



# Immigration Law Advisor

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## Disparity? Or Diversity? Contested Issues in Asylum Law

by Edward R. Grant

Recent critiques of the asylum adjudication system focus on alleged disparity of results between adjudicators at all levels—Asylum Officers, Immigration Judges, the Board of Immigration Appeals, and even the Federal courts of appeals—as evidence of something gone awry. These critiques, however, generally fail to take into account one of the most obvious factors that may contribute to such disparity: the inherent volatility and uncertainty in many questions of asylum and refugee law. We are just now approaching the 30th anniversary of the Refugee Act of 1980, the “constitution,” as it were, of American law in this area. In other words, this is a young area of law, so such volatility should be no surprise.

Several recent decisions from the courts of appeals remind us of this volatility. The Eleventh Circuit, for example, recently addressed the claim of an Iranian who feared being put to death for apostasy due to his conversion from Islam to Christianity. *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 2009 WL 2391397 (11th Cir. Aug. 6, 2009). The court put the matter bluntly:

This petition for review . . . places this Court between Scylla and Charybdis. A denial of review will return the petitioner to the theocratic regime in Iran, but an erroneous grant of review could establish a precedent that rewards less than genuine fears of persecution based on religious conversion.

*Id.* at \*1. The court navigated between the twin dangers by remanding for further consideration of evidence that, the court concluded, had not been given “reasoned consideration” by the Board. *Id.* As further evidence of the “disparity” that such cases can engender, the panel issued three decisions, including one dissent.

## When Does Avoidance of Persecution Itself Constitute Persecution?

Kazemzadeh's claim was both political and religious. The court found that the Board did not err in concluding that Kazemzadeh's arrest, interrogation, and beating for having taken part in a student demonstration did not rise to the level of persecution. Further monitoring by authorities after this incident was mere "harassment." Also, documentary evidence that Kazemzadeh had been convicted in absentia and sentenced to 6 years' imprisonment did not compel a finding of well-founded fear of persecution because the documents did not state the reason for the conviction and were not authenticated.

The religious claim, premised on Kazemzadeh's conversion to Christianity in the United States, drew the court's closest attention. The court appeared to agree that despite the severity of apostasy laws (making the offense punishable by death), the laws are not enforced to such an extreme, and evidence of actual physical persecution is scanty. However, the court held that the Board failed to consider two critical points in Kazemzadeh's testimony: that Christian converts are forced to practice "underground" in order to avoid the apostasy laws, and that he might be a subject of special interest because of his prior encounters with the regime.

On the first point, the court joined the Seventh Circuit in holding "that having to practice religion underground to avoid punishment is itself a form of persecution." *Id.* at \*10 (citing *Muhur v. Ashcroft*, 355 F.3d 958, 960-61 (7th Cir. 2004)). The Board cited evidence that the apostasy laws are rarely enforced but "did not consider whether enforcement is rare because apostates practice underground and suffer instead that form of persecution to avoid detection and punishment." *Id.* at \*10. Rejecting the dissent's contention that, given the presence of 100,000 Christian apostates in Iran, the lack of enforcement must result from something other than the fact that such believers are in hiding, the majority noted that this is less than two-tenths of a percent of the entire population, and it is not implausible that such a small minority would be able to avoid punishment by concealing their faith.

The court also agreed that Kazemzadeh's prior arrest, coupled with evidence of the in absentia conviction and past adverse treatment of his father, is relevant to

the religious claim because it shows that he is a person "about whom the Iranian regime already has a heightened interest." *Id.* The Board thus had to consider whether this made it more likely that his conversion would be discovered.

Judge Marcus "join[ed] fully" the majority opinion, but concurred separately to emphasize three points: that asylum should be granted when an applicant can only avoid religious persecution by successfully hiding his beliefs; that evidence in the case substantially supported a well-founded of persecution under the apostasy laws; and that since Kazemzadeh was found to be credible, this is not a case that presents any "palpable risk" of admitting any new fraudulent claims. *Id.* at \*11-12.

"[A]ny requirement," Judge Marcus wrote, "that Kazemzadeh abandon his faith or practice in secret in order to conceal his conversion amounts to religious persecution under our asylum laws." *Id.* at \*12; *see also Woldemichael v. Ashcroft*, 448 F.3d 1000, 1003 (8th Cir. 2006) (stating that harassment and economic deprivation of believers do not constitute persecution "unless those persons are prevented from practicing their religion or deprived of their freedom"); *Iao v. Gonzales*, 400 F.3d 530, 532 (7th Cir. 2005) (holding that a Falun Gong adherent whose fear of persecution would cause her to conceal her practice can establish persecution, and stating that "it is the existence of such a fear that motivates the concealment"); *Zhang v. Ashcroft*, 388 F.3d 713, 719-20 (9th Cir. 2004). While not "presum[ing] to superimpose" the free exercise protections of the First Amendment on asylum law, Judge Marcus strongly suggested that the words "persecution on account of . . . religion" in the definition of "refugee" be interpreted to allow open and visible worship, in light of our history and tradition and the guarantees of the First Amendment. *Kazemzadeh*, 2009 WL 2391397, at \*14-16. The legislative history of the Refugee Act, he noted, was replete with references to the need to protect oppressed religious minorities; the drafters would not have settled for the "narrow view that secret practice can cure persecution." *Id.* at \*16.

The dissent of District Judge Edenfield concluded that it would be implausible to account for the near-total absence of persecution under the apostasy laws by the fact that 100,000 Christian converts practice underground. Since prosecutions even of publicly practicing apostates are rare, other factors must be at work, and a pattern or

practice of persecution of apostate Christians has not been established. The majority's decision, he concluded, failed to give sufficient deference to the Immigration Judge's and Board's consideration of the factual record.

The rule adopted in *Kazemzadeh* regarding religious persecution may be novel in its statement, but it has likely been followed in practice for years. Where evidence of genuine religious persecution exists, and an applicant establishes adherence to the persecuted faith, adjudicators do not commonly deny asylum solely on grounds that an applicant can avoid harm by remaining "underground." In fact, it does not appear that the Board even did this in *Kazemzadeh*. Rather, it focused on the evidence that persecution is uncommon and concluded that the applicant, who had no history of past persecution on religious grounds, did not establish a well-founded fear. The issue can be more complex when considered in other contexts. For example, in Chinese "house church" cases, the question often comes down to whether the authorities have any genuine interest in the religious adherents or are content to allow them to meet in small groups. The *Kazemzadeh* rule obviously could reach such cases if it were argued that the adherents desire to engage in larger, more public forms of worship but are limited to their more secret forms of worship out of fear of persecution.

### Persecution as a Question of Fact

Another context where the "persecution" and "nexus" inquiries intersect is claims stating a fear of anti-homosexual violence. The Tenth Circuit recently held that the Board acted reasonably in concluding that childhood beatings and tauntings did not rise to the level of persecution, and that evidence of killings of homosexuals in Brazil did not compel a well-founded fear finding because the nexus of those killings to a protected ground was not firmly established. *Halmenschlager v. Holder*, 2009 WL 3065212 (10th Cir. July 31, 2009)<sup>1</sup>. The Board had reversed an Immigration Judge's grant of asylum to Halmenschlager, concluding that incidents occurring in his childhood—being taunted and beaten by schoolmates, and being exposed to by an adult and some teenagers—did not constitute persecution and were not on account of his sexual orientation. The Board also found that evidence of violence against homosexuals, which included 180 killings in a recent year, did not give rise to a well-founded fear of persecution, partly in light of evidence that Brazilian authorities have taken steps to protect the rights of homosexuals.

In affirming the Board, the Tenth Circuit focused on gaps in the country conditions evidence regarding the reasons for the extent of violence involving homosexual victims.

The unvarnished fact that 180 homosexuals were killed in one year is not remarkable in a country of over 180 million, particularly when the [State Department] report does not identify the killings as murder, contains no mention of the reasons for the killings or any description of the perpetrators (by type, not name). The reader is left to speculate—were they homophobic killings or were they motivated by other factors (jilted lovers, drug dealing, prostitution, etc.) and only coincidentally involved homosexuals.

*Id.* at \*8. The court also stated that it was "fair to infer" that the Board, in its brief decision, had put the reported killings in context, considering the diversity of the Brazilian population and problems involving other segments of that population. *Id.* at \*9.

*Halmenschlager* is more noteworthy, however, for its conclusion that the Board lacks authority to review de novo the question whether past harm rises to the level of persecution, because that inquiry is solely one of fact. In prior cases, the Tenth Circuit held that "the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008); *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008). Thus, it concluded that a determination by the Board that an applicant has not suffered past persecution is reviewed under the "substantial evidence" standard.

The Tenth Circuit is hardly alone in applying the substantial evidence standard to the question of persecution. The standard appears mandated by *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), and has been adopted widely by other circuits. However, it is equally clear that other circuits, in employing this standard, do not treat the issue of persecution merely as a question of *fact*, but rather as an inquiry into whether the facts in a particular case meet the legal definition of persecution as fashioned

by the circuit. See *Benyamin v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 2581734 (9th Cir. Aug. 24, 2009) (finding that even “minimal” forms of female genital mutilation constitute persecution); *Hussain v. Holder*, 576 F.3d 54, 57 (1st Cir. 2009) (stating that “the law of this circuit is clear that not every instance of physical harm rises to the level of persecution,” and holding that the case did not involve facts rising to level of harm defined in prior case law); *Banturino v. Holder*, 576 F.3d 10, 13-14 (1st Cir. 2009) (same); *Karapetyan v. Mukasey*, 543 F.3d 1118 (9th Cir. 2008).

The Tenth Circuit, therefore, appears unique in its insistence that the question of persecution is *solely* a question of fact, “foreclose[ing] any argument that the application of a correct legal definition for persecution to the facts of a specific case is a mixed question of law and fact.” *Halmenschlager*, 2009 WL 3065212, at \*4 (quoting *Vincente-Elias*, 532 F.3d at 1091). And the court is clearly alone in holding that because persecution is solely a question of fact, the Board cannot apply de novo review. As *Halmenschlager* acknowledged, both the supplementary information accompanying the 2002 regulation setting forth the Board’s standard of review and subsequent Board precedent explicitly state that the question whether particular harm rises to the level of persecution is to be reviewed by the Board de novo as a question of law. See *Matter of A-S-B-*, 24 I&N Dec. 493, 497 (BIA 2008). But *Halmenschlager* rejected these interpretations as contrary to the plain language of the regulations, which require questions of fact to be reviewed only under the “clearly erroneous” standard. *Halmenschlager*, 2009 WL 3065212 at \*5.

The point is a bit academic for now—*Halmenschlager* held that since the applicant did not raise the issue of the proper standard of review before the Board, the issue was not exhausted and thus could not be further reviewed. But perhaps this is the last we will hear of this issue. The Tenth Circuit may be of the view that if the Board is permitted to classify the “persecution” inquiry as one fit for de novo review, the courts would be required to review that ruling on a less deferential basis. Such an assumption seems incorrect—section 242(b)(4)(D) of the Act states that the “discretionary judgment” whether to grant asylum shall be “conclusive unless manifestly contrary to the law and an abuse of discretion.” Furthermore, as the Seventh Circuit recently reiterated, it reviews “denials of asylum and withholding of removal”—not merely the findings of fact underlying those denials—under the “substantial evidence” standard.

*Nzeve v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 2959252 (7th Cir. Sept. 17, 2009). Thus, even though the Board may treat the issue of persecution as one over which it has de novo review, the “substantial evidence” standard still applies.

### Persecution as a Question of Law

*Kazemzadeh* illustrates why viewing the issue of persecution as a question of fact is likely too restrictive. A religious believer who is compelled to practice in secret, but is thereby successful in avoiding identification, has not suffered the type of harm traditionally associated with the “extreme concept” of persecution. But the Eleventh Circuit, ruling as a matter of law, pointed the analysis in a different direction and required the Board to reconsider the facts in light of that legal determination. Another example of a “pure law” determination on the question is the Ninth Circuit’s recent decision in *Benyamin*, 2009 WL 2581734.

Benyamin, an Indonesian Muslim married to a Venezuelan Catholic, claimed persecution in his native country based on the fact that his daughter was forced by relatives to undergo female genital mutilation (“FGM”). He also feared that his second daughter would be similarly treated if returned to Indonesia. The Immigration Judge denied asylum, stating that Benyamin himself had not suffered past persecution, and that while his daughter had suffered “harm” from FGM, the procedure was minimal in its effects. The Board affirmed, noting evidence that the type of FGM practiced in Indonesia involves minimal, short-term pain, suffering, and complications.

The Ninth Circuit reversed and remanded for the Board to consider in the first instance whether Benyamin, although he was a principal and sole asylum applicant (because his wife and children were derivatives on his application), can nevertheless state a derivative claim based on the past infliction of FGM on one daughter and the feared infliction on the other.

As to whether this “minimal” form of FGM constituted persecution, however, the court was unequivocal, holding that the Board’s ruling to the contrary was erroneous *as a matter of law*. *Id.* at \*6. Citing evidence that even the least drastic forms of FGM can cause a wide range of complications, the court concluded that the all forms of the procedure constitute persecution. “To suggest, as did the IJ, that there is no persecution because of minimal physical harm ignores

both the involuntary nature of the procedure and the very real follow-on consequences.” *Id.*

*Benyamin* presents a circumstance where a court considered a finding of persecution to be *compelled* as matter of law. On the other hand, the First Circuit recently signaled that some claims of persecution are *foreclosed* as a matter of law and should not be further litigated. *Banturino*, 576 F.3d 10. The applicant was an Indonesian Christian who testified that his mother died from a heart attack after the burning of a neighborhood church by Muslim extremists in 1996 also damaged the family home, and that his brother, while unharmed, was on a bus attacked by extremists in 1992. He also claimed that country conditions supported his claim of both a well-founded fear and a probability of persecution.

The court dismissed for lack of jurisdiction Banturino’s appeal from the decision to pretermitt his asylum application as untimely filed. It found that the sporadic incidents of harm that occurred in Indonesia did not meet the First Circuit’s standards for defining “persecution,” and that the claim fell short as well on establishing that the respondent or his family had been specifically targeted. The death of his mother, while tragic, was due in part to her age and fragile health, and she was not a target of the arsonists. Regarding the claim of future persecution, the court cited to a series of precedents in which it has concluded that reports of country conditions do not establish that there is a “pattern or practice” of persecution of Indonesian Christians. *Id.* at 14-15 (citing *Pangemanan v. Holder*, 569 F.3d 1 (1st Cir. 2009); *Sinurat v. Mukasey*, 537 F.3d 59 (1st Cir. 2008); *Pulsir v. Mukasey*, 524 F.3d 502 (1st Cir. 2008)).

Taking an unusual step, the court noted that these cases, and others, involved claimants represented by the same counsel. “The facts of every case are different and no case can determine the outcome of another. However, as the body of agency and court decisions grows, more guidance is available for the court in reviewing petitions and for attorneys in assessing the strength of their clients’ claims.” *Banturino*, 576 F.3d at 15. The court admonished that disagreements with agency fact-finding are not to be “dressed up as legal challenges,” and that petitions should be drafted to respect the “clearly established law” of the circuit on issues such as “persecution” and “nexus.” *Id.* at 15-16.

Contributing largely to the volatility of immigration jurisprudence, of course, are the differences between the circuits. The law regarding Indonesian Christians is a case in point. The First Circuit reminded litigants in *Banturino* that it has not adopted what it termed the “disfavored group” approach employed by the Ninth Circuit. See *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009). It also distinguished the Second Circuit’s decision in *Mufied v. Mukasey*, 508 F.3d 88 (2d Cir. 2007), which it characterized as a remand for further factual finding on the issue of “pattern or practice.” (In practice, *Mufied* could be interpreted more broadly—not merely as looking for more precise fact-finding, but for further clarification of the legal standard employed by the Board toward all “pattern or practice” claims.)

Recently, the Second Circuit helpfully clarified that while it would prefer the Board to issue further precedent on the meaning of the “systematic and pervasive” standard it applies to pattern and practice claims, see *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005), it is sufficient for Immigration Judges and the Board to specifically address the issue of “pattern or practice” wherever the claim has been raised. *Santoso v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 2914267 (2d Cir. Sept. 14, 2009). *Santoso* affirmed the finding of the Immigration Judge and the Board that no pattern or practice of persecution had been established, citing country report evidence regarding the size of the population, the efforts of the government to quell sectarian violence, and the predominance of Roman Catholicism in certain geographic areas. The Second Circuit had, since *Mufied*, issued a number of decisions affirming such specific findings on the “pattern or practice” issue. The publication of *Santoso* should assist both in establishing a standard for assessing such claims arising in the circuit, and in clarifying that despite the court’s preference for more precedential guidance from the Board, cases can continue to be adjudicated under existing standards.

### **Particular Social Group: Deference and the “Social Visibility” Test**

Ambiguous statutory terms are an invitation to volatility in adjudication, and no better example can be cited than the curious case of the “particular social group.” Since the drafters of the Refugee Convention left behind no guidance on their intent, adjudicators worldwide have struggled with the meaning of the term. The Board’s

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR AUGUST 2009

*by John Guendelsberger*

The United States courts of appeals issued 420 decisions in August 2009 in cases appealed from the Board. The courts affirmed the Board in 386 cases and reversed or remanded in 34, for an overall reversal rate of 8.1% compared to last month's 10.2%. There were no reversals from the First, Fourth, Fifth, Sixth, and Tenth Circuits.

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

Circuit	Total cases	Affirmed	Reversed	% reversed
First	8	8	0	0.0
Second	154	148	6	3.9
Third	28	24	4	14.3
Fourth	16	16	0	0.0
Fifth	15	15	0	0.0
Sixth	18	18	0	0.0
Seventh	13	8	5	38.5
Eighth	6	5	1	16.7
Ninth	128	112	16	12.5
Tenth	5	5	0	0.0
Eleventh	29	27	2	6.9
<b>All circuits:</b>	<b>420</b>	<b>386</b>	<b>34</b>	<b>8.1</b>

Of the 16 reversals in the Ninth Circuit, 6 involved asylum claims, including 2 credibility calls. The others involved level of harm for past persecution, corroboration requirements under the REAL ID Act, and a discretionary denial. Another five reversals involved application of the categorical or modified categorical approach to various criminal offenses. Other reversals came in a denial of a motion to reopen for ineffective assistance of counsel and a denial of a continuance for failure to complete fingerprints or background checks.

The Second Circuit reversed in six cases. These included issues of relocation in an asylum claim, continuance to await approval of a pending I-130 visa petition, ineffective assistance of counsel, divisibility in the context of a firearms conviction, and an exceptional and extremely unusual hardship determination in which

the court found that evidence had been overlooked or mischaracterized.

The Seventh Circuit reversed or remanded in five cases. These included a nexus issue involving the particular social group determination, the opportunity to present an "other resistance" claim not raised in the initial asylum application, and a motion to reopen based on changed country conditions in Pakistan.

The four reversals in the Third Circuit all involved asylum issues. In addition to questions of credibility and nexus, the reversals included a case in which the Board applied an incorrect standard in reversing an Immigration Judge's grant of asylum, and another in which the level of harm for past persecution was not addressed by the Immigration Judge.

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

Circuit	Total cases	Affirmed	Reversed	% reversed
Ninth	1329	1090	239	18.0
Seventh	59	49	10	16.9
Third	195	162	33	16.9
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Eighth	52	47	5	9.6
Sixth	129	118	11	8.5
Eleventh	217	202	15	6.9
Second	1017	965	52	5.1
Fifth	155	148	7	4.5
Tenth	31	30	1	3.2
First	55	54	1	1.8
Fourth	125	123	2	1.6
<b>All circuits:</b>	<b>3365</b>	<b>2989</b>	<b>376</b>	<b>11.2</b>

Last year at this point there were 2941 total decisions and 425 reversals for a 14.5% overall reversal rate.

*John Guendelsberger is a Member of the Board of Immigration Appeals.*

## ***Brand X* Developments in the Ninth Circuit and Beyond**

by Bijal Shah

The issue of agency authority vis-à-vis the statutory and regulatory interpretive powers of the Federal courts of appeal was highlighted in an article for the January 2008 Immigration Law Advisor.<sup>1</sup> That piece focused on *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”), which established that a court’s prior interpretation of an ambiguous statute does not prevent an agency from adopting an alternate, reasonable interpretation to which courts must defer under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The article concluded by outlining *Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007) (“*Duran Gonzales*”), which it termed “the first circuit decision to fully apply *Brand X* in analyzing” a decision of the Board of Immigration Appeals.

This article will build from the previous one by comparing *Duran Gonzales* to two decisions that reached an alternate conclusion. The first is the recently published, but ultimately vacated, decision by the United States Court of Appeals for the Ninth Circuit in *Escobar v. Holder*, 567 F.3d 466 (9th Cir. 2009). The second, *Mercado-Zazueta v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 2857197 (9th Cir. Sept. 8, 2009), reinstated the reasoning put forth in *Escobar*. The purpose of this analysis is to highlight the disparate procedural histories of cases whose legal reasoning might appear similar at first glance. In making this comparison and situating *Escobar* and *Mercado-Zazueta* both in and out of the immigration context, this article endeavors to provide guidance regarding the way in which similar cases may be treated by courts in the future.

### ***Duran Gonzales* Redux**

*Duran Gonzales* arose in the Ninth Circuit from a Department of Homeland Security (“DHS”) appeal of an injunction issued by a Federal district court. This injunction instructed the DHS to adjudicate certain I-212 waiver applications filed by aliens who illegally reentered the United States, in accord with *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Perez-Gonzalez*, the court had held that an alien who unlawfully reentered the United States after being removed could seek adjustment of status under special provisions without regard to the 10-year waiting period in section 212(a)(9)(C)(ii)

of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(9)(C)(ii), if he or she applied for an I-212 waiver with the DHS. However, the Board subsequently found in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), that by illegally reentering the country, an alien becomes permanently inadmissible under section 212(a)(9)(C)(i)(II) of the Act and therefore needs to remain outside the United States for 10 years before requesting permission to reapply. In coming to its decision in *Duran Gonzales*, the Ninth Circuit applied *Brand X* to find that the Board’s decision in *Matter of Torres-Garcia* controlled, rather than the court’s decision in *Perez-Gonzalez*. Specifically, the *Duran Gonzales* court concluded that the Board, in *Matter of Torres-Garcia*, had provided a reasonable interpretation of the relevant provision of the Illegal Immigration Reform and Immigrant Responsibility Act and was thereby entitled to *Chevron* deference under *Brand X*.

### **Recent Developments in the Ninth Circuit**

This year, the Ninth Circuit published *Escobar*, which also discussed the application of *Brand X* in the immigration context. While the Ninth Circuit’s decision in *Escobar* was subsequently vacated for jurisdictional reasons,<sup>2</sup> the original Ninth Circuit *Escobar* analysis remains useful because it would have been precedent had the court retained jurisdiction to review the petition. In fact, the more recently decided *Mercado-Zazueta* echoes the rationale of *Escobar*,<sup>3</sup> and both stand in distinct contrast to *Duran Gonzales*.

In *Escobar*, the court reversed *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), in which the Board decided that it was not bound to follow *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005). *Cuevas-Gaspar* holds, in part, that the lawful admission and residence of a parent may be imputed to his or her unemancipated minor child to satisfy the 7-year residence requirement of section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2). In *Matter of Escobar*, the Board declined to extend *Cuevas-Gaspar*’s reasoning in determining that the 5-year permanent residence requirement under section 240(A)(a)(1) of the Act cannot be fulfilled by imputing a parent’s residence to an unemancipated minor.

On appeal, the Ninth Circuit disagreed with the Board by finding that the reasoning of *Cuevas-Gaspar* applied equally to the residence requirements of sections 240A(a)(1) and (2) of the Act, the latter of which was

explicitly discussed in *Cuevas-Gaspar*. The *Escobar* court explained that *Chevron* deference would not be accorded to the Board's decision in *Matter of Escobar* because the court had previously applied *Chevron* in *Cuevas-Gaspar* and found that, while the Board retains discretion to interpret an ambiguous statute in a reasonable manner, the Board's conclusion that the residence requirement under section 240A(a)(1) of the Act could not be imputed was an unreasonable interpretation of the statute. *Matter of Escobar* did not therefore provide a "new" interpretation of section 240A(a), but rather the same unreasonable interpretation rejected in *Cuevas-Gaspar*.

In addition, the *Escobar* court criticized the Board's decision in *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008). *Matter of Ramirez-Vargas* also directly rejected the *Cuevas-Gaspar* holding regarding the section 240A(a) imputation of residence issue considered in *Matter of Escobar*. The court found that in *Matter of Ramirez-Vargas*, the Board once again did not reasonably interpret section 240A(a) of the Act and therefore could not utilize *Brand X* to override the Ninth Circuit precedent delineated in *Cuevas-Gaspar*.

In *Mercado-Zazueta*, a more recent decision by the Ninth Circuit, the court reversed the Board's unpublished decision in *Matter of Mercado-Zazueta*, 2007 WL 1195899 (BIA Mar. 27, 2007), by deciding that "the rationale and holding of *Cuevas-Gaspar* apply equally to" sections 240A(a)(1) and (2) of the Act and therefore compel the conclusion that a parent's status as a lawful permanent resident may be imputed to an unemancipated minor child for the purposes of satisfying these requirements. *Mercado-Zazueta*, 2009 WL 2857197, at \*1. This is the exact issue decided in the Ninth Circuit's vacated opinion in *Escobar*, and much of the decision in *Mercado-Zazueta* speaks directly to *Matter of Escobar* by reflecting the court's discussion in *Escobar*. In fact, the primary justification for the court's decision in *Mercado-Zazueta* is the same as in *Escobar*: that the Board in both *Matter of Escobar* and *Matter of Mercado-Zazueta* had resurrected the same statutory construction of sections 240A(a)(1) and (2) that had been deemed unreasonable by a previous application of *Chevron* in *Cuevas-Gaspar*. The court in *Mercado-Zazueta* also restated that, in *Matter of Ramirez-Vargas*, the Board improperly relied on *Brand X* and *Duran Gonzales*, and it incorrectly utilized the logic of *Matter of Escobar* to deny imputation as a means to acquire the requisite 5 years of permanent residence under section 240A(a)(1) of the Act.

In sum, the articulated differences in reasoning between the Ninth Circuit's decision in *Duran Gonzales* and its decisions in the *Escobar/Mercado-Zazueta* cases are as follows. In *Matter of Torres-Garcia*, the Board provided an alternate interpretation of an ambiguous statute; because the Board's interpretation was reasonable, the Ninth Circuit applied *Brand X* to accord the Board *Chevron* deference in *Duran Gonzales*, notwithstanding the fact that the court had previously interpreted the statute in question in *Perez-Gonzalez*. By contrast, in *Escobar* and *Mercado-Zazueta*, the court did not defer to the Board's statutory interpretation in *Matter of Escobar* (and the unpublished, nonprecedential decision in *Matter of Mercado-Zazueta*), because *Matter of Escobar* was decided according to a prior Board statutory interpretation that the Ninth Circuit already deemed in *Cuevas-Gaspar* to be unreasonable and therefore undeserving of *Chevron* deference.

### **Analyzing *Duran Gonzales*, *Escobar*, and *Mercado-Zazueta***

Although both the *Duran Gonzales* and *Escobar* decisions are articulated within the *Brand X* framework, the cases were decided under different procedural circumstances. For example, *Matter of Torres-Garcia*, in which the Board arrived at a statutory interpretation opposite that of the Ninth Circuit in *Perez-Gonzalez*, was informed by *Perez-Gonzalez* but arose in the Fifth Circuit. Therefore, Ninth Circuit case law did not control *Matter of Torres-Garcia*. Conversely, *Matter of Escobar* and *Matter of Mercado-Zazueta* both arose in the Ninth Circuit and were decided directly under the Ninth Circuit's decisions in *Cuevas-Gaspar* and *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir.1994). However, the procedural histories of both sets of cases do intersect in *Matter of Ramirez-Vargas*, in which the Board rejected the Ninth Circuit's *Cuevas-Gaspar* decision. In *Matter of Ramirez-Vargas*, the Board simultaneously acknowledged *Cuevas-Gaspar* and yet still applied the more recent *Matter of Escobar* by suggesting that, under certain circumstances, an agency decision that was previously found to be unreasonable may warrant deference from the Ninth Circuit.<sup>4</sup> The Board referenced *Duran Gonzales* to make this point and, in this way, utilized an issue of *Chevron* deference under *Brand X* that originally arose in the Fifth Circuit (in *Matter of Torres-Garcia*) to make an argument in *Matter of Ramirez-Vargas*, which arose in the Ninth Circuit.

In addition, there are elements within each line of cases that imply alternate reasons for the disparate decisions reached in *Duran Gonzales* and *Escobar/Mercado-Zazueta*. For instance, the Ninth Circuit decided *Duran Gonzales* (and conferred agency deference) on the premise that its interpretation in *Perez-Gonzalez* was of an ambiguous statute and the Board decision discussed in *Perez-Gonzalez* that was revived in *Duran Gonzales* was not unreasonable. However, the *Perez-Gonzalez* decision itself appeared to consider the statute in question to be unambiguous, deem the Board's decision unworthy of full deference, and judge the Board's interpretation of the statute to be unreasonable as implied by usage of "legal error" terminology. For example, in *Perez-Gonzalez* the court noted that "*Chevron* deference is *not applicable* in this case because under *Chevron*, 'a court must first analyze the law applying normal principles of statutory construction, and then defer to the agency if, after performing that analysis, it concludes that the statute is ambiguous or uncertain.'" *Perez-Gonzalez*, 379 F.3d at 786 (quoting *Castro-Cortez v. INS*, 239 F.3d 1037, 1053 (9th Cir. 2001)) (emphasis added). In addition, the court in *Perez-Gonzalez* stated that "[a]gency interpretations [such as the one in question] contained in informal formats such as guidance memoranda are only entitled to 'some deference,' as opposed to the rigorous deference owed formal agency interpretations under *Chevron*." *Id.* at 793. Finally, the *Perez-Gonzalez* decision also declared that "we need not accord any deference to an unreasonable construction that does not conform with the wording and purpose of the regulation" and that the Immigration and Naturalization Service committed legal error that the court had jurisdiction to review when it concluded that *Perez-Gonzalez* could not apply for a Form I-212 waiver from within this country. *Id.* at 789-90 (quoting *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166 (9th Cir. 2003)).

In contrast to the strong wording of *Perez-Gonzalez*, the court in *Duran Gonzales* stated that "despite some language to the contrary, *Perez-Gonzalez* was based on a finding of statutory ambiguity that left room for agency discretion." *Duran Gonzales*, 503 F.3d at 1237. The *Duran Gonzales* court ultimately concluded that *Matter of Torres-Garcia* was entitled to deference under *Chevron* and *Brand X* as a reasonable interpretation of an ambiguous statute. One possible justification for this apparent paradox is that—apart from its analysis of the appropriateness of giving *Brand X* deference to the Board—

the court in *Duran Gonzales* reconsidered and ultimately rebuffed the substantive validity of its decision in *Perez-Gonzalez*, which allowed a respondent who unlawfully reentered the United States after previous removal and who was inadmissible under section 212(a)(9)(C)(i) of the Act to bypass the 10-year waiting period that an alien seeking admission under section 212(a)(9)(C)(ii) of the Act must comply with simply because he was applying for admission under the latter statute retroactively.

In the Ninth Circuit's *Escobar* decision, the substantive validity of the holding in *Matter of Escobar* may also have been of concern to the Ninth Circuit, in addition to the procedural issue whether *Chevron* deference to the Board under *Brand X* was justified in this instance. The Ninth Circuit's procedural decision not to confer *Brand X* deference to the Board's decision in *Matter of Escobar* resulted in a reversal of the substance of the Board's decision in this case, in which a minor was not allowed to assume the lawful permanent resident status of his parent for the purposes of cancellation of removal. In *Mercado-Zazueta*, the Ninth Circuit's subsequent decision adopting the reasoning of its *Escobar* decision, the court seemingly further considered the substantive consequence of denying *Brand X* deference to the Board's decision in *Matter of Escobar*. The court indicated its concern that a child may not have had the ability or individual legal authority to apply for permanent residence even after becoming qualified to do so, putting the child at a disadvantage if imputation was barred as means for fulfilling the requirements of sections 240A(a)(1) and (2) of the Act.<sup>5</sup> *Mercado-Zazueta*, 2009 WL 2857197, at \*2.

Further, the Ninth Circuit's decision in *Mercado-Zazueta* emphasized other factors that were not explicitly expressed in the court's earlier *Escobar* decision that nevertheless support the reasoning in the earlier decision. One such factor is that "Congress designed the dual requirement of a five-year legal permanent residency *and* seven-year continuous residence in any status . . . to clear up prior confusion and to strike a balance between [] conflicting [circuit court] interpretations" and not to alter the availability of imputation to unemancipated minor children of parents who qualify for relief. *Id.* at \*4 (quoting *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1016 (9th Cir. 2006)). Another is that the imputation of a parent's status to his or her minor child for both sections 240A(a)(1) and (2) of the Act is in keeping with section 240A(a)'s fundamental goal of "provid[ing] relief from

deportation for those who have lawfully formed strong ties to the United States.” *Id.* at \*5 (quoting *Lepe-Guitron*, 16 F.3d at 1025). In this way, the court’s justification for procedurally denying the Board *Chevron* deference under *Brand X* also serves as a foundation for the substantive result of the *Mercado-Zazueta* decision, that imputation is now a means for fulfilling the requirements of section 240A(a) in the Ninth Circuit.

### Beyond Ninth Circuit Immigration Law

Had the Ninth Circuit’s *Escobar* decision not been vacated, it would have been a robustly worded decision similar to the court’s *Mercado-Zazueta* decision, both of which ruled that the rationale behind imputation of status applies to both sections 240A(a)(1) and (2) of the Act equally and that “neither *Brand X* nor *Duran Gonzales* suggests that an agency may resurrect a statutory interpretation that a circuit court has foreclosed by rejecting it as unreasonable at *Chevron*’s second step.” *Escobar*, 567 F.3d at 479. Were another court similarly to find the Board’s interpretation of these statutes to be unreasonable, it likely would have ruled in the same way as did the Ninth Circuit. However, in *Augustin v. Att’y Gen. of U.S.*, 520 F.3d 264 (3d Cir. 2008), the Third Circuit found the Board’s interpretation of section 240A(a)(1) of the Act to be reasonable and therefore granted the Board *Chevron* deference under *Brand X*. As Judge Graber stated in his concurrence in *Mercado-Zazueta*:

Judge Fernandez’ dissent in *Cuevas-Gaspar* and the Third Circuit’s unanimous decision in *Augustin* aptly explain why the [Board’s] interpretation [of section 240A(a)(1) of the Act] is reasonable when considering *Chevron* deference. That conclusion is particularly warranted because “judicial deference to the Executive Branch is especially appropriate in the immigration context.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999); see also *Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (“Deference is especially appropriate in the context of immigration law, where national uniformity is paramount.” (internal quotation marks omitted)).

*Mercado-Zazueta*, 2009 WL 2857197, at \*11.

In general, both within the immigration context<sup>6</sup> (including *Duran Gonzales*) and outside of it,<sup>7</sup> circuit courts appear to apply *Brand X* in a generous manner and often defer to agency expertise.<sup>8</sup> However, one situation in which this is not as uniformly true is in regard to the application of criminal law within the immigration context. Here, courts appear to defer to the Board concerning its interpretations of ambiguous statutes addressing criminal issues specific to immigration law, such as the concepts of “serious nonpolitical crime,”<sup>9</sup> “crime involving moral turpitude,”<sup>10</sup> and “particularly serious crime.”<sup>11</sup>

Some statutory definitions used in the immigration context may not be specific to the field of immigration. If such a term is one on which certain immigration-related decisions are premised (such as “national of the United States”), has a certain evidentiary standard, and is particularly difficult to define in the abstract, at least one court, the Fourth Circuit, has been willing to grant the Board’s interpretation of the term deference as well. *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007). However, the Supreme Court in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), ruled that the Board’s interpretation of “aggravated felony,” a term also widely used outside of the immigration context, does not merit deference. The *Nijhawan* and *Leocal* decisions specifically indicate that there is no deference accorded the Board’s analysis of the term “aggravated felony” in particular. Moreover, these decisions may also imply that when a term is of broad significance and often utilized in contexts outside of the immigration framework, the Board’s expertise and authority are not construed to encompass it, so the Board’s interpretation of it is not given deference.<sup>12</sup>

Finally, a noteworthy recent Supreme Court decision concerning a controversial topic and involving the issue of *Chevron* deference to the Board is *Negusie v. Holder*, 129 S. Ct. 1159 (2009), in which the Court held that its decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), does not control the question whether there is an involuntariness or duress exception to the persecutor bars in sections 208(b)(2)(A) of the Act, 8 U.S.C. § 1158(b)(2)(A), and 241(b)(3)(B)(i) of the Act, 8 U.S.C. § 1231(b)(3)(B)(i). *Fedorenko* found that under the Displaced Persons Act of 1948 (“DPA”), an individual’s service as an armed guard in a concentration camp—whether voluntary or involuntary—made him ineligible for entry into the United States. To reach this conclusion, the *Fedorenko* decision noted that Congress did not adopt

any voluntariness requirement in the applicable statutory subsection, but that it did include such a requirement in a following subsection barring those who had “voluntarily assisted the enemy forces.” The Court therefore reasoned in *Fedorenko* that the contrast between these two provisions in the DPA showed that the kind of activity constituting a bar to admission under the applicable statutory subsection (barring service as an armed guard in a concentration camp) may be voluntary or involuntary.

In *Negusie*, the Court stated that *Fedorenko* did not, however, control the question of voluntariness in the present case involving the persecutor bar because the bar was the result of a completely different statute—the Refugee Act of 1980—that did not contain the word “voluntary” in any subsection. The decision in *Negusie* also noted that the Refugee Act was enacted to provide a general rule for the ongoing treatment of all refugees and displaced persons, whereas the DPA addressed the specific circumstances of World War II and the Holocaust. The Court determined that because the Board and the Fifth Circuit misapplied *Fedorenko* as mandating that whether applicants are compelled to assist in persecution is immaterial for persecutor bar purposes, *Chevron* deference was not accorded by the Court and the record was remanded for the Board to address in the first instance whether the persecutor bar contains a voluntariness requirement. The *Negusie* decision did not, in the end, decide the question whether there is an involuntariness or duress exception to the persecutor bars. The opinion of the Court took no position on this subject except to say that the statutory provisions in question are ambiguous, and thus that the matter must first be resolved by the Board in accordance with standard principles of administrative law.

*Bijal Shah is a Presidential Management Fellow who was on rotation with the Board of Immigration Appeals.*

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1. William N. Frank, *Brand X: Deference Should Be More Than a Matter of ‘Who’s On First,’* Immigration Law Advisor, Vol. 2, No. 1 (Jan. 2008).

2. *Escobar v. Holder*, 2009 WL 2039081 (9th Cir. July 15, 2009). In this separate, unpublished decision, the court found that it lacked jurisdiction to review Escobar’s petition because the Board had granted reopening prior to the issuance of the court’s decision.

3. The Ninth Circuit in *Mercado-Zazueta* specifically focused on the Board’s decision in *Matter of Escobar* and not *Matter of Mercado-Zazueta*. The court did this because both are “decisions [that] rely on the same reasoning to reach their conclusions” and because the former is published while the latter is not and the Board’s “published, precedential decisions warrant greater deference.” *Mercado-Zazueta*, 2009 WL 2857197, at \*5 n.8; see also *Escobar*, 567 F.3d at 474 n.8.

4. “In the prior Ninth Circuit decision at issue in *Gonzales*, the court had found the interpretation of an ambiguous provision at issue in that case to be unreasonable. *Perez-Gonzales v. Ashcroft*, 379 F.3d 783, 788-89 (9th Cir. 2004). The court nevertheless found that it was required to defer to the subsequent interpretation of the agency. *Gonzales v. Department of Homeland Security*, [508 F.3d at 1242]. We therefore consider ourselves bound by our more recent precedent in *Matter of Escobar*, *supra*.” *Matter of Ramirez-Vargas*, 24 I&N Dec. at 600-01.

5. One more example of an apparent paradox within the Ninth Circuit’s *Escobar/Mercado-Zazueta* decision-making process is as follows: in coming to its decision to deny the Board deference, the Ninth Circuit repudiated the distinction between “residence” and “domicile” made by the Board in *Matter of Escobar* while itself distinguishing between “physical presence” and “domicile” in a similar manner in the *Escobar* and *Mercado-Zazueta* companion case *Barrios v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 2882868 (9th Cir. Sept. 10, 2009) (holding that a minor who seeks special rule cancellation of removal under Nicaraguan Adjustment and Central American Relief Act (“NACARA”) as a derivative must personally satisfy the requirement of 7 years of continuous presence and cannot impute it from a parent). In *Matter of Escobar*, the Board differentiated its decision from the majority in *Cuevas-Gaspar* by finding “that residence is different from domicile because [residence] ‘contains no element of subjective intent,’” *Matter of Escobar*, 24 I&N Dec. at 233 (quoting *Cuevas-Gaspar*, 430 F.3d at 1031 (Fernandez, J., dissenting)). The Ninth Circuit rejected this distinction in *Escobar* and *Mercado-Zazueta*. However, in *Barrios*, the Ninth Circuit held in a parallel fashion that the definition of “physical presence” is distinct from the meaning of “domicile” because physical presence does not require a specific status, intent, state of mind, or other legal construct and that it is a “state of being” which can be attained as readily by a minor as by his parent. *Barrios*, 2009 WL 2882868, at \*10.

The Ninth Circuit’s distinction between physical presence and domicile in *Barrios* may not conflict with its simultaneous rejection of the Board’s comparable distinction between residence and domicile in *Matter of Escobar*, because the meanings of the terms “residence” and “physical presence” may have unique applications (and therefore require distinct comparisons to the term “domicile”) to the requirements of section 240A(a)(1) of the Act and of special rule cancellation of removal under NACARA, as discussed in *Escobar/Mercado-Zazueta* and *Barrios* respectively. The Ninth Circuit stated in *Escobar*:

As discussed, section 240A(a) was only intended to clarify “the *type of status* necessary to qualify for relief.” [*Cuevas-Gaspar*, 430 F.3d at 1027] (emphasis added). Therefore, unlike the “physical presence” at issue in *Ramos Barrios*, which does not include “an element of status, intent, or state of mind,” . . . the status requirements of section 212(c) and section 240A(a) are equally amenable to imputation.

*Escobar*, 567 F.3d at 476 (quoting *Ramos Barrios v. Holder*, 567 F.3d 45, 464 (9th Cir. 2009) (subsequently amended)). Moreover, the court further emphasized in *Mercado-Zazueta* that it saw a distinction in its treatment of imputation in regard to the special rule cancellation of removal under NACARA discussed in *Barrios* versus that of section 240A(a) of the Act discussed in *Cuevas-Gaspar* and *Lepe-Guitron* by stating:

In declining to impute physical presence [in *Barrios*], we stressed that “the definition of ‘physical presence’ does not require a specific status, intent, or state of mind,” . . . unlike the terms at issue in *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994), *Cuevas-Gaspar*, and our other imputation precedent, see *Ramos Barrios* . . .

*Mercado-Zazueta*, 2009 WL 2857197, at \*2 n.2 (quoting *Ramos Barrios*, 567 F.3d at 464).

6. See, e.g., *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1238 (10th Cir. 2008) (stating that “a court’s—even the Supreme Court’s—prior interpretation of a statute that an agency is empowered to administer forecloses an agency’s reasonable construction only if the relevant judicial decision held the statute to be unambiguous”); *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008) (giving deference to the Board’s interpretation of the term “crime involving moral turpitude”); *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007) (deciding that the Board is owed deference regarding its interpretation of the term “national of the United States” and that *Brand X* requires a departure from the interpretation of that term in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996)); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (declaring that an “unexplained inconsistency” in an agency’s interpretation of its governing statute (as discussed in *Brand X*, 545 U.S. at 981) provides a basis for rejecting an agency’s interpretation only in “rare instances, such as when an agency provides no explanation at all for a change in policy, or when its explanation is so unclear or contradictory that we are left in doubt as to the reason for the change in direction”); *Ucelo-Gomez v. Gonzales*, 464 F.3d 163 (2d Cir. 2006) (remanded) (discussing a specific interpretation of particular social group in asylum law under the Act; question answered on remand by the Board in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007); subsequently given deference (through a denied petition) by *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007)).

7. The following is a sample of cases involving *Brand X* outside of the immigration context, organized by agency:

Equal Employment Opportunity Commission (“EEOC”):

*American Ass’n of Retired Persons v. EEOC*, 489 F.3d 558, 567 (3d Cir. 2007) (finding that the proposed regulation is within the EEOC’s exemption authority under Section 9 of the Age Discrimination in Employment Act and stating that “it is clear that the EEOC’s proposed regulation was supported by the agency’s full consideration of the relevant factors, potential effects, and possible alternatives to such a policy, and was not arbitrary or capricious”).

Environmental Protection Agency (“EPA”):

*Friends of Everglades v. South Florida Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (applying *Brand X* to defer to the EPA’s interpretation of the Clean Water Act, whose statutory language and statutory construction within the broader context of the statute as a whole are ambiguous and regarding which the EPA’s construction is permissible).

*Miami-Dade County v. U.S. EPA*, 529 F.3d 1049, 1066 n.12, 1071 (11th Cir. 2008) (citing *Brand X* in deferring to the EPA’s judgment and concluding that the EPA’s “Final Rule is a reasonable interpretation of [Part C of the Safe Drinking Water Act], is sufficiently supported by the administrative record, and is not arbitrary and capricious”).

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001) (refusing to foreclose the possibility that its decision might be different if *Chevron* deference applied by stating that “[i]f the EPA’s position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by [other] courts might be appropriate”).

Federal Communications Commission (“FCC”):

*Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 217, 222 (3d Cir. 2007) (stating that “the FCC’s conclusion that from the perspective of the end-user, wireline broadband service and cable modem service are functionally similar and, therefore, that they should be subject to the same regulatory classification under the Communications Act” and that the FCC’s broad market analysis is “both reasonable and consistent with the approach upheld by the Supreme Court in *Brand X*”).

*Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) (stating that given that “in *Brand X* the Supreme Court upheld the narrow definition of ‘offer’ advanced by the Commission,” the Commission has “reasonably interpreted the word ‘provide,’” and given the “word ‘provide’ a different meaning than the word ‘offer’”).

Forest Service:

*Lands Council v. Martin*, 529 F.3d 1219, 1225 (9th Cir. 2008) (holding that the Forest Service provided a “rational explanation” for its change in policy regarding the definition of “live trees” that did not leave the court “in doubt as to the reason for the change in direction” (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007))).

Internal Revenue Service (IRS):

*Swallows Holding, Ltd. v. Comm’r*, 515 F.3d 162, 171 (3d Cir. 2008) (finding that because a provision of the Internal Revenue Code was ambiguous, “the Secretary was justified in promulgating a rule that prescribed a filing deadline”).

*McNamee v. Dep’t of the Treasury*, 488 F.3d 100 (2d Cir. 2007).

Securities and Exchange Commission (“SEC”):

*Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 502-03 (3d Cir. 2008). The Third Circuit stated that *Chevron* and *Brand X* principles should apply to regulations as well as statutes by noting that “[a]fter all, ‘[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order’” (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)), and that “[a]n administrative agency’s interpretation of its own regulation receives even greater deference than that accorded to its interpretation of a statute” (quoting *Facchiano Constr. Co. v. U.S. Dep’t of Labor*, 987 F.2d 206, 213 (3d Cir. 1993)). The court also stated that the Securities and Exchange Act of 1934 is ambiguous and that the SEC’s interpretation of new Rule 16b-3 and new Rule 16b-7 are reasonable.

8. Given the terminology of many of the decisions discussed in footnotes 6 and 7, other circuits may have otherwise upheld the Board’s decision in *Matter of Escobar* by applying the “arbitrary, capricious, or manifestly contrary to the statute” standard deeming an agency interpretation of a statute or regulation unreasonable only if it is problematic; this standard did not factor into *Cuevas-Gaspar* or *Escobar* and was not directly applied in *Mercado-Zazueta*. See *Chevron, U.S.A., Inc.*, 467 U.S. at 842-43, which held:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

9. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (granting *Chevron* deference to a Board decision interpreting the statutory language “serious nonpolitical crime” under the Act).

10. See, e.g., *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc) (deferring to the Board’s determination that aggravated driving under the influence of alcohol is a crime involving moral turpitude); *Ali*, 521 F.3d at 739 (holding that moral turpitude is an “open-ended” term that the

Board is both “required and entitled” to flesh out, and giving deference to the Board’s finding that the respondent was convicted of a crime involving moral turpitude).

11. *See, e.g., Morales v. Gonzales*, 478 F.3d 972, 982 (9th Cir. 2007) (holding that it must defer to the Board’s statutory interpretation regarding what evidence may be considered in deciding whether a prior offense is a “particularly serious crime,” so long as the Board’s interpretation “is based on a reasonable—and therefore permissible—construction of the statute”).

12. *See generally* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. Chi. L. Rev. 1671, 1681 (2007).

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## RECENT COURT OPINIONS

### ***First Circuit:***

*Faye v. Holder*, \_\_F.3d\_\_, 2009 WL 2767302 (1st Cir. Sept. 1, 2009): The First Circuit denied the appeal from the Board’s denial of the Senegalese respondent’s asylum application. In a decision rendered pursuant to a remand from the court, the Board rejected the particular social group proposed by the respondent, namely, “women who had a child out of wedlock/are considered adulterers because they gave birth to a child allegedly not their husband’s/have been abused by their husbands.” The court found that substantial evidence supported the Board’s conclusion that such a group was both too amorphous and lacking in social visibility to meet the requirements established by case law. The court further upheld the Board’s denial of the respondent’s claim based on her religious beliefs, where the record failed to establish what beliefs she held or that she was persecuted on account of them. Lastly, the court affirmed the Board’s denial of the respondent’s CAT claim.

*Caal-Tiul v. Holder*, \_\_F.3d\_\_, 2009 WL 2883540 (1st Cir. Sept. 10, 2009): The First Circuit denied the respondent’s petition for review of the Board’s order denying asylum, which reversed the decision of the Immigration Judge. Although the Board acknowledged that the respondent and her daughter were subjected to criminal acts in their native Guatemala, it found no evidence in the record to support the Immigration Judge’s conclusion that such harm was “on account of” their status as indigenous women. The court reluctantly agreed, noting that the outcome would regrettably result in the respondent’s separation from her children, who had become United States citizens through their father’s naturalization. However, the court noted that deferred action or other humanitarian measures might be available and “would be far from frivolous” under the circumstances.

### ***Second Circuit:***

*Santoso v. Holder*, \_\_F.3d\_\_, 2009 WL 2914267 (2d Cir. Sept. 14, 2009): The Board affirmed the Immigration Judge’s decision denying the Indonesian respondent’s application for asylum. The Second Circuit found the respondent’s reliance on its decision in *Mufied v. Mukasey* unpersuasive support for her argument that the Immigration Judge and the Board failed to adequately consider whether a “pattern or practice” of persecution exists in Indonesia against ethnic Chinese or Catholics. The court noted that, unlike the situation in *Mufied*, the Immigration Judge did specifically address the issue in this case. Moreover, the court did not find error in the Immigration Judge’s conclusion that no pattern or practice was established, holding that this determination was supported by the background evidence of record.

*Hu v. Holder*, \_\_F.3d\_\_, 2009 WL 2778442 (2d Cir. Sept. 3, 2009): The Second Circuit remanded following the denial of the Chinese respondent’s pre-REAL ID Act applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Immigration Judge had denied the applications in 2002 based on an adverse credibility finding. The case was subsequently remanded from the Second Circuit. Without hearing any additional testimony, the Immigration Judge issued a written decision in 2006 further explaining the adverse credibility finding. In its current decision, the court noted that the Immigration Judge’s 2006 decision “contains detailed analyses of [the respondent’s] credibility based on her demeanor during her testimony at the 2002 hearing.” Stating that the Immigration Judge never commented on the respondent’s demeanor at the 2002 hearing, the court found that “[a] four-year-old memory of the witness’s demeanor is not entitled to the . . . deference” normally afforded to Immigration Judges’ demeanor assessments. The court further stated that “[t]he IJ’s opinion regarding [the respondent’s] testimony about her forced abortion is . . . based on impermissible speculation,” and that “[t]wo of the inconsistencies upon which the IJ relied in reaching his adverse credibility determination are based on flawed reasoning or misstatements of the record.”

### ***Third Circuit:***

*Camara v. Att’y Gen. of the U.S.*, \_\_F.3d\_\_, 2009 WL 2836437 (3d Cir. Sept. 4, 2009): The Third Circuit reviewed the Board’s denial of the respondent’s application for asylum from Cote D’Ivoire and remanded the record.

The Board had found that the respondent did not suffer past persecution in Cote D'Ivoire, and that any persecution she suffered after being sent to live in Guinea to escape the violence of her own country's civil war was irrelevant. The court disagreed with the first holding, finding that where the respondent witnessed her father being kidnaped by rebels who directly threatened her and her family, the Board erred in concluding that such mistreatment did not rise to the level of persecution.

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

*Hernandez v. Holder*, \_\_F.3d\_\_, 2009 WL 2747075 (8th Cir. Sept. 1, 2009): The Eighth Circuit denied in part and granted in part the petition for review of an asylum applicant from Guatemala. The respondent was granted asylum by an Immigration Judge in a 1994 decision that was reversed by the Board 6 years later upon its finding that the respondent was barred from relief as a persecutor. In its initial decision in the matter, the court reversed and remanded. However, the record was assigned to a different Immigration Judge, as the original Immigration Judge no longer traveled to the Bloomington court on detail and was thus considered "unavailable." The respondent's requests to reinstate the 1994 decision or to have his case reheard by the original Immigration Judge were denied. Furthermore, the respondent's motion to administratively close his case for repapering was opposed by the DHS. Eventually, his asylum claim was denied because of changed country conditions. In its current decision, the court found no due process violation in the substitution of the new Immigration Judge, holding that a respondent has a right to a fair and impartial judge, but not to a particular Immigration Judge. The court also rejected the respondent's arguments regarding his request for a grant of asylum nunc pro tunc. However, the court remanded for further consideration of the respondent's application for a humanitarian grant of asylum.

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

*Mercado-Zazueta v. Holder*, \_\_F.3d\_\_, 2009 WL 2857197 (9th Cir. Sept. 8, 2009): An Immigration Judge pretermitted a lawful permanent resident's application for cancellation of removal under section 240A(a)(1) of the Act for failure to establish the requisite 5 years of lawful permanent residence. On appeal, the Board refused to allow the respondent to impute his adoptive father's period of permanent residence. In its decision, the Ninth Circuit rejected the Board's reasoning in *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007). In that case, the Board had refused to apply the court's holding in *Cuevas-*

*Gaspar v. Gonzales* that allowed imputation of a parent's residence to satisfy the 7-year residence requirement of section 240A(a)(2) of the Act. Here, the court held that the rationale of *Cuevas-Gaspar* applies equally to the residence requirements of both sections 240A(a)(1) and (2), and it found the Board's conclusion to the contrary impermissible. The court further found the Board's decision in *Matter of Ramirez-Vargas* (in which it applied a *Brand X* analysis to conclude it was not bound to follow *Cuevas-Gaspar* on the section 240A(a)(2) residence issue) "misplaced," stating that a *Brand X* scenario had not been present.

*Khan v. Holder*, \_\_F.3d\_\_, 2009 WL 2871222 (9th Cir. Sept. 9, 2009): The Ninth Circuit denied the petition for review of an asylum-seeker from India. An Immigration Judge denied the respondent relief because of his involvement with a terrorist organization, the Jammu Kashmir Liberation Front ("JKLF"). In reaching this decision, the Immigration Judge applied the newly enacted provisions of the REAL ID Act to the respondent's case retroactively. The Immigration Judge granted the respondent CAT relief. The court acknowledged that the asylum and withholding claims turned on the questions whether the JKLF was a terrorist organization, and whether the respondent knew or should have known that it was. The court found that the Immigration Judge's conclusions to these questions were supported by substantive evidence; that the definition of "terrorist activity" under the Act was not unconstitutionally vague; and that no due process violation arose from the Immigration Judge's failure to hold a second hearing subsequent to the enactment of the REAL ID Act.

## BIA PRECEDENT DECISIONS

The Board addressed grounds for granting a motion to reopen to rescind an in absentia order in *Matter of Evra*, 25 I&N Dec. 79 (BIA 2009). The issue was whether an order of removal issued pursuant to section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A), could be rescinded if the alien was in Federal or State custody at the time of the scheduled hearing, and the alien was not later acquitted of the charges leading to the custody or the charges were not dismissed. Section 240(b)(5)(C)(ii) of the Act provides that an order entered in absentia may be rescinded at any time upon a motion to reopen demonstrating that the

alien failed to appear because he did not receive proper notice of the hearing or was in Federal or State custody and failed to appear “through no fault of the alien.” The Immigration Judge found that the phrase “through no fault of the alien” referred to the alien’s culpability. The Board disagreed, holding that the phrase merely refers to aliens prevented from attending proceedings because they are incarcerated and cannot get to the hearing. The conduct underlying the alien’s arrest and incarceration does not constitute “fault” within the meaning of the statute. In this case, the respondent provided evidence that he was in State custody at the time of his removal hearing and could not attend the proceedings. The Board remanded the case for further proceedings.

In *Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009), the Board found that a lawful permanent resident who qualifies as a battered spouse may be eligible for cancellation of removal under section 240A(b)(2) of the Act, 8 U.S.C. § 1229b(b)(2). The Department of Homeland Security argued that because section 240A(b) of the Act is entitled “Cancellation of Removal . . . for Certain Nonpermanent Residents,” lawful permanent residents are not eligible for relief. The Board began its analysis by noting that the text of section 240A(b) does not require applicants to show any particular immigration status. When suspension of deportation for battered spouses was first enacted as former section 244(a)(3) of the Act, 8 U.S.C. § 1254(a)(3), by the Violence against Women Act of 1994 (“VAWA”), the existing law regarding suspension of deportation permitted aliens in lawful permanent resident status, as well as nonimmigrant or illegal status, to apply. Further, when the cancellation statute was enacted in 1996, the legislative history did not indicate any intent to make relief unavailable to lawful permanent residents, stating only that section 240A(b)(2) “restate[d]” the battered spouse provision of former section 244(a)(3). In discussing statutory construction, the Board cited Supreme Court authority, which states that the title of a statute and heading of a section cannot limit the plain meaning of the statute’s text but may be relevant to interpreting ambiguous terms. However, the Board found that there is no ambiguity in the statutory text.

As there was no dispute that the respondent met the eligibility requirements for cancellation of removal, the Board turned to the issue of discretion, cautioning that in discretionary determinations, factors set forth in case law for one type of relief may not be applicable to

other types of relief. In this case, the Board balanced the respondent’s significant positive equities against the facts that she had previously adjusted her status through a VAWA a battered spouse self-petition, had since divorced her abusive spouse, and had remarried. The Board found that since the respondent had already obtained VAWA protection from her prior spouse and was not requesting relief based on her current relationship, the purpose of the Act would not be served by granting the application. The Board therefore denied the respondent’s application in the exercise of discretion.

## REGULATORY UPDATE

74 Fed. Reg. 46, 938

DEPARTMENT OF HOMELAND SECURITY  
8 CFR Parts 103, 214 and 274a

### **E-2 Nonimmigrant Status for Aliens in the Commonwealth of the Northern Mariana Islands With Long-Term Investor Status**

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) is proposing to amend its regulations governing E-2 nonimmigrant treaty investors to establish procedures for classifying long-term investors in the Commonwealth of the Northern Mariana Islands (CNMI) as E-2 nonimmigrants. This proposed rule implements the CNMI nonimmigrant investor visa provisions of the Consolidated Natural Resources Act of 2008 extending the immigration laws of the United States to the CNMI.

DATES: Written comments must be submitted on or before October 14, 2009.

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### **Disparity? Or Diversity? *continued***

recent decisions on the subject have provided greater clarity on the subject, and they have been widely deferred to and accepted in the circuit courts. *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), *aff’d sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *Matter of C-A-*, 23 I&N Dec. 951, 959-61 (BIA 2006), *aff’d sub nom. Castillo-Arias v. U.S. Atty Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 549

U.S. 1115 (2007); *see also Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009); *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008). However, proving that “outliers” exist on the courts of appeals as well, the Seventh Circuit recently rejected the “social visibility” test adopted by the Board as part of the criteria for determining the existence of a particular social group. *Gatimi v. Holder*, \_\_\_F.3d\_\_\_, 2009 WL 2568952 (7th Cir. Aug. 20, 2009).

*Gatimi* presented a claim heard with increasing frequency in immigration courts: Kenyans claiming harm from the Mungiki, a subgroup or sect of the Kikuyu tribe that is involved in violent criminal activity and requires female members (and female relatives of members) to undergo FGM. The applicant joined the Mungiki in 1995 and defected from the group in 1999, after which sect members broke into his home and threatened him with death unless his wife was presented for “circumcision.” The Seventh Circuit dismissed as “absurd” the Immigration Judge’s conclusion that Mr. Gatimi had not been persecuted—but this issue was not addressed by the Board. Instead, the Board affirmed the alternate finding that “defectors from the Mungiki” do not constitute a particular social group, and thus that Gatimi did not establish a nexus to a ground specified in the Act.

The court rejected the Board’s reliance on the “social visibility” standard in rejecting Gatimi’s social group claim, holding that the test conflicts with the court’s prior holding that former subordinates of the Colombian attorney general with information about the FARC guerrillas constituted a particular social group. *See Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006). In addition, the court held that Gatimi’s case could not be distinguished on the facts. The court also claimed that the Board has failed to explain, in any case, “the reasoning behind the criterion of social visibility.” *Gatimi*, 2009 WL 2568952, at \*3.

Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will

take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be “seen” by other people in the society “as a segment of the population.” Those former employees of the Colombian attorney general tried hard, one can be sure, to become invisible and, so far as appears, were unknown to Colombian society as a whole.

*Id.* The court also claimed that the Board has been “inconsistent” in applying the “social visibility” test. However, the cases in which it claims the Board did *not* apply the standard long predate the more recent decisions that have articulated and applied the test. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988).

The court acknowledged that no less than five circuits have accepted the “social visibility” test as a criterion for defining a particular social group, and it claimed not to have a quarrel with the *results* reached in those cases. However, one case cited with approval as to result by *Gatimi* denied particular social group status to informers against Brazilian drug smugglers. *See Scatambuli*, 531 F.3d at 628-29. It is unclear why, if Gatimi’s defection from a violent criminal organization such as the Mungiki marks him as a member of a particular social group, an informant’s decision to place his life at risk by ratting on drug smugglers does not. The Seventh Circuit claimed that in cases such as *Scatambuli*, “[w]e just don’t see what work ‘social visibility’ does,” thus indicating that the claims could just as easily have been denied without reference to that standard. *Gatimi*, 2009 WL 2568952, at \*4. However, it seems clear from the Board decisions developing the test, and its broad acceptance in the circuits, that the test *does* do some work, specifically in defining when a claimed individual characteristic, even one that is indisputably shared by others persons, is sufficient to define a cognizable social group.

Furthermore, the court did not address the level of deference that should be accorded the Board’s standard for defining “particular social group.” The First, Second, and Ninth Circuits have all held that deference should be applied under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Ramos-Lopez*, 563 F.3d at 858-59; *Scatambuli*, 558 F.3d at 58;

*Ucelo-Gomez*, 509 F.3d at 72. The Seventh Circuit also noted that the Supreme Court has required the circuits specifically to defer to the Board’s definition of particular social group, *Gonzales v. Thomas*, 547 U.S. 183 (2006), but, citing the alleged inconsistency in Board precedent noted above, declined to join its sister circuits in applying the deference called for by the Court.

Coincidentally for our purposes, the Seventh Circuit also linked its analysis of *Gatimi*’s case to the issue presented in *Kazemzadeh*.

The Board’s position in [*Gatima*’s] case . . . is of a piece with another position that we have rejected: that a person cannot complain of religious persecution if by concealing his religious practice he escapes the persecutors’ notice. The only way, on the Board’s view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend “I am a Mungiki defector.”

*Gatimi*, 2009 WL 2568952, at \*4 (citations omitted). While groups should not be recognized when their members have little in common beside being targets, the court explained that this rule does not apply to Mungiki defectors who, like the lawyers in *Sepulveda* or the children of the old aristocracy in the Soviet Union, are “breakaway factions that were relentlessly pursued.” *Id.*

Left unaddressed by *Gatimi*—and perhaps unfortunately so—is whether the putative group of Mungiki defectors *does* have social visibility in the unique circumstances of Kenyan society. A tribe in Kenya, like a

clan in Somalia, would almost certainly be recognized as a particular social group. Perhaps a strong claim can be made that those who have defected from a subgroup of the tribe are distinctive and recognizable, as a group, in a way that defectors from a criminal gang in El Salvador are not. In other words, acceptance and application of the social visibility test might have *strengthened* the court’s ruling in *Gatimi*’s favor, avoided a split in the circuits, and provided a basis for ongoing development of the standard—an enterprise that most other circuits have now joined, but from which the Seventh Circuit, at least for the present, has excluded itself.

## Conclusion

Diversity is highly valued in our society, Government agencies, and courts. But with diversity of viewpoints comes diversity of outcomes. The cases discussed this month show that even on questions as basic as whether an issue is a question of fact or law, or whether or not *Chevron* deference should be applied a legal determination by the Board, controversy can rage. Not to mention, of course, the divided views on substantive issues such as what constitutes “persecution,” and whether a nexus to a protected ground has been established. For those in the trenches struggling with the question whether our diversity has resulted in too much “disparity,” take heart. Adjudicators and judges at all levels are struggling with the same issue, and over time, the system both permits and encourages consensus to be reached on problems that, for the moment, seem intractable and even divisive.

*Edward R. Grant was appointed to the Board of Immigration Appeals in January 1998.*

1. This decision was originally published in error, but it was withdrawn and republished as a nonprecedential order.

### EOIR Immigration Law Advisor

**David L. Neal, Acting Chairman**  
*Board of Immigration Appeals*

**Brian M. O’Leary, Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Jack H. Weil, Acting Assistant Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Karen L. Drumond, Librarian**  
*EOIR Law Library and Immigration Research Center*

**Carolyn A. Elliot, Senior Legal Advisor**  
*Board of Immigration Appeals*

**Emmett D. Soper, Attorney Advisor**  
*Office of the Chief Immigration Judge*

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