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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.

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The Unsettled Concept of Firm Resettlement as a Bar to Asylum

By Patricia Allen

The words *firm resettlement* may conjure images of the solid roots of a tree, the concrete foundation of a house, or a rock created by layers of sediment pressed together over time. However, a study of the application of *firm resettlement* as words of art in United States immigration law reveals that its interpretation in the Circuit Courts of Appeal is more ephemeral.

First, a bit of background. The concept of firm resettlement as a bar to asylum hit the international legal consciousness via the Constitution of the International Refugee Organization, December 15, 1946 ("IRO"). The IRO declared that it did not offer protection to those refugees who during their flight "acquired a new nationality; or . . . have . . . become otherwise firmly established." In 1948, Congress incorporated the IRO's rather nebulous language into the Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948) ("DPA"), a predecessor to current immigration law. In 1951, the United Nations High Commissioner for Refugees, the successor to the IRO, provided a more detailed description of firm resettlement in its Convention Relating to the Status of Refugees ("Convention"), by explicitly excluding from its protection a person in flight:

who has acquired a new nationality, and enjoys the protection of the country of his new nationality . . . [or has been] recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) ("Convention").

Interestingly, in 1957, the concept of firm resettlement was removed from the DPA. It reappeared in legislation in 1960, in the Fair Share Refugee Act, which adopted the definition from the Convention. However, the legal application of the concept remained unclear until 1971, when the Supreme Court decided *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971). *Woo* involved an appeal from a United States Court of Appeals for the Ninth Circuit decision stating that firm resettlement was irrelevant to asylum applications. The Supreme Court reversed, ruling that firm resettlement was indeed a relevant factor to be considered among many in determining whether the applicant qualified for asylum.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), added firm resettlement as a mandatory bar to asylum at section 208(b)(2)(A)(vi) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(vi). *Firm resettlement* is now defined for purposes of the mandatory bar in 8 C.F.R., which provides:

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refu-

gee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

8 C.F.R. § 1208.15 (2007)

So, what exactly is *firm resettlement*? The firm resettlement bar to asylum differs from some other bars in that it exists complete and apart from the asylum applicant's claim of persecution. In other words, an applicant with an otherwise valid claim for asylum may be barred from this relief if he or she is found by either the Immigration Judge or the Board of Immigration Appeals to have at one time been firmly resettled in a third country subsequent to his or her flight from persecution.

Who has the burden of proof? It is unanimous amongst the circuit courts that the initial burden of proof lies with the government. Then, once the government has provided evidence that the applicant was firmly resettled in a third country, the burden shifts to the applicant, who may then demonstrate that one of the two exceptions of 8 C.F.R. § 1208.15 (2007) applies and that a finding of firm resettlement is inappropriate in his or her case. However, the circuits diverge on what exactly satisfies the government's burden of proof. Some circuits shift the burden of proof to the applicant once the government demonstrates that the applicant received an offer of resettlement by the government of the third country either directly through an official issuance or impliedly through acquiescence of the applicant's permanent presence in the country. Other circuits take a broader route and shift the burden to the applicant after the government has shown by a "totality of the circumstances" that the applicant has resettled in a third country. As the Board has not directly addressed this issue since *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991), which was decided before firm resettlement was added as a mandatory bar, the following is a summary of the treatment of this issue amongst the circuit courts.

Those circuits leaning toward the more literal interpretation of the regulation have held that the initial step in the determination requires that the government present direct or circumstantial evidence that the applicant received an offer of resettlement from the government of a third country. See *Abdille v. Ashcroft*, 242 F.3d

477, 486-87 (3^d Cir. 2001). Circumstantial evidence is only allowed if the court is satisfied that direct evidence does not exist. *Id.* Circumstantial evidence of an offer of resettlement has included “the length of an alien’s stay in a third country, the alien’s intent to remain in the country, and the extent of the social and economic ties developed by the alien.” *See id.*; *see also Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004) (dismissing the totality of the circumstances test as “outdated” and finding no offer of firm resettlement despite evidence of a four-year stay in the third country while working odd jobs); *Abdalla v. INS*, 43 F.3d 1397 (10th Cir. 1994) (finding an implication of an offer where government acquiesced to the applicant’s twenty-year stay in the third country under an official “residence permit”). Most recently, the Ninth Circuit also took the literal route in *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (en banc), where it staunchly applied the approach of *Abdille*. Addressing the concern raised in the dissent that the approach opens the door to country shopping, the Court stated that the agency “can always recede from the *Abdille* construction by changing the language of [8 C.F.R.] § [1]208.15”. *Id.* at 976 (remanding to explore the nature of an alleged offer of refugee status in Canada).

Other circuits have considered the offer of resettlement, direct or implied, in a third country as a mere factor among many in the analysis. These circuits take a more theoretical approach in an effort “to protect those arrivals with nowhere else to turn . . . [by] reserving the grant of asylum for those applicants without alternative places of refuge abroad regardless of whether a formal ‘offer’ of permanent settlement has been received.” *See Sall v. Gonzales*, 437 F.3d 229, 233 (2^d Cir. 2006). These circuits have allowed the government to satisfy its burden by presenting the “totality of the circumstances” affecting the applicant’s stay in the third country. *Id.* This approach permits the government to base its argument not only on whether an offer was made, but also on factors including the applicant’s length of stay, enjoyment of public assistance, and business, property, and familial ties. *See id.* Such factors also include whether the applicant intended to settle in the third country, had “business or property connections that connote permanence and whether he enjoyed the legal rights – such as the right to work and to enter and leave the country at will – that permanently settled persons can expect to have.” *Id.* at 235. Along with the Second Circuit, the Fourth and Eighth Circuits have taken this route. *See Rife v.*

Ashcroft, 374 F.3d 606 (8th Cir. 2004) (stating that although receipt of an offer is “an important factor” and the “proper place to begin the . . . analysis,” it is not dispositive and the mere length of stay of four years may suffice); *Mussie v. INS*, 172 F.3d 329, 331-32 (4th Cir. 1999) (holding that, in certain circumstances, “[a] duration of residence in a third country sufficient to support an inference of permanent resettlement . . . shifts the burden of proving absence of firm resettlement to the applicant”).

The remaining circuits have not yet entered the ring; they have merely addressed areas already settled. *See Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005) (applying an exception and finding that the applicant “had no intention of ever remaining in [the third country] and only stayed there so long as was necessary to arrange onward travel”); *Salazar v. Ashcroft*, 359 F.3d 45, 51 n.4 (1st Cir. 2004) (finding it unnecessary to address the issue of whether “non-offer-based” evidence may satisfy the government’s burden); *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (finding that, although the applicant’s “entry into [the third country] was arguably a necessary consequence of her flight from persecution . . . she did not remain there ‘only as long as was necessary to arrange onward travel’”); *Barreto-Claro v. U.S. Atty. Gen.*, 275 F.3d 1334 (11th Cir. 2001) (observing that firm resettlement as a regulatory bar to asylum “supports the doctrine of common sense, as an alien who has resettled somewhere else is no longer in flight from persecution or in need of refuge here”).

In conclusion, the overall treatment amongst the circuit courts on the issue of firm resettlement is anything but settled (pardon the pun). One camp scrutinizes the relationship between the applicant and the government of the third country in order to extract evidence of an offer of resettlement. Another favors an extensive investigation of the actions taken by the applicant while living in the third country. The third camp has remained silent. However, what is clear is that the inquiry into whether the applicant was firmly resettled in a third country remains essential to many asylum determinations.

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“I Second That (E)Motion”: How EOIR Motions Practice Is Increasingly Governed by the Federal Courts

by Edward R. Grant

Gerald S. Hurwitz and William “Smokey” Robinson do not often get mentioned in the same sentence. But both made their mark on the word “motion:” Hurwitz for his pithy but oft-cited 1982 article on Board motions practice in the *San Diego Law Review*¹, and Robinson for the above-mentioned 1967 classic hit (inspired, the story goes, by a friend’s mis-locution of “I second that motion.”).

The United States Federal Circuit Courts of Appeal may be singing a sadder tune, based on the sizable portion of their immigration docket that arises from motions practice before Immigration Judges and the Board. Case volume is not the only issue. As anyone working for EOIR knows, motions practice can raise some of the more nettlesome questions in immigration law, ranging from deadline exemptions to eligibility for relief to discretion. Increasingly, the standards for addressing such questions are being established in the federal courts.

While even a cursory review of recent federal jurisprudence on *motions* cases is well beyond the limited scope of this article, a peek at the most significant circuit decisions for the first half of 2007 demonstrates that motions cases are not low-hanging fruit that can easily be decided and disposed of by EOIR adjudicators. To the contrary, the need for full consideration of all issues raised in a motion to reopen or motion to reconsider is a recurrent theme of these recent decisions.

The June 21 decision in *Gutierrez-Almazan v. Gonzales*, ___F.3d ___, 2007 WL 1774027 (7th Cir. 2007) illustrates the point. The respondent, who pled guilty in 1994 to a child sex abuse crime later determined to be an aggravated felony, benefitted from a Board remand stating that he was eligible to apply for relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2001). On remand, the alien failed to submit the appropriate application, his claim was dismissed for want of prosecution, and he was ordered removed.

Although represented before the Immigration Judge, the alien filed a pro se appeal. Five days before his appeal brief was due, he found an envelope from the Board “in a pile of old newspapers,” and later took the envelope to his lawyers, only to discover that the briefing deadline was past. A motion to file the brief late was denied in the standard one-sentence order: “We find the reason stated by the respondent insufficient for us to accept the untimely brief in our exercise of discretion.” The Board dismissed the appeal, noting that even if the alien was correct that confusion between him and his lawyer prevented the filing of the 212(c) application, the alien was nevertheless barred from relief under *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). (The Seventh Circuit subsequently held, without reaching the *no comparable ground* issue based on 8 C.F.R. § 1212.3(f)(5), that application of *Blake* to a pre-1996 plea did not impermissibly conflict with *St. Cyr. Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007)).

The Seventh Circuit remanded, finding that the Board failed to provide sufficient reasoning in its denial of the late-brief motion. “The Board has given this Court no indication that it took account of Gutierrez-Almazan’s pro se status, education, language skills, or any other factors that might be relevant to the merits of his motion. Indeed, we cannot tell from the Board’s order whether it ‘heard and thought,’ or ‘merely reacted.’” *Gutierrez-Almazan* at *3. The Circuit also noted that the Board had, in 1999, granted a briefing extension request filed in connection with the alien’s first appeal, concluding that this made the denial of late-brief motion filed 6 years later *inconsistent*.

(Noting the just-issued disapproval of *Blake* by a sister circuit, the Seventh Circuit also invited the Board on remand to reconsider the *no prejudice* aspect of its dismissal of the alien’s appeal. See *Blake v. Carbone*, ___ F.3d ___, 2007 WL 1574760 (2^d Cir. 2007) (stating on remand, that the Board must determine if aliens’ aggravated felony offenses “could form the basis” of a CIMT-based ground

of exclusion, thus making the aliens eligible for relief under section 212(c)); *but see Caroleo v. Gonzales*, 476 F.3d 158, 168 (3^d Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58, 62 (1st Cir. 2006); and *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007) (all following *Blake* rule that section 212(c) did not provide basis for waiver of particular aggravated felony charges)).

The ruling in *Gutierrez-Almazan* leaves a number of open questions. The Seventh Circuit clearly did not apprehend the difference in practice at the Board between deadline extension requests (one of which is routinely granted by the Board) and late-filed brief motions (which are reviewed more circumspectly and granted far less frequently). Whether the Circuit will require a separate, reasoned decision each time a late brief is rejected remains to be seen. The decision also leaves no guidance on what types of reasons are acceptable in denying such a motion. Finally, it seems likely that the Circuit was swayed somewhat by the Second Circuit's partial disavowal of *Blake* – otherwise, the Board's "no prejudice" finding should have been dispositive. Whether this tips the Circuit's hand regarding its own views on the "no comparable ground" issue is unknown.

Turning the spotlight back to New York, the Second Circuit recently held that while the Board and Immigration Judges may take administrative notice of changed country conditions in addressing an asylum-based motion to reopen, the alien must have the opportunity to respond to such evidence. *Chhetry v. Dep't of Justice*, ___ F.3d ___, 2007 WL 1759472 (2^d Cir. 2007). The alien, from Nepal, filed a motion to reopen based on deteriorating conditions associated with the King's seizure of power during 2005. By the time the Board resolved the motion, conditions had changed again, with the King yielding power back to parliament and granting greater freedom to opposition political parties. Based on reports of these developments, the Board denied the motions.

The Second Circuit reversed. It first rejected the alien's argument that the Board erred in taking notice of articles posted on yahoo.com, and on the CNN and BBC websites. It found these reports were accurate and verifiable, thus meeting the Circuit's established standards for such evidence. Next, the Circuit held that the Board did err in not first giving the alien "the opportunity to rebut the significance of the noticed facts as applied to his particular situation." *Chhetry* at *3. Citing rulings from

the Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, the Court held that an alien must be given the chance to rebut the *truth and significance* of the administratively-noticed evidence. However, the Court rejected the conclusion of the Fifth, Seventh, and D.C. Circuits that an alien's opportunity to file a subsequent motion to reopen or reconsider satisfies the requirement for rebuttal. The *motion option* is unlikely to afford the protection needed; moreover, in a case such as this, a subsequent motion to contest the reliance on *noticed* facts might itself be denied as number-barred.

While the fundamental thrust of *Chhetry* – that a party should have a chance to rebut adverse evidence – seems unremarkable, a closer look raises an important question: since it is the alien's burden in a motion to reopen to establish changed country conditions adverse to himself, is that burden met if the alien has produced an incomplete (or, in this case, an "overtaken-by-events") account of those conditions? The notice-with-rebuttal rule is clearly warranted when, for example, the burden is on the government to establish changed country conditions or if the Board relies on newly-reported evidence in denying an applicant's claim on the merits. Is it fully warranted here, where it is the respondent's own evidence of changed conditions that is *balanced* by the Board's taking of administrative notice? One likely impact of the rule is further remands to the immigration court for such evidentiary matters to be reviewed.

Heading down the Turnpike to Philadelphia, we find the Third Circuit recently addressing an increasingly-frequent issue: in motions based on ineffective assistance of counsel, what likelihood of success must an alien show in order to establish that he was prejudiced by prior counsel's alleged deficient performance? The alien in *Fadiga v. Attorney General*, ___ F.3d ___, 2007 WL 1720048 (3^d Cir. 2007), entered the United States from Guinea in 1991 and applied years later for withholding of removal under both section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3) and the Convention Against Torture. The applications were denied based in large part upon discrepancies in the record; the gravamen of the ineffective assistance of counsel complaint laid these discrepancies at the feet of counsel. Counsel admitted in court that his client had been interviewed by a law student working in his office and that the student's errors *may or may not* account for the discrepancies. The Immigration Judge denied the case, stating that while it was a *close issue*, the alien's right to a fair hearing had not been compromised.

The Board affirmed, and also denied a motion to remand accompanied by affidavits from his trial counsel regarding deficiencies in preparation of the case, and also related to further available corroborative evidence. The Board concluded that the respondent's asylum application was barred as untimely, and that even assuming the truthfulness of his testimony, he had not established either past persecution or a *clear probability* that he would be targeted for future persecution.

In reversing the Board, the Third Circuit seized upon this "clear probability" language, stating that it ran afoul of the "prima facie eligibility" standard that the Board properly applies in cases where ineffective assistance has been established. *Fadiga* at *7. The Board, the Circuit concluded, wrongly required Mr. Fadiga to "demonstrate eligibility for relief under the ultimate standards applicable to claims for withholding of removal." *Id.* at *14. The proper standard, instead, was whether there was a "reasonable likelihood" that the outcome of the hearing would have been different absent the errors made by counsel. Explaining this standard, *Fadiga* states that it requires more than a showing of a *plausible* ground for relief, but does not require a showing that a different outcome was *more likely than not*. In other words, the alien claiming ineffective assistance need not prove that, but for the ineffective assistance, the result *would* have been different; it is sufficient to show a *reasonable likelihood* that this would have been the case.

There will be much parsing of this standard, as there will be of the standards articulated in *Gutierrez-Almazan*, *Chhetry*, and numerous other 2007 cases that did not make the cut for this article. Perhaps the greatest lesson from *Fadiga* is the need to be absolutely clear in what is being decided. This is particularly true when, as in *Fadiga*, the issue of ineffective assistance was both preserved as an issue for appeal on the merits, and raised as well in a motion to remand. The Board treated the issue as one, concluding that if the sworn testimony of the respondent, accepted at face value, established neither past persecution nor a likelihood of future harm, further proceedings would not alter the result. (No charge was made that Mr. Fadiga's counsel was ineffective in the course of the hearing.) However, given the stringent emerging standards on addressing all substantive issues raised in a motion, the Board could be criticized for failing to sufficiently disaggregate the *merits* and *motions* issues presented in this somewhat complex appeal.

As in all matters, immigration law may not inspire a "lifetime of devotion." (That's Robinson, not Hurwitz). But it continues to provide its interesting notions and issues.

1 Hurwitz, "Motions Practice before the Board of Immigration Appeals," 20 San Diego Law Review 79 (1982).

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CIRCUIT COURT DECISIONS FOR MAY 2007

By John Guendelsberger

The overall reversal rate by the United States Courts of Appeal of petitions for review of Board decisions for May 2007 was nearly 25%. This is the highest rate of reversal for any month in years 2006 or 2007 and comes on the heels of a 7% overall reversal rate in April 2007. The following chart provides the results from each circuit for May 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	10	9	1	10.0
2nd	102	86	16	15.7
3rd	12	9	3	25
4th	14	13	1	7.1
5th	16	13	3	18.8
6th	11	10	1	9.1
7th	7	4	3	42.3
8th	5	2	3	60
9th	148	94	54	36.5
10th	11	10	1	9.1
11th	23	20	3	13.0
All:	359	270	89	24.8

What happened? Compared to last month (over 600 decisions and 43 reversals) the number of decisions in May dropped significantly while the number of reversals more than doubled. The Ninth Circuit in particular issued 148 decisions (compared to 387 in April) and reversed in 54 (compared to 14 in April) so that its reversal rate rose to 36% (compared to 4% in April). This change was due in large part to the issuance of decisions in the last week of the month by a panel composed of Judges

Pregerson, Reinhardt and Tashima. This panel reversed in 36 of its 48 decisions (75%) compared to an 18% reversal rate by other Ninth Circuit panels during May.

The reversals in the Ninth Circuit covered a wide range of issues including credibility in asylum cases(16); past persecution finding (2); well-founded fear determination (3); relocation (1); discretionary denial (1), and failure to separately address the Convention Against Torture claim (1). Four reversals came in cases in which removal was based on a controlled substance offense but the record of conviction consisted of a minute order which did not specify the controlled substance involved. A good number of remands involved late motions to reopen based on changed country conditions or on ineffective assistance of counsel including questions of *Lozada* compliance and equitable tolling. Several other remands involved cases in which the court found that the Board had failed to address issues raised on appeal or had overlooked significant evidence in the record.

The Second Circuit reversed in 16 of 102 cases (15.7%), down a bit from last month's 17.2%. Six of these reversals involved flaws in the adverse credibility determination in asylum claims. Other reversals involved the level of harm for past persecution, nexus, and a frivolousness determination. The court also remanded in several denials of motions to reopen involving issues of proper notice of hearing, due diligence, as well as a denial

in which the Board did not fully address the new evidence offered.

The chart below shows numbers of decisions for the first five months of calendar year 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	44	29	15	34.1
8th	42	30	12	28.6
2nd	491	379	94	19.1
9th	1090	940	150	13.8
10th	35	31	4	11.4
6th	54	48	6	11.1
3rd	141	127	14	9.9
5th	84	77	7	8.3
4th	86	79	7	8.1
1st	21	20	1	4.7
11th	139	123	6	4.3
All:	2227	1911	316	14.2

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RECENT COURT DECISIONS

Second Circuit

Blake v. Carbone, __ F.3d __, 2007 WL 1574760 (2^d Cir. June 1, 2007). The Second Circuit rejected the Board's categorical "statutory counterpart" approach to determining whether a ground for removal based on a conviction for an aggravated felony may be waived by former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The Court applied the *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), equal protection analysis to the 212(c) comparability issue to find that "if the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation." see *Blake v. Carbone* *12. The Court remanded *Matter of Blake*, 23 I&N Dec.722 (BIA 2005) (sexual abuse of a minor) and

Matter of Brieva, 23 I&N Dec. 766 (BIA 2005) (crime of violence) for the Board to determine whether the particular underlying aggravated felony offense in each case could have formed the basis of exclusion under section 212(a) as a crime involving moral turpitude.

The Court acknowledged that the Board's categorical "statutory counterpart" approach has been approved by a number of other circuits including the First, Third, Fifth, and Ninth. *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3^d Cir. 2007); *Dung Tri Vo. v. Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994). The Seventh Circuit has also approved the Board's approach. *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007).

Chhetry v. U.S. Department of Justice, ___ F.3d ___, 2007 WL 1759472 (2^d Cir. June 20, 2007). The petitioner filed a motion to reopen asserting changed country conditions in Nepal. The Board denied the motion, taking administrative notice of dramatic changes in Nepal since the motion was filed, and found insufficient basis to reopen. On appeal, the Second Circuit found that the Board exceeds its allowable discretion when, in denying a motion to reopen based solely on facts of which it took administrative notice, it fails to give the petitioner an opportunity to rebut the inferences it drew from those noticed facts.

Third Circuit

Fadiga v. Attorney General USA, ___ F.3d ___, 2007 WL 1720048 (3^d Cir. June 15, 2007). An Immigration Judge denied the petitioner's applications for asylum, withholding of removal and protection under the Convention Against Torture. The petitioner filed an appeal with the Board, asserting ineffective assistance of counsel. The Board denied the appeal, finding no prejudice. The Board applied a clear probability standard to assess whether the petitioner would have prevailed on the withholding claim. The Court found that the Board had used an incorrect standard in assessing prejudice. To establish prejudice in an ineffective assistance of counsel claim, the petitioner must demonstrate "a reasonable likelihood that the result would have been different if the error in the deportation proceeding had not occurred." *United States v. Charleswell* 456 F.3d 347, 362 (3^d Cir. 2006) The Court found that counsel's inadequate performance in preparing the application and advising the alien severely compromised the alien's ability to present his claims to the Immigration Judge, and there was at least a reasonable likelihood that the Immigration Judge would have granted withholding of removal or protection under the CAT absent counsel's errors.

Fifth Circuit

Waggoner v. Gonzales, ___ F.3d ___, 2007 WL 1548934 (5th Cir. May 30, 2007). An Immigration Judge determined that the petitioner, a native and citizen of Fiji, was ineligible for an extreme hardship waiver of the requirement to file a joint petition to remove the conditions on her permanent resident status because the petitioner had entered into her marriage in bad faith. The Board affirmed. The Fifth Circuit concluded that an alien does not have to demonstrate a good faith marriage to obtain an extreme hardship waiver under section § 216(c)(4)(A) of the Act, 8 U.S.C. § 1186a(c)(4)(A), and the Board did not abuse

its discretion in denying the petitioner's motion to remand because the petitioner did not submit an asylum application with her motion, which was essentially a motion to reopen.

Sixth Circuit

Matovski v. Gonzales, ___ F.3d ___, 2007 WL 1713306 (6th Cir. June 15, 2007). The Sixth Circuit joined the Fourth Circuit in finding that an Immigration Judge has jurisdiction over portability determinations under section 204(j) of the Act, 8 U.S.C. § 1154(j) (Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence). See *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), *overruling Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005).

Seventh Circuit

Xiu Ling Chen v. Gonzales, ___ F.3d ___, 2007 WL 1661584 (7th Cir. June 11, 2007). The Immigration Judge and the Board rejected the respondent's claim based on an abortion in China as not credible, and the Board applied *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), to reject the claim to a well founded fear of persecution based on birth of two children in the United States. The Court approved the Board's approach to risk assessment in *Matter of C-C* but found that the framework did not go far enough in addressing the extent of the economic sanctions that might be imposed for having had a second child without permission, i.e., would they meet the threshold described in the recent decision in *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007): the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. On remand, the Court instructed the Board to consider what financial exactions normally are used in Fujian, and whether these are permissible inducement or force. The Court also asked that the Board consider the evidence now before it in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2^d Cir.2006), and *Jin Xiu Chen v. Gonzales*, 468 F.3d 109 (2^d Cir.2006), noting that if the 1999 Changle City Handbook "is genuine and current, the translation accurate, and the threat serious (as opposed to saber rattling), this would call into question the conclusion of *Matter of C-C-* that Fujian no longer uses force in its family-planning program." *Xiu Ling Chen v. Gonzales*, *supra* at *3. In his decision for the majority, Judge Easterbrook, as in previous decisions, encourages the Board through litigation to develop rules comparable to the Grid developed by the Social Security Administration through rulemaking.

Eleventh Circuit

Niftaliev v. U.S. Atty. Gen., ___ F.3d ___, 2007 WL 1514175 (11th Cir. May 25, 2007). Petitioner, born in the Soviet Union to an Azerbaijani father and an Ukrainian mother, sought review of the Board's affirmance of the Immigration Judge's denial of his application for withholding of removal. The Immigration Judge denied the petitioner's application because the petitioner's testimony was not detailed and he failed to provide corroboration. The Board affirmed. The petitioner argued that the IJ erred in concluding that he did not suffer past persecution. He argued that the systematic discrimination and abuse he suffered based on his nationality, his fifteen-day detention where he was beaten, starved and threatened for his life, amounts to past persecution. The Court held that the Immigration Judge's finding that the petitioner was not credible and his testimony was consistent with his application is equivalent to finding the petitioner credible. "In spite of the ruling on credibility, the IJ found, and the petitioner now argues, that the petitioner's testimony is not sufficiently detailed to warrant relief. In our view, this is merely a veiled attempt to attack the petitioner's credibility. If an IJ wishes to make an adverse credibility finding, he must do so explicitly. A reference to a lack of detail in the petitioner's testimony is not sufficient." *Id.* at *4. The Court found that the petitioner had established past persecution and remanded the case.

BIA PRECEDENT DECISIONS

In *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007), the Board addressed asylum claims relating to China's coercive population control policies and evaluated whether the respondent demonstrated that the Chinese government has a national policy of requiring forced sterilization of a parent who returns with a second child born outside of China. The respondent did not assert past persecution, but based his claim solely on a fear of future persecution because of the birth of his United States citizen children. The Board found that the evidence in this case indicated that if a returnee who has had a second child while outside of China is penalized at all upon return, the sanctions would be fines or other economic penalties not severe enough to amount to persecution. Regarding specific evidence introduced, the Board placed more weight on the reports from the Department of State than the affidavits from demographer John Shields Aird. Separately, the Board considered

documents in the record that discuss enforcement in Fujian Province and Changle City. The Board concluded that the documents introduced in the record do not support a claim that sterilization is enforced. The Board noted that physical coercion is officially condemned, and enforcement of the one-child policy in Fujian has historically been lax and uneven. Lastly, the Board found that the respondent's claim of persecution due to illegal departure is not on account of one of the grounds specified in the Act, and the evidence suggests the penalty for one illegal departure is a fine which does not amount to torture under the Convention Against Torture.

In *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007), the Board considered whether a person who fathers or gives birth to two or more children in China, in apparent violation of China's family planning policies, may qualify on that basis alone as a refugee. In this case, the respondent's wife gave birth to daughters in 1999 and 2002. The respondent also testified to beatings at the hands of the birth control officials, but the Immigration Judge found, and the Board and the United States Court of Appeals for the Second Circuit affirmed, that the respondent's claims lacked credibility. The Court of Appeals remanded the case, however, to consider the respondent's claim for relief based solely on the undisputed birth of his two children. The Board found that the starting point for determining whether there is objective evidence supporting a well-founded fear of persecution is proof of the details of the family planning policy relevant to each case. The respondent must then establish that he or she violated that policy. Assuming these burdens have been met, the alien must also establish that the violation of the family planning policy would be punished in the local area in a way that would give rise to an objective fear of future persecution.

In this case, the Board found that the evidence showed that while China has a one-child policy, deviations from this policy are permitted, depending upon many geographic and ethnic factors. The record showed that enforcement of the policy varies greatly, that the Chinese Government achieves compliance with birth limits using both incentives and pressure. In some instances, this has involved physical coercion, including placement in unofficial prisons, and there are reports of forced sterilizations and abortions. On balance, however, the record suggests that physical coercion is uncommon and

unsanctioned. In this case, because the respondent was not credible, the record did not show that the respondent violated the policy. The respondent's first child was a girl, and a Chinese couple can apply to have a second child in that instance. The record does not reflect whether the respondent applied for the exception.

In *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007) the Board resolved the issue of "stand alone" waivers of inadmissibility under section 212(h) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(h). The question was whether a returning lawful permanent resident seeking to overcome a ground of inadmissibility may apply for a 212(h) waiver without also applying for adjustment of status. The Board found that nothing in the Act bars a stand alone 212(h) waiver for arriving lawful permanent residents. This situation was clearly contemplated by section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v), relating to when a lawful permanent resident is regarded as seeking admission, and the only regulation relating to this issue does not cover aliens in the respondent's situation.

In *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007), the Board considered the provisions of the REAL ID Act of 2005 relating to mixed motive asylum cases. The respondents presented a claim which arose from a land dispute in Rwanda. The Board noted that the language of the REAL ID Act requires that one of the five protected grounds under the Act must be "at least one central reason," but not "a central reason" as was originally proposed in the legislation. This language confirms that aliens whose persecutors were motivated by more than one reason continue to be protected under the Act. The legislative history and citations show that the protected ground cannot be incidental or tangential, however. The Board concluded that its standard in mixed motive cases has not been radically altered. In this case, the respondents asserted that they received threats and harassing telephone calls because they were natives of Burundi (but citizens of Rwanda) and/or repatriated refugees. The Board found that there was no evidence that these grounds were anything more than a tangential motivation for the threats against the respondents.

In *Matter of Gonzalez-Silva*, 23 I&N Dec. 218 (BIA 2007), the Board considered whether the respondent was eligible for cancellation of removal under section

240A(b) of the Act when the respondent had a conviction for willful cruelty or unjustifiable punishment of a child that preceded the effective date of section 237(a)(2)(E) of the Act, 8 U.S.C. § 1227(a)(2)(E). The Board found that an offense can be one "described" in section 237(a)(2)(E) only if the conviction for that offense occurred after September 30, 1996. Relying on the reasoning set forth in *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), the Board found that the description of a category of offenses incorporates the entirety of the offense, including exceptions. In this case, an offense is not one described in section 237(a)(2)(E) if it occurred before the effective date of that provision.

LEGISLATIVE COMMENTARY

Immigration Legislation: RIP?

by Edward R Grant

The Senate voted 53-46 on June 28 to not invoke cloture on further debate of S. 1639, the immigration reform bill, prompting majority leader Harry Reid to pull the legislation from the floor. (Cloture is a procedure by which the Senate can vote to place a time limit on consideration of a bill, and thereby overcome a filibuster.) The move virtually ends the possibility that this legislation will be further considered in this session of Congress, and few observers believe it can be revived during the 2008 election year.

In the end, it appears that by trying to satisfy a wide array of interests – from supporters of amnesty to supporters of stronger border enforcement and more restrictive legal immigration policies – the bill's proponents wound up losing votes. On June 26, 64 Senators had voted for cloture, meaning the bill lost 18 votes in a matter of 48 hours. Some of that is attributable to the defeat of amendments during the intervening debate, ranging from Senator Jim Webb's attempt to limit "Z" visa eligibility to aliens who had physical presence for at least 4 years, to Senator Robert Menendez's effort to give family status greater weight in the bill's proposed changes to legal immigration categories.

Even outside supporters of a "comprehensive" approach had serious objections which made it difficult for them to offset the fierce opposition from those opposed to the bill's "legalization" provisions. Immigration inter-

est groups were lukewarm regarding the overall impact of the package, including its enforcement and future legal immigration provisions; business groups questioned the extent of employer verification mandates and the penalties for employing unauthorized workers; and traditional labor groups such as the AFL-CIO opposed the guest worker program.

While supporters of immigration reform in the House of Representatives have proposed their own process to craft a bill, the Senate defeat may kill the momentum needed to move that process forward.

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

REGULATORY UPDATE

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Codes of Conduct for the Immigration
Judges and Board Members

AGENCY: Office of the Chief Immigration Judge;
Board of Immigration Appeals, Executive Office for
Immigration Review, Department of Justice.

ACTION: Notice.

SUMMARY: The Executive Office for Immigration Review (EOIR) is proposing newly formulated Codes of Conduct for the immigration judges of the Office of the Chief Immigration Judge and for the Board members of the Board of Immigration Appeals. EOIR is seeking public comment on the codes before final publication.

DATES: Comment date: Comments may be submitted not later than July 30, 2007.

ADDENDUM: Calculating “Loss to Victim or Victims” under section 101(a)(43)(M) of the Immigration and Nationality Act

Since the publication of the aforementioned article, the United States Court of Appeals for the Ninth Circuit has 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 *Kharana v. Gonzales*, ___ F.3d ___, 2007 WL 1531822 (9th Cir., May 29, 2007), the respondent pled guilty to 4 counts of obtaining money by false pretenses in violation

of California law, and each count involved the victim being defrauded of an amount over \$10,000. The Court found that the charging document and the plea were sufficient to establish an adequate loss for removability under section 101(a)(43)(M) of the Act. The Court rejected the respondent’s argument that she was not removable because she had “paid down” the losses to her victim. In doing so, the Court declined to decide whether the United States Sentencing Guidelines (USSG) approach to calculating loss should be used for determining loss in the removal context because even under the USSG approach, the respondent’s crime involved a loss to the victim of over \$10,000. In a footnote, the Court discussed the interplay between sections 101(a)(43)(M) and (U) of the Act.

For the initial article Calculating “Loss to the Victim or Victims”, see the [Immigration Law Advisor Vol 1 No 4](#).

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