



# Immigration Law Advisor

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## Matter of Compean: Balancing Fairness and Finality in Deficient Performance of Counsel Claims

by Suzanne DeBerry

Immigration courts and appellate authorities are daily met with the challenge of balancing the reality of attorney misconduct with the need to prevent frivolous claims. Before *Matter of Compean, Bengaly & J-E-C*, 24 I&N Dec. 710 (A.G. 2009) (“*Compean*”), the Board of Immigration Appeals had addressed this issue by referring to a constitutional right to effective assistance of counsel for respondents in removal proceedings. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In order to deter frivolous claims, the Board required specific documentary evidence for a successful motion to reopen or reconsider. *Lozada*, 19 I&N Dec. at 639-40. On January 7, 2009, then-Attorney General Michael Mukasey reevaluated the previous balance, holding that neither a constitutional nor a statutory right to effective assistance of counsel existed under the law, but that fairness dictated that such a claim would be available “in the extraordinary case” as a matter of discretion. *Compean*, 24 I&N Dec. at 727-30. This new claim is entitled “deficient performance of counsel” and mandates documentary evidence similar to the evidence required under *Lozada* but with stiffer requirements and a higher standard for actual prejudice. See *id.* at 732-39.

### Previous Case Law

#### *Board Precedent*

Prior to *Compean*, the leading Board decision concerning motions to reopen or reconsider claiming ineffective assistance of counsel was *Matter of Lozada*, 19 I&N Dec. 637. In *Lozada*, the Board held that ineffectiveness of counsel alone is insufficient to serve as a basis for a motion to reopen or reconsider. *Id.* A respondent must also show that “the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Id.* at 638. With respect to the basis of its ruling, the Board stated, “Any right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process.” *Id.* The Board further held that in order to succeed on a motion

to reopen or reconsider, a respondent must provide the following specific documentary evidence: (1) an affidavit “that sets forth in detail the agreement that was entered into with former counsel . . . and what counsel did or did not represent to the respondent in this regard”; (2) evidence that the former attorney was informed of the violation and was given the chance to respond; and (3) if the ineffectiveness was caused by an ethical or legal violation, a statement addressing “whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.” *Id.* at 639. The respondent must also show actual prejudice from his attorney’s misconduct. *Id.* at 638. The reviewing authority will then determine whether the attorney’s misconduct is sufficient to meet the “high standard” to reopen or reconsider a claim based on ineffective assistance of counsel. *Assaad*, 23 I&N Dec. at 558 (citing *Lozada*, 19 I&N Dec. at 639).

In *Matter of Assaad*, the Board upheld its decision in *Lozada*, concluding that the Supreme Court’s decisions in *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991), and *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982), did not require withdrawal from *Lozada*. *Assaad*, 19 I&N Dec. at 554. In both cases, which arose out of criminal proceedings, the Court found that the petitioners had no right to effective assistance of counsel because they had no right to counsel in the first place. See *Coleman*, 501 U.S. at 752 (involving a petition for State habeas relief); *Wainwright*, 455 U.S. 586 (involving a petition to the Florida Supreme Court). In *Assaad*, the Board found that *Coleman* and *Wainwright* had arisen in the context of criminal proceedings and therefore did not apply to removal proceedings, which are civil actions. *Assaad*, 19 I&N Dec. at 560. The Board further differentiated *Coleman* and *Wainwright* because those cases had been decided more than a decade prior to *Assaad*, and the Immigration and Nationality Service had never argued that they overruled *Lozada*. *Id.* at 554, 560. Further, circuit courts had “consistently continued to recognize that despite having no right to appointed counsel in an immigration hearing, a respondent has a Fifth Amendment due process right to a fair immigration hearing.” *Id.* at 558.<sup>1</sup> The Board declined to determine whether or not a statutory right to effective assistance of counsel existed under the Immigration and Nationality Act. *Id.* at n.5; see also sections 240(b)(4)(A), 292 of the Act, 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (stating that a respondent has the “privilege” of being represented, “at no expense to the Government”).

## Circuit Split

Currently, there is a circuit split as to whether or not a constitutional right to effective assistance of counsel exists for respondents in removal proceedings. A majority of circuit courts, the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits, have held that a constitutional right to effective assistance of counsel exists. See *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Aris v. Mukasey*, 517 F.3d 595, 600-01 (2d Cir. 2008); *Fadiga v. Att’y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Sene v. Gonzales*, 453 F.3d 383, 386 (6th Cir. 2006); *Dakane v. Att’y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988). The Fourth, Seventh, and Eighth Circuits have held that no constitutional right to effective assistance of counsel exists. See *Jeziarski v. Mukasey*, 543 F.3d 886, 888-89 (7th Cir. 2008); *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008); *Afanwi v. Mukasey*, 526 F.3d 788, 798-99 (4th Cir. 2008). Some disagreement exists as to the holding of the Fifth Circuit, however. See *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975) (assuming, without deciding, that an alien is entitled to effective assistance of counsel). *But see Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) (suggesting in dictum that there is no constitutional right). These appeals courts also treat the *Lozada* requirements with varying standards. For example, in Attorney General Mukasey’s words, “Some courts . . . have applied a strict standard of prejudice while others have not; some have treated the *Lozada* factors as mandatory while others have not.” *Compean*, 24 I&N Dec. at 713. Consequently, disagreement exists among various circuits as to when to reopen removal proceedings for ineffective assistance of counsel claims.

## Matter of Compean

### *No Constitutional Right to Effective Assistance of Counsel*

In *Matter of Compean*, Attorney General Mukasey reexamined *Lozada* in light of the circuit split. See *Compean*, 24 I&N Dec. at 714-27. He first examined whether respondents have a constitutional right to effective assistance of counsel under either the Fifth or Sixth Amendment.

In evaluating whether such a right exists under the Sixth Amendment, the Attorney General found that the Sixth Amendment right to effective assistance of counsel has no application to removal proceedings. *Id.* at 716-17.

He explained that because the Sixth Amendment right to counsel applies only to criminal actions, it does not apply to removal proceedings, which are civil actions. *Id.* at 716. Consequently, the “Sixth Amendment right to effective assistance of counsel” also does not apply to removal proceedings. *Id.* at 716-17 (citing, e.g., *Afanwi*, 526 F.3d at 796 & n.31 (4th Cir. 2008) (citing cases)).

The Attorney General then examined the Fifth Amendment due process right, concluding that the Fifth Amendment does not protect parties from privately retained lawyers in removal proceedings. *Id.* at 717-27. To support this conclusion, the Attorney General began by asserting that circuit cases that had found a Fifth Amendment right to effective assistance of counsel were based on “a weak foundation.” *Id.* at 719. Their reasoning dated back to two Fifth Circuit cases which only stated, in dictum, that if such a right existed, it would be grounded in the Fifth Amendment. *Id.* at 719-20 (citing *Barthold v. INS*, 517 F.2d 689 (5th Cir. 1975); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975)). These cases did not, however, specifically find that such a constitutional right existed. *Id.*

In analyzing the Fifth Amendment due process right in depth, the Attorney General reasoned that although the Fifth Amendment protects all persons, whether or not they have immigration status, the due process guarantee “applies only against the Government.” *Id.* at 717 (citing, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). For the actions of private actors to be attributed to the Government, and thus give rise to a due process claim, the actions of the private actor and the Government must have a “sufficiently close nexus” so that the actions of the private actor may be “fairly treated” as those of the Government. *Id.* at 720 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Although the Government takes affirmative steps to notify aliens of available counsel and regulate the private immigration bar, the Attorney General found that there is an insufficient nexus between the actions of the private bar and the Government to attribute the actions of privately retained lawyers to the Government. *Id.* at 721 (citing, e.g., 8 C.F.R. §§ 1003.101(a)(1)-(4), 1003.102(k), 1240.10(a)(1)-(3), 1292.1(a)(1)-(6), 1292.2(a), (c), (d), 1292.3(a)). Further, the Supreme Court’s decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), holding that ineffective assistance related to a privately retained attorney can provide a basis for Federal habeas relief, is inapplicable because that decision was based on the Sixth Amendment guarantee of counsel in criminal proceedings, not on the

Fifth Amendment guarantee of due process. *Compean*, 24 I&N Dec. at 722.

The Attorney General then turned to the Supreme Court’s decisions in *Coleman*, 501 U.S. 722, and *Wainright*, 455 U.S. 586. The Attorney General found that *Coleman* and *Wainright* directly spoke to whether a respondent has a Fifth Amendment right to effective assistance of counsel in removal proceedings. *Compean*, 24 I&N Dec at 723. In contrast to the Board in *Assaad*, the Attorney General found that respondents in removal proceedings are similarly situated to the petitioners in *Coleman* and *Wainright* because respondents, like the petitioners in *Coleman* and *Wainright*, lack the constitutional right to counsel possessed by individuals in certain types of criminal proceedings. *See id.* Thus, like the parties in *Coleman* and *Wainright*, respondents in removal proceedings have suffered no deprivation of their constitutional right to effective assistance of counsel. *See id.*; *see also Coleman*, 501 U.S. at 752 (citing *Wainright*, 455 U.S. 586). The Attorney General further reasoned that although *Coleman* and *Wainright* related to criminal defendants, not respondents in civil proceedings, *Coleman* involved habeas review, which is civil in nature. *Compean*, 24 I&N Dec. at 724. Moreover, he asserted that if a constitutional right to effective assistance of counsel did not exist for criminal defendants, such a right was even less likely to exist for respondents in removal proceedings. *See id.* Unlike the Board in *Assaad*, the Attorney General did not give significant deference as to how the circuits had interpreted *Lozada* and *Assaad* in light of *Coleman* and *Wainright* but only explained that a split had grown between circuits. *See id.* at 718-19.

The Attorney General lastly addressed whether removal proceedings should be treated differently from other types of proceedings because of the vulnerability of respondents and the high stakes of judicial determinations. He reasoned that if such a differentiation was made, “the Constitution would arguably require not just effective assistance of privately retained lawyers in removal proceedings, but also assistance of counsel—including Government-approved counsel—in removal proceedings,” and such a right has not been held to exist by any court. *Id.* at 725. Further, no constitutional right to effective assistance of counsel has been found in other civil proceedings with high stakes. *Id.* at 725-26. Thus, Attorney General Mukasey concluded that respondents have no constitutional right to effective assistance of counsel under either the Fifth or Sixth Amendment. *Id.* at 726.

### *No Statutory Right to Effective Assistance of Counsel*

Attorney General Mukasey further asserted that statutory law, namely sections 240(b)(4)(A) and 292 of the Act, provides only that respondents have the privilege to obtain counsel, not the right to effective assistance of counsel. *Id.* at 727. Respondents have the option to retain counsel. However, the Government bears no responsibility under the Act to allow a respondent to reopen his removal proceedings based on the ineffectiveness of that privately retained counsel. *Id.*

### *Remedy: Deficient Performance of Counsel as a Matter of Discretion*

After finding that the law does not require the Department of Justice to provide respondents with an opportunity to reopen their cases for ineffective assistance of counsel, Attorney General Mukasey acknowledged the law does “allow[] the Department to do so ‘as a matter of sound discretion.’” *Id.* at 727 (quoting *Magala v. Gonzales*, 434 F.3d 523, 526 (7th Cir. 2005)). Acknowledging the “strong public interest in . . . the fairness and accuracy of removal proceedings,” the Attorney General declared that the Board should allow “an alien to relitigate his removal in the extraordinary case where his lawyer’s deficient performance likely changed the outcome of his initial removal proceedings.” *Id.* at 727-28. This new remedy, called deficient performance of counsel, is “committed to the discretion of the Board or the Immigration Judge.” *Id.* at 730. Similar to the *Lozada* requirements, a deficient performance of counsel claim must be accompanied by certain documentary evidence and proof of actual prejudice. *See id.* at 730-40.

*Compean* requires the respondent to show that he has an “extraordinary case.” *Id.* at 729. First, he must establish that his attorney’s failings were not simply mistakes or slight errors but rose to the level of “egregious” conduct. *Id.* at 732 (citing *Lozada*, 19 I&N Dec. at 639). This high standard requires that respondents overcome “the strong public interest in finality and the rule that ‘litigants are generally bound by the conduct of their attorneys.’” *Id.* (quoting *Lozada*, 19 I&N Dec. at 639). Second, if the respondent’s motion to reopen was filed more than 90 days after the removal order was issued (or beyond any other applicable deadline for reopening), the respondent must prove “that he exercised due diligence in discovering and seeking to cure” his attorney’s error. *Id.* at 732. Third, he must show actual prejudice caused by

the error. *Id.* at 733 (citing *Lozada*, 19 I&N Dec. at 638). In deciding between several standards to test whether a respondent has actually been prejudiced by his attorney’s conduct, the Attorney General concluded that in the interest of finality, the highest standard should be required: “but for the deficient performance, it is more likely than not that the alien would have been entitled to the ultimate relief he was seeking.” *Id.* at 734.

The respondent must also provide six documents or sets of documents in order to prove his claim. First, “he must submit a detailed affidavit setting forth the facts that form the basis of the deficient performance of counsel claim.” *Id.* at 735. The purpose of this signed affidavit is to provide the facts of the error and to better deter frivolous claims. *See id.* at 735-36. Second, the respondent must provide a copy of the attorney/client agreement. *Id.* at 736. If no agreement is available, then the respondent must describe in his affidavit “what the lawyer had agreed to do, including whether it included the particular step in the proceedings in which the deficient performance is alleged to have occurred.” *Id.* Third, the respondent must supplement his claim with “a copy of a letter to his former lawyer setting forth the lawyer’s deficient performance and a copy of the lawyer’s response, if any.” *Id.* This requirement provides the attorney “an opportunity to present his side of the story” and “put[s] the lawyer on notice that the alien intends to file a deficient performance claim.” *Id.* If the former attorney does not respond, the respondent’s “affidavit must note the date on which he mailed his letter and state whether he made any other efforts to notify the lawyer.” *Id.* Fourth, the respondent must include “a completed and signed complaint addressed to the appropriate State Bar or disciplinary authorities.” *Id.* at 737. For this requirement, the Attorney General varied from *Lozada* by not requiring that the complaint actually be sent to the disciplinary authorities. *Id.* at 737-38. This change was made in order to deter respondents from sending frivolous complaints to the authorities. *Id.* Fifth, if the respondent’s claim is based on his former attorney’s failing to submit a document, the respondent must include the omitted document with his motion to reopen. *Id.* at 738. Finally, if the respondent is represented when filing his motion to reopen, the new attorney must submit the following signed statement: “Having reviewed the record, I express a belief, based on a reasoned and studied professional judgement, that the performance of my client’s former counsel fell below minimal standards of professional competence.” *Id.* at 738-39.

In addition, the Attorney General stated that a respondent must comply with the above requirements in full in order to become eligible for discretionary reopening based on deficient performance of counsel. He commented as follows:

Excusing an alien from compliance with a particular requirement, or deeming “substantial compliance” adequate (as several courts have done with respect to the *Lozada* factors, see, e.g., *Reyes v. Ashcroft*, 258 F.3d 592, 597-99 (9th Cir. 2004)), would hinder the development of a complete record . . . would undermine the Board’s (and the bar’s) efforts to monitor the quality of representation before the immigration courts . . . [and] would create uncertainty as to when a requirement will be enforced and when it will be waived.

*Id.* at 739.

### After Matter of *Compean*

Former Attorney General Mukasey framed his decision in *Matter of Compean* as an attempt to balance the “competing considerations” of “fairness and accuracy” on one hand, and “expeditiousness and finality” on the other. *Id.* at 728-30. Going forward, there are questions to be answered concerning *Compean*. First, it remains to be seen how current Attorney General Eric Holder will treat his predecessor’s decision. In response to questions concerning *Compean* from Senators Orrin Hatch and Russ Feingold during his confirmation process, Holder wrote:

The Constitution guarantees due process of law to those who are the subjects of deportation proceeding [sic]. I understand Attorney General Mukasey’s desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair. For this reason, I intend to reexamine the decision should I become Attorney General.<sup>2</sup>

Assuming *Compean* stays in effect, there are other questions as well. As noted above, *Compean*’s remedy is similar to, but generally more rigorous than, *Lozada*’s. As *Compean* was only recently published, how it will be interpreted and applied has yet to be seen. It also remains to be seen how the circuit courts will react to *Compean*.

Perhaps most obviously, the circuits will need to evaluate Attorney General Mukasey’s holding that respondents in removal proceedings have no constitutional right to effective assistance of counsel. Regarding this issue, Attorney General Mukasey stated in a footnote to *Compean* that one effect of his decision would be to “allow those circuits [that had found a constitutional right to effective assistance of counsel] to reconsider the question (en banc if necessary) more efficiently and easily, and without the weight of the Board’s 1988 *Lozada* precedent, which predated the majority of the relevant judicial decisions.” *Id.* at 730 n.8. Whether the courts will accept this invitation is still in question. Another issue that the circuit courts will likely address concerns how much deference to accord agency denials of motions to reopen under *Compean*, especially considering that *Compean*’s remedy is explicitly framed as a matter of discretion. For these reasons, the subject of poor performance by counsel in removal proceedings is likely to remain a topic of intense interest for the foreseeable future.

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1. At that time, only the Seventh Circuit had suggested otherwise, in *Stroe v. INS*, 256 F.3d 498 (7th Cir. 2001). See *Assaad*, 23 I&N Dec. at 559-60. The Board noted, however, that the Seventh Circuit’s statements were made “in dicta and in a divided opinion.” *Id.* at 559.

2. “Written Questions for Eric Holder From Senator Hatch,” question 7, available at <http://judiciary.senate.gov/nominations/EricHolder/upload/HatchToHolder.pdf>. Holder provided an identical response to a question from Senator Feingold. See “Written Questions for Eric H. Holder Jr. From Senator Feingold,” question 12, available at <http://judiciary.senate.gov/nominations/EricHolder/upload/FeingoldToHolder.pdf>.

## FEDERAL COURT ACTIVITY

### CIRCUIT COURT DECISIONS FOR FEBRUARY 2009

by John Guendelsberger

The United States courts of appeals issued 280 decisions in February 2009 in cases appealed from the Board. The courts affirmed the Board in 250 cases and reversed or remanded in 30, for an overall reversal rate of 10.7%. The Second and Ninth Circuits together issued 59% of all the decisions and 80% of the reversals. There were no reversals from the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits.

The chart below provides the results from each circuit for February 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	8	8	0	0.0
2nd	79	72	7	8.9
3rd	23	20	3	13.0
4th	11	11	0	0.0
5th	19	19	0	0.0
6th	15	15	0	0.0
7th	8	7	1	12.5
8th	4	4	0	0.0
9th	87	70	17	19.5
10th	3	3	0	0.0
11th	23	21	2	8.7
<b>All:</b>	<b>280</b>	<b>250</b>	<b>30</b>	<b>10.7</b>

Eleven of the seventeen reversals in the Ninth Circuit found fault with a denial of asylum. Of these, four reversed the adverse credibility determination, two found that the evidence compelled a finding of past persecution, two found that the Government had not submitted sufficient evidence to rebut the well-founded fear presumption stemming from a finding of past persecution, and one found that the “disfavored group” issue had not been addressed. In another case the court found that the Immigration Judge improperly conducted independent internet research into the facts of the case. Other reversals involved criminal grounds for removal, section 212(c) eligibility, and timeliness of a VAWA motion to reopen.

The Second Circuit reversed in only two asylum cases, both involving the issue of whether a well-founded fear of persecution had been established. Notably, there were no adverse credibility determinations from the Second Circuit this month. The other reversals included a motion to reopen an in absentia order, a section 212(c) request in deportation proceedings involving a post-IIRIRA conviction, two aggravated felony issues involving drug distribution offenses, and a remand to further consider denial of continuance while awaiting a visa petition based on labor certification.

The chart below shows the combined numbers for the first 2 months of 2009 arranged by circuit from highest to lowest rate of reversal.

Last year at this point there were 753 decisions and 105 reversals for a 14% reversal rate.

Circuit	Total	Affirmed	Reversed	% reversed
3rd	57	42	15	26.3
5th	34	30	4	11.8
9th	256	227	29	11.3
11th	52	47	5	9.6
8th	11	10	1	9.1
2nd	174	159	15	8.6
7th	12	11	1	8.3
10th	7	7	0	0.0
1st	13	13	0	0.0
4th	26	26	0	0.0
6th	27	27	0	0.0
<b>All:</b>	<b>669</b>	<b>599</b>	<b>70</b>	<b>10.5</b>

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

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### **March Madness: A “Sweet Sixteen” for Immigration Wonks** *by Edward R. Grant*

**W**e have come nearly to the conclusion of “March Madness.” I believe that is a trademarked term, so all royalties from this column will be transferred to the NCAA’s hospitality fund for this weekend’s “Final Four.” Oops, there I go again.

It has been a wild season—multiple No. 1 teams along the way, including one that got dumped in the first round of the tournament. A feast for the Big East, which is more unhappy news for ACC fans. And, sadly, a squeezing out of the “little guys” from non-major conferences—never mind that smaller schools nurtured the game for decades, while bigger state schools tended to concentrate on football.

True immigration wonks may have missed all this, because keeping up with the U.S. courts of appeals on immigration matters has practically become a full-time hobby. Just since our most recent “list” column, the courts have issued enough notable decisions to easily warrant a new tabulation. In fact, the process of winnowing these cases down to a “sweet sixteen” mirrored the tension of “Selection Sunday.” (Oops!) But unlike the faceless tournament selection committee, your humble scribe takes full blame for all inclusions and exclusions.

So, put away your dog-eared, useless tournament bracket, have better luck next year, and see how the Board of Immigration Appeals and the Immigration Judges fared in this latest round of judicial skirmishes.

### **East Region: Where the Game Began**

Just as a true basketball aficionado would never pass up a game at Madison Square Garden, no list of notable circuit court decisions would be complete without a visit to Foley Square—home of the U.S. Court of Appeals for the Second Circuit. But, in true rivalry fashion, their counterparts in Beantown also made the cut.

*Garcia-Padron v. Holder*, \_\_F.3d\_\_, 2009 WL 468202 (2d Cir. Feb. 26, 2009). When the last pair of Air Jordans has worn out, and the last gasp of air has seeped out of the last basketball, section 212(c) will surely still be with us.

The latest evidence is this decision, in which the Second Circuit held that as long as an alien is in deportation proceedings commenced prior to the effective date of the repeal of section 212(c) [April 1, 1997, the effective date for relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)], the alien can apply for section 212(c) relief—even for convictions entered after that date, and after trial.

Mr. Garcia-Padron was placed in deportation proceedings in 1993; these proceedings were administratively closed while the petitioner served time for various convictions, including attempted robbery, assaulting an ambulance driver, and petit larceny. He was convicted after trial of the latter offense in 1998. Once proceedings were reanimated in 2001, he was found ineligible for section 212(c) relief by both the Immigration Judge and the Board because the petit larceny offense post-dated the repeal of section 212(c).

The Second Circuit disagreed. It relied primarily on a “savings clause” in IIRIRA stating that the changes made by the subtitle, which included the section 212(c) repeal, would not apply to pending deportation and exclusion proceedings. The court ruled that regulations at 8 C.F.R. § 1212.3(h), restricting section 212(c) eligibility to aliens who had not gone to trial, also did not control the outcome, because those regulations were intended to implement the “reliance interest” rationale of *INS v. St. Cyr*, 533 U.S. 289 (2001), on pre-IIRIRA convictions that were the basis for post-IIRIRA removal proceedings.

*Hoodho v. Holder*, \_\_F.3d\_\_, 2009 WL 279654 (2d Cir. Feb. 6, 2009). Conceding the match is common in golf and chess, but not basketball. Nevertheless, a concession of removability in Immigration Court can stick.

The charge in this case—deportability under section 237(a)(2)(E)(ii) of the Act for violating that portion of a protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury—was conceded by the respondent’s counsel. The concession was based on a conviction for “intentional disobedience or resistance” to a lawful order of the court—in this case, a stay-away order to protect the respondent’s wife. The factual basis of the conviction included repeated ringing of the wife’s doorbell in the early morning hours, accompanied by foot-stomping and screaming. The Second Circuit noted that such conduct could permit a conclusion either way as to whether the petitioner had violated the relevant portions of the protective order against violence and harassment. However, the court concluded that it did not need to reach the issue because the concession by respondent’s counsel was “plausible” under the circumstances.

The Second Circuit’s dismissal of the petitioner’s argument that he not be bound by the concession is a reminder that some commonly held principles of litigation do apply in Immigration Court. The court found, *inter alia*, that an Immigration Judge may accept a “plausible” concession of deportability without conducting a thorough examination and legal analysis; that a party is deemed bound by the acts of the lawyer that party has retained; and that “egregious circumstances” are not presented by the mere fact that, in hindsight, it might have been better not to have made the concession. Judicial admissions by counsel in removal proceedings, the court concluded, are not to be treated differently from similar admissions in other forms of litigation.

*Scatambuli v. Holder*, \_\_F.3d\_\_, 2009 WL 456413 (1st Cir. Feb. 25, 2009). One method of keeping score on the development of immigration law is to see how Board precedents fare at the circuits. On the issue of standards for defining a particular social group (“PSG”), the Board’s decisions continue their winning streak.

*Scatambuli* addressed the Board’s recent precedents involving the victims of gang recruitment and gang violence in Central America in a different context: the fears of a U.S. Government informant that he would face retaliation from the smugglers he has informed on. The

Immigration Judge rejected the claim that “government informants” constituted a particular social group, or that the alien in this case could claim membership in such a group. The claimed group was not visible, and the alien’s act of informing was known only to the U.S. Government, his family, and possibly the smugglers themselves.

The case reached the First Circuit after the Board’s decisions in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). The court noted that other circuits have endorsed the “social visibility” analysis adopted in those cases. See *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008); see also *Donchev v. Mukasey*, 553 F.3d 1206 (9th Cir. 2009) (and cases cited therein). The First Circuit specifically endorsed “social visibility” as a factor in defining a PSG and concluded that fears of individual retaliation for specific actions are not evidence that a “group” is at risk. See also *Amilcar-Orellana v. Mukasey*, 551 F.3d 86 (8th Cir. 2008) (finding that the alien’s fear of retribution for testifying against gangs was not premised on “social group” membership).

*Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009). The decision of the Immigration Judge was whistled here for two infractions: an erroneous adverse credibility determination and a failure to suppress a “border statement” that the court concluded was inherently unreliable and taken under conditions that denied due process.

This was not a garden-variety smuggling case. Two acquaintances who rented separate apartments in the same house traveled across the border at Buffalo, N.Y., to visit a “gentlemen’s club” in Ontario. The petitioner was a lawful permanent resident; his companion, a Canadian citizen, was apparently working without authorization at a gas station in Buffalo. When stopped at the border, the petitioner originally lied about the circumstances of the trip, saying that he had met his companion in Hamilton, Ontario, and had agreed to bring him to the United States (thinking that the Canadian passport was sufficient for entry). Eventually, the petitioner admitted to the secondary inspecting officer the truth of the matter, including his knowledge that his companion was working without permission. The petitioner was placed in proceedings, charged with smuggling under section 212(a)(6)(E)(i) of the Act.

The Second Circuit rejected the adverse credibility finding. It found that the Immigration Judge

misapprehended the facts as to when the petitioner had been advised of his right to counsel by the inspecting officers. It also rejected as irrelevant the Immigration Judge’s “taking notice” that strip clubs existed on the U.S. side of the border—even if the petitioner was dissembling on whether such clubs existed, there might have been other reasons (such as escaping notice) to visit Canada for such a night out. Finally, his initial lie, in which he failed to disclose the purpose of the visit to Canada, was immaterial to the immigration issue at hand. On some issues, clearly, the petitioner had lied at the border. But those issues, the Second Circuit ruled, were irrelevant to the smuggling charge.

Still, the petitioner clearly admitted at the border that he knew his companion was working without authorization in the U.S. The Second Circuit, finding that it was a violation of due process to admit the statement in evidence, relied on the following factors: (a) the statement was taken late at night and early in the morning, following hours of detention; (b) the petitioner was not advised until after the fact that he had a right to an attorney and that his statement could be used against him; (c) the petitioner was in custody; (d) the petitioner was subject to pressure and only admitted to knowing that his companion was working without authorization after being asked the same question repeated times.

The context of the case did not make it a strong one for the Government. No pattern of smuggling or remuneration was involved; the “smugglee” was a Canadian citizen living in a U.S. border city; and the petitioner was a lawful permanent resident (“LPR”) with a stable job and family. As noted by the Second Circuit, the whole mess could have been avoided by visiting a “gentleman’s club” on the U.S. side of the border.

### **Midwest Region: Hoosier Ball**

Our Midwestern circuits—Sixth, Seventh, and Eighth—generally play a methodical game reminiscent of *Hoosiers*, the brilliant (albeit somewhat fictionalized) account of tiny Milan High School’s heroic run to the 1954 Indiana State basketball championship. (Trivia question based on a key fact left out of the film: Milan’s quarterfinal opponent was Indianapolis Crispus Attucks, led by a sophomore star who would in time become one of the greatest to ever play the game. Who was this star? Answer at the end of this column.) Hoosier ball—still exemplified in today’s Big Ten—may not be exciting to watch, but has had its share of success over the years (as

fans of Louisville found to their chagrin). In Chicago, of course, the game gets a bit flashier—as sometimes do the opinions of the Seventh Circuit.

*Diaz-Zanatta v. Holder*, \_\_F.3d\_\_, 2009 WL 529173 (6th Cir. Mar. 4, 2009). The proper application of the “persecutor bar” to asylum claims has become a bit of a jump ball, particularly in light of the Supreme Court’s decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009). *Negusie* was decided on very narrow grounds: did the Court’s prior holding in *Fedorenko v. United States*, 449 U.S. 490 (1981), require the persecutor bar to be applied regardless of whether the asylum applicant’s participation in persecutory acts was voluntary or involuntary? *Negusie* held, very narrowly, that *Fedorenko* did not require such an interpretation because it had dealt with restrictions in the Displaced Persons Act of 1948, not the persecutor bar language in the Refugee Act of 1980. It is now up to the Board to redetermine the “voluntariness” question as a matter of administrative interpretation—and thus, no further comment can be made.

Other issues involving the persecutor bar—chiefly the level of “participation” or “assistance” that invokes the bar—have percolated in the circuit courts in recent years. *Diaz-Zanatta* synthesized that case law to conclude that while *Fedorenko* remains the basic standard in determining the level of “assistance” that will invoke the bar (the famous “hairstylist vs. camp guard” continuum), two additional requirements must be met: first, there must be some nexus between the applicant’s actions and the persecution of others; and second, the applicant must have acted with scienter, that is, some level of prior or contemporaneous knowledge that the persecution was being conducted. In so holding, the Sixth Circuit relied heavily on cases from sister circuits. See *Chen v. U.S. Atty Gen.*, 513 F.3d 1255 (11th Cir. 2008); *Castenada-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007); *Xie v. INS*, 434 F.3d 136 (2d Cir. 2006); *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005).

*Diaz-Zanatta* involved the claim of a former Peruvian military intelligence officer who worked undercover to identify terrorism suspects but objected when she became aware that such suspects were subject to torture and other human rights violations. This context mattered greatly to the Sixth Circuit in addressing the Government’s argument that *Fedorenko* controlled: “We disagree . . . and conclude that the legal analysis of these terms when applied to an alien who is accused of having ‘assisted or participated in persecution’ in the

context of working for a legitimate arm of a recognized government differs materially from that analysis when applied to an alien who served as a Nazi concentration camp guard.” *Diaz-Zanatta*, 2009 WL 529173, at \*1. The Seventh Circuit had drawn a similar distinction in *Singh*, noting that unlike Nazi concentration camps, whose sole existence was premised on the persecution of innocent civilians, a police department has traditional law enforcement purposes and did not engage exclusively in the persecution of others. *Singh*, 417 F.3d at 739. In such contexts, the prevailing view in the circuits, now set forth in the specific two-part test by *Diaz-Zanatta*, is that the specific actions and knowledge of the asylum applicant must be taken into consideration. Mere association with an agency of government that engages in persecution, and actions that only tangentially relate to those acts of persecution, will not suffice.

*Obi v. Holder*, \_\_F.3d\_\_, 2009 WL 510941 (7th Cir. Mar. 3, 2009). The retroactivity of amendments made by IIRIRA is an issue with Michael Jordan-like hang time. The Seventh Circuit recently brought the question back to earth, ruling in *Obi* that the “crime bars” to cancellation of removal under section 240A(b) of the Act (“non-LPR cancellation”) enacted in IIRIRA are not impermissibly retroactive when applied to a criminal conviction entered prior to IIRIRA. The petitioner had been whistled for several technical fouls of the marital variety. His first marriage-based adjustment application was denied in 1986 because the marriage was judged to be a sham. His second application was scored and he adjusted to permanent resident status, but on replay, the adjustment was rescinded and the petitioner was convicted of two counts of marriage fraud. He then absconded and was convicted for failing to appear for sentencing. Undaunted, he married a third U.S. citizen in 2001 and, when placed in removal proceedings, applied for cancellation of removal based on hardship to his wife. The Immigration Judge and the Board barred his application due to his criminal convictions.

Applying the two-prong test of *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), *Obi* found both (1) that Congress intended the criminal bars to cancellation of removal to apply to pre-IIRIRA convictions, see *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001), and (2) that retroactive application of the criminal bars did not impair rights that had existed before IIRIRA or increase liability for prior acts. The petitioner’s conviction for visa fraud was a deportable offense before IIRIRA as well as after, and there was no “detrimental reliance” shown because

the respondent, as a non-LPR, would not have been eligible for relief under former section 212(c). *Obi* thus joins the ranks of other circuit decisions denying such “impermissible retroactivity” claims. See *Martinez v. INS*, 523 F.3d 365, 374-75 (2d Cir. 2008); *Heaven v. Gonzales*, 473 F.3d 167, 175-76 (5th Cir. 2006); *Pinho v. INS*, 249 F.3d 183, 188 (3d Cir. 2001); *Tang v. INS*, 223 F.3d 713, 719 (8th Cir. 2000).

*Banat v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 564958 (8th Cir. Mar. 6, 2009). The Immigration Judge or Board Member, unlike the referee, really does get to determine the outcome of the “game.” But even in that role, there are limits on how much they can influence the course of play. In this case, the key corroborative evidence in support of the respondent’s claim was a handwritten threat on the purported letterhead of the Popular Front for the Liberation of Palestine (“PFLP”). The Immigration Judge, suspicious of the letter’s authenticity, forwarded it to the Department of State (“DOS”) with a request that it be investigated. The response came back, stating that the letter was likely fabricated, and that PFLP letterhead was easily fabricated.

The Eighth Circuit found admission of the DOS report unduly prejudicial to the petitioner. The report had identified neither the investigator who prepared it, nor the PFLP informant who opined on the letter’s authenticity. In addition, there were multiple levels of hearsay: “Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair because, without that information, it is nearly impossible for the immigration court to assess the report’s probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigation’s allegations.” *Banat*, 2009 WL 564958, at \*3.

The Eighth Circuit’s ruling is consistent with its own rulings and those of other circuits. See *Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008) (stating that it is improper to rely on a Wikipedia article); *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008) (finding that admission of an overseas investigation report was improper when it was based on multiple hearsay and it was unclear that confidentiality of asylum application was protected); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003) (same). These cases exemplify the need for caution in the cross-examination and impeachment of asylum applicants and their witnesses—particularly of the requirement that a proper foundation first be laid for

lines of questions and reports or other evidence designed to contradict an applicant’s account. The holdings in these cases could apply to one of the more questionable cross-examination tactics employed by some Government attorneys: attempting to impeach applicants on the basis of their prior statements to an asylum officer, without first laying a proper foundation that the applicant had, in fact, made such statements. The lack of transcription of Asylum Office interviews contributes to this problem. But allowing an attorney to attempt to read into the record what transpired at the Asylum Office interview on the basis of incomplete notes of that interview will rarely satisfy the demands of procedural fairness.

*Habchy v. Filip*, 552 F.3d 911(8th Cir. 2009). Just as referees do not often seem to whistle point guards for palming the ball, circuit courts do not often reverse for abuse of discretion the Board’s denial of motions to reopen for asylum based on changed country conditions. *Habchy*, like those occasional calls for palming, reminds us of the rule that the substance of the respondent’s evidence must be considered.

Briefly, the Lebanese respondent’s motion to reopen was denied in an opinion stating that the motion was based solely on the deteriorating conditions in Lebanon, conditions that applied not only to all Lebanese Christians, but to all aspects of Lebanese society. The court held that this denial overlooked the particularities of the respondent’s claim—namely, that as a former member of the secret-service branch of the Lebanese forces, he had been detained and tortured and had also been accused of being an Israeli collaborator. In light of the specific changed circumstances—the Israeli incursion into Lebanon in 2006—he feared that his alleged status as a “collaborator” would mark him for greater risk than that facing the population as a whole. The Eighth Circuit agreed that the Board had failed to take these specifics into account, and thus that its opinion did not articulate a reasoned basis for denial of the motion. The court did not order the motion to be granted but remanded for further consideration, including further evidence regarding country conditions.

### **South Region: The Game Transplanted**

Basketball is the quintessential urban game—it was invented by a YMCA official who needed something to occupy his young charges during the winter, and it later established an almost symbiotic identity with places like New York City. It was fitting, then, that a New York

coach, Frank McGuire, along with homegrown talent such as Lennie Rosenbluth, brought the “religion” to North Carolina in the mid-1950s. Then, in stunning fashion, the Tar Heels toppled mighty Kansas (second trivia question: who was the Jayhawks’ center?) in the greatest college basketball game ever played—the triple-overtime final of the 1957 NCAA Championship.

Almost a decade later, another hoops prophet, Don Haskins, set another milestone, coaching the first all-African American starting five to the 1966 championship for Texas Western (recalled in the recent film, *Road to Glory*).

Our “southern circuits” are sometimes overlooked in the analysis of significant immigration precedents. But they are faced with possibly the broadest array of issues of any region of the country due to the proximity of the southern land border in Texas, and immigration from the Caribbean and South America in Florida. Their decisions, therefore, directly impact a huge percentage of our nation’s newest immigrants.

*Hoxha v. Holder*, \_\_F.3d\_\_, 2009 WL 500568 (3d Cir. Mar. 2, 2009) (Due to the abundance of “talent” in the East bracket, this case—unlike Philadelphia Final Four team Villanova—was compelled to play “out of region.”) The issue whether an alien has “exhausted his administrative remedies” by first presenting his arguments to the Immigration Judge and the Board is a perennial issue on petitions for review. “Exhaustion” is a time-honored principle of administrative law; in immigration cases, it is preserved in section 242(d)(1) of the Act: “A court may review a final order of removal only if— . . . the alien has exhausted all administrative remedies available to the alien as of right . . . .” Courts of appeals generally appear to be applying a strict rule on exhaustion. The Sixth and Ninth Circuits have both ruled that an alien has not “exhausted his administrative remedies” before the Board if the alien raises an argument in a Notice of Appeal but then fails to address the argument in a subsequently filed brief. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc).

*Hoxha* took a different view. As long as an issue is mentioned on the Notice of Appeal to the Board, that issue has been preserved for Federal appellate review, and administrative remedies have been exhausted. The court cited its own “liberal exhaustion policy,” under which the focus “must be on the nature of the notice provided to the BIA by both the Notice of Appeal and any brief filed with

the BIA.” *Hoxha*, 2009 WL 500568, at \*4; *see also Lin v. Att’y Gen.*, 543 F.3d 114 (3d Cir. 2008); *Yan Wan Lu v. Ashcroft*, 393 F.3d 418 (3d Cir. 2005).

*Omari v. Holder*, \_\_F.3d\_\_, 2009 WL 531688 (5th Cir. Mar. 4, 2009). *Omari* presented a more complex and thorough rationale for a stricter view of exhaustion requirements than that adopted in *Hoxha*—although it did not reach the precise issue raised in *Hoxha*.

Based on his convictions for domestic assault and for conspiracy to transport stolen goods, the respondent was found removable as having been convicted of a crime of domestic violence and of two crimes involving moral turpitude. The Immigration Judge granted his application for LPR cancellation of removal under section 240A(a) of the Act. The Department of Homeland Security (“DHS”) appealed, and the Board reversed the grant of relief, finding that it was not merited in the exercise of discretion. The respondent then filed a motion to reconsider with the Board, alleging that he was not removable as charged, that the Board erred in a finding that he was in arrears on child support, and that the Board failed to assign proper weight to the positive discretionary factors in his case. The Board denied the motion, and the respondent, now a petitioner, filed a petition for review with the Fifth Circuit.

The Fifth Circuit first held that the respondent had failed to properly preserve the issue of removability before the Board because he raised it first in a motion to reconsider. The issue should have been raised in either a cross-appeal from the decision of the Immigration Judge, or in a brief in response to the DHS’s appeal. A motion to reconsider, which is confined to the substance of the *Board’s* prior decision, is not the proper venue in which to raise the issue for the first time. Thus, the issue was not “properly presented” to the Board and thus was not “exhausted.” The Fifth Circuit concluded, therefore, that it had no jurisdiction to address the issue.

Regarding cancellation, the court held that it had no jurisdiction to rule on the petitioner’s contention that the Board committed legal error by making its own factual findings instead of properly deferring to those of the Immigration Judge.

As this argument alleges a legal error in the BIA’s decision, *Omari* necessarily did not address this issue in his initial brief to the BIA. Still, *Omari* raises this issue for the first time before this court, and

the BIA never had a chance to address it. This court and others have previously held (albeit in unpublished decisions) that certain allegations of BIA error must first be brought to the BIA in a motion for reconsideration. . . . Omari could have brought his allegation of impermissible factfinding before the BIA in his motion for reconsideration, and we conclude that his failure to do so constitutes a failure to exhaust the issue.

*Omari*, 2009 WL 531688, at \*4.

*Omari* presented a well-developed further rationale for its doctrine of exhaustion. It rejected the respondent's claim that he had "effectively" exhausted the issue of removability because the Board had the opportunity to address the issues he raised in full for the first time before the Fifth Circuit. That argument is unpersuasive, the court ruled, because the Board should not be "saddled" with the burden of identifying the specific substance of a party's appeal. The Board is free to engage issues not specifically presented, and at that point, those issues will be deemed exhausted. *See, e.g., Lin*, 543 F.3d at 123-25. However, it is not obliged to do so. *Omari* also dismissed the argument that, since the court of appeals has jurisdiction to review legal and constitutional claims de novo, the failure to raise such an issue before the agency should be excused. The "exhaustion" requirement, stated in section 242(d) of the Act, is both mandatory and jurisdictional. Thus, under a recent decision of the Supreme Court, it cannot be waived on equitable grounds. *Bowles v. Russell*, 551 U.S. 205 (2007).

*Omari* acknowledged that it imposed a strict exhaustion requirement. Three other circuits, in post-*Bowles* decisions, have likewise rejected attempts to carve out an "equitable" exception to the requirements of section 242(d) of the Act. *See Massis v. Mukasey*, 549 F.3d 631, 640 (4th Cir. 2008); *Bah v. Mukasey*, 521 F.3d 857, 859 (8th Cir. 2008); *Grullon v. Mukasey*, 509 F.3d 107, 114 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008). Whether other circuits would adopt the strict procedural requirements imposed by *Omari*—that an issue decided adversely to an alien by the Board must first be addressed to the Board, and with specificity, in a motion to reconsider, remains to be seen. Based on *Hoxha*, it seems less than likely that the Third Circuit would impose such a requirement, particularly where, as here, a motion to reconsider *was* filed, even if it did not raise the precise issue of overall improper fact-finding by the Board.

*Singh v. U.S. Att'y Gen.*, \_\_\_F.3d\_\_\_, 2009 WL 604370 (11th Cir. Mar. 10, 2009). The respondent was prosecuted as an adult and pled guilty to the following offenses when he was age 15: armed burglary, third-degree grand theft, and burglary. Fortunately for him, his sentence to confinement was only 364 days, and when placed in removal proceedings, he was found deportable but granted cancellation of removal under section 240A(a) of the Act.

Unfortunately, he later violated the conditions of his community control and was resentenced to over 6 years in prison. He was again placed in removal proceedings and was found ineligible for cancellation of removal, both because he had been convicted of a crime of violence for which a sentence greater than 1 year was imposed, and because he had previously been granted the same relief. The Eleventh Circuit addressed two issues on petition for review: whether the conviction at age 15 constituted a "conviction" under the Act; and whether *res judicata* barred the subsequent deportation charge based on the same offense underlying the first removal proceedings.

The court answered both questions in the negative. First, since the respondent was tried as an adult, his conviction was not analogous to a proceeding under the Federal Juvenile Delinquency Act. Other circuits to have addressed this issue have reached the same conclusion. *See Savchuk v. Mukasey*, 518 F.3d 119, 122 (2d Cir. 2008); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 922-23 (9th Cir. 2007); *Vieira Garcia v. INS*, 239 F.3d 409, 411-12 (1st Cir. 2001). Second, the aggravated felony charge in the new removal proceeding did not violate *res judicata* because the charge could not have been brought in the prior proceeding. The violation of community control and resentencing to a longer term of imprisonment thus "gave rise to a new cause of action that was not previously available." *Singh*, 2009 WL 604370, at \*3.

*Narine v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 580865 (4th Cir. Mar. 9, 2009). A waiver of appeal rights, even when granting "pre-conclusion" voluntary departure under section 240B(a) of the Act, must be clear, according to this Fourth Circuit opinion. The respondent was found removable and was scheduled for a hearing at which he could apply for relief. His lawyer withdrew "for economic reasons" and submitted a letter to court stating that she had advised her client regarding his eligibility for relief, and specifically regarding the liabilities and obligations attendant to a grant of voluntary departure. The respondent then informed the Immigration Judge that he

wished to go forward with an application for voluntary departure, which the judge treated as an application for pre-conclusion voluntary departure. In a brief colloquy, the respondent first indicated that he did not want to accept this as a “final decision.” The Immigration Judge then informed him that he had to accept the decision as final in order to be granted voluntary departure, to which the respondent agreed.

While recognizing that a waiver of appeal rights is a precondition to being granted voluntary departure under section 240B(a) of the Act, the court held that such a waiver must still be “knowingly and intelligently made.” *Id.* at \*3. The word “appeal” was never mentioned in the colloquy regarding voluntary departure, nor did the record demonstrate that the petitioner had a “clear understanding” of the consequences of accepting voluntary departure. The letter from the attorney did not specify whether the necessity of waiving appeal had been explained to the petitioner. Quoting the Board’s decision in *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000), the court concluded that use of the words “final” or “accept as final” to an unrepresented alien does not constitute a clear explanation of the rights being waived. *See also Ali v. Mukasey*, 525 F.3d 171, 174 (2d Cir. 2008).

### **West Region: Fast Break City**

The incomparable UCLA teams of the 1960s and 1970s could do everything well—except slam dunk, which was against the rules at the time. Perhaps it is just as well, because their trademark fast breaks, culminating in a dunk by the likes of (then) Lew Alcindor or Bill Walton would have been, well, unfair. The Ninth Circuit, which rules the Western bracket as UCLA did the entire national bracket in its heyday, is also no stranger to the dizzying rush up the court and the occasional “facial”—sometimes in the form of a thunderous dissenting opinion. In recent months, the action has been hot and fast, especially as the court revisits some of its old precedents.

*Li v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 736767 (9th Cir. Mar. 23, 2009). The petitioners in three consolidated cases were subject to various forms of detention, beating, and other abuse by Chinese authorities for assisting North Korean refugees by providing food, shelter, and clothing. Their claims were denied on grounds that the Chinese authorities acted to prosecute the petitioners for a criminal act—harboring illegal aliens—as opposed to punishing them for a political opinion or other protected ground. The Ninth Circuit reversed, finding that the

petitioners had violated no “law” of China, but rather, an “unofficial policy” aimed at discouraging humanitarian assistance to North Korean refugees: “The BIA . . . did not rely upon any Chinese law that actually criminalizes the provisions of food and clothing to undocumented North Koreans or other foreigners so as to give rise to a ‘legitimate prosecutorial purpose.’” *Id.* at \*1.

The humanitarian interests at stake in such cases are two-fold. The petitioner—as was the lead alien here—is often motivated by a religious commitment and thus has been targeted for activity that is fundamental to the person’s Christian faith. Moreover, those the petitioner assists are fleeing a restrictive regime. It is reasonable to ask whether the formal categories of “on account of” analysis can be too rigorously applied in such cases so as to defeat the larger goals of refugee protection.

The Ninth Circuit’s decision in *Li* would be transparent if it had gone straight to the basket on the issue of nexus by finding, for example, that the petitioners had effectively been prosecuted for exercising the mandates of their religious faith. Instead, the court’s analysis of “prosecution versus persecution” wandered into more murky territory, raising the question whether there must be a formal written law in order to classify a government’s actions as “prosecution.” As the court noted, China has a stiff law against alien smuggling. The lead petitioner in *Li* was not prosecuted under that law, but for failure to cooperate with a police investigation. While the court, as discussed below, dismissed that as a mere pretext, it is plausible that Chinese authorities suspected those engaged in humanitarian assistance to have some knowledge of those who assisted North Koreans by arranging their entry into the country. Whether such suspicions were valid, the behavior of the authorities in these cases is consistent with such a motivation.

The Ninth Circuit concluded, however, that the real reason for the detentions and harm inflicted in these cases was to punish for opposition to the “nebulous, unwritten policy that undocumented North Korean refugees should receive no aid from Chinese citizens.” *Id.* at \*13. Those who so acted were motivated by a moral obligation to protect such refugees, and while they did not express verbal opposition to the policy, their opposition was expressed through their “lawful deeds” of providing assistance. In other words, they were persecuted for “lawful deeds” that, nevertheless, were against official, but unwritten policy. Since the Chinese Government lacked a legitimate prosecutorial motive or other logical reason

for the actions it took against the petitioners, the motive for such actions must be deemed political. *Id.* at \*11.

It is hard to quibble with the specific result here—persons are granted protection who were subject to prosecution for actions in the service of refugees. But suppose that China had enacted a law specifically forbidding the provision of such humanitarian assistance. Would that really have made a difference? Should it have? Another avenue, in addition to the religion-based nexus theory mentioned above, is possible. The Ninth Circuit hinted, but did not make a clear finding that China’s anti-humanitarian policy violates its own obligations as a signatory to the 1967 Refugee Convention. Perhaps a direct conclusion that those subject to persecution for violating policies that subvert the Convention ought to be treated as “presumptive refugees” under the Convention is in order. Such a holding might be a stretch, but it would stand on firmer footing than one based on whether such anti-humanitarian measures are a matter of codified law, or “policy.”

*Sanchez v. Holder*, \_\_F.3d\_\_, 2009 WL 779756 (9th Cir. Mar. 26, 2009) (en banc). The Ninth Circuit previously held that an alien who has engaged in alien smuggling—and thus is presumptively lacking good moral character under section 101(f)(3) of the Act—is nevertheless eligible for non-LPR cancellation of removal, provided the alien would have been eligible for a waiver of inadmissibility based on a charge of smuggling. *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005) (holding that an alien who would have been eligible for a section 212(d)(11) “family unity” waiver if charged for alien smuggling is eligible for cancellation of removal notwithstanding a contrary “good moral character” finding based on section 101(f)(3)). In *Sanchez*, an en banc panel overruled *Moran*.

Good moral character during the 10-year period prior to the application—a time that extends to the date on which the application is adjudicated under *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005)—is a prerequisite for non-LPR cancellation of removal. Sections 240A(b)(1)(A)-(B) of the Act. The petitioner in *Sanchez* entered the United States illegally in 1988, returned to Mexico in 1993 to get married, and then paid a coyote \$1000 to smuggle him and his new wife across the border. These facts differed from *Moran*, where the alien had done the smuggling himself, without hiring an agent. An earlier three-panel decision in *Sanchez* determined to apply the reasoning of *Moran* to these facts; a concurring

opinion, however, noted tension between *Moran* and *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000), which held that an alien who paid a smuggler to bring his wife and child illegally from Mexico could not establish good moral character. Thus, three different fact patterns emerged: alien in U.S. pays smuggler to bring his wife and children across the border (*Khourassany*); alien pays smuggler to bring both himself and a family member across (*Sanchez*); and alien, not using smuggler, brings his own family members across (*Moran*). Not surprisingly, the Ninth Circuit voted to hear the question en banc.

The court—with one dissent—held that the plain language of section 101(f)(3) (defining acts that bar a finding a good moral character) plainly covers all persons who, “whether inadmissible or not,” are described in, inter alia, section 212(a)(6)(E)(i) of the Act as alien smugglers. Thus, the fact that, upon being granted a waiver, an alien would not be inadmissible for the act of smuggling only a family member is not relevant to the determination of good moral character. Also, while the waiver is available to waive inadmissibility, it is not available to grant relief from removal—especially since the criteria for such relief, on their face, make alien smugglers ineligible. In addition, the section 212(d)(11) waiver is available only to aliens lawfully admitted for permanent residence—and the respondent here clearly was not that.

None of the opinions in the case noted this fact: the smuggling incident occurred in 1993, now well outside the 10-year period during which the petitioner would have to establish good moral character under the Board’s holding in *Matter of Ortega-Cabrera*. It is possible then, that the petitioner here might have lost the battle under the now-overruled *Moran*, but could win the war because the good moral character question would no longer count against him.

*Wakkary v. Holder*, \_\_F.3d\_\_, 2009 WL 595579 (9th Cir. Mar. 10, 2009). Indonesian asylum claims—particularly those involving Christians with Chinese ethnicity—have been in some state of flux in the Ninth Circuit since *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). There, the court held that while there was no “pattern and practice” of persecution against the group, Chinese Christians were nevertheless a “disfavored group” subject to frequent harassment and discrimination. This factor, *Sael* held, must be taken into account in addressing whether such persons have a well-founded fear of persecution.

For reasons unknown, a significant number of Indonesian claims are not filed within the 1-year deadline, and thus, applicants are eligible only for withholding of removal. Whether the “disfavored group” analysis applies in such cases—where the standard is not a “reasonable possibility” of facing persecution, but a “likelihood”—has been unclear. However, it appears that the common practice in Immigration Judge and Board decisions was to limit the application of *Sael* to claims for asylum. In addition, there was some sense in the wake of *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc), that the full Ninth Circuit was pulling back from at least some potential implications of *Sael*. See *Lolong*, 484 F.3d at 1179, 1181 (stating that some evidence of individualized risk is necessary).

*Wakkary* sought to reconcile *Sael* and *Lolong*. But most significantly, it held that the “disfavored group” analysis applies to claims for withholding of removal as well as asylum. The court stated:

[W]e do recognize that the disfavored group mode of analysis needs clarification, as it has been misunderstood by both the agency and some other circuits. Moreover, we note that in practice, the impact of the disfavored group mode of analysis is likely to be of considerably less significance in withholding than in asylum cases, due to the different standards of proof for these two forms of relief. Still, even though this evidence will not often change the outcome of a withholding claim, it is nevertheless relevant, and the BIA erred in not considering it.

*Wakkary*, 2009 WL 595579, at \*9.

The salience of the “disfavored group” analysis, *Wakkary* explained, is not that it lowers the ultimate burden of proof for asylum and withholding applicants. Asylum applicants, the court noted, must still show an “at least 10 percent” chance of persecution, and withholding applicants must still establish a probability. Disfavored group analysis, however, affects the level of individualized risk that an applicant must show. The more egregious the showing of group persecution—the risk to all members of the group—the less evidence of individualized risk of persecution must be adduced. *Id.* (citing *Kotas v. INS*, 31 F.3d 847, 853 (9th Cir. 1994)). Thus, the panel asserted, other circuits are mistaken in their conclusions that the

*Sael* standard alters the statutory and regulatory burden of proof. See *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007); *Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005); *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005) (all rejecting the “disfavored group” analysis as an alternative to a “pattern and practice of persecution” finding); see also *Sioe Tjen Wong v. Att’y Gen. of the United States*, 539 F.3d 225 (3d Cir. 2008) (rejecting a “pattern and practice” claim for Chinese Christians from Indonesia).

*Sael* specifically reserved the question whether this analysis should apply to withholding claims; *Wakkary* held that the Board erred in rejecting the standard in the context of withholding because the Board misconstrued the standard as lowering the burden of proof. Since the ultimate burden of proof—probability—remains the same, it is appropriate to apply the disfavored group analysis in determining whether that burden of proof has been met. As in asylum cases, if an applicant can establish membership in such a group, and that the group is widely targeted for discrimination, his or her burden to demonstrate individualized risk will be proportionally lower. *Wakkary*, 2009 WL 595579, at \*11.

As *Wakkary* acknowledged, several other circuits have not accepted the “disfavored group” analysis. On the one hand, the Ninth Circuit appears correct in stating that “common sense” would dictate a lower burden to demonstrate specific individualized risk where it is clear the an applicant belongs to a group that is subject to discrimination, harassment, and physical harm. On the other hand, the Ninth Circuit’s application of the standard to the context of Indonesian Christians focuses on pervasive discrimination and harassment, not acts that necessarily rise to the level of persecution. This raises the difficult question—one often faced by Immigration Judges: how relevant is evidence of widespread discrimination and harassment, falling short of the level of persecution, in determining whether there is a reasonable possibility or likelihood of harm that *does* rise to the level of persecution. Common sense would suggest that such evidence is *relevant*; but this does not necessarily imply that a new method of analysis, lowering the burden to show an individualized risk of persecution, is warranted. *Wakkary* will no doubt prompt renewed consideration of this question, both in the Ninth Circuit as applicants in other contexts seek the benefit of the “disfavored group” analysis, and in other circuits, where applicants again urge adoption of this newly explained doctrine.

*Marmolejo-Campos v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 530950 (9th Cir. Mar. 4, 2009) (en banc). The 2009 NCAA tournament has not been one for stunning upsets. In *Marmolejo-Campos*, the Ninth Circuit more than made up for this, holding that it must defer to the Board's determination that the offense of aggravated driving under the influence ("DUI") while one's license is suspended or revoked constitutes a crime involving moral turpitude ("CIMT") under Arizona Revised Statutes § 28-1383(A)(1).

The Board had previously found that any conviction under § 28-1383(A) would be for a CIMT. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). But that interpretation was rejected, at least in part, by *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003) (holding that a conviction under subsection (2) of § 28-1383(A) might involve mere "control," but not actual operation, of the vehicle). Strictly viewed, *Hernandez-Martinez* had "only" reached the issue whether the Board had improperly construed the Arizona statute, in all of its potential applications, to cover actual driving or operation of a motor vehicle and held open the possibility that a conviction for actual driving under the statute might be for a CIMT. However, few would have placed wagers on that possibility, particularly in light of subsequent Ninth Circuit decisions on the CIMT issue. In particular, a Ninth Circuit panel as recently as November 2008 reaffirmed that the question whether an offense is a CIMT is one that it reviews de novo, with no deference to the agency. See *Latu v. Mukasey*, 547 F.3d 1070 (9th Cir. 2008). When the Ninth Circuit voted to rehear the panel decision in *Marmolejo-Campos* finding the aggravated DUI offense to be a CIMT, most predicted that it would not survive under the de novo standard. See *Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007), *reh'g en banc granted*, 519 F.3d 907 (9th Cir. 2008).

The en banc panel, however, decided to change the standard. By a 7 to 4 margin, it voted to overrule all prior circuit opinions—which it characterized as "inconsistent" on the level of deference owed to the Board on the CIMT question—that have held or implied that the appropriate level of deference is other than "the same traditional principles of administrative deference we apply to the Board's interpretation of other ambiguous terms in the INA." *Marmolejo-Campos*, 2009 WL 530950, at \*6 (overruling *Plasencia-Ayala v. Mukasey*, 516 F.3d 738

(9th Cir. 2008)); see also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The majority also deferred to the Board's finding that the petitioner's crime was a CIMT based on the reasoning in *Lopez-Meza*. The court dismissed the argument that *Lopez-Meza* did not deserve deference because it was inconsistent with other Board precedent. The dissenting opinion (four judges), as well as the concurrence/dissent of Judge Bybee, asserted that *Lopez-Meza* conflicted with *Matter of Torres-Valera*, 23 I&N Dec. 78 (BIA 2001) (finding that a recidivist DUI offense is not a CIMT). The majority concluded that the Board presented a "rational distinction" between the two types of DUI crimes because aggravated DUI involved the presence of a culpable mental state—that is, the defendant knew at the time of the DUI that his/her license was suspended. To the contrary, recidivist DUI did not involve a similar scienter; rather, the aggravating factor was solely that the petitioner had previously committed simple DUI. The majority also determined that *Lopez-Meza* could be reconciled with *Matter of Short*, 20 I&N Dec. 136 (BIA 1989) (finding that the Federal offense of assault with intent to commit any felony could not be a CIMT without first considering whether the underlying crime was a CIMT). Again, the majority found the Board to have provided a rational explanation—as stated in *Lopez-Meza*, *Short* prohibited the finding of a CIMT based on the amalgamation of offenses in that case, but did not foreclose a similar analysis involving different offenses in subsequent cases.

The majority decision noted that the dissents in the instant case and in *Lopez-Meza* clearly indicated that the question is one upon which reasonable minds can disagree. However, Congress delegated the choice between reasonable interpretations of the ambiguous terms of the Act to the Attorney General and, by his delegation, to the Board and further desired that they possess "whatever degree of discretion the ambiguity allows." *Marmolejo-Campos*, 2009 WL 530950, at \*11 (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)).

*Edward R. Grant, a member of the Board of Immigration Appeals since 1998, had his bracket busted in the first round, as usual. He is grateful to Ellen C. Liebowitz for assistance in the selection process. The answer to the first trivia question is Oscar Robertson, and the answer to the second question is Wilt Chamberlain.*

## RECENT COURT DECISIONS

### ***Fourth Circuit:***

*Narine v. Holder*, \_\_ F.3d \_\_, 2009 WL 580865 (4th Cir. Mar. 9, 2009): The Fourth Circuit reversed the Board's dismissal of the respondent's appeal. The court disagreed with the Board's conclusion that the respondent had knowingly and intelligently waived his right to appeal, where former counsel had advised him of the consequences of accepting voluntary departure and then failing to depart, but not of the consequences of waiving appeal. The court further noted that the Immigration Judge did not discuss appellate options with the respondent (who was by then unrepresented and legally unsophisticated) and that it was not clear that the respondent understood the meaning of accepting a decision as "final."

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

*Diaz-Zanatta v. Holder*, \_\_ F.3d \_\_, 2009 WL 529173 (6th Cir. Mar. 4, 2009): The Sixth Circuit reversed an Immigration Judge's decision (upheld by the Board) barring from asylum eligibility an applicant who had worked as an intelligence analyst with the Peruvian military. The court found that the Immigration Judge had erred in failing to adequately consider whether there was a nexus between the intelligence provided by the respondent and the persecution of individuals by the Peruvian military. It further found that the Immigration Judge failed to properly consider whether the respondent had a contemporaneous knowledge of such persecution. The court held that in order to be barred, it must be shown that the information supplied by the respondent was actually used to persecute individuals, and that the respondent specifically knew that the information she was supplying would be used for such purpose.

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

*Ghani v. Holder*, \_\_ F.3d \_\_, 2009 WL 579247 (7th Cir. Mar. 9, 2009): The Seventh Circuit dismissed the appeal from an Immigration Judge's decision (upheld by the Board) finding him ineligible for non-LPR cancellation of removal because he was convicted of a CIMT. The court rejected the respondent's attack on the constitutionality of the conviction (due to the lack of an indictment) because (1) such argument was waived because it was not raised below; and (2) the respondent could not attack the validity of the conviction where he had pled guilty to the crime. The court also found proper the Immigration Judge's reliance on the judgment of conviction, and the determination that the respondent's offense, making a false statement to a government official, was a CIMT.

### ***Eighth Circuit:***

*Banat v. Holder*, \_\_ F.3d \_\_, 2009 WL 564958 (8th Cir. Mar. 6, 2009): The Eighth Circuit reversed an Immigration Judge's decision (affirmed by the Board) denying asylum to a Palestinian refugee residing in Lebanon. The court found improper the Immigration Judge's admission into evidence of a letter from the U.S. Department of State suggesting that a material document submitted by the applicant had been fabricated. The court found the State Department letter contained multiple layers of hearsay, and thus violated the applicant's due process rights. The court further found actual prejudice, as the Immigration Judge relied on the State Department letter in reaching an adverse credibility finding.

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

*Wakkary v. Holder*, \_\_ F.3d \_\_, 2009 WL 595579 (9th Cir. Mar. 10, 2009): The Ninth Circuit vacated the Immigration Judge's ruling (upheld by the Board) premitting the applicant's asylum application as untimely, where the application was filed just over 6 months after the expiration of the applicant's religious worker visa. In dismissing the excuse that the applicant was gathering supporting documentation for his asylum claim, the court found that the Immigration Judge failed to adequately consider whether such activity could constitute a reasonable delay under the circumstances. The court failed to find that the respondent suffered past persecution, or that there is a "pattern or practice" of persecution of ethnic Chinese Christians in Indonesia. However, the court found the Board's conclusion that its "disfavored group" analysis does not apply to applications for withholding of removal incorrect. The court did acknowledge that such analysis would have less impact on the outcome of a withholding claim than on an asylum application.

### ***Eleventh Circuit:***

*Keungne v. U.S. Att'y Gen.*, \_\_ F.3d \_\_, 2009 WL 604890 (11th Cir. Mar. 10, 2009): The Eleventh Circuit upheld the Board's determination that the respondent's conviction for criminal reckless conduct under Ga. Code Ann. § 16-5-60(b) was for a crime involving moral turpitude. Among the factors considered by the court were the statute's requirements of a sufficiently culpable mental state, and conduct grossly deviating from the standard of care expected of a reasonable person. The court also looked for guidance to precedent decisions of the Board defining CIMTs.

## BIA PRECEDENT DECISIONS

In *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), the Board considered the definition of the term “custody” as the term is used in 8 C.F.R. § 1236.1(d)(1). In this case, the Department of Homeland Security (“DHS”) released the respondent on his own recognizance provided he comply with certain conditions: appear at hearings, report to DHS on the tenth day of each month, secure permission to move, not violate any laws, assist DHS to secure travel documents, wear an electronic monitoring device on his ankle, and remain in his residence between 7:00 p.m. and 7:00 a.m. The respondent sought amelioration of the terms of release from custody from an Immigration Judge after the permitted 7 days set forth at 8 C.F.R. § 1236.1(d)(1). The Immigration Judge found that she still had jurisdiction over the request because she found that DHS had imposed a form of custody. The Immigration Judge set bond at \$1500, waived home confinement upon posting of the bond, and ordered the electronic ankle monitor removed.

The Board first reviewed the use of the term “custody” and found that the term has multiple meanings and can be interpreted differently depending upon the situation. The Board found that Congress used the terms “custody” and “detain” interchangeably in former section 242(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(1), and current section 236(a) of the Act, 8 U.S.C. § 1226(a). “Detain” generally refers to actual physical restraint or confinement within a given space, whereas “custody” has a broader meaning. Consequently, the Board found that custody in this context must mean actual physical restraint. The Federal habeas statute, which the Immigration Judge relied upon, interprets the term “custody” broadly to include restraints. The purpose of the statute, however, is to ensure that no person’s imprisonment or detention is illegal, whereas the term “custody” in the present context refers to an Immigration Judge’s review jurisdiction. The Board found that the respondent was released from custody, and the conditions placed on that release are terms of release, not custody.

In *Matter of Louissant*, 24 I&N Dec. 754 (BIA 2009), the Board found that the respondent’s conviction for burglary of an occupied building in violation of section 810.02(3)(a) of the Florida Statutes was a conviction for a crime involving moral turpitude (“CIMT”). Relying on *Matter of M-*, 2 I&N Dec. 721 (BIA, A.G. 1946), the

Immigration Judge had found that whether a burglary is a CIMT depends on whether the underlying crime the respondent intended to commit when he or she entered the building or structure involves moral turpitude. From the record of conviction, the Immigration Judge could not determine what the underlying crime was and therefore could not conclude that it involved moral turpitude. The Board applied *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2009), in finding that under the categorical analysis, there is no “realistic probability” that the Florida statute would be applied to reach conduct that does not involve moral turpitude. The Board clarified that the offense discussed in *Matter of M-*, third degree burglary pursuant to section 404 of the New York Penal Law, was not in itself a crime involving turpitude because the offense under the New York statute differed from common burglary, most notably in that it did not require entering of the dwelling house of another. In this case, the Florida offense involves unlawful entry into a dwelling, which is necessarily acting in a base, vile, or depraved manner; therefore, unlike in *Matter of M-*, the offense need not have a separate underlying CIMT to be itself considered a CIMT.

In *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009), the Board found that an Immigration Judge may order an alien detained until departure, also known as “under safeguards,” as a condition of a grant of voluntary departure. The Board reasoned that the regulation establishing the parameters of DHS’s grant of voluntary departure specifically includes the terms “continued detention” and “safeguards.” 8 C.F.R. § 240.25(b). The respondent argued that the regulations relating to Immigration Judges do not contain the express power to detain an alien without bond. Further, the regulations require the Immigration Judge to set bond, which the respondent interpreted to mean that Immigration Judges do not have the authority to order continued detention in the voluntary departure context. The Seventh Circuit considered the question in this case in the habeas context and found that 8 C.F.R. § 1240.26(c)(3) does empower Immigration Judges to grant voluntary departure with the condition that the alien remain in custody. See *Al-Siddiqi v. Achim*, 531 F.3d 490 (7th Cir. 2008). The regulation authorizes an Immigration Judge to set “such conditions as he or she deems necessary to ensure the alien’s timely departure,” which confers broad discretion on the Immigration Judges. The Board does not interpret the regulation to require bond where detention has been mandated, as this would merely be an unnecessary addition to an onerous requirement.

In *Matter of Zorilla-Vidal*, 24 I&N Dec. 768 (BIA 2009), the Board reaffirmed its precedent in *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992), in finding that a conviction for criminal solicitation under a State's general purpose solicitation statute is a conviction for a violation of a law "relating to a controlled substance" under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), where the record of conviction reflects that the crime solicited is an offense relating to a controlled substance. The Board recognized contrary authority, particularly in the Ninth Circuit Court of Appeals, and noted that *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997), should be followed in the Ninth Circuit.

## LEGISLATIVE UPDATE

**O**n March 11, 2009, President Barack Obama signed into law H.R. 1105, the "Omnibus Appropriations Act, 2009." The bill provides funding for the operation of the Federal Government through Fiscal Year 2009. It also gives special immigrant status to certain Afghans. Of particular interest to EOIR, the new law:

Provides \$267,613,000 for EOIR, \$5 million of which will be used to hire new Immigration Judges and support personnel. The bill also provides funding for EOIR's Legal Orientation Program.

Directs EOIR to submit to Congress a strategic plan to address the case backlogs.

Directs EOIR to report to Congress on its performance on the 22 measures to improve the efficiency of Immigration Courts that were identified by the Attorney General in August 2006.

Encourages EOIR to work with experts and interested parties in developing standards and materials for Immigration Judges to use in conducting competency evaluations of persons appearing before the courts.

*Fatimah A. Mateen, Counsel, Legislative and Public Affairs*

## REGULATORY UPDATE

**74 Fed Reg 14,144 (2009)**  
**DEPARTMENT OF HOMELAND SECURITY**  
**U.S. Citizenship and Immigration Services**

## Filing Procedures and Automatic Extension of Employment Authorization and Related Documentation for Liberians Provided Deferred Enforced Departure

**SUMMARY:** This Notice announces a six month automatic extension of employment authorization documents (EADs) for Liberians (and persons without nationality who last habitually resided in Liberia) for whom deferred enforced departure (DED) has been extended in accordance with the memorandum of March 20, 2009 from President Obama to the Secretary of Homeland Security, Janet Napolitano.

The memorandum directed that DED for certain Liberians be extended and that employment be authorized for 12 months from April 1, 2009, through March 31, 2010. This Notice further informs Liberians covered by DED and their employers how to determine which EADs are automatically extended. This Notice also sets forth procedures necessary for individuals who are covered by DED to file for employment authorization for the full 12-month extension with U.S. Citizenship and Immigration Services (USCIS). Finally, this Notice provides instructions for those Liberians who have been provided DED and who would like to apply for permission to travel outside the United States during the 12-month DED period.

**DATES:** This Notice is effective March 30, 2009. The six-month automatic extension of employment authorization for Liberians who are eligible for DED, including the extension of their EADs, as specified in this notice, is effective as of 12:01 a.m. April 1, 2009. This automatic extension will expire on September 30, 2009.

### EOIR Immigration Law Advisor

**Juan P. Osuna, Chairman**  
*Board of Immigration Appeals*

**Michael C. McGoings, Acting Chief Immigration Judge**  
*Office of Chief Immigration Judge*

**Jack Weil, Immigration Judge**  
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**Carolyn Elliot, Senior Legal Advisor**  
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