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The Top Twenty: Cases To Remember From 2009

by Edward R. Grant

Introduction

It does not seem so long ago that we counted down the end of the Second Millenium, mildly fearful of a "Y2K" crash and mildly hopeful for what a new decade and century would bring.

There were no iPhones or Facebook. Most of us computed, at home, at dial-up speed. The World Trade Towers stood, major newspapers appeared to be flourishing, and the end of an impeachment scandal lent a sense of political calm. The S&P 500 stood at 1469 on 12/31/1999; few saw that it would now struggle to remain *only* 350 points lower. Even fewer, if any, foresaw that the White Sox, Phillies, Marlins, Diamondbacks, and Red Sox (twice!) would *all* win the World Series, or that the Yankees would win only in the new decade's bookend years of 2000 and 2009.

Our world was different as well. Most Board of Immigration Appeals decisions were from three-member panels, and the ratio of cases backlogged to cases adjudicated was prodigious. The Board also exercised de novo review, including on questions of fact and credibility. Petitions for review to the circuit courts of appeals numbered less than 2000 per year. *INS v. St. Cyr*, 533 U.S. 289 (2001), had not yet resurrected section 212(c) relief in removal proceedings, and there was no PATRIOT Act or REAL ID Act. Plus, one almost forgets, the government agency standing before us was the "legacy" Immigration and Naturalization Service ("INS").

Yet, indomitable as ever, we stumbled through it all, across the finish line of 2009, and now look forward to a new year and decade ahead. As we do, it's appropriate to look back on some of the highlights from the Federal courts, including the Supreme Court, during the past year. Our method is only slightly more opaque than that employed by the misnamed "Bowl Championship Series" in college football, but with a far greater degree of

accountability: all selections are in sole and unreviewable discretion, nay, whim, of the author.

20 & 19 (Tie). *Karimijanaki v. Holder*, 579 F.3d 710 (6th Cir. 2009); *Mushtaq v. Holder*, 583 F.3d 875 (5th Cir. 2009); *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009); *see also Escobar v. Holder*, 567 F.3d 466 (9th Cir. 2009). **Shall the Sins (or Status) of the Parents Be Visited on the Next Generation?** “Imputation” of the actions or status of a parent to an alien child garnered significant judicial attention during 2009. In summary, *Karimijanaki* (involving abandonment of lawful permanent resident (“LPR”) status) and *Mushtaq* (involving immigrant visa and naturalization fraud) affirmed Board rulings that the sins of the fathers can bar children from reaping immigration benefits, while *Mercado-Zazueta* reversed the Board precedent in *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), holding that children could not benefit from imputation of their parents’ status as LPRs. *Barrios*, however, held that for purposes of the physical presence requirement for cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (“NACARA”), children are on their own and cannot benefit from the physical presence of their parents.

Many of the issues here defy easy summary. The Board and Ninth Circuit decisions culminating in *Mercado-Zazueta* were fully discussed in our September edition and, to save space, will not be further digested here. *See* Bijal Shah, *Brand X Developments in the Ninth Circuit and Beyond*, Immigration Law Advisor, Vol. 3, No. 9 (Sept. 2009). *Barrios* distinguished the requirement of physical presence from the types of circumstances, including domicile, LPR status, or abandonment, that the Ninth Circuit (and in some cases the Board) has previously found to be imputable. These latter categories, *Barrios* explained, all involve a formal status, intent, or state of mind that a minor is either incapable of satisfying, or should not reasonably be expected to satisfy, independent of his or her parents. *Barrios*, 581 F.3d at 862. In contrast, physical presence does not involve a status, intent, or state of mind, but merely the objective fact of being present in the United States. Since nothing in the NACARA statute or regulations suggests that this requirement can be met other than by actual physical presence of the applicant, there was no basis on which to impute the physical presence of *Barrios*’s father to his son. At year’s end, the Fifth Circuit also held that the LPR status of a parent

cannot be imputed to a son or daughter for purposes of establishing continuous residence for cancellation of removal under section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2), because residence also presents no question regarding a minor’s intention. *Deus v. Holder*, ___ F.3d ___, 2009 WL 4936392 (9th Cir. Dec. 23, 2009).

Abandonment of LPR status, on the other hand, is just the type of circumstance involving status, intent, or state of mind that can be imputed from parent to child. As the discussion in *Karimijanaki* demonstrates, the question of abandonment demands a highly fact-intensive inquiry. The parents and three children had immigrated from Iran in 1997 based on an immigrant visa filed by the husband’s brother. A month later, the mother returned to Iran with three of the children to look after an adult daughter who, not being a derivative, had to remain behind. The mother returned to the United States with her son in 2005, and both were placed in proceedings. The Eighth Circuit affirmed the Board’s ruling that the mother’s 7-year absence, coupled with evidence of her ownership of property and bank accounts in Iran and lack of ties to the United States, equated to abandonment of her LPR status. The son argued, however, that this abandonment should not be imputed to him; rather, he should be imputed to have the status of his father, who had remained in the United States and become a citizen. The Eighth Circuit disagreed, citing the son’s long and exclusive residence with his mother and his apparent lack of ties to his father. *Karimijanaki*, 579 F.3d at 719-21. The court also rejected the son’s claim of imputed citizenship, even though that issue had not been addressed by the Board.

Mushtaq also involved a family affair, albeit of more dubious variety. The mother and father were married in Pakistan and gave birth to four children. The father emigrated to the United States in 1985 and, through marriage to a United States citizen, acquired citizenship himself. His daughter, the subject of this case, then immigrated here as a derivative citizen—by dint of an application falsely stating that her mother was deceased. She later, at age 15, filed a visa petition for her own husband; her siblings also obtained citizenship through the ruse of the mother’s death.

The nondeceased mother then emigrated to these shores under a false name, remarried the father, and attempted thereby to gain her own immigration benefits. Authorities noticed, the couple was convicted of conspiracy and naturalization fraud, and denaturalization

proceedings ensued all around. The daughter, now in removal proceedings, sought a waiver under section 212(k) of the Act, 8 U.S.C. § 1182(k), contending that because of her status as a minor, she could not have known or ascertained the existence of the fraud.

Relying on the decision in *Senica v. INS*, 16 F.3d 1013 (9th Cir. 1994), the Fifth Circuit concluded that imputation was proper in this circumstance because the opposite result would make every minor child who has benefitted from a scheme of immigration fraud eligible for benefits that he or she was clearly not entitled to in the first place. The court also cited Board precedent on imputing the abandonment of LPR status, creating a conceptual link to the analysis in *Karimijanaki*. See *Mushtaq*, 583 F.3d at 877-78 (citing *Matter of Zamora*, 17 I&N Dec. 395 (BIA 1980)).

18. *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341 (11th Cir. 2009). A Return to First Principles?

As this case was featured in the September edition of the Immigration Law Advisor, a lengthy explanation of its principal holding—that asylum should be granted when an applicant can only avoid religious persecution by successfully hiding his beliefs—is not required here. See Edward R. Grant, *Disparity? Or Diversity? Contested Issues in Asylum Law*, Immigration Law Advisor, Vol. 1, No. 9 (Sept. 2009). The concurring opinion of Judge Stanley Marcus, however, warrants special mention. Judge Marcus, while declaiming any intent to impose the full protections of the First Amendment free exercise clause on asylum jurisprudence, nevertheless found that protection of religious liberty lay at the heart, not only of the nation’s founding, but in its commitment, in the Refugee Act of 1980, to offer protection to the persecuted.

[T]he Refugee Act was created in no small measure as a response to some of the world’s largest contemporary refugee crises; the hearings focused on the need to protect Soviet Jewish refugees, Middle Eastern Christian refugees, and Iranian minorities from religious persecution. . . .

Neither the founders nor the drafters of the Refugee Act could have accepted the narrow view that secret practice can cure persecution. The apparent view that a petitioner is not entitled to asylum on

account of religious persecution so long as he can mitigate the atrocities of his situation by hiding his faith and practicing only in darkness cannot be squared with the asylum statute. Forced clandestine practice amounts to religious persecution all by itself; it should not be the guarantee of safety to which we relegate genuine converts who have attracted the attention of a totalitarian state.

Kazemzadeh, 577 F.3d at 1360. Thus, Judge Marcus concluded that being forced on pain of death to renounce one’s faith or practice it in secret meets the definition of persecution as an “extreme concept.”

The notion that those fleeing religious persecution warrant a special solicitude under refugee and asylum laws is, of course, nothing new. The Lautenberg Amendment, first enacted in the 1980s, oriented our refugee admissions program to Jews and other religious minorities in the former Communist bloc. The Eleventh Circuit and other courts of appeals have previously indicated that religious adherents cannot be compelled to hide their practice as a means to avoid persecution. See *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1003 (8th Cir. 2006); *Antipova v. U.S. Att’y Gen.*, 392 F.3d 1259, 1263 (11th Cir. 2004); *Zhang v. Ashcroft*, 388 F.3d 713, 719-20 (9th Cir. 2004); *Muhur v. Ashcroft*, 355 F.3d 958, 960 (7th Cir. 2004). Finally, the nation’s history weighs heavily on the side of such an understanding.

Kazemzadeh, then, reminds us that protection of conscience, while not limited to religious belief, warrants special consideration when the arm of the state is employed to suppress, or even eliminate, some or all forms of religious belief.

17 & 16. *Lin v. Holder*, ___F.3d___, 2009 WL 4360802 (9th Cir. Dec. 3, 2009); *Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252 (11th Cir. 2009); see also *Liu v. Att’y Gen. of U.S.*, 555 F.3d 145 (3d Cir. 2009). Consensus on “Two-USC Child” Motions To Reopen? Measured solely by the number of cases it may impact—within the Ninth Circuit and elsewhere—*Lin* may have the largest influence of any case discussed here. Rejecting the Eleventh Circuit’s approach in *Jiang*, the Ninth Circuit solidly endorsed the Board’s trio of decisions regarding Chinese asylum claims based on the birth in

the United States of two or more children and affirmed the Board's denial of the petitioner's motion to reopen. See *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007); *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007); *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007).

Lin's significance derives largely from the fact that the Ninth Circuit's standards for reviewing late motions to reopen based on changed conditions require, inter alia, that the new and previously unavailable evidence, together with previous evidence, establish "prima facie" eligibility for asylum. *Toufighi v. Mukasey*, 538 F.3d 988 (9th Cir. 2008); *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006). The petitioner contended that this standard was satisfied by the evidence (similar to that frequently seen by Immigration Judges and the Board) that couples with two children in China are categorically required to undergo sterilization. The Ninth Circuit rejected this in favor of the "case-by-case" approach favored in the Board's precedents, stating that this best fit its own precedents. *Lin*, 2009 WL 4360802, at *3.

Lin noted the "substantial uniformity" of the circuits on this issue, highlighting the Third Circuit's decision in *Liu*. *Id.* at *6 (citing *Liu*, 555 F.3d 145). The latter was significant because an earlier Third Circuit decision concluded that the Board had failed to give sufficient consideration to a "village letter" indicating that the alien would be targeted for sterilization. See *Zheng v. Att'y Gen. of U.S.*, 549 F.3d 260 (2008). *Liu* illustrated the circuit's expectations by quoting approvingly from the Board's discussion of the evidence that the petitioner had presented in her motion to reopen. While the evidence in *Liu* did not include a village letter, the evidence in *Lin* did; the Ninth Circuit discounted the letter in part because while it stated that the petitioner herself was not a citizen or permanent resident of the United States, it failed to account for the fact that the petitioner's husband was a permanent resident. The court likewise discounted anecdotal reports of coerced sterilizations because none of the children born to the parents in those cases were United States citizens.

In the end, the court concluded, the Board did not abuse its discretion in determining that there had not been a material change in country conditions regarding enforcement of the family planning policy. "Tellingly," the court noted, counsel for the petitioner, when pressed at oral argument, could identify no circumstance in which a Chinese national who was married to a U.S. LPR, and

whose children were United States citizens, was subjected to forced sterilization on return to China. *Lin*, 2009 WL 4360802, at *7.

The clear trend in other circuits now leaves the Eleventh Circuit, and decisions such as *Jiang* and *Li v. U.S. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007), as the outliers. Considering the same evidence before the Board and other circuits, the court concluded that recent legal developments, particularly the 2002 codification of the national family planning laws, constituted a material change in conditions which, when coupled with petitioner's evidence alleging increased sterilizations in her home village, provided evidence of prima facie eligibility for asylum. *Jiang*, 568 F.3d at 1258. The Eleventh Circuit clearly had the opportunity to reconsider its position in light of developments in other courts but, without citing any of those cases, chose not to do.

All that can be said is that the Eleventh Circuit is reading virtually identical evidence in a manner different from all other circuits to have considered the question—and therein lies the significance for our purposes, particularly of the decisions in *Lin*, for apparently solidifying the consensus among the circuits, and *Jiang*, for bucking the same consensus.

15. *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270 (11th Cir. 2009); *Kueviakoe v. U.S. Att'y Gen.*, 567 F.3d 1301 (11th Cir. 2009). Caution in Applying REAL ID Credibility Standards. *Tang*, analyzed in our August edition, see Edward R. Grant, *A Crummy Summer Rerun: Still More on Corroboration, Credibility, and the REAL ID Act*, Immigration Law Advisor, Vol. 3, No. 8 (Aug. 2009), and *Kueviakoe* emphasize that even in a circuit as traditionally deferential to Board and Immigration Judge findings as the Eleventh, application of the fact-finding and credibility standards adopted by the REAL ID Act are subject to scrutiny to determine if they comply with the "totality of the circumstances" standard in section 208(b)(1)(B)(iii) of Act, 8 U.S.C. § 1158(b)(1)(B)(iii). Both cases concluded that adverse credibility determinations were not based on substantial evidence: in *Tang* because the Immigration Judge had based a negative plausibility assessment on his "personal perceptions," as opposed to objective evidence; and in *Kueviakoe* because the Immigration Judge had relied on discrepancies that the court concluded were not present in the record. *Tang* also faulted the Immigration Judge and Board for not considering the circumstances under

which Tang's allegedly inconsistent prior statements had been made, or her explanations for them.

Tang, as we previously concluded, suggests that factors such as plausibility and demeanor will not be given a "free pass" on judicial review simply because they are subjective in nature. The court reversed outright the Immigration Judge's determination on plausibility and seriously questioned whether the written record supported the "demeanor" finding that the petitioner had been hesitant in her testimony. *Tang*, 578 F.3d at 1281. *Kueviakoe* determined that the alleged inconsistencies—whether the petitioner was transported in a police "car" or "truck," whether he was "beaten" or just "mistreated" on his second day of detention, and whether he was hospitalized "for" 2 days, or 2 days after his release from detention—were not supportable on a full reading of the record. *Kudviakoe*, 567 F.3d at 1305-06.

It is that full reading of the record—the "totality of the circumstances" in the words of the Act, that ought to guide credibility determinations. Adverse findings based on inconsistencies or other factors that appear isolated from the record as a whole continue to be as vulnerable under the REAL ID Act as before. These cogent reminders easily land *Tang* and *Kueviakoe* on our annual list.

14. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). Seeing Past "Social Visibility." *Gatimi*, being the subject of recent analysis in these pages, will not occupy much attention here. See Edward R. Grant, *Disparity? Or Diversity? Contested Issues in Asylum Law*, Immigration Law Advisor, Vol. 3, No. 9 (Sept. 2009). The Seventh Circuit is the first, and thus far the only, court to reject the Board's "social visibility" standard for determining the existence of a "particular social group." See *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. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 549 U.S.1115 (2007). As noted in our prior discussion, the impact of *Gatimi* may be limited, even within the Seventh Circuit. The aliens involved may have had a viable claim, even applying the social visibility standard, based on their membership in a particular tribe. In addition, by agreeing with and distinguishing the First

Circuit's decision in *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009), *Gatimi* does not open the door to general categories of defectors and informers from criminal organizations.

Nevertheless, *Gatimi* remains a useful and generally applicable caution against an overly mechanistic application of the "social visibility" standard that fails to take into account the particular circumstances of an applicant's claim and the prevailing conditions and culture in the home country. Citing *Gatimi*, the Seventh Circuit also held at year's end that former members of an El Salvadoran street gang constitute a particular social group. *Benitez Ramos v. Holder*, ___F.3d___, 2009 WL 4800123 (7th Cir. Dec. 15, 2009).

13. *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), cert. granted, ___ S. Ct. ___, 2009 WL 2058154 (U.S. Dec. 14, 2009) (No. 09-60). When Do Two Drug Possessions Constitute an Aggravated Felony? Perhaps, at long last, we will see resolution of the vexing question whether, and under what circumstances, a second State conviction for possession of a controlled substance constitutes a "drug trafficking crime" under the Controlled Substances Act, and thus an aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).

The Fifth Circuit considered, and rejected, the Board's preferred approach to the question, announced in the decision under review. See *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007). But the court concluded that the Board had accurately discerned the Fifth Circuit's own view on the matter: that in order to qualify as a "drug trafficking crime," the second possession offense need not have been specifically prosecuted as a "recidivist" offense.

As the Fifth Circuit noted, the circuits have split, if not quite down the middle, on the question. See *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (holding that a recidivist prosecution is not required); *United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (7th Cir. 2008) (per curiam) (same). *But see Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (holding that a recidivist prosecution is required); *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008) (same); *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) (same); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002) (same).

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR NOVEMBER 2009

by John Guendelsberger

The United States courts of appeals issued 282 decisions in November 2009 in cases appealed from the Board. The courts affirmed the Board in 262 cases and reversed or remanded in 20, for an overall reversal rate of 7.1% compared to last month's 11.3%. There were no reversals from the First, Sixth, Seventh, Eighth, and Tenth Circuits.

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

Circuit	Total cases	Affirmed	Reversed	% reversed
First	5	5	0	0.0
Second	133	131	2	1.5
Third	27	21	6	22.2
Fourth	13	10	3	23.1
Fifth	33	32	1	3.0
Sixth	9	7	2	22.2
Seventh	5	5	0	0.0
Eighth	7	7	0	0.0
Ninth	37	31	6	16.2
Tenth	4	4	0	0.0
Eleventh	9	9	0	0.0
All circuits:	282	262	20	7.1

The Second Circuit, which accounted for nearly half of the month's cases, issued only two reversals. The bulk of the Second Circuit decisions this month were short orders affirming the Board's denials of motions to reopen based on assertions of changed country conditions in Chinese family planning asylum claims that were previously denied on the merits. The two reversals involved an adverse credibility determination and a question regarding the date of the plea agreement in the context of a section 212(c) waiver.

The Ninth Circuit issued relatively few decisions and reversed in only six. Reversals included cases involving an adverse credibility determination, the presumption of a well-founded fear of persecution when there is a finding of past persecution, a particularly serious crime

determination for asylum eligibility, and two cases relating to criminal grounds.

The four reversals from the Third Circuit involved an adverse credibility determination in an asylum claim, a remand to further address a claim for humanitarian asylum based on the severity of past persecution, a continuance denial in a cancellation case, timeliness of an appeal to the Board, and two motions to reopen based on changed country conditions in which the court found insufficient reasoning and failure to fully consider all of the evidence submitted.

The three reversals in the Fourth Circuit involved credibility, corroboration, and level of harm for past persecution, all in the context of asylum claims.

The chart below shows the combined numbers for the first 11 months of 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total cases	Affirmed	Reversed	% reversed
Ninth	1610	1319	291	18.1
Third	284	235	49	17.3
Seventh	72	62	10	13.9

Sixth	150	136	14	9.3
Eighth	68	62	6	8.8
Eleventh	263	244	19	7.2
Second	1335	1263	72	5.4
First	67	64	3	4.5
Fifth	233	224	9	3.9
Fourth	164	158	6	3.7
Tenth	45	44	1	2.2
All circuits:	4291	3811	480	11.2

Last year at this point there were 4074 total decisions and 526 reversals for a 12.9% overall reversal rate.

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RECENT COURT OPINIONS

First Circuit:

Rasiah v. Holder, ___F.3d___, 2009 WL 4667103 (1st Cir. Dec. 9, 2009): The First Circuit denied a petition for review filed by an ethnic Tamil citizen of Sri Lanka. The alien appealed after the Board affirmed the Immigration Judge's denial of his asylum application. The Immigration Judge made an adverse credibility finding and further found no pattern or practice of persecution against ethnic Tamils in Sri Lanka. The alien challenged only the latter holding on appeal. He also sought reopening from the Board based on his claim of worsened country conditions. The court noted that the country condition materials established that, as a result of civil strife, Tamils have suffered human rights abuses attributable to the Government of Sri Lanka or its indifference. However, the court ruled that such showing was insufficient to establish the reasonable likelihood of persecution of all members of the group. The court found no evidence to support the claim of worsened conditions and upheld the Board's dismissal of the alien's additional claim (first raised before the Board) that he would face persecution as a member of a particular social group of "denied asylum seekers," based on his failure to raise such claim before the Immigration Judge.

Second Circuit:

Shi Jie Ge v. Holder, ___F.3d___, 2009 WL 4281472 (2d Cir. Dec. 2, 2009): The Second Circuit overturned the Board's affirmance of an Immigration Judge's denial of an asylum application filed by a Chinese applicant. The alien's claim was based on his membership and activities with the China Democracy Party ("CDP"). The asylum application was filed more than 1 year after his entry. The court found error in the Immigration Judge's ruling that the alien did not establish an exception based on "changed circumstances" resulting from his CDP activities, where the Immigration Judge noted that the alien had joined the CDP 3 years prior to filing and had failed to establish that his membership had ever become known to the Chinese Government. The court noted that the Immigration Judge erred in considering the alien's clandestine act of joining the party as the only changed circumstance, and in failing to consider his later activities that first brought his membership to the attention of the Chinese authorities. The court further noted that the alien was not required to establish that the authorities had already learned of his membership in order to establish a well-founded fear, but could meet such burden as well by showing that such membership was likely to become known to the authorities. The record was therefore remanded.

Pierre v. Holder, ___F.3d___, 2009 WL 4576054 (2d Cir. Dec. 8, 2009): The Second Circuit vacated the decision of the Board finding sua sponte that the alien was removable as an aggravated felon under section 101(a)(43)(U) of the Act (involving attempt or conspiracy to commit an offense defined as an aggravated felony). The case was appealed to the Board from an Immigration Judge's determination that the alien was removable as an aggravated felon under section 101(a)(43)(M) of the Act (involving fraud or deceit in which the loss to the victim exceeds \$10,000). On appeal, the Board agreed with the alien's argument that, as the requisite monetary loss had not been established, the requirements of section 101(a)(43)(M) had not been met. However, the Board nevertheless dismissed the appeal upon its determination that the "attempt or conspiracy" clause of subsection (U) was a lesser included offense to subsection (M). The court disagreed and found a due process violation where, in proceedings before the Immigration Judge, the DHS repeatedly stated that it would rely on subsection (M) only and declined to amend the Notice to Appear to add a charge under subsection (U). The court thus found that the alien had no notice of the charge under subsection (U), and thus no reason to defend against such charge before the Immigration Judge.

Almeida v. Holder, ___F.3d___, 2009 WL 4576067 (2d Cir. Dec. 8, 2009): The Second Circuit denied the alien's petition for review of the Immigration Judge's decision (affirmed by the Board) that his conviction for second degree larceny under Connecticut law constituted a conviction for an aggravated felony as a theft offense under section 101(a)(43)(G) of the Act. The court first granted deference to the Board's broad interpretation of the term "theft offense" as stated in its precedent decision in *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Applying the categorical approach, the court next analyzed the Connecticut statute's requirement of intent to "deprive" or "appropriate" and rejected the alien's argument that the latter term rendered the statute divisible. In reaching such conclusion, the court found that both terms involve the intent to deprive a person of some rights or benefits of property ownership, and thus that the crime constituted a theft offense.

Ninth Circuit:

Toj-Culpatan v. Holder, ___F.3d___, 2009 WL 4256449 (9th Cir. Dec. 1, 2009): The Ninth Circuit denied the alien's petition for review from a decision of an Immigration Judge (affirmed by the Board) pretermittting the alien's

asylum application as untimely. The court rejected the alien's claim that he had established extraordinary circumstances sufficient to excuse his late filing, based on the facts that he was unable to speak English, he was detained for 2 months in an immigration detention center, and he had his case transferred after moving from Arizona to California. The court did not find these circumstances, either individually or cumulatively, to be extraordinary. The court took notice that the inability to speak English is ordinary for an immigrant, and that many non-English speaking immigrants file timely asylum applications in English. The court further found that the alien failed to explain how he was prevented from filing his application during his time in detention (during which time he was represented by counsel), or why such period of detention would have prevented his filing during the months he was not detained. The court similarly found no explanation for how the case transfer prevented his timely filing.

Fen Gui Lin v. Holder, __F.3d__, 2009 WL 4360802 (9th Cir. Dec. 3, 2009): The court denied the petition for review of an alien from China, whose motion to reopen proceedings after giving birth to two children in the U.S. (and while pregnant with a third) was denied by the Board. On appeal, the alien contended that the Board erred in failing to find her new evidence to establish changed conditions in China sufficient to warrant reopening. While the court had previously held that the birth of children in the U.S. constituted a change in personal circumstances, and not a change in country conditions, the alien claimed to have submitted evidence that the implementation and enforcement of the family planning policy in her home village and province had, since the time of her prior hearing, become more stringent. The court did not find the Board's determination to the contrary to be arbitrary, irrational or contrary to the law, and it particularly focused on the fact that the alien's evidence failed to address the fact that the alien's husband was a lawful permanent resident.

BIA PRECEDENT DECISIONS

In *Matter of Portillo-Gutierrez*, 25 I&N Dec. 148 (BIA 2009), the Board clarified that a stepchild is a qualifying relative for purposes of establishing exceptional and extremely unusual hardship for cancellation of removal under section 240A(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(D). Section 101(b)(1) of the Act,

8 U.S.C. § 1101(b)(1), includes a stepchild within the definition of a "child," provided the child had not reached the age of 18 years at the time that the marriage creating the status of stepchild occurred. In this case, because the respondent married his wife when her United States citizen children were under 18, the children could be considered qualifying relatives for cancellation purposes. Since the Immigration Judge had not considered hardship to the stepchildren, the Board remanded for further findings.

In *Matter of Martinez-Serrano*, 25 I&N Dec. 151 (BIA 2009), the Board considered the factual basis for a charge of removability under section 237(a)(1)(E)(i) of the Act, 8 U.S.C. § 1227(a)(1)(E)(i). The respondent was convicted of aiding and abetting other aliens to evade and elude examination and inspection by immigration officers in violation of 18 U.S.C. § 2(a) and 8 U.S.C. § 1325(a)(2). The Immigration Judge determined that although the evidence showed that the respondent harbored aliens after their entry, there was insufficient evidence to establish that she helped them enter the country illegally. The Board found that 8 U.S.C. § 1325(a) is a statute that addresses the manner of an illegal entry, and case law confirms that the act of entry may include other related acts that occurred either before, during, or after entry so long as they are in furtherance of securing the entry. The statute was intended to cover a broad range of conduct, and a conviction for aiding and abetting another alien to enter illegally under that statute establishes removability under section 237(a)(1)(E)(i) of the Act. The Board found, alternatively, that the Immigration Judge could consider the facts underlying the conviction because the ground of removability does not require a conviction. In this case, the complaint and the plea agreement revealed that the respondent's conduct was tied to the aliens' manner of entry and her specific intent was to harbor them in order to elude immigration officials.

REGULATORY UPDATE

74 Fed. Reg. 69,186
DEPARTMENT OF STATE

In the Matter of the Review of the Designation of al-Jihad AKA Egyptian Islamic Jihad AKA Egyptian al-Jihad AKA Jihad Group AKA New Jihad 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 there is a sufficient factual basis to find that al-Jihad, also known as Egyptian Islamic Jihad, also known as Egyptian al-Jihad, also known as Jihad Group, also known as New Jihad, has merged with al-Qa’ida, and that the relevant circumstances described in Section 219(a)(1) of the INA still exist with respect to that organization. Therefore, I hereby determine that the amendment of the designation of al-Jihad, and its aliases, as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained as a designated alias of al-Qa’ida, as provided for in 74 FR 4069 (January 22, 2009).

Dated: December 18, 2009.

74 Fed. Reg. 67,969

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1001, 1208, 1209, 1212, 1235, 1245 and 1274a

Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands

SUMMARY: With this amendment, the Department of Homeland Security (DHS) corrects an inadvertent error that was made in the interim final rule, Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands, published in the Federal Register on October 28, 2009, at 74 FR 55725.

DATES: December 22, 2009.

74 Fed. Reg. 69,355

DEPARTMENT OF HOMELAND SECURITY

**U.S. Citizenship and Immigration Services
Extension of the Designation of Sudan for Temporary Protected Status**

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Sudan for temporary protected status (TPS) for 18 months from its current expiration date of May 2, 2010, through November 2, 2011. This Notice also sets forth procedures necessary for nationals of Sudan (or aliens having no nationality who last habitually resided

in Sudan) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Reregistration is limited to persons who previously registered for TPS under the designation of Sudan and whose applications have been granted or remain pending. Certain nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. New EADs with a November 2, 2011, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs.

DATES: The extension of the TPS designation of Sudan is effective May 3, 010, and will remain in effect through November 2, 2011.

The Top Twenty *continued*

It is not common that a “decision to decide” merits Top 20 status. But here, the Supreme Court’s grant of certiorari could bring to an end an issue batted about for 2 decades. It easily makes the list.

12. *United Airlines, Inc., v. Brien*, ___F.3d___, 2009 WL 3923336 (2d Cir. Nov. 20, 2009). **Vanishing Airline Fines? Cases before the Board require decisions on all manner of human concern, from detention and imprisonment, to crime and punishment, to marriage and childbirth. Few, however, involve the actual awarding of money. And for the time being, because of the Second Circuit’s decision in *United Airlines*, there will be fewer still.**

Those not familiar with fines litigation under section 273 of the Act, 8 U.S.C. § 1323, are cautioned to enter at their own risk. Briefly put, the Government has imposed fines for decades on carriers that bring to the United States passengers who are not entitled to be admitted to the country. A sometimes dizzying array of legal standards have governed the imposition of the fines, depending in part on the culpability or diligence of the carrier. See *Matter of Varig Brazilian Airlines “Flight No. 830”*, 21 I&N Dec. 744 (BIA 1997) (stating that the reasonable diligence standard of section 273(c) of the Act applies both to the determination of a passenger’s alienage and the adequacy of a carrier’s examination of travel documents). Whether fines can be imposed also depends in part on the disposition of the alien’s application for admission to the United States—whether it

is denied, deferred, or resolved by waiver of documentary requirements or parole under section 212(d)(5) of the Act. See *Matter of Finnair Flight AY103*, 23 I&N Dec. 140 (BIA 2001) (finding that fine liability under section 273(a) of the Act persists despite the grant of a document waiver because of a 1996 regulation preserving the visa requirement even in the event of a waiver); *Matter of United Airlines Flight UA802*, 22 I&N Dec. 777 (BIA 1999) (finding that a carrier is subject to a fine when the INS paroled an undocumented alien into the country rather than granting a waiver of documentary requirements); *Matter of Air India Airlines Flight No. AI 101*, 22 I&N Dec. 681 (BIA 1999) (finding that the carrier was subject to a fine under section 273(a) of the Act for bringing an undocumented passenger, even though the passenger received a waiver of documentary requirements as an LPR). In *United Airlines*, the Second Circuit affirmed the Board's eponymously named decision, but it effectively reversed the Board's decision in *Air India* and directly reversed it in *Finnair*.

The Second Circuit first affirmed the fundamental Board rule in fines cases, stating that when a waiver of documentary requirements is granted to an alien, a carrier is not subject to a fine. This was a major victory for the airlines, as the district court had held that the Board's interpretation violated the plain terms of section 273(a) and thus that carriers were liable even if a waiver had been granted. However, ruling in the *United Airlines* matter, the Second Circuit held that the INS policy of *paroling* aliens into the United States, instead of granting waivers, was not improper even though the clear intent of the policy was to increase fines liability and thus deter the carriage of aliens without proper entry documents. "However repugnant the idea of financial drivers may be to United, there is no authority for United's claim that such motives are improper or contrary to Congress's intent." *United Airlines*, 2009 WL 3923336, at *13.

The Second Circuit was not so kind, however, to the efforts of the INS, now the Department of Homeland Security ("DHS"), to collect fines involving two categories of passengers: LPRs granted waivers pursuant to an INS regulation issued in 1966 and improperly documented passengers granted waivers pursuant to a regulatory change made in 1996. In both cases, defects in the process of issuing the regulations vitiated the ability of the INS/DHS to impose fines.

In the case of the LPR waivers, the *Air India* case, the district court had initially held that the 1966

regulation was invalid for lack of notice and comment, but it granted a motion filed by the INS under Federal Rule of Civil Procedure 60(b)(6), based on the carrier's failure to challenge the validity of the regulation within 6 years of its issuance. The Second Circuit held that the Rule 60 motion was improperly granted because the legal error alleged was not sufficiently extraordinary to compel reopening of the initial decision, particularly since the INS had waived appeal.

Finnair, involving a regulation that has provided the foundation for most airline fines imposed by the INS/DHS since 1996, is the most consequential of the Second Circuit's three rulings. The 1996 regulation attempted to preserve the Government's ability to fine carriers, even when a documentary waiver is granted, by clarifying that the requirement that the alien must have a visa is preserved despite the granting of an emergency waiver permitting the alien to enter the United States, usually for a brief, designated period of time. Various carriers challenged the regulation on grounds that it violated the "joint action" requirement in section 212(d)(4) of the Act, which states that visa requirements may be waived "jointly" by the Attorney General and the Secretary of State. The court accepted the argument, concluding that the State Department had not delegated to the INS its authority to promulgate regulations on this question, and that the State Department's own follow-on regulation, issued in 1999, did not satisfy either the requirement that the agencies act "jointly" in this regard, or the requirements of notice and comment.

The Board's decision in *Finnair* has, for most of this decade, anchored hundreds if not thousands of decisions dismissing carrier appeals from fines imposed pursuant to the 1996 regulation. Clearly, the new decade will see new rules governing the imposition of future fines.

11. *Zhang v. Holder*, 585 F.3d 715 (2d Cir. 2009). Credible Fear Interviews and Credibility Determinations. The Second Circuit held in *Zhang* that while prior statements made in a credible fear interview can be relied upon in assessing the credibility of an asylum applicant, the credible fear interview should be considered more closely analogous to an "airport interview" than to an asylum interview attended by an alien who has filed an affirmative application for asylum. On the one hand, the court stated, the credible fear interview occurs several days after the alien has arrived in the United States, and after the alien has had the opportunity to consult with counsel or another advisor. On the other, the alien remains detained

and thus more vulnerable than a nondetained affirmative asylum applicant who has established more contacts in this country.

Thus, the court concluded that the reliability of a credible fear interview should be assessed in accordance with the standards for airport interviews set forth in *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179-80 (2d Cir. 2004). That case holds that an airport interview is deemed more reliable if there is a verbatim account or transcript of an interview, if the questions are designed to elicit pertinent information regarding the asylum application, and if there is no indication that the alien was reluctant to provide information or did not understand English or the provided translation. *Zhang* emphasized, however, that Immigration Judges and the Board are not bound to “robotic incantations” or “talismanic” statements in meeting this standard; it will suffice if “the record of a credible fear interview displays the hallmarks of reliability.” *Zhang*, 585 F.3d at 725 (quoting *Xiao Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315, 336-37 n.17 (2d Cir. 2006)). Applying these standards, the court affirmed the adverse credibility determination, based on discrepancies appearing in both the applicant’s initial airport interview, and subsequent credible fear interview.

10. *American Academy of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009). Does Limited Reviewability of Consular Visa Denials Extend to Consular Procedures? The doctrine of consular nonreviewability shields visa denials made by consular officials overseas from domestic judicial review. *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986). The doctrine, however, does not bar American citizens from alleging that the denial of a visa infringed on their constitutional rights; such claims can be subject to a “highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.” *Bustamante v. Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

American Academy of Religion carried this doctrine forward to the circumstance of an alien denied a visa based on material support given to a putative charitable organization that supports Hamas, a designated terrorist organization. To some extent, the decision broke no new ground on the issue of consular nonreviewability; the court deflected various Government arguments seeking to limit the reach of *Kleindienst v. Mandel*, including

the argument that since *Mandel* involved the Attorney General’s decision to deny a waiver of excludability, its holding should not apply to a direct determination of inadmissibility. The Second Circuit disagreed, following the lead of the Ninth Circuit in *Bustamante*. *American Academy of Religion*, 573 F.3d at 125.

However, the court’s determination to review—and create new mandates regarding—the *procedure* employed at the consulate demonstrates the conceptual difficulty in keeping the level of review “highly constrained” to that of protecting the rights of the citizen plaintiffs, as opposed to the visa applicants themselves.

The visa applicant, Tariq Ramadan, a Swiss Muslim scholar who was once hired to teach at Notre Dame but whose H1-B visa was revoked, was then denied a “B” visa on grounds that, between 1998 and 2002, he had contributed \$1300 to the Association de Secours Palestinien (“ASP”), a charitable organization with ties to the designated terrorist organization Hamas. (ASP was itself designated as a terrorist entity in 2003.) The Second Circuit held that since the record was clear that Ramadan “knowingly” made the contributions to ASP, the consular officer had a facially legitimate and bona fide reason to conclude that he had knowingly provided material support to ASP. In so doing, the court rejected the plaintiffs’ argument that section 212(a)(3)(B)(iv)(VI) of the Act requires the Government to establish that a visa applicant (or, by likely logical extension, an applicant for admission in Immigration Court) knew that the organization being provided material support was, in fact, a terrorist organization.

The “material support” provision, however, does include an exception—if the applicant can demonstrate, by clear and convincing evidence, that he did not know, or should not reasonably have known, that the organization was a terrorist organization. Section 212(a)(3)(B)(iv)(VI)(dd) of the Act. While the consular officer had concluded that Ramadan did not, and could not, meet this evidentiary standard, the Second Circuit found this insufficient—the consular decision did not reflect that Ramadan had been confronted with the evidence of his material support or afforded an opportunity to demonstrate that he met the exception.

In construing the “unless” clause to require confronting the visa applicant with the allegation of the knowledge he

needs to negate, we are not requiring the consular officer to conduct a mini trial. It will suffice for the consular officer to state the knowledge alleged to render the visa applicant ineligible and then afford the applicant a reasonable opportunity to present evidence endeavoring to meet the “clear and convincing” negation of knowledge. Unless the allegation of knowledge has been conveyed to the applicant prior to his appearance before the consular office, it will normally be advisable to afford the applicant at least a brief opportunity to return with his available evidence.

American Academy of Religion, 573 F.3d at 133-34 (footnotes omitted).

The holding here may be difficult to square with *Bustamante*. There, the visa applicant and his family alleged that the consular officer lacked sufficient factual basis to conclude (under the “reason to believe” standard in section 212(a)(2)(C) of the Act) that the respondent was a drug trafficker.

While the Bustamantes alleged in their complaint that Jose is not and never has been a drug trafficker, they failed to allege that the consular official did not in good faith believe the information he had. It is not enough to allege that the consular official’s information was incorrect. Furthermore, the Bustamantes’ allegation that Jose was asked to become an informant in exchange for immigration benefits fails to allege bad faith; if anything, it reflects the official’s sincere belief that Jose had access to information that would be valuable in the government’s effort to combat drug trafficking.

Bustamante, 531 F.3d at 1062-63. Since the consular officer relied on information from the Drug Enforcement Administration (“DEA”), absent an allegation that either the officer or the DEA knew the information to be false, the Bustamantes failed to establish that the visa refusal lacked a legitimate basis. In other words, as long as there was a legitimate “reason to believe,” it did not matter for purposes of the “highly restrained” review of

the consular decision that the reason might be based on faulty premises.

It may be that the subjective nature of the “reason to believe” standard provides a basis to distinguish *Bustamante* from *American Academy of Religion*, and thus tenuously reconcile their holdings. However, the Ninth Circuit has not shied away from testing the “reason to believe” standard by objective criteria when it is applied in Immigration Court to an applicant for admission. See *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000) (stating that an Immigration Judge’s determination must be based on reasonable, substantial, and probative evidence). It is also inconceivable that if *Bustamante* were in removal proceedings, as opposed to being a visa applicant, he would not be permitted to contest the validity of evidence such as the DEA report. See *Pronsvakulchai v. Gonzales*, 461 F.3d 903, 908 (7th Cir. 2006) (stating that an alien must have an opportunity to rebut evidence on which a “reason to believe” is premised). The Second Circuit’s decision to extend such rights to a visa applicant—even if a “mini trial” is not required—appears to extend the boundaries of *Mandel* beyond those envisioned by the Supreme Court, or adopted by other circuits.

9. *Almeida v. Holder*, __F.3d__, 2009 WL 4576067 (2d Cir. Dec. 8, 2009). “Appropriation” Means “Theft.” The contours of what constitutes “theft,” for purposes of resolving both moral turpitude and aggravated felony charges, is among the most vexing questions at the intersection of immigration law and criminal law. The Board’s decision in *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000), attempted to clarify matters for aggravated felony charges under section 101(a)(43)(G) of the Act, concluding that the term “theft offense” sweeps more broadly than common-law larceny and includes a criminal intent to deprive the owner of the rights and benefits of ownership, even if the deprivation is less than total or permanent. *Id.* at 1345-46.

The Board’s attempt has met with mixed reception. See *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir. 2008) (rejecting the Board’s conclusion that a conviction under section 10851 of the California Vehicle Code is a conviction for a “theft offense”); *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346 (11th Cir. 2005) (concurring with *Matter of V-Z-S-*, but holding that “appropriat[ing]” property does not necessarily entail depriving the owner of

rights to property); *Hernandez-Mancilla v. INS*, 246 F.3d 1002 (7th Cir. 2001) (adopting the standard in *Matter of V-Z-S-*).

Almeida clarifies that where a larceny statute is sufficiently specific in its connection to the “intent to deprive” standard set forth in *Matter of V-Z-S-*, it will be regarded as a “theft offense.” A conviction under the Connecticut second-degree larceny statute at issue in *Almeida* may be obtained by proof that the defendant has either “deprived” another of property, or “appropriated” the property of another. Connecticut law defines “appropriate” to mean the exercise of control over the property of another, “permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit,” or to dispose of the property for the benefit of someone other than the owner. Conn. Gen. Stat. 53a-118(a)(4). The Second Circuit noted that the “right to exclude others” is one of the essential “sticks” in the bundle of rights characterized as property and thus rejected the petitioner’s argument that the statute could be applied to “appropriations” (such as unauthorized access to an internet or cable service) that do not interfere with the owner’s own use of the “property.” *Almeida*, 2009 WL 4576067, at *8. The Second Circuit avoided a direct conflict with the Eleventh Circuit’s apparently contrary ruling in *Jaggernaut*, noting that the Florida larceny statute defined “appropriation” more broadly than did Connecticut. *Id.* at *9 (stating that the *Jaggernaut* case was “not helpful”). However, if a violation of the “right to exclude others” constitutes a genuine deprivation of property rights, as *Almeida* clearly holds, the rationale in *Jaggernaut* may not be sustainable, and the two decisions may be impossible to reconcile.

Almeida breaks no new significant ground in the Second Circuit, which had already accepted the *Matter of V-Z-S-* standards. *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004). But given the frequency with which these issues arise, and the multiple potential applications of the “theft” concept to myriad State statutes, the decision makes the grade as one of the year’s most significant.

8. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009). Proving Fraud “Loss” on the Specific Facts. *Nijhawan* resolved a clear split in the circuits, rejecting the holdings of the Second, Ninth, and Eleventh Circuits that in determining whether the “loss to the victim” of a fraud offense exceeded \$10,000 for purposes of aggravated felonies under section 101(a)(43)(M) of the

Act, Immigration Judges and the Board are limited to considering whether that amount of loss constitutes an element of the underlying conviction. See *Kawashima v. Mukasey*, 530 F.3d 1111, 1117 (9th Cir. 2008); *Dulal-Whiteway v. U.S. Dep’t of Homeland Security*, 501 F.3d 116, 131 (2d Cir. 2007); *Obasohan v. U.S. Att’y Gen.*, 479 F.3d 785, 791 (11th Cir. 2007). Rather, in a brief unanimous opinion, the Court affirmed the Third Circuit’s contrary ruling in *Nijhawan v. Att’y Gen. of U.S.*, 523 F.3d 387 (3d Cir. 2008), and endorsed the Board’s view that the specific factual circumstances of the crime may be considered. See *Matter of Babaisikov*, 24 I&N Dec. 306 (BIA 2007); see also *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008); *Conteh v. Gonzales*, 461 F.3d 45, 55 (1st Cir. 2006).

The Court’s decision has implications beyond aggravated felony charges that are based on fraud convictions. *Nijhawan* identified several aggravated felony provisions that include factors or exceptions that would not be discernible on a strictly elements-based reading of the statute of conviction. See section 101(a)(43)(K)(ii) of the Act (prostitution for commercial advantage); section 101(a)(43)(P) of the Act (passport forgery, exception for certain family members); section 101(a)(43)(M)(ii) of the Act (tax evasion exceeding \$10,000). Conversely, *Nijhawan* identified other aggravated felony provisions that are amenable to an elements-based approach, including sexual abuse of a minor, illicit trafficking in controlled substances, and illicit trafficking in firearms. *Nijhawan*, 129 S. Ct. at 2300.

Several intervening circuit court decisions further map the contours of the permissible factual inquiry under *Nijhawan*. *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009), held that costs associated with investigating a defendant’s fraud may constitute “loss to the victim” for purposes of section 101(a)(43)(M)(i) of the Act, even where such costs may also have been incurred in relation to offenses of which he was not convicted. *Tian* held that since the amount of the investigative costs was not in dispute, and they clearly related at least in part to the crime of which the petitioner was convicted, he had the burden to show that the portion of the costs devoted to his crime was less than \$10,000.

The Second Circuit, in two recent decisions, held that a conviction for attempted fraud, where the intended loss exceeds \$10,000, constitutes an aggravated felony under sections 101(a)(43)(M)(i) and (U) of the Act,

Ljutica v. Holder, ___F.3d___, 2009 WL 4349837 (2d Cir. Dec. 3, 2009), but that a charge brought solely under section 101(a)(43)(M)(i) does not necessarily include a charge for “attempt” under subsection (U) as a lesser included offense. *Pierre v. Holder*, ___F.3d___, 2009 WL 4576054 (2d Cir. Dec. 8, 2009).

In *Ljutica*, which involved a conviction for bank fraud under 18 U.S.C. § 1344, the court rejected the alien’s claim that he was wrongly denied naturalization, concluding that the record of his conviction clearly established that he was convicted of “attempted” fraud under that statute, and that his intent to cause loss in the amount of \$475,000 satisfied the monetary threshold for an aggravated felony. The court endorsed the Board’s position in *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999), which concluded that the fact that the respondent had failed to obtain the money he sought to acquire in an insurance fraud scheme only established that his “attempt” had failed, not that he was not deportable for the attempt. See *Ljutica*, 2009 WL 4349837, at *4-5. The court also rejected the alien’s argument that since the Government had previously granted him a section 212(c) waiver for the fraud offense, it was estopped from asserting that conviction as a bar to good moral character in the context of naturalization.

Pierre, 2009 WL 4576054, also involving a conviction for bank fraud where the facts demonstrated no actual loss to the institution, does not appear to depart from the basic holding in *Ljutica*. Rather, *Pierre* focused on the fact that the alien was charged solely with removability under section 101(a)(43)(M)(i) of the Act, and not under subsections (M)(i) and (U) jointly. *Pierre* held the Board erred in analyzing the offense under subsection (U) because its own precedents appear to require that an “attempt”-based charge be brought jointly under subsections (M)(i) and (U). The court also held that the Board’s sua sponte invocation of subsection (U) violated the alien’s due process rights because no charge under that provision had been brought.

7 & 6. *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009); *Lochhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009); *Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009). Visa Relief for Aggrieved Widows. Among the harsh outcomes that result from inevitable line-drawing in the immigration laws, the “widow(er) penalty” has caused much anguish. Section 201(b)(2)(A)(i) of the Act, 8 U.S.C.

§ 1151(b)(2)(A)(i), until recently, provided that an alien shall be considered to remain the immediate relative of a deceased United States citizen if the alien was married to the deceased for at least 2 years, they were not separated at the time of death, and the alien filed a self-petition under section 204(a)(1)(A)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(ii). In addition, the INS, later the DHS, and the Board consistently held that with regard to petitions pending at the time of death, the spousal relationship terminated with death, thus requiring denial of the petition. Therefore, aliens widowed within 2 years of marriage were denied benefits under pending visa petitions and were also foreclosed from self-petitioning for LPR status.

Earlier this year, *Neang Chea Taing* and *Lochhart* followed the Ninth Circuit in holding that, with regard to *pending* visa petitions, a widowed spouse remains a “spouse” under the plain meaning of the Act and thus is entitled to adjudication of the marital visa petition on its merits. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). But see *Robinson*, 554 F.3d at 366-67 (holding that a spousal relationship terminates upon death, warranting denial of a pending petition). These decisions were examined in detail in our May edition. See Edward R. Grant, *Marital Rites: Recent Court Decisions on Visa Eligibility, Waivers, and Marriage Fraud*, Immigration Law Advisor, Vol. 3, No. 5 (May 2009). The First and Sixth Circuits both concluded that the plain language meaning of “spouse” included one who has been widowed, and that the limitation included in section 201(b)(2)(A)(i) of the Act was intended solely to place conditions on the right of widowers to self-petition after the death of their citizen spouse, and not to define the relationship of “immediate relative” with respect to petitions pending at the time of death.

Neang Chea Taing, *Lochhart*, *Freeman*, and the contrary decision in *Robinson*, prompted Congress to act. The 2010 appropriations bill for the DHS, signed in October by President Obama, included amendments to the Act removing the 2-year duration requirement on self-petitions, and specifying that the beneficiaries of petitions pending or approved at the time of a qualifying relative’s death shall have the petition or application for adjustment of status adjudicated unless the Secretary of DHS determines that such adjudication “would not be in the public interest.” Pub. Law No. 111-83, §§ 568(c)-(d), 123 Stat. 2142, 2187 (Oct. 28, 2009) (amending section 201(b)(2)(A)(i) of the Act and adding new section 204(l)

of the Act). These amendments retain the condition that the widowed spouse file a self-petition within 2 years of the spouse's death—this also has been the cause of some heartache in circumstances where no petition was filed prior to death and the widow(er) was not aware of, or did not act on, his or her rights within the 2-year window. Congress also provided, in a transitional amendment, that surviving widow(er)s of citizens who were previously excluded from self-petitioning shall have 2 years from the date of enactment to file such petitions.

5. *Negusie v. Holder*, 129 S. Ct. 1159 (2009). Duress Exception to Persecutor Bar? *Negusie*, decided in March, has been given lengthy treatment in these pages. See Brigitte L. Frantz, *Assistance in Persecution Under Duress: The Supreme Court's Decision in Negusie v. Holder and the Misplaced Reliance on Fedorenko v. United States*, Immigration Law Advisor, Vol. 3, No. 5 (May 2009); Edward R. Grant, *Through the Eye of the Needle: Immigration in the October 2008 Term*, Immigration Law Advisor, Vol. 2, No. 10 (Oct. 2008). The Court's holding is plain enough—in considering whether there is a “duress exception” to the persecutor bar to asylum under the Refugee Act of 1980, the Board and the Fifth Circuit erred in relying on the Court's prior holding that no such exception existed under the terms of the Displaced Persons Act of 1948 (“DPA”). See *Fedorenko v. United States*, 449 U.S. 490 (1981). The Court expressed no view on whether such an exception should be found under the Refugee Act and its amended provisions in the Act; its only hint was the observation that the historical circumstances giving rise to the DPA differed from those present when the Refugee Act was adopted. As the matter remains pending before the Board, no further comment is appropriate.

Meanwhile, new circuit court decisions continue to define the contours of “assistance in persecution” in determining whether the bar should apply. See *Yan Yan Lin v. Holder*, 584 F.3d 75 (2d Cir. 2009) (holding that assisting in examinations sometimes connected to forced abortions is not assistance in persecution); *Parlak v. Holder*, 578 F.3d 457 (6th Cir. 2009) (holding that fundraising and weapons smuggling for the Kurdistan Workers Party (“PKK”) constitutes persecution where the PKK's targets were Turkish sympathizers); *Weng v. Holder*, 562 F.3d 510 (2d Cir. 2009) (holding that providing post-operative care to women subject to forced abortions is not assistance in persecution).

4 & 3. *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). Deference to *Silva-Trevino*? Does a genuine split in the circuits now exist regarding the application of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)? That question is posed by the juxtaposition of *Jean-Louis* and *Marmolejo-Campos*, so far the only two court of appeals decisions to examine the Attorney General's revised standard for defining crimes involving moral turpitude (“CIMTs”). *Marmolejo-Campos* gave at least a provisional thumbs up to the broader “scienter” requirement announced in *Silva-Trevino*; *Jean-Louis*, while appearing to concur with the scienter requirement, gave an unequivocal thumbs down to *Silva-Trevino*'s further holdings on the application of the categorical approach (the “reasonable probability” standard) and the ability of Immigration Judges to go beyond the formal record of conviction to determine if the respondent's criminal conduct was, in fact, turpitudinous.

Marmolejo-Campos, issued in March and dissected in that month's “Sweet Sixteen” column, established a new—for the Ninth Circuit—standard of deference for determinations by the Board that a particular conviction is for a crime involving moral turpitude. See Edward R. Grant, *March Madness: A “Sweet Sixteen” for Immigration Wonks*, Immigration Law Advisor, Vol. 3, No. 3 (March 2009). By an 8-3 margin, the en banc panel voted to overrule all prior circuit opinions—which it characterized as “inconsistent” on the level of deference owed to the Board on the CIMT question—that have held or implied that the appropriate level of deference is other than “the same traditional principles of administrative deference we apply to the Board's interpretation of other ambiguous terms in the INA.” *Marmolejo-Campos*, 558 F.3d at 911 (overruling *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 998 (9th Cir. 2008); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008)); see also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court acknowledged that its position was now in accord with that of all other circuits to have considered the issue. *Marmolejo-Campos*, 558 F.3d at 911.

A narrower 7-4 majority deferred to the Board's conclusion that the crime in question—aggravated DUI under Arizona law—was a crime involving moral turpitude because a conviction required proof that the defendant knew that he was prohibited from driving on

account of a prior DUI conviction. *Id.* at 916-17; *see also Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (same). The dissenters were incredulous, concluding that *Matter of Lopez-Meza*, contrary to past Board precedents, allowed “mere knowledge” that one is committing a regulatory offense to satisfy the level of scienter typically required for a crime to be considered one of moral turpitude. *Marmolejo-Campos*, 558 F.3d at 921 (Berzon, J., dissenting) (“*Lopez-Meza* breaks with [prior Board precedent requiring ‘evil intent’] by holding that the ‘knew or should have known’ standard . . . is a sufficiently ‘evil’ mens rea to transform that regulatory offense into a CIMT.”).

While *Matter of Silva-Trevino*, not yet having been issued, played no role in the Board’s decision in *Marmolejo-Campos*, it became a key factor in the majority’s response to the criticism lodged by the dissent.

“The real question,” the dissent asserts, is “what is a sufficiently ‘culpable mental state?’” This stands in stark contrast to the Attorney General’s determination that “some form of scienter” is all that is required in order to conclude that a crime involves moral turpitude. *Silva-Trevino*, 24 I. & N. Dec. at 706 (emphasis added). Indeed, the dissent asks us to apply a heightened standard of review, a standard of review far beyond the deferential approach mandated by *Chevron*. Because the statutory text is devoid of any provision which requires a particular level of scienter, we must defer to the agency’s case-by-case adjudication of the matter so long as its construction of the statute is permissible. As the dissent itself admits, the BIA has not seen fit to create a categorical level of scienter for all crimes involving moral turpitude: nor is it required to.

Marmolejo-Campos, 558 F.3d at 916 (citations omitted). The majority also noted that the Attorney General, in *Silva-Trevino*, held that scienter is a “hallmark” of a crime involving moral turpitude. The upshot seems clear: the Ninth Circuit is satisfied that the Attorney General’s requirement of “some form of scienter” is a permissible interpretation of the ambiguous phrase “moral turpitude.”

Jean-Louis, issued by the Third Circuit in October, did not discuss or even cite to *Marmolejo-Campos*, a notable lapse given the decision’s virtually complete rejection of the *Silva-Trevino* framework. *See Jean-Louis*, 582 F.3d at 470-82. *Jean-Louis* concluded that simple assault on a child under 12 years of age in Pennsylvania did not constitute a CIMT because the statute of conviction did not require any specific level of knowledge regarding the age of the victim. The Third Circuit contended that its ruling was “bolstered” by *Silva-Trevino* because that decision not only required “some level of scienter” for a CIMT, but it also further stated that “[w]hether the perpetrator knew or should have known the victim’s age is a critical factor in determining whether his or her crime involved moral turpitude for immigration purposes.” *Jean Louis*, 582 F.3d at 469 (quoting *Matter of Silva-Trevino*, 24 I&N Dec. at 706). Technically, the Third Circuit’s contention is correct—*Silva-Trevino* does impose a requirement of “some” level of scienter. But it is equally clear that *Silva-Trevino* imposes no absolute requirement that the element of scienter be present in the statute of conviction. To the contrary, *Silva-Trevino* requires inquiry *beyond* the text of the statute to determine if there is a “realistic probability” that convictions under the statute have been applied to conduct that is not turpitudinous. *Matter of Silva-Trevino*, 24 I&N Dec. at 697. This latter requirement the Third Circuit decisively rejected.

The court’s decision constitutes a full-throated defense of the “least culpable conduct” standard for ascribing moral turpitude.

Under our precedents, the possibility of conviction for non-turpitudinous conduct, however remote, is sufficient to avoid removal; proof of actual application of the statute of conviction to the conduct asserted is unnecessary. “As a general rule, a criminal statute defines a crime involving ‘moral turpitude only if *all* of the conduct it prohibits is turpitudinous.”

Jean-Louis, 582 F.3d at 471 (quoting *Partyka v. Att’y Gen. of U.S.*, 417 F.3d 408, 411 (3d Cir. 2005)). There is no doubt, as the Third Circuit states, that Board and circuit court precedents have always favored a statute-based, as opposed to conduct-based, approach to CIMT analysis. It is also true that some of these precedents, particularly older ones, have adopted a strictly rigorist analysis,

akin to the “however remote” standard rearticulated in *Jean-Louis*. See *id.* at 473 n.13. However, as the Third Circuit acknowledged, albeit in disagreement, case law is trending away from this rigorist approach, and it is permitting inquiry into whether there is a reasonable probability that the statute could be applied to conduct that is not turpitudinous. *Id.* at 481; see also *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (“[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” (emphasis added)).

The Third Circuit “seriously doubt(s)” that the “logic” of *Duenas-Alvarez* can be imported into the CIMT context, because no “legal imagination” is required to conclude that, in a case such as the Pennsylvania assault statute, a defendant can be convicted while lacking the requisite scienter. *Jean-Louis*, 582 F.3d at 481. However, considering the actual element in question—that the victim be *less* than 12 years of age—it may require a flight of imagination to conclude that the defendant engaging in the assault did *not* know that his victim is of such tender age. In other words, is there a realistic possibility that the statute has been applied, in fact, to adult defendants who, at the very least, had acted recklessly with regard to the age of their victim? The Third Circuit’s analysis implies, if not holds, that the assault crime in question is a *malum prohibitum*, as opposed to a *malum in se*, offense. One may doubt whether this is a “realistic” view of the statute, in intent or operation.

The Third Circuit’s dismissal of the “realistic probability” approach raises two additional questions, one regarding the level of deference it accords to Board (or Attorney General) decisions regarding whether a crime involves moral turpitude, and the other regarding the conceptual difficulty of applying a “categorical” test to the CIMT category. The questions are really two sides of the same coin. “Moral turpitude” is an inherently ambiguous concept; unlike the “generic federal offense” construct at issue in *Duenas-Alvarez*, there are no “generic” elements which define a turpitudinous crime. Thus, all circuits, with the recent addition of the Ninth, profess to grant *Chevron* deference to the Board’s rulings on the matter. The Third Circuit is no exception; *Jean-Louis*, however,

repeated the court’s position that anything less than a fully rigorist approach to the potential scope of the statute is contrary to the plain language of the Act, specifically the terms “crime” and “conviction.” *Id.* at 473-74. The Attorney General was not owed *Chevron* deference, therefore, because his interpretation created an ambiguity in the statute that did not exist.

This answers the first of our two questions. And whatever one might think of the Third Circuit’s analysis, it is not uncommon for a Federal court, while professing to bestow *Chevron* deference, to conclude that the Board or another agency has erred on whether the statute is plain or ambiguous. However, the second question remains—in this case, why would an assault by an adult over 21 upon a child under 12 not be the equivalent of a “categorical match” to the category of turpitudinous crimes that seek to protect children from the predations of adults? Even the Ninth Circuit majority in *Nicanor-Romero*, 523 F.3d 992, while holding that the full range of statutory rape offenses did not constitute moral turpitude because the victims might be sufficiently mature to give consent to sex, recognized that crimes involving younger victims and older defendants would involve moral turpitude.

The Seventh Circuit, prior to *Silva-Trevino*, stepped in to resolve these questions by recognizing the differences both between criminal and immigration proceedings, and between the concept of “crime involving moral turpitude” and generic crimes defined by statutory elements. *Ali v. Mukasey*, 521 F.3d 737, 741-42 (7th Cir. 2008) (holding that a presentence report may be used to determine if a firearms offense also involved fraud). An immigration court engages in two inquiries that are not comparable to those engaged in by judge and jury at a criminal trial: the fact of the prior conviction, and “the appropriate classification of that conviction, which may require additional information.” *Id.* at 741. Specifically,

The need to decide whether a crime is one of “moral turpitude” does not have a parallel in criminal cases and may require some additional information, since the charging papers that led to the prior conviction are not framed with such classifications in mind (for “moral turpitude” just isn’t relevant to the criminal prosecution; it is not as if “turpitude” were an element of an offense).

Id. at 741-42. *Jean-Louis* rejects the Seventh Circuit's approach as part of its dismissal of *Silva-Trevino*; the determination of moral turpitude, it concluded, must be limited to the record of conviction documents identified in the Act, as well as by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

Undoubtedly, the issues confronted by *Marmolejo-Campos*, *Jean-Louis*, and *Ali* will resurface in subsequent circuit court decisions and perhaps one day will reach the Supreme Court. Stay tuned, particularly to developments in your circuit.

2 & 1. *Pelaya-Garcia v. Holder*, __F.3d__, 2009 WL 4755728 (9th Cir. Dec. 14, 2009); *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009). "I Did Not Knowingly Have Sex With That Minor" and Other Lessons From the Categorical Approach. The year 2009 was astonishingly busy, even by Ninth Circuit standards, for cases addressing the immigration consequences of crimes. In no particular order, the court determined: that a Hawaii conviction for possession of drug paraphernalia "related to" a controlled substance for purposes of section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), *Bermudez v. Holder*, 586 F.3d 1167 (9th Cir. 2009); that California convictions for offering to transport a controlled substance, *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009) (California Health & Safety Code § 11352(a)), and transporting a controlled substance, *Hernandez-Aguilar v. Holder*, __F.3d__, 2009 WL 4067644 (9th Cir. Nov. 25, 2009), also "related to" a controlled substance; that abuse of a cohabitant under California law did not "categorically" constitute a CIMT, *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009), and child endangerment did not categorically constitute a crime of child abuse, *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009); that receipt of stolen property (California Penal Code § 496(a)) is not categorically a CIMT, *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009), but is categorically a "theft offense," and thus an aggravated felony, *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. 2009); that attempted kidnaping, *Delgado-Hernandez v. Holder*, 582 F.3d 930 (9th Cir. 2009), and solicitation to commit rape by force, *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009), are categorically crimes of violence, while first-degree residential burglary under California Penal Code § 459 is categorically not a crime of burglary, *United States v. Aguila-Montes*, 553 F.3d 1229 (9th Cir. 2009); that operation of a vehicle "chop shop" is

not a theft offense, *Carrillo-Jaime v. Holder*, 572 F.3d 747 (9th Cir. 2009); and finally, that contempt for violation of a domestic protective order constitutes a crime of domestic violence under section 237(a)(2)(E)(i) of the Act, *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009).

Any one of these decisions could have made the cut for carving out new law, as well as illustrating the exigencies of the categorical and modified categorical approaches. *Fregozo* deserves special mention—its analysis (in dicta) of what is required to meet the modified categorical approach in the context of a plea of guilty or nolo contendere indicates that the circuit is not backing down from its rigorist approach to that subject. *Fregozo*, 576 F.3d at 1038-40. While "minute orders" are now recognized as legitimate records of conviction, see *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266 (9th Cir. 2009), a bare indication that the alien admitted guilt on a particular count may not be sufficient unless the phrase "as charged" is included. *Fregozo*, 576 F.3d at 1039.

Yet, standing above all these contenders are the twin decisions of the Ninth Circuit in *Medina-Villa*, 567 F.3d 507, and *Pelayo-Garcia*, 2009 WL 4755728. The former adopted what appeared to be a more common-sense approach to the question of when sexual conduct with a minor constitutes "sexual abuse of a minor," and thus an aggravated felony. The court determined that the respondent's conviction for lewd and lascivious acts with a child under the age of 14 constituted a conviction for sexual abuse of a minor. The court distinguished the prior ruling in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc), which held that several statutory rape offenses under California law did not fall under the generic Federal offense of "sexual abuse of a minor" because, among other things, the victims could be over the age of 16 and the age range between victim and perpetrator could be less than 4 years. See 18 U.S.C. § 2243 (Federal statute for sexual abuse of a minor). *Medina-Villa* concluded that not all sexual offenses involving minor victims had to meet the specific elements of the generic Federal offense; this would, among other things, lead to absurd results because the generic offenses refer to victims only between the ages of 12 and 16. The formal elements test in *Estrada-Espinoza* applied only to statutory rape offenses; other sex offenses should be analyzed in accordance with the "national contemporary standards" holding that sexual activity with a younger child is certainly abusive. *Medina-Villa*, 567 F.3d at 514 (quoting *Estrada-Espinoza*, 546 F.3d at 1153).

Estrada-Espinonza did not consider one prong of California statutory rape law—unlawful sexual intercourse with a minor under section 261.5(d) of the California Penal Code. *Pelayo-Garcia* took up the cudgel and held (1) that section 261.5(d) was not a categorical match to the Federal offense of sexual abuse of a minor because it does not require, as an element, that the alien have “knowingly” engaged in sexual intercourse; and (2) that section 261.5(d) criminalizes a broader range of conduct than the statute at issue in *Medina-Villa* and thus applied to conduct that was not “inherently abusive.” *Pelayo-Garcia*, 2009 WL 4755728, at *4-5.

Applying the first test, the “categorical match” to 18 U.S.C. § 2243, section 261.5(d) requires proof for conviction: (1) that the defendant engaged in sexual intercourse with another person; (2) that the defendant was at least 21 years of age at the time of intercourse; and (3) that the victim was under the age of 16. *Estrada-Espinonza* concluded that an offense of statutory rape must include an element that the respondent “knowingly” engaged in sexual intercourse—in other words, the scienter requirement applies to the act of sex, not to the age of the victim. Since section 261.5(d) includes no element requiring that the sexual intercourse was engaged in “knowingly,” *Pelayo-Garcia* concluded that it could not be classified, categorically, as sexual abuse of a minor. *Id.* at *4.

A logical question in response is whether there is a reasonable possibility that a defendant could be convicted if he did not “knowingly” engage in intercourse. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183. The court did not address this point but suggested that a jury presented with a statute that *did* contain an element of scienter as to the act of intercourse itself might acquit on evidence that the defendant was extremely intoxicated or otherwise incapacitated. *Pelayo-Garcia*, 2009 WL 4755728, at *2.

Turning to the “inherently abusive” standard advanced in *Medina-Villa*, the court in *Pelayo-Garcia* concluded that section 261.5(d) covered a “broader range” of conduct for two reasons: (1) the statute does not expressly include physical or psychological abuse of the minor as an element; and (2) the statute criminalizes conduct that is not per se abusive, “because it is not limited to conduct targeting younger children.” *Id.* at *5. The court rejected the argument that, under *Medina-Villa*, sexual conduct with a minor under 16 should be considered inherently abusive; rather, the court repeated its contention that crimes of statutory rape, even under

the Federal definition in 18 U.S.C. § 2243, and thus even when the victim must be under the age of 16, cover conduct that is not inherently abusive.

The Ninth Circuit is not alone in applying an “age differential” standard to the question of when sex crimes involving minor victims equate to “sexual abuse.” See *United States v. Osborne*, 551 F.3d 718 (7th Cir. 2009) (stating that, in a sentence enhancement context, a statute requiring a 2-year age differential covers conduct that is not inherently abusive). *But see Gaikov v. Holder*, 567 F.3d 832 (7th Cir. 2009) (holding that a statute criminalizing touching with sexual intent where the victim is between 14 and 16, and the defendant is at least 18, constitutes sexual abuse of a minor, and distinguishing *Osborne* as not involving the question of deference to a Board interpretation of “sexual abuse”). The decision in *Gaikov*, apart from giving far greater deference to the Board’s jurisprudence on this question, resolves the question of “age-differential” quite differently from the approach adopted by the Ninth Circuit. *Gaikov* even noted in dicta that if the stricter standard in *Osborne* were to be applied, the petitioner’s conduct would still constitute sexual abuse because, as a 20-year-old, he had intercourse with a 14-year-old girl.

Pelayo-Garcia, one suspects, is not the last we will hear of this issue; the apparent split with the Seventh Circuit may, in time, require resolution by a higher authority.

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