



# Immigration Law Advisor

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## Assistance in Persecution Under Duress: The Supreme Court's Decision in *Negusie v. Holder* and the Misplaced Reliance on *Fedorenko v. United States*

by Brigette L. Frantz

It is a difficult issue faced by the immigration courts. An individual appears in immigration court seeking asylum on account of a statutorily protected ground—race, religion, nationality, membership in a particular social group, or political opinion. The Immigration Judge hears testimony revealing that the respondent is fully credible and has, in fact, suffered persecution and appears eligible for asylum. Yet, the Immigration Judge finds that the respondent is statutorily barred from asylum in the United States based on his participation and assistance in the persecution of others. This statutory provision, more commonly referred to as the "persecutor bar," precludes the granting of asylum to anyone who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 208(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(i). The respondent asserts in his defense that any persecutory acts he committed were involuntary and the result of coercion and duress. However, relying on a long history of case law, the Immigration Judge denies relief because duress is not an exception to the persecutor bar. This issue—whether there is a duress exception to the persecutor bar—recently reached the Supreme Court in *Negusie v. Holder*, 129 S. Ct. 1159 (2009). This article will explore the history of this issue, from the incorporation of the persecutor bar into the Act through the Court's decision in *Negusie*.

The prohibition against granting asylum to any individual who persecuted another was first introduced into the Immigration and Nationality Act by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ("Refugee Act"). One primary purpose of the Refugee Act was to implement the United States obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S.

267, and the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-38 (1987). Section 201(a) of the Refugee Act excluded from the definition of a “refugee” “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” This language was incorporated into the definitional provisions of the Act at section 101(a)(42), 8 U.S.C. § 1101(a)(42), which defines the term “refugee,” as well as into the asylum provisions of the Act at section 208(b)(2)(A), which sets forth those groups of individuals who are ineligible for asylum.

The plain language of the Refugee Act does not articulate any exceptions to the persecutor bar, whether based on duress or any other factor. There is no direct provision indicating whether the bar applies only to individuals who voluntarily committed persecutory acts, or whether an alien could be exempted from the bar if he or she acted as a result of coercion or force. However, the question whether a duress exception exists has frequently been at issue in persecutor bar cases and has appeared in many forms. *See, e.g., Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005) (holding that the petitioner, a member of India’s police force, assisted in the persecution of Sikhs despite the petitioner’s claims that he was opposed to such persecution); *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003) (holding that the petitioner, a member of the Revolutionary United Front in Sierra Leone, assisted in persecution although he alleged he was forcibly recruited into the group); *see also Hajdari v. Gonzales*, 186 Fed. Appx. 565 (6th Cir. 2006) (finding that the petitioner, an Albanian prison guard, assisted in the persecution of others).

The immigration courts, the Board of Immigration Appeals, and the Federal circuit courts of appeals have all been presented with the complicated and often emotionally compelling question whether to bar an individual from asylum for having assisted in persecution under duress. These bodies have also all relied extensively on the Supreme Court’s decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), to resolve the matter. While this reliance has potentially reached its end in light of the Court’s *Negusie* decision, an understanding of *Fedorenko* is critical to any discussion of the persecutor bar and a potential duress exception. As will be discussed below,

the Court’s decision in *Fedorenko* did not directly relate to asylum. Instead, the Court granted certiorari to examine whether the circuit court had applied the appropriate test in revoking the citizenship of an individual who had served as a prison guard at a Nazi concentration camp in Treblinka, Poland. However, the Court analyzed a different persecutor bar containing wording similar to the persecutor bar to asylum found in the Act and found no basis for an “involuntary assistance” exception.

The petitioner in *Fedorenko* was conscripted into the Russian Army in 1941 and was later captured by the Germans. He was eventually trained as a concentration camp guard and assigned to Treblinka during 1942 and 1943. Fedorenko admitted that, during his time at Treblinka, he had served as a perimeter guard and had shot in the direction of inmates attempting to escape. After an uprising by the inmates at Treblinka necessitated the camp’s closure, Fedorenko was transferred to another city where he served as a warehouse guard until just before the British army arrived in 1945. Fedorenko then worked as a civilian laborer in Germany for several years before applying for a visa to the United States under the Displaced Persons Act of 1948, 62 Stat. 1009 (“DPA”). The DPA was enacted “to enable European refugees driven from their homelands by [World War II] to emigrate to the United States without regard to traditional immigration quotas.” *Fedorenko*, 449 U.S. at 495. In his visa application, Fedorenko falsely stated that he worked in a factory during the war and omitted any reference to his service as a guard. Fedorenko’s false statements were not discovered until 1977—nearly 30 years after he left Germany and 7 years after he had obtained United States citizenship.

The United States Government sought to revoke Fedorenko’s citizenship, alleging that he had fraudulently obtained his initial DPA visa, and later his citizenship, by materially misrepresenting his military service. The Government argued that Fedorenko was ineligible for his initial visa based on the definition of a “displaced person” under the DPA, which adopted the definition contained in the Constitution of the International Refugee Organization of the United Nations, Dec. 15, 1946, 62 Stat. 3037 (entered into force Aug. 20, 1948) (“IRO”). The IRO specifically excluded from the definition of “displaced persons” two distinct groups—in section 2(a) those who “assisted the enemy in persecuting civil populations” and in section 2(b) those who “voluntarily

assisted the enemy forces.” IRO Annex I, Part II, 62 Stat. at 3051-52. Relying on a witness who was an expert on the interpretation of the DPA, the Government contended that Fedorenko’s service as a Treblinka guard constituted assisting the enemy in persecution, regardless of whether his service was voluntary. Fedorenko claimed that his service was forced and that he had therefore not assisted in the persecution of the concentration camp inmates. Interestingly, the United States district court that initially heard the case entered judgment in favor of Fedorenko, in *United States v. Fedorenko*, 455 F. Supp. 893 (D.C. Fla. 1978). The court found that Fedorenko’s service as a guard was forced and he could not be found to have assisted the enemy in persecution under section 2(a) of the IRO, as incorporated into the DPA, if his actions were involuntary. Accordingly, his visa was valid and his citizenship should not be revoked.

The United States Court of Appeals for the Fifth Circuit reversed the district court’s decision without addressing the voluntary or involuntary nature of Fedorenko’s military service in *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979). It was not until the case reached the Supreme Court that the issue whether Fedorenko’s military service was voluntary was again addressed. The Court looked at the definition of displaced person in sections 2(a) and 2(b), the first of which contains no voluntariness requirement, and the second of which very specifically requires that any assistance provided be voluntary. The Court found that the district court had improperly imposed a voluntariness requirement into section 2(a), which was a misconstruction of the statutory language. The Court went on to state:

The plain language of the [DPA] mandates precisely the literal interpretation that the District Court rejected: an individual’s service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa. That Congress was perfectly capable of adopting a “voluntariness” limitation where it felt that one was necessary is plain from comparing § 2(a) with § 2(b), which excludes only those individuals who “*voluntarily* assisted the enemy forces . . . in their operations. . . .” Under traditional principles of statutory

construction, the deliberate omission of the word “voluntary” from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.

*Fedorenko*, 449 U.S. at 512.

The Court noted that the district court had a reason for reading a voluntariness requirement where one did not exist. The district court was “concerned that a literal interpretation of § 2(a) would bar ‘every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp.’” *Id.* at 511 n.33 (quoting *Fedorenko*, 455 F. Supp. at 913). However, in its now infamous footnote 34, the Court attempted to put that concern to rest by stating that the focus in situations involving persecution must be on whether the conduct constitutes *persecution*, not on whether the acts were committed voluntarily. That is, one must look to the objective effect of a person’s actions, not the individual’s motivation or intent. For instance, a person who does nothing more than cut the hair of inmates does not contribute to the inmates’ persecution, while an armed guard, who keeps prisoners in custody so that they may be subjected to future harm, certainly falls within the group of those who assist in persecution. However, the Court also noted that “other cases may present more difficult line-drawing problems” than the haircutter/prison guard comparison. *Id.* at 512 n.34. For a discussion of the difficult lines courts have had to draw, see Edward R. Grant, *Persecution and Persecutors: No Bright Lines Here*, Immigration Law Advisor, Vol. 1, No. 8 (Aug. 2007).

The Court resolved the *Fedorenko* case in 1981 by finding that Fedorenko was, as a matter of law, ineligible for his initial visa. The Court reasoned that he did not qualify as a displaced person because he assisted in persecution, given that the DPA contained no “voluntariness” exception. *Fedorenko*, 449 U.S. at 512-14. The Court ultimately held that Fedorenko’s citizenship must be revoked as illegally procured. For purposes of the persecutor bar to asylum, introduced only the year before the Court’s decision, *Fedorenko* marked not a resolution, but the beginning of a long inquiry into whether an individual’s persecutory acts may be excused if committed involuntarily or under duress. With the similarities between the DPA language at issue in *Fedorenko* and the language of the persecutor bar

to asylum in the Act, it is not surprising that the Court's decision has been so heavily relied upon by courts when addressing cases involving alleged persecutors. Yet, courts have grappled with the seemingly implacable standard set forth in *Fedorenko*—that the voluntary or involuntary nature of an individual's actions is immaterial to the question whether he assisted in persecution.

The Board adopted the Court's standard as its own in the assessment of asylum-related persecutor bar cases in *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988). There, the Board held that "[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief" and then cited to the Court's decision in *Fedorenko* to support its holding. *Id.* at 814. Prior to *Rodriguez-Majano*, the Board had relied on the *Fedorenko* standard in two other cases dealing with a persecutor bar outside of the asylum context. In *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), the Board held that section 241(a)(19) of the Act, 8 U.S.C. § 1251(a)(19), which has since been repealed, and which provided for the deportation of any person associated with the Nazi party who "ordered, incited, assisted, or otherwise participated in" persecution, did not contain an intent element. The Board rejected Laipenieks' argument that his motives should be considered. Also, in *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), a case involving the same individual as the Supreme Court's *Fedorenko* case, who was now appealing an order of deportation following the revocation of his citizenship, the Board again addressed the same persecutor bar in section 241(a)(19) of the Act. The Board reaffirmed its *Laipenieks* decision and found that the objective effect of Fedorenko's actions was that he assisted the Nazis in persecution and thus was subject to the persecutor bar.

While the Board has been fairly consistent in its cases dealing with persecutor bars, the circuit courts have differed greatly in their application of *Fedorenko* and disagree regarding the extent to which an individual's intent or voluntariness should be considered. For instance, the Fifth Circuit, the circuit in which *Fedorenko* arose, has adopted a strict adherence to the Supreme Court's holding. When addressing the persecutor bar to withholding of removal found at section 241(b)(3)(B)(i) of the Act, 8 U.S.C. § 1231(b)(3)(B)(i), which is identical to the asylum persecutor bar at section 208(b)(2)(A)(i) of the Act, the Fifth Circuit found that "the alien's personal motivation is not relevant." *Bah*, 341 F.3d at 351. On the

other end of the spectrum, the Ninth Circuit has developed a two-part test to determine whether an individual has assisted or participated in persecution. This test requires the establishment of individual accountability and an evaluation of the surrounding circumstances, taking into account whether the alleged persecutor acted in self-defense. *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004). For a full discussion on how the circuit courts have addressed the issue of voluntariness under the persecutor bar, as well as scienter and burden of proof, see Derek C. Julius, *Splitting Hairs: Burden of Proof, Voluntariness and Scienter Under the Persecutor Bar to Asylum-Based Relief*, Immigration Law Advisor, Vol. 2, No. 3 (Mar. 2008).

In *Negusie v. Holder*, 129 S. Ct. 1159, the Supreme Court recently had an opportunity to directly address the question whether duress or coercion is a legitimate exception to the persecutor bar to asylum. This opportunity presented itself in the case of Daniel Negusie, who appeared before an Immigration Judge seeking asylum from Eritrea. Negusie, a dual national of Eritrea and Ethiopia, was raised in Ethiopia until he finished school, when he moved to Eritrea in search of employment.<sup>1</sup> While in Eritrea in 1995, Negusie was conscripted into the Eritrean military. He was forced to perform hard labor for about 1 month before he was transferred to a military training facility for 6 months. After training, Negusie was assigned to a naval camp where he was trained on the use of heavy machinery guns and artillery. After serving at the naval camp for 1 year, Negusie was discharged. In 1998, war broke out between Eritrea and Ethiopia, and Negusie was conscripted into the Eritrean military for a second time. However, he refused to fight against Ethiopia because it was his other home country. For his refusal to fight, Negusie earned 2 years of imprisonment, during which time he was held in solitary confinement for approximately 6 months, beaten with sticks, and forced to roll on the ground in the hot sun.

On his release from confinement, Negusie served as a prison guard on a rotating basis for 4 years. In his position as a guard, Negusie carried a gun and guarded both the entry gate and the prisoners. He kept prisoners from taking showers and getting fresh air, as well as guarded them to keep them in the sun when they were being punished. He was also aware that some of the prisoners were subjected to torture with electricity, although he claimed he had never participated in such

torture. Negusie also stated that he sometimes tried to help the prisoners by giving them water or letting them take showers, contrary to his orders. Eventually, Negusie escaped from the prison and fled to the United States by hiding in a shipping container on a cargo ship. The Immigration Judge found that Negusie was largely credible in his testimony. Nevertheless, the Immigration Judge denied asylum and withholding of removal, finding that Negusie had assisted or otherwise participated in the persecution of others in his role as a prison guard. The Immigration Judge also specifically noted that even though “there’s no evidence to establish that [Negusie] is a malicious person or that he was an aggressive person who mistreated the prisoners,” Negusie was still barred from relief for guarding a prison where he knew prisoners were being persecuted. *Id.* at 1163 (quoting the Immigration Judge’s decision). Notably, the Immigration Judge cited to the Court’s *Fedorenko* decision in arriving at this conclusion.

Negusie appealed to the Board, which affirmed the Immigration Judge’s decision. The Board found that the issue whether Negusie’s actions were compelled was immaterial to the determination whether he was a persecutor and that the objective effect of his actions was controlling. This ruling was based on the Board’s earlier decisions in *Fedorenko*, *Rodriguez-Majano*, and *Laipeeniks*, which, as discussed above, were based in turn on the Court’s decision in *Fedorenko*. *See id.* at 1163, 1166 (discussing the Board’s decision). The next stop for Negusie on his long road to the Supreme Court was the Fifth Circuit. In a brief, unpublished decision, the Fifth Circuit upheld the Board’s decision, finding that Negusie was a persecutor of others, regardless of whether his actions were voluntary. *See Negusie v. Gonzales*, 231 Fed. Appx. 325 (5th Cir. 2007). The court held that “the question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities’ intentions.” *Id.* at 326.

Negusie appealed his case to the Supreme Court, which granted certiorari on March 17, 2008. The question presented to the Court was whether the persecutor bar contains an exception for those who were compelled against their will to participate in persecutory acts. *See* Brief for Petitioner, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2445504, at \*i; Brief for the Respondent, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 3851621, at \*I. Both

parties in this case presented arguments that the Court described as having “substance.” *Negusie*, 129 S. Ct. at 1164. The Government argued that the plain language of the persecutor bar is not ambiguous and “contains no state-of-mind requirement and no duress exception,” and that the Court’s decision in *Fedorenko* supported this conclusion. Brief for the Respondent, *supra*, at \*8. Further, according to the Government, Congress had repeatedly enacted persecutor bars similar to the bar applicable to asylum, and none contained any motivation-based exception. The Government also argued that Congress was capable of including a voluntariness requirement if it wished, as evidenced by numerous other provisions in the Act that specifically require voluntary conduct and excuse involuntary conduct. *Id.* at 22; *see also* section 212(a)(3)(D)(ii) of the Act, 8 U.S.C. § 1182(a)(3)(D)(ii) (providing an involuntariness exception to inadmissibility for membership in a totalitarian party); section 208(c)(2)(D) of the Act (providing for termination of asylum if an alien has “voluntarily” availed himself of the protection of his home country)). Finally, the Government stated that a strict plain-text application of the statute was reasonable given the United States obligations to both protect refugees and exclude undesirable aliens from asylum protection.

The petitioner’s arguments also focused on what he alleged was the unambiguous plain language of the persecutor bar statute. However, he claimed that the “critical term” was “persecution,” which requires an assessment of the actor’s state of mind and whether it meets “a standard of moral offensiveness.” Brief for Petitioner, *supra*, at \*19. The petitioner argued that acts committed under threat of death or serious injury are not motivated by a voluntary choice and thus are not so morally offensive as to be considered persecution. Accordingly, an actor’s state of mind and other relevant facts must be considered, not simply the objective result of the acts. Further, the petitioner contended that *Fedorenko*, which the Government argued was applicable, should not be relied upon because it dealt with different statutory language, which was implemented to deal with a specific class of refugees.

Briefs were filed in support of Negusie by several organizations and individuals as amici curiae, including the Office of the United Nations High Commissioner

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR APRIL 2009

*by John Guendelsberger*

The United States courts of appeals issued 433 decisions in April 2009 in cases appealed from the Board. The courts affirmed the Board in 382 cases and reversed or remanded in 51 for an overall reversal rate of 11.8%. The Ninth Circuit issued 40% of the decisions and 70% of the reversals. There were no reversals from the Fourth, Fifth, Seventh, and Eighth Circuits.

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

Circuit	Total	Affirmed	Reversed	%
1st	4	3	1	25.0
2nd	129	121	8	6.2
3rd	20	19	1	5.0
4th	19	19	0	0.0
5th	22	22	0	0.0
6th	13	10	3	23.1
7th	7	7	0	0.0
8th	6	6	0	0.0
9th	174	138	36	20.7
10th	3	2	1	33.3
11th	36	35	1	2.8
<b>All:</b>	<b>433</b>	<b>382</b>	<b>51</b>	<b>11.8</b>

The 36 reversals in the Ninth Circuit included 6 adverse credibility determinations in asylum cases. Five cases were reversed under *Cui v. Mukasey*, 538 F.3d 1289 (9th Cir. 2008), for abuse of discretion in denying a continuance to complete fingerprinting or background checks. The court also remanded in seven cases involving various criminal grounds of removal after finding that the categorical or modified categorical approach had been misapplied. Several other reversals involved remands to consider evidence overlooked or arguments not fully addressed by the Board.

The Second Circuit reversed in only eight cases. These included a credibility determination, two frivolousness findings, a persecutor bar issue, and a case in which “other resistance” to family planning policy had not been addressed. The other reversals involved a motion to reopen for adjustment of status, a case in

which the briefing schedule was sent to an incorrect address, and the moral turpitude ground for removal.

Two of the three decisions from the Sixth Circuit found that the Board had not considered all relevant factors in denying a motion to reopen an in absentia order of removal based on lack of notice. The third involved the moral turpitude ground for removal and divisibility.

The chart below shows the combined numbers for the first 4 months of 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
3rd	93	76	17	18.3
9th	739	637	102	13.8
6th	55	48	7	12.7
8th	22	20	2	9.1
10th	12	11	1	8.3
2nd	421	393	28	6.7
7th	30	28	2	6.7
11th	112	106	6	5.4
5th	76	72	4	5.3
1st	23	22	1	4.3
4th	65	64	1	1.5
<b>All:</b>	<b>1649</b>	<b>1478</b>	<b>171</b>	<b>10.4</b>

Last year at this point there were 1643 total decisions and 227 reversals for a 13.8% overall reversal rate.

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### **Marital Rites: Recent Court Decisions on Visa Eligibility, Waivers, and Marriage Fraud**

*by Edward R. Grant*

No offense to those tying the knot this month, but “June weddings” may be overrated. It’s impossible to get reservations, the prices are premium, the good cover bands are spoken for—and who wants to don a woolen tuxedo in the blazing sun?

Marriage, and time, lately seem on the mind of some Federal courts of appeals. Three circuits have addressed one of the more poignant questions in immigration law: whether the death of a citizen spouse within 2 years of marriage should, as the Immigration and Nationality Act seems to dictate, void the visa petition filed by the deceased on behalf of his or her spouse. Other cases have addressed the issues of marriage fraud and good-faith waivers.

### **When Is A Spouse Still a “Spouse”?: The 2-Year Rule Revisited**

Marriage is a legitimate topic for levity; widowhood decidedly is not. It is the latter that provokes one of the more poignant scenarios in immigration law: an alien marries a United States citizen in good faith, only to lose the opportunity to immigrate on the basis of that marriage because the citizen spouse dies within 2 years of the marriage or because the alien fails to file a widow self-petition within 2 years of the spouse’s death. See section 201(b)(2)(A)(i) of the Act (hereinafter “definition of immediate relative”). Consistent with the statutory and regulatory provisions governing all visa petitions, a spousal petition is adjudicated on the basis of the facts extant at the time of adjudication, not at the time of the filing of the petition. See *Shaikhs v. INS*, 181 F.3d 823 (7th Cir. 1999) (finding that an alien who divorced a month prior to entering the United States lacked valid lawful permanent resident status). Thus, the death of the citizen spouse bars favorable consideration of a visa petition pending at the time of death. See *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970) (finding that an alien spouse is no longer a “spouse” for purposes of the Act if the petitioning spouse died before adjudication of an I-130). But see *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985) (holding that the Board lacks jurisdiction over an appeal by a widowed beneficiary claiming that she should retain status as a “spouse” for purposes of her pending visa petition).

The immediate relative definition, as amended by the Immigration Act of 1990, provides some measure of amelioration for widowed spouses of citizens. (Significantly, no parallel provision exists for the alien spouses of lawful permanent residents.) If they have been the spouse of a citizen for at least 2 years, if they were not separated at the time of death, if they file a self-petition within 2 years after the spouse’s death, and if they remain unmarried, they can retain their immediate relative status and be

granted an immigrant visa. This can be accomplished by filing an I-360 self-petition. In addition, a spousal I-130 petition pending at the time of death will convert to an I-360 petition, provided the other conditions—most importantly the 2-year marriage requirement—are met.

This remained the settled legal posture until April 2006, when the Ninth Circuit held that the beneficiary of a visa petition filed by a citizen spouse remained an “immediate relative,” notwithstanding the fact that her citizen spouse died within 2 years of marriage. *Freeman v. Gonzales*, 444 F.3d 1031, 1037-40 (9th Cir. 2006). The court held that the language in the *first* sentence of the definition of immediate relative is plain: the term “immediate relative” includes the spouse of a United States citizen, and nothing in the provision states that such status terminates upon the death of the citizen spouse. An alien in such unfortunate circumstances remains a *surviving* spouse and, contrary to the Board’s decision in *Matter of Varela*, remains eligible for an immigrant visa on the basis of the petition pending at the time of death. *Id.* at 1038-39 (giving limited deference to *Matter of Varela* due to the subsequent ruling in *Matter of Sano* that the Board lacks jurisdiction over beneficiary appeals).

*Freeman* stated that the *second* sentence of the immediate relative definition—including the conditions stated above—applies only to those circumstances where the citizen spouse had failed to file a visa petition before the time of death, and it thus preserved the right of certain bereaved spouses to self-petition. *Freeman*, 444 F.3d at 1041. Further, had the petition in question been granted before the death of the citizen spouse, the alien’s conditional status as a lawful permanent resident would not have been affected by that death. *Id.* at 1042; see also section 216(b)(1)(A)(ii) of the Act (providing that conditional status terminates if the marriage terminates, other than through the death of the spouse).

Three circuits have recently addressed the issue raised by *Freeman*. The Third Circuit rejected the Ninth Circuit’s analysis, finding that one’s status as a “spouse” is determined not at the time a visa petition is filed, but rather at the time it is adjudicated. In making that determination, the first and second sentences of the immediate relative definition could not be “divorced.” *Robinson v. Napolitano*, 554 F.3d 358, 364 (3d Cir. 2009). The second sentence “qualifies” the definition of a “spouse,” and its requirements for self-petition apply equally to those with visa petitions pending, and those not,

at the time of the spouse's death. The court also rejected the claim that the term "surviving spouse" equates with the term "spouse," and that the latter applies exclusively when one's partner is still alive. Marriage, in other words, is "until death do us part"—and it does terminate upon death. *Id.* at 366. The second sentence of the immediate relative definition—adopted after *Matter of Varela* in the Immigration Act of 1990—provides for a continuation of immediate relative status beyond the termination of marriage by death, but only under specified conditions. *Id.*

The Sixth and First Circuits, however, rejected *Robinson* and followed *Freeman*, holding that the "common, ordinary meaning" of the term "spouse" includes a "surviving spouse." *Neang Chea Taing v. Napolitano*, \_\_\_F.3d\_\_\_, 2009 WL 1395836 (1st Cir. May 20, 2009) ("Taing"); *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. 2009). *Lockhart* presented perhaps the most difficult factual circumstance of these three recent cases—the spouses had been married 23 months at the time of the husband's sudden death from a heart attack. (The marriages in *Robinson* and *Taing* were each for less than a year at the time of death.) *Lockhart* and *Taing* both relied heavily on *Freeman*. Both also addressed an additional argument not presented in *Freeman*: the Government's contention that the definition of a "spouse" in the Defense of Marriage Act ("DOMA") precluded recognition of spousal status beyond death. Both courts rejected the DOMA on grounds that it was intended not to define when a marriage began or ended, but only to provide that for purposes of Federal law, a "spouse" must be a person of the opposite sex.

Three aspects of the "*Freeman* rule" deserve closer attention. First is the assertion that the "common, ordinary meaning" of the term "spouse" includes one who has been widowed. The assertion does not seem self-evident. *Lockhart* acknowledged that under the law of Ohio (where the beneficiary resided), marriage terminates upon the death of one of the parties. However, it held that State law could not be incorporated when doing so "would frustrate a federal statute's purposes." *Lockhart*, 561 F.3d at 619. Since it was the clear intent of Congress to include a "surviving spouse" as a "spouse" in the immediate relative definition, that intent must prevail. *Id.* However, in discerning this "clear intent," both *Lockhart* and *Taing* relied upon a source—*Black's Law Dictionary*—that is neither unambiguous nor comprehensive. Earlier editions of *Black's*, through the fifth edition, defined

"spouse" and "surviving spouse" under two entirely separate entries. Beginning with the 1990 edition (sixth) and continuing through the present edition (eighth), the word "spouse" is accorded a primary entry, defined as "one's husband or wife by lawful marriage." "Surviving spouse" is accorded a subordinate entry, under the definition for "spouse." However, this appears to be an editorial convention adopted for the convenience of the reader, not a determination that "surviving spouse" and "spouse" are interchangeable terms. ("Surviving spouse" is defined as a spouse "who outlives the other" spouse.) See *Taing*, 2009 WL 1395836 at \*6; *Lockhart*, 561 F.3d at 618 (both discussing *Black's Law Dictionary* definitions). Similar examples abound in *Black's*, where terms such as "owner" and "option" have multiple subordinate entries that were given their own separate entries in older editions. In addition, the brief definitions in *Black's* do not fully reflect the complex legal landscape regarding the status of a "surviving spouse" or speak to the particularities of immigration law.

The second issue is the courts' bifurcation of the immediate relative definition. The legislative history is clear. When the Board decided *Matter of Varela* and *Matter of Sano*, the definition of an "immediate relative" referred, in pertinent part, solely to a "spouse." The amendment in the Immigration Act of 1990 adding the provision for widow petitions adopted the "two-year" window already established in numerous provisions of the Act related to marital petitions (largely as a result of the Immigration Marriage Fraud Amendments adopted in 1986). The courts seemed to lack a clear understanding of how these provisions interrelate. An example is the consistent use of the present tense in sections 204 and 205 of the Act and the consistent practice, based on this language, that visa petitions are based on the status of the relationship at the time of adjudication, not the time of filing. Thus, the Sixth Circuit incongruously stated: "[W]e observe that those provisions relate to visa petitions, not Form I-130 petitions. Therefore, it is not entirely clear that even if facts must be true at the time visa petitions are adjudicated, the same is true of Form I-130 petitions." *Lockhart*, 561 F.3d at 620 (emphasis added). Since an "I-130 petition" is a "visa petition," see 8 C.F.R. § 204.1(a)(1), the court's point is not clear.

The First Circuit did not repeat this particular analysis, but did follow *Lockhart's* conclusion that the "automatic revocation" provision in the regulations does not apply to *pending* immediate relative petitions.

8 C.F.R. § 205.1(a)(3)(i)(C) (providing that an approved visa petition terminates upon the death of a petitioner, with an exception for approved I-730 widow petitions); *Taing*, 2009 WL 1395836 at \*8-9; *Lockhart*, 561 F.3d at 621. The rationale given—that a provision for automatic termination of an *approved* petition is irrelevant to consideration of the status of a *pending* petition—raises more questions than it resolves. The automatic revocation presupposes that a pending petition cannot be *granted* if the petitioner has died—otherwise, what is the justification for automatic revocation if the petitioner dies after approval of the petition, but before lawful permanent resident status is conferred? Moreover, should the Department of Homeland Security (“DHS”) follow the court’s ruling and approve the visa petition pending at the citizen spouse’s death, would that approval then be subject to automatic revocation? Equally important, would the alien then be eligible to adjust status? These questions are not directly addressed in *Freeman*, *Lockhart*, or *Taing*.

A final point concerns the Board’s jurisdiction to address the issues (and the circuit split) raised by these three decisions—or more to the point, the Board’s lack of jurisdiction. *Matter of Sano* and other cases confirm that the Board lacks jurisdiction over a “beneficiary appeal.” However, there is no other direct avenue for the Board to review the issues now presented. Thus, as occurred in both *Lockhart* and *Taing*, the issue will go directly from DHS (U.S. Citizenship and Immigration Services) to review in Federal district court and thence to the court of appeals. Beyond the dated decision in *Matter of Varela* (which, of course, takes no account of the numerous statutory and regulatory provisions regarding marriages enacted since 1970), there is no binding agency precedent for future courts to consider and perhaps to accord deference.

Taken together then, *Freeman*, *Lockhart*, and *Taing* establish a formidable beachhead against the traditional understanding of the “two-year marriage” requirement in the immediate relative definition. Absent further clarification by the Board, it will be up to the regulators at DHS and the Department of Justice—or perhaps Congress—to resolve the split that now exists among the circuits. These “beachhead” cases clearly assume that it was the intent of Congress not to deny benefits to those aliens whose citizen spouses died before a spousal visa petition could be approved. See *Taing*, 2009 WL 1395836 at \*10 (“We do not believe Congress intended for the speed at which immigration authorities attend to a

pending application to be dispositive in determining when a surviving spouse like Mrs. Taing, who has diligently followed the rules, can qualify as an ‘immediate relative.’ . . . [T]he result the government seeks ‘would create[] an arbitrary, irrational, and inequitable outcome in which approvable petitions will be treated differently depending solely on when the government grants the approval.’” (quoting *Lockhart*, 561 F.3d at 620)). Given the strength of this appeal to congressional intent and issues of policy, it is likely that Congress alone will be able to provide further binding resolution of this issue.

### **Marriage Fraud and Good-Faith Waivers: Two Compelling Narratives**

Marriage fraud cases present some of the more interesting factual tangles for Immigration Judges and the Board to unravel. Two recent circuit decisions offer prime examples. *Ibrahimi v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1393761 (8th Cir. May 20, 2009); *Ogbolumani v. Napolitano*, 557 F.3d 729 (7th Cir. 2009).

*Ibrahimi* held that the Board did not err in refusing to grant a “good-faith” waiver under section 216(c)(4) of the Act to the former spouse of the United States citizen whose conditional lawful permanent resident status was terminated due to their divorce, despite the fact that the parties resided together and their marriage produced a child. These factors, the court held, did not overcome contrary evidence that the alien did not enter the marriage in good faith. The Eighth Circuit held that it had de novo authority to address the legal question whether the alien entered the marriage in good faith, as this is a question of statutory eligibility for the waiver. But the court also found that it did not have authority to “reevaluate the relative strength of the evidence” reviewed by the Board. *Ibrahimi*, 2009 WL 1393761 at \*4, \*6. In fact, the extent of the jurisdiction of the court of appeals to review the denial of a section 216(c)(4) waiver is not settled. See *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1143 (9th Cir. 2005) (“[W]e are generally free to review BIA decisions that marriages were not entered into in good faith . . . .”); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 161 (3d Cir. 2004) (finding no jurisdiction on issues of credibility and weight given to the evidence); see also *Cho v. Gonzales*, 404 F.3d 96, 101-02 (1st Cir. 2005) (declining to extend *Urena-Tavarez* to the ultimate question of eligibility, but applying a “substantial evidence” standard to whether evidence supported the Board’s legal determination).

The facts in *Ibrahimi* had the makings of a soap opera. Ibrahimi arrived from Tunisia in May 2000 and soon began dating a United States citizen, Urgento, eventually living with her and proposing marriage. She refused the proposal and broke up with him on Christmas Day 2001. Three days later, Ibrahimi met another woman, Kohring, in a bar. Perhaps not quite over Urgento, he simultaneously moved in with Kohring after this first date but also called Urgento to see if she would renew their relationship. Urgento refused, whereupon Ibrahimi married Kohring—on January 17, just 20 days after their first meeting at the bar. It is undisputed that the two resided together, had joint bank accounts and health insurance, and became parents of a son. Nevertheless, the Board found Ibrahimi ineligible for the good-faith waiver because the evidence—including the brevity of the courtship, the timing of the break-up with Urgento and the attempted reconciliation, and Ibrahimi’s past threats to leave Urgento if she did not marry him—all indicated that Ibrahimi’s intent at the time of the marriage was other than to establish a good-faith marriage. The Eighth Circuit agreed, finding that Ibrahimi had not met his burden to establish that the marriage was entered in good faith.

The burden of proof may have been a decisive factor in this case. A request for a waiver under section 216(c)(4)(B)—applicable when an alien has failed to meet the requirement, through no fault of his own—to file a joint petition for removal of his conditional resident status mandates that the respondent establish the facts supporting his eligibility. See *Oropeza-Wong*, 406 F.3d at 1148-49 (finding that the Board’s determination that the alien did not meet the burden of proof to establish a good-faith marriage was supported by substantial evidence). Had the procedural posture of the case been different—if, for example, DHS had relied on adverse information provided by Urgento to affirmatively terminate Ibrahimi’s conditional resident status while he was still married to Kohring, the Government would have had the burden of proof in future proceedings on that issue. See sections 216(b)(2), (c)(3)(D) of the Act (both assigning the burden of proof to the Attorney General).

The burden of proof to bar approval of a visa petition on grounds of a prior fraudulent marriage always rests with the Government. Section 204(c) of the Act; *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *Ogbolumani*, decided recently by the Seventh Circuit,

found that burden rather easily met. A field investigation into the alien’s first marriage revealed evidence that he paid \$5,000 to his wife, that his wife’s relatives knew nothing of the marriage, and that his tax and insurance records at work listed him as “single.” His wife told investigators that she had received money, as well as the promise of having her school tuition paid. The alien himself admitted, “I felt I had no other way to obtain my immigration benefits. I did what I felt I had to do. You are intelligent investigators and basically have my head on a platter. However, I can’t bring myself to ‘mouth’ the words that will destroy any remaining hope I may have.” *Ogbolumani*, 557 F.3d at 732.

All this took place against the backdrop of the alien’s *second* marriage to a United States citizen—the first, fraudulent marriage having ended in divorce. The alien’s second wife filed a visa petition. In response to a notice of intent to deny, the new petitioner submitted a response alleging that the first marriage was legitimate. This was understandably rejected, and the visa petition was denied. The Board affirmed in a summary decision. Rejecting a number of substantive and procedural arguments, the Seventh Circuit held that the prior marriage fraud had been easily established (the alien’s “own words wreak considerable havoc to his cause,” *id.* at 733), that the parties had been put on adequate notice of the basis for denial of the visa petition, and that there was no error in relying on hearsay evidence from the family of the first wife.

The court could not, however, overlook the impact of the decision it was “constrained” to make. *Id.* at 736. “[N]obody has questioned the legitimacy” of the alien’s current marriage, the opinion concluded, and “we encourage . . . the government to take a fresh look at [the alien] . . . and consider all its options before seeking his deportation. If there is some way [his] grave error in judgment in connection with [his first wife] can be forgiven (even the movie *Green Card* . . . involved true love), we urge the government to consider doing so.” *Id.* When it comes to cases involving marriage fraud, fact may often be stranger than fiction. *The Proposal* (release date June 19), in which a pushy boss (Sandra Bullock) forces her young assistant to marry her so that she can retain her visa status and avoid deportation to Canada, may be coming to a theater or immigration court near you.

*Edward R. Grant, a Board Member since January 1998, is blissfully married.*

## Ninth Circuit Reasserts Itself on “Imputed” Residence and Presence

by Edward R. Grant

Relying on the Supreme Court’s decision in *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the Board has invoked its authority to issue statutory interpretations contrary to circuit court precedent in a number of cases, including *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), and *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008) (declining to follow *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), on the issue of imputation of lawful admission and residence to an unemancipated minor to fulfill the eligibility conditions of section 240A(a)(2) of the Act.

The Ninth Circuit has pushed back. In *Escobar v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 1459441 (9th Cir. May 27, 2009), the court reversed *Matter of Escobar*, in which the Board found that a parent’s lawful permanent resident status could not be imputed to a child for purposes of calculating the 5 years of lawful permanent resident status under section 240A(a)(1) of the Act. *Matter of Escobar* had declined to follow the reasoning in *Cuevas-Gaspar*. In addition to reversing *Escobar*, the Ninth Circuit strongly criticized *Ramirez-Vargas*, finding that the Board did not properly apply a *Brand X* analysis to override circuit precedent. The court found that the holding, reasoning, and logic of *Cuevas-Gaspar* applied equally to the resident status requirements of both sections 240A(a)(1) and (2) of the Act, and thus imputation of the custodial parent’s status to the minor is compelled. The court in *Escobar* declined to apply *Chevron* deference to *Matter of Escobar* because it had previously (in *Cuevas-Gaspar*) applied *Chevron* and found the Board’s interpretation of section 240A(a) unreasonable; *Matter of Escobar* was therefore not deemed to be a “new” interpretation of section 240A(a), but was rather the same “unreasonable interpretation” rejected in *Cuevas-Gaspar*. The court explained that this was not a proper *Brand X* scenario, as no case law has suggested that an agency may resurrect a statutory interpretation of a statute that a circuit court has foreclosed by rejecting it as unreasonable at *Chevron*’s second step.

A companion decision, *Barrios v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 1459484 (9th Cir. May 27, 2009), held that a minor who seeks NACARA relief (special rule cancellation of removal) as a derivative must personally satisfy the Act’s

requirement of 7 years of continual presence and cannot impute it from a parent.

*Edward R. Grant is grateful to Ellen C. Liebowitz for editorial and research assistance with this article.*

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### RECENT COURT DECISIONS

#### **First Circuit:**

*Tawadrous v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 1259391 (1st Cir. May 7, 2009): The First Circuit dismissed the appeal from the Board’s denial of a motion to reopen. The respondent, an Coptic Christian from Egypt, sought reopening of his asylum application based on a letter from his father stating that a “death sentence” awaited him in Egypt. He claimed that the letter was new and previously unavailable because the father (out of fear of the Egyptian Government) would not send it until he found a messenger promising to deliver the letter by hand. The Board denied the motion as untimely, finding no changed country conditions, and further cited the respondent’s failure to document the manner of delivery to establish that the evidence was previously unavailable. A subsequent motion to reconsider was also denied by the Board. The court found it lacked jurisdiction to review denial of the motion to reconsider, as the respondent failed to file a petition for review challenging that decision. As to the motion to reopen, the court found the father’s letter “neither material nor novel,” as it merely reiterated the hearing testimony without rehabilitating the respondent’s credibility or documenting changed country conditions.

#### **Second Circuit:**

*Mendez v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 1259078 (2d Cir. May 8, 2009): The Second Circuit granted a petition challenging the Immigration Judge’s denial of non-LPR cancellation of removal. The court first determined that cancellation applications require a two-step adjudication process: first to determine eligibility, and then to determine whether relief should be granted or denied. The court found that while legislation denied them jurisdiction to review discretionary grants or denials, they retained jurisdiction to review determinations regarding eligibility. The court found flawed fact-finding in the Immigration Judge’s failure to properly consider medical evidence relating to hardship to the respondent’s United States citizen son and remanded for proper consideration of such evidence.

**Fourth Circuit:**

*Midi v. Holder*, \_\_F.3d\_\_, 2009 WL 1298651 (4th Cir. May 12, 2009): The Fourth Circuit denied the appeal from a decision of the Board holding that the Child Status Protection Act (“CSPA”) does not apply to applications for relief under the Haitian Refugee Immigration Fairness Act (“HRIFA”). The court determined that it had jurisdiction to consider the question. Finding no mention in the language of the CSPA referencing HRIFA, the court found it must defer to the agency’s interpretation, which it found to be reasonable. The court further found that the respondent had “not demonstrated that Congress had no possible rational basis for denying CSPA protection to HRIFA applicants.”

**Eighth Circuit:**

*Cubillos v. Holder*, \_\_F.3d\_\_, 2009 WL 1288671 (8th Cir. May 12, 2009): The Eighth Circuit dismissed the appeal of the Board’s decision reversing an Immigration Judge’s grant of asylum. The court upheld the Board’s determination that four anonymous threats received by the respondent (two by telephone and two by letter) over a 4-year period did not rise to the level of past persecution or give rise to a well-founded fear of future persecution. The court further dismissed the respondent’s argument that the Board exceeded the scope of its authority and engaged in impermissible fact-finding in reversing the asylum grant. The court noted that the Board adopted the Immigration Judge’s credibility finding. It further found that the applicable regulations state that the “clearly erroneous” standard does not apply to legal determinations, including those concerning “whether the record facts established persecution.”

*Ibrahimi v. Holder*, \_\_F.3d\_\_, 2009 WL 1393761 (8th Cir. May 20, 2009): The court dismissed the appeal from the Board’s decision denying the respondent’s application for a good faith waiver of the spousal joint-filing requirement to remove the condition on his LPR status. In spite of the proffer of evidence of shared family life, including proof of joint residence, bank accounts, and health insurance, the Board concluded that the respondent had not established a good-faith intent at the time of marriage. The court found no error in such finding. It also upheld the Board’s determination that the respondent bore the burden of proving such good-faith intent. The court found that it lacked jurisdiction to consider the respondent’s due process arguments because the respondent lacked “a liberty interest in obtaining discretionary relief from removal.”

**Ninth Circuit:**

*United States v. Heron-Salinas*, \_\_F.3d\_\_, 2009 WL 1395670 (9th Cir. May 20, 2009): In a criminal case, the Ninth Circuit dismissed the appeal from a district court’s denial of the appellant’s motion to dismiss his indictment for attempted entry into the United States after deportation. The appellant argued that his underlying deportation was invalid, asserting that his California conviction for assault with a firearm was not for a crime of violence. The court disagreed, holding that the conviction was categorically for a crime of violence, and therefore an aggravated felony, for immigration purposes.

**Eleventh Circuit:**

*Kueviakoe v. U.S. Att’y Gen.*, \_\_F.3d\_\_, 2009 WL 1298537 (11th Cir. May 12, 2009): The Eleventh Circuit granted the respondent’s petition and reversed the adverse credibility finding of an Immigration Judge in an asylum claim governed by the REAL ID Act amendments regarding credibility determinations. The Immigration Judge relied on three perceived inconsistencies in reaching his credibility finding. The Board affirmed, finding no clear error. The court ruled that the record compelled reversal, as no reasonable fact-finder could conclude from the record that the inconsistencies cited were, in fact, inconsistencies. The record was remanded for further proceedings.

**BIA PRECEDENT DECISIONS**

**I**n a plurality decision, the en banc Board found that a pending late-reinstated appeal of a criminal conviction, filed pursuant to section 460.30 of the New York Criminal Procedure Law, does not undermine the finality of the conviction for purposes of the immigration laws in *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009). The respondent, who was admitted as a lawful permanent resident on June 26, 1996, was convicted of first degree burglary on October 11, 2007. The respondent did not file an appeal within the 30-day deadline provided by New York Criminal Procedure Law and was placed in removal proceedings. He was found removable by an Immigration Judge and did not appeal. In a motion dated August 15, 2008, the respondent requested that the New York criminal court grant him permission to file an appeal out of time, which was granted. The respondent subsequently filed a motion to reopen with the Immigration Judge, who denied the motion, finding that the conviction remained final and valid for immigration purposes.

The Department of Homeland Security urged the Board to find that section 322(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 (“IIRIRA”), which set forth the definition of the term “conviction,” disturbed the longstanding rule that a conviction is not final for immigration purposes until direct appeal has been exhausted or waived, which was noted in *Matter of Ozkok*, 19 I&N Dec. 546, 552 n.7 (BIA 1998). The Board found that it need not reach that issue because a late-reinstated appeal is not a direct appeal. The Board first pointed out there was no understanding regarding late-reinstated appeals prior to the IIRIRA. Congress adopted the Board’s definition of the term “conviction” set forth in *Matter of Ozkok* with the important exception of deferred adjudication proceedings, which Congress eliminated. Congress was concerned with the indeterminate nature of such proceedings. Under the New York statute at issue here, the resolution of a motion to file a late-filed appeal has no time limits and can involve complicated procedures, adding a layer of uncertainty and delay far beyond that of a traditional appeal. Congress also intended to prevent the immigration laws from being dependent on the vagaries of State law when it defined the term “conviction.”

The Board considered the question whether a stepchild relationship can be the basis for derivative citizenship under section 320(a) of the Immigration and Nationality Act, 8 U.S.C. § 1431(a) (2006), in *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009). The language of section 101(c) of the Act, 8 U.S.C. § 1101(c), which defines the terms “child,” “parent,” “father,” and “mother,” is silent as to stepchild or stepparent relationships. In concluding that a stepchild relationship will not support derivative citizenship, the Board first noted that section 101(c) defines these terms in the citizenship context, whereas other sections define the term for other contexts. Sections 101(b)(1)(B) and (2) of the Act, 8 U.S.C. §§ 101(b)(1)(B) and (2), define the term “child” to include a stepchild. Under principles of statutory construction, a negative inference may be drawn from the inclusion in one section and not in the other. Moreover, Congress demonstrated that it could make its intentions clear in this respect. The Board found further support in legislative history and observed that the DHS’s United States Citizenship and Immigration Services has formally taken this position.

#### 74 Fed. Reg. 23,226 (2009)

DEPARTMENT OF STATE

#### **In the Matter of the Review of the Designation of Revolutionary Organization 17 November, as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (“INA”), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2003 redesignation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation. Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. This determination shall be published in the Federal Register.

James B. Steinberg,

Deputy Secretary of State, Department of State.

#### 74 Fed. Reg. 23,226 (2009)

DEPARTMENT OF STATE

#### **In the Matter of the Designation of Revolutionary Struggle aka Epanastatikos Aghonas as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter “INA”) (8 U.S.C. 1189), exist with respect to Revolutionary Struggle (aka Epanastatikos Aghonas). Therefore, I hereby designate that organization and its alias as a foreign terrorist organization pursuant to section

219 of the INA. This determination shall be published in the Federal Register.

Hillary Rodham Clinton,  
Secretary of State, Department of State.

**74 Fed. Reg. 23,226 (2009)**  
DEPARTMENT OF STATE

**In the Matter of the Designation of Revolutionary Nuclei, a.k.a. Revolutionary Cells a.k.a. ELA a.k.a. Epanastatiki Pirines a.k.a. Epanastatikos Laikos Agonas a.k.a. June 78 a.k.a. Liberation Struggle a.k.a. Organization of Revolutionary Internationalist Solidarity a.k.a. Popular Revolutionary Struggle a.k.a. Revolutionary People's Struggle a.k.a. Revolutionary Popular Struggle as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Records assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2003 redesignation of Revolutionary Nuclei as a foreign terrorist organization have changed in such a manner as to warrant a revocation of the designation. Therefore, I hereby revoke the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189). This determination shall be published in the Federal Register.

Hillary Rodham Clinton,  
Secretary of State, Department of State.

**74 Fed. Reg. 24,891 (2009)**  
DEPARTMENT OF STATE

**In the Matter of the Review of the Designation of Abu Nidal Organization Movement (ANO) and Palestinian Liberation Front—Abu Abbas Faction (PLF) and All Designated Aliases, as Foreign Terrorist Organizations Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2003 redesignation of the aforementioned organizations as foreign terrorist organizations have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designations. Therefore, I hereby determine that the designations of the aforementioned organizations as foreign terrorist organizations, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. This determination shall be published in the Federal Register.

James B. Steinberg,  
Deputy Secretary of State, Department of State.

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**Assistance in Persecution *continued***

for Refugees, Human Rights First, Human Rights Watch, and scholars of international refugee law. These briefs resoundingly agreed that an individual's personal culpability and intent—and thus whether he acted voluntarily—must be established before he can be subjected to the persecutor bar. *See, e.g.*, Brief for Scholars of International Law as Amici Curiae in Support of Petitioner, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2550611; Brief of Amici Curiae Human Rights First et al. in Support of Petitioner, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2597010. It was also alleged that failing to consider Negusie's intent and whether his actions were voluntary was "[i]n contravention of [the] United States' international obligations." Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2550609, at \*5.

With the briefs submitted, the Court heard oral arguments in Negusie's case on November 5, 2008. The stage was then set for the Court to resolve the issue whether there is a duress exception to the persecutor bar, and the immigration community waited with great anticipation for such a resolution. However, when the Court issued its

relatively brief decision on March 3, 2009, a firm resolution was not delivered. In a 6-to-3 opinion which garnered a concurring opinion, a dissenting opinion, and an opinion both concurring and dissenting, the Court did not decide whether there is a duress exception to the persecutor bar. Rather, the Court held that while the persecutor bar in the Act is ambiguous and the Board is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it interprets ambiguous portions of the Act, the Board had misapplied the Court's holding in *Fedorenko* as controlling in its interpretation of the statute. Accordingly, the Board had not actually exercised its interpretive authority and thus the Court could not review the agency's decision to determine if it was owed *Chevron* deference. Because the Board's interpretation of the persecutor bar misapplied *Fedorenko*, it would have to address the duress exception question on remand "free of this mistaken legal premise." *Negusie*, 129 S. Ct. at 1163.

In its decision, the Court addressed the application of *Fedorenko* as controlling by both the Board and the Fifth Circuit, and why such an application was mistaken. The Court noted that such reliance was "not without some basis" because *Fedorenko* did involve the interpretation of another persecutor bar. *Id.* at 1164. However, the Court distinguished the statute at issue in *Fedorenko* from the persecutor bar contained in the Act. In *Fedorenko*, there were two statutory subsections at issue: one contained the word "voluntary" and the other did not. Relying on rules of statutory construction, the *Fedorenko* Court determined that the "deliberate omission" of the word "voluntary" indicated that Congress intended no exception for involuntary actions. *Fedorenko*, 449 U.S. at 512. In the Act, however, the persecutor bar does not contain the word "voluntary" in any subsection. The *Negusie* Court therefore held that the omission of the term "voluntary" in this context "cannot carry the same significance" as in *Fedorenko*. *Negusie*, 129 S. Ct. at 1165. The Court also pointed out that the purposes of the Act and the DPA were very different. The DPA was enacted to aid individuals after the Second World War and addressed a very specific need. The Refugee Act, on the other hand, was "designed to provide a general rule for the ongoing treatment of all refugees and displaced persons." *Id.* Because *Fedorenko* involved "a different statute enacted for a different purpose," it could not be controlling in the Board's interpretation of the Act's persecutor bar. *Id.* at 1166.

The Court was also careful to point out that when the Board considers the duress exception issue on remand, "[t]he BIA is not bound to apply the *Fedorenko* rule that motive and intent are irrelevant to the persecutor bar." *Id.* at 1167. Likewise, it would seem that the Board is also not required to find that there is an exception for involuntary conduct. The Court appeared to leave open the possibility that the Board may come to the same conclusion as in its prior decisions, but using different reasoning that does not rely on *Fedorenko*. As Justice Scalia stated in his concurring opinion, "[t]he statute does not mandate the rule precluding the duress defense but does not foreclose it either; the [Board] is free to retain that rule so long as the choice to do so is soundly reasoned, not based on irrelevant or arbitrary factors." *Id.* at 1168-69 (Scalia, J., concurring).

As with any split decision, several of the Justices voiced their own opinions regarding the resolution of *Negusie*. While not central to the Court's majority opinion in the case, these opinions are worth briefly addressing because they demonstrate the difficulty and contentiousness of the issue. Justice Scalia, who was joined in his concurrence by Justice Alito, wrote to emphasize that his agreement to remand the case to the Board was based on his belief that "the agency has the option of adhering to its decision" and is not required to recognize a duress exception. *Id.* at 1168 (Scalia, J., concurring). He also addressed the issue of culpability and whether one must be culpable to be subject to the persecutor bar. He noted that "[a]t common law, duress was not an accepted defense to intentional killing," and that "there is no historical support for the duress defense when a soldier follows a military order he knows to be unlawful." *Id.* at 1169. Justice Scalia wrote that he does not endorse "any particular rule" regarding the persecutor bar, and that the Board must only decide the case before it and "need not provide an 'all-embracing answer.'" *Id.* at 1170 (quoting *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007)).

Justice Stevens, who, interestingly, filed a dissenting opinion in *Fedorenko*, was joined by Justice Breyer in his partial concurrence and partial dissent in *Negusie*. While Justice Stevens agreed with the majority's finding that the "misguided decision" in *Fedorenko* does not govern for purposes of the persecutor bar, he dissented because he "would provide a definite answer to the question presented." *Id.* (Stevens, J., concurring in

part and dissenting in part). He wrote that the question whether there is a duress exception to the persecutor bar is a “pure question of statutory construction” which is left to the courts to decide. *Id.* (quoting *Cardoza-Fonseca*, 480 U.S. at 446). He then stated that he “think[s] it plain that the persecutor bar does not disqualify from asylum . . . an alien whose conduct was coerced or otherwise the product of duress.” *Id.* at 1174. He would, however, leave it to the agency to determine “how the voluntariness standard should be applied.” *Id.* at 1176.

Justice Thomas also filed a dissenting opinion in this case and reached a conclusion contrary to that of Justice Stevens. Justice Thomas firmly stated that he believes “the INA unambiguously precludes any inquiry into whether the persecutor acted voluntarily.” *Id.* (Thomas, J., dissenting). Justice Thomas would have affirmed the decision of the Fifth Circuit and found categorically that there is no duress exception to the persecutor bar. He wrote that the statute “mandates precisely’ what it says” and there is no requirement that assistance in persecution be voluntary. *Id.* at 1182 (quoting *Fedorenko*, 449 U.S. at 512). Justice Thomas noted that Congress “has evidenced its ability to both specifically require voluntary conduct and explicitly exclude involuntary conduct in other provisions of the INA” and that the absence of a voluntariness requirement in the persecutor bar should be viewed with this in mind. *Id.* at 1179. Finally, he observed that “Congress is aware of a judicial interpretation of statutory language and ‘adopt[s] that interpretation when it re-enacts a statute without change.”” *Id.* at 1181 (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). While the Act’s persecutor bar was first enacted in 1980 before the *Fedorenko* decision, it was reenacted unchanged in 1996 after *Fedorenko*, via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,

Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. Justice Thomas found that the Court must assume, absent evidence to the contrary, that Congress was aware of the *Fedorenko* decision when it reenacted the Act’s persecutor bar and thus “adopt[ed] that interpretation.” *Id.* at 1181 (quoting *Lorillard*, 434 U.S. at 580).

After a trip to this nation’s highest court, Daniel Negusie still does not have a final resolution to his case and he is back before the Board of Immigration Appeals. The Board, in addition, finds itself with having over 25 years of case precedent, in a sense, overruled. Yet, the Board is not operating in a vacuum; it has a plethora of circuit court caselaw, as well as its own caselaw issued in the nearly 30 years since *Fedorenko* was decided, to evaluate and draw upon. Additionally, the Supreme Court in *Negusie*, while not ruling on whether a duress exception exists, provided valuable arguments for and against such an exception in the majority decision, as well as the concurrences and dissents. All of these factors will likely stand the Board in good stead when it considers Negusie’s case. It is unclear whether the Board will decide in favor of or against a duress exception to the persecutor bar, or whether the Board will resolve Negusie’s case on other grounds. If the Board does find that an exception exists, it is also unclear how that exception will be defined. What is fairly certain is that this issue is long from resolved and will continue to perplex courts for years to come.

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<sup>1</sup> This summary of the factual background in *Negusie* is taken from Negusie’s testimony found in the Joint Appendix, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-449), 2008 WL 2442321, as well as from the Court’s decision.

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