluntary departure. In other words, the rule would afford the alien the option either to abide by the terms of the grant of voluntary departure, in lieu of an order of removal, or to forgo the benefits of voluntary departure and instead challenge the final order on the merits in a motion to reopen or reconsider or a petition for review. If the alien elects to seek further review and forgo voluntary departure, the alien will be subject to the alternate order of removal that was issued in conjunction with the grant of voluntary departure, similar to other aliens who were found to be removable. But this approach also means he or she will not be subject to the penalties for failure to depart voluntarily. The rule also amends the bond provisions for voluntary departure to make clear that an alien's failure to post a voluntary departure bond as required will not have the effect of exempting the alien from the penalties for failure to depart under the grant of voluntary departure. Aliens who are required to post a voluntary departure bond remain liable for the amount of the voluntary departure bond if they do not depart as they had agreed. However, the rule clarifies the circumstances in which aliens will be able to get a refund of the bond amount upon proof that they are physically outside of the United States. In addition, the rule provides that, at the time the immigration judge issues a grant of voluntary departure, the immigration judge will also set a specific dollar amount of not less than $3,000 as a civil money penalty if the alien voluntarily fails to depart within the time allowed.
DATES: Written comments must be submitted on or before January 29, 2008

"World, Take Good Notice" continued.

Eighth Circuit

In *Wojcick v. INS*, 951 F.2d 172, 173 (8th Cir. 1991) (citing *Kapcia v. INS, supra* and *Kaczmarczyk v. INS, supra*) the Eighth Circuit found it acceptable that the Board took notice of country conditions referenced by a news article. More recently, in *Francois v. INS*, 283 F.3d 926, 933 (8th Cir. 2002), the Court of Appeals held the alien's due process rights were not violated by the Board taking notice of country conditions in Eritrea without giving prior notice where the alien was aware of the issue before the Immigration Judge, the Immigration Judge considered the issue, and the alien had submitted relevant evidence to the Board.

Eleventh Circuit

The Eleventh Circuit only opined on this topic in *Lorisme v. INS*, 129 F.3d 1441 (11th Cir. 1997), finding it would be proper for the Board to take notice of improved conditions in Haiti. *See also Coriolan v. INS*, 559 F.2d

993, 1002-03 (5th Cir. 1977) (before split of Fifth and Eleventh Circuits).

Advance Notice

Second Circuit

In the Second Circuit, the Board must provide an alien with notice and an opportunity to respond *before* taking administrative notice. In *Burger v. Gonzales*, 498 F.3d 131 (2d Cir. 2007), taking administrative notice of changed country conditions, the Board reversed an Immigration Judge's grant of asylum. The Court concluded that the Board erred by failing to give the alien advance notice of its intention to consider the administratively noticed facts. In addition, the Board erred in depriving the alien of the opportunity to rebut the significance of those facts before issuing its decision. The Court specifically rejected the government's position that a motion to reopen is sufficient to satisfy due process in this context. *Id.*

In *Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196 (2d Cir. 2007), the Court held that the Board must warn a petitioner of its intent to take administrative notice and provide an opportunity to respond before the Board denies a motion to reopen on the basis of administratively noticed facts.

Ninth Circuit

Very early on, the Ninth Circuit found that the alien must be given notice and an opportunity to rebut noticed evidence or show why administrative notice should not be taken in order to comport with due process. *Castillo-Villagra v. INS,* 972 F.2d 1017 (9th Cir. 1992); *accord Gonzalez v. INS,* 82 F.3d 903 (9th Cir. 1996); *Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994). Recently, in *Circu v. Gonzales*, 450 F.3d 990 (9th Cir. 2006) (en banc) the Court of Appeals found that the Immigration Judge violated due process by failing to give the alien advance notice of his reliance on the Country Report for Romania, which he had noticed after the hearing, and thus the alien could not be heard on individual impact of change. The Board had issued an affirmance without opinion. *See Andriasian v. INS*, 180 F.3d 1033, 1040 ns. 7 and 9 (9th Cir. 1999); *Kahssai v. INS,* 16 F.3d 323 (9th Cir. 1994); *Sarria-Sibaja v. INS*, 990 F.2d 442 (9th Cir. 1993).

In *Getachew v. INS*, *supra,* the Court held that the argument in the Immigration and Naturalization Service brief to the Board did not constitute sufficient notice to the alien that the Board would take administrative notice of a change in government. The Court of Appeals explained the difference this way:

> A warning is *all* that is required where the facts in question are "legislative, indisputable, and general," such as, for example, which party has won an election in the immigrant's home country. *Castrillo-Villagra v. INS at 1029.* Other, more controversial or individualized facts, such as whether a particular group remains in power after an election, and whether the election has vitiated any previously well-founded fear of persecution, require more than mere notice. Such controversial or individualized facts require *both* notice to the applicant that administrative notice will be taken *and* an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts. *Id.* Evidence of a change in government falls in this last category, requiring the Board to provide both notice and an opportunity to respond.

Getachew v. INS at 846.

In *Kazlauskas v. INS*, 46 F.3d 902 (9th Cir. 1995), *citing Acewicz v. U.S. INS*, 984 F.2d 1056 (9th Cir. 1993), the Court of Appeals found administrative notice by the Immigration Judge was proper because the alien had been given notice and an opportunity to be heard. In *Acewicz v. U.S. INS, supra*, the Board took notice of the changes in Poland, but the aliens had been questioned before the Immigration Judge on the changes and had the opportunity to argue the contrary. *Accord Kotasz v. INS*, 31 F.3d 847, 855 n. 13 (9th Cir. 1994).

Even where the alien has the opportunity to challenge administrative notice, an individualized inquiry must be made. Where there was a showing of past persecution and additional evidence of present conditions, the DHS cannot rebut the fear of future persecution by relying only on the administratively noticed facts. *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996), *as amended*.

Surprisingly, it was permissible for the Immigration Judge to take administrative notice of a State Department letter and of the beliefs of Jehovah's Witnesses, i.e. the prohibition against swearing oaths, as one part of a determination that the respondent is not credible (dissent disagrees). *Mejia-Paiz v. INS*, 111 F.3d 720, 724 (9th Cir. 1997).

The Board may be required to take administrative notice in some cases. Where a pro se applicant in his motion to reopen referred generally to recent country reports, the Board was obliged to consider the most recent DOS Profile in making its decision. *Abassi v. INS*, 305 F.3d 1028 (9th Cir. 2002); *cf. Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (Court of Appeals will not take notice of Country Report not considered by Board). On the other hand, in *Liu v. Waters*, 55 F.3d 421, 427 (9th Cir. 1995), the Court of Appeals held the Board was not required independently to take administrative notice of conditions in China before denying relief under former section 212(c) of the Act, 8 U.S.C. § 1182, in discretion.

Tenth Circuit

The Tenth Circuit recognizes the ability of the Immigration Judge to take administrative notice of changed circumstances in the DOS Country Report, such as a change in government, to rebut past persecution. *Woldemeskel v. INS*, 257 F.3d 1185 (10th Cir. 2001). In *Kapcia v. INS*, 944 F.2d 702 (10th Cir. 1991), the Court of Appeals approved of taking notice that Solidarity was part of the Polish government and the alien no longer had a well-founded fear of persecution. In *Baka v. INS*, 963 F.2d 1376 (10th Cir. 1992), the Court held the Board could take notice of current events and it was within its broad discretion to do so.

Like the other circuits, the Tenth Circuit finds that the Board must provide notice and opportunity to respond before taking administrative notice. *Kowalczyk v. INS*, 245 F.3d 1143, 1147-48 (10th Cir. 2001) (note that in this case there had been a 9 year delay between the hearing and the decision of the Board). In an earlier case, the Court of Appeals also had found the Board violated due process by not giving notice that it intended to take administrative notice. It held the possibility of reopening is *not* a sufficient remedy. *Llana-Castellon v. INS*, 16 F.3d 1093, 1096-97 (10th Cir. 1994). An unpublished case, *Abraham v. INS*, 39 F.3d 1191 (10th Cir. 1994), citing *Kapcia v. INS, supra*, reiterated that the Board may take administrative note of facts and draw reasonable inferences from those facts. In regard to notice to the alien, it found that *Llana-Castellon* does not apply where the Board is affirming the Immigration Judge, instead of reversing a grant of asylum by the Immigration Judge.

In another unpublished case the Tenth Circuit agreed the Board could refuse to take administrative notice of newspaper articles. *Vorobieva v. INS*, 172 F.3d 64 (10th Cir. 1999). On the other hand, in *Uanreroro v. Gonzales*, 443 F.3d 1197 (10th Cir. 2006), the Court of Appeals remanded to the Board, requiring it to take notice of the most recent Country Report on female genital mutilation.

First Circuit

The First Circuit generally does not require advance notice, but where the Board takes notice in deciding a motion to reopen, the Court found that it is inappropriate to expect the alien to then file another motion to reopen to address the information that the Court took notice of. In *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993), taking administrative notice of changed country conditions, the Board affirmed the Immigration Judge's decision denying the alien's request for asylum and withholding of deportation. In considering the alien's subsequent motion to reopen/reconsider, the Board once again took administrative notice and denied the alien's motion on the basis of those extra-record facts. At no point during either proceedings did the Board provide the alien with pre-decision notice and an opportunity to respond. Noting that a post-decision motion to reopen will "ordinarily" satisfy the demands of due process, the Court determined that "*[a]rguably*, the motion to reopen process allowed the Board to cure the first procedural irregularity because petitioner had ample opportunity to respond to the material originally noticed." *Gebremichael v. INS*, *supra* at 39 (emphasis added). However, with regard to the alien's motion, the Court concluded that the alien's due process rights were violated because the Board did not warn the alien of its intention to use administratively noticed facts in considering the alien's motion nor did the Board provide the alien with an opportunity to respond. Thus, the Court observed that "even if the availability of a motion to reopen or reconsider will ordinarily suffice, the demands of due process will, as always, ultimately depend on the circumstances." *Gebremichael v. INS*, *supra* (citation omitted).

Thereafter, in *Fergiste v. INS*, 138 F.3d 14 (1st Cir.1998), the Court did not address the argument that the Board violated the respondent's due process rights by relying on extra-record documentation of changes in country conditions without notifying the respondent that it would be considering those events. However, the Court rejected the government's position that pursuant to *Gebremichael v. INS*, *supra*, the availability of a post decision motion to reopen is always necessary and sufficient to satisfy procedural defects arising from a lack of notice and opportunity to respond to administratively noticed facts on appeal. *See Fergiste v. INS*, *supra*, at 19 n.4.

1. From Walt Whitman, *Leaves of Grass*
WORLD, take good notice, silver stars fading,/ Milky hue ript, weft of white detaching,/ Coals thirty-eight, baleful and burning,/ Scarlet, significant, hands off warning,/ Now and henceforth flaunt from these shores.

2.Under the Federal Rules of Evidence 201(b) judicial notice may be taken of facts not subject to dispute in that they are 1) generally known or 2) capable of accurate and ready determination by resort to sources not questioned. Fed.R.Evid. 201(e) recognizes the right to be heard even after notice has been taken "as to the propriety of taking judicial notice and the tenor of the matter noticed."

3.The 2002 regulations forbid the Board from engaging in factfinding except for "taking administrative notice of commonly known facts." 67 Fed. Reg. 54878-01 (August 26, 2002); 8 C.F.R. § 1003.1(a)(3)(iv). The preamble to the regulation cites as examples of administrative notice current events and the contents of official documents such as country condition reports prepared by the DOS. *Id*. The preamble to the 2002 regulation also states notice may include the foreign policy expertise, analysis, and opinion of the DOS. *Id*.

4. *See Berishaj v. Ashcroft*, 378 F.3d 314, 328-32 (3d Cir.2004), stating that an asylum claimant should have the opportunity to challenge an updated country report that the government would rely on but not specifically addressing the issue of whether a post-decision motion would be sufficient to satisfy the demands of due process. The decision includes a discussion generally approving the use of motions to raise new facts, i.e., changed country conditions. *See also Tewelde v. Ashcroft*, 114 Fed.Appx. 91, 2004 WL 2667415, at 94 n.2 (November 23, 2004, 4th Cir.)(Board affirmed the Immigration Judge's decision denying the alien's request for asylum and withholding of removal, taking administrative notice of changed country conditions. The Court observed that the availability of a post decision motion to reconsider is sufficient to satisfy due process in this context.); *Ulloa v. INS*, No. 91-3028, 1991 WL 181745 (September 17, 1991, 6th Cir.)(taking administrative notice of a change in government, the Board reversed an Immigration Judge's grant of asylum and withholding of deportation. The Court specifically rejected the government's position that a motion to reopen is sufficient to satisfy due process in this context, remanding the case to afford the alien an opportunity to rebut the administratively noticed facts regarding the change in government.

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Addendum: Calculating "Loss to Victim or Victims" under section 101(a)(43)(M) of the INA

The United States Court of Appeals for the Fifth Circuit has recently addressed the issue of calculating loss to a victim or victims under section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M). In *Martinez v. Mukasey*, __ F.3d __, 2007 WL 3358397 (5th Cir., Nov. 14, 2007), the petitioner was convicted under Texas Penal Code § 35.02, a statute which the Court found to be "facially overinclusive" since it penalized offenses resulting in both less and more than $10,000 in loss to the victim(s). The Court employed "the modified categorical approach" and examined the "record of conviction" to determine the amount of loss. These documents included a signed written plea agreement wherein the petitioner agreed to over $11,467.36 in restitution, of which he was directed to pay $5,733.68. In discussing the restitution, the plea agreement specifically referenced the conditions of the petitioner's probation to which he agreed in the plea agreement. One of these conditions was that he was jointly and separately liable for the entire $11,467.36. This evidence was found to establish that the amount of loss to the victim was over $10,000 for purposes of removability. The Court rejected the argument that the amount of restitution actually paid by the petitioner should control. It also considered that the restitution amount and the indictment were not inconsistent.

The initial feature article can be found in Vol 1 No 4 of the Immigration Law Advisor, additional updates can be found in Vol 1 No 6.

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