U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

November-December 2011 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 5 No. 10*

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Super Circuit?: Random Musings on 2011's Top Twenty

by Edward R. Grant

The confusion wrought by the myriad inter-circuit conflicts in immigration law is exceeded perhaps only by the proposals to *end* that confusion. One idea is a "super-circuit," consisting of judges selected periodically at random from the various geographical circuits, to adjudicate either all petitions for review or selected cases presenting clear conflicts among the circuits. Putting aside the constitutional, logistical, and budgetary obstacles to the "super-circuit" idea (and others), there is at least one precedent to ponder: the rise of the so-called super-conferences in college sports.

Think of it: the Big East, nobly born in the First, Second, Third, and D.C. Circuits, will cover the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh, and has designs on the Tenth. (A wag might suggest that the conference should have stayed truly "East" by recruiting schools in Tokyo, Shanghai, Hanoi, or even Beirut and Jerusalem. Or that it trade names with Conference USA.)

The Atlantic Coast Conference, which some say started the madness, has left the comfort zone of the Fourth and Eleventh Circuits to raid the First, Second, and Third Circuits. Looking west, you might think that the Fifth and Eighth Circuits would be space wide open enough to support its own super-conference. But with all the raiding and carpet-bagging from outside, the Big 12 is shrinking back to the size of the legacy Big 8 and must now extend its reach to Morgantown, WV. Meanwhile, the Big 10 continues to strain the credulity of its collective math departments by expanding to 12, and eventually to 14 or 16.

Pretty soon, therefore, women's volleyball and men's soccer teams will routinely criss-cross the nation, rubbing shoulders at the Starbucks and TGIFs at Hartsfield, O'Hare, and DFW as they await connecting flights to their next games. Athletic department suits will no doubt anoint this as perfect training for their future lives in business. Only crew, with its

ineluctable attachment to the bounds of natural geography, may escape this lunacy.

So, on third thought, perhaps it is wisest to endure the vicissitudes of inter-circuit conflict and avoid grand schemes of reform. Circuit judges might get tired of TGIF, and there is no TV money to drive the deal. Inconsistency among Federal courts is generally not something to make light of, but the quest for perfect consistency is a sure route to madness—for which a few moments of irreverence and levity are the perfect cure.

In that spirit, we offer commentary on this year's Top 20 immigration decisions from the Federal courts. Our usual criteria of complete arbitrariness and utterly nonreviewable abuse of discretion apply. Many of these cases have received full treatment in earlier columns, so pardon, in the interests of space, the numerous back references. Hopefully, though, we will provide an accurate snapshot of the year past.

20. A Year Is a Year—*Habibi v. Holder*, 658 F.3d 977 (9th Cir. 2011): "How many days are in a year?" So begins Judge Bybee's decision for the Ninth Circuit, and a pertinent question as we head into 2012. The answer, he reminds us, is "more complicated than it may first appear." The Royal Observatory, Greenwich, gives the correct answer as "approximately" 365.24237 days. To compensate, we add an extra day every fourth year; to not overcompensate, we exempt years at the end of a century—except those divisible by four.

Petitioner Jawid Habibi, convicted in 1999 of Battery of a Current or Former Significant Other in violation of California law, argued that since he would serve his 365-day suspended sentence during one of those end-of-century years divisible by 4, he was therefore not convicted of a crime of violence "for which the term of imprisonment [is] at least one year." Section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). A sentence of 365 days, he contended, was not, at least in 2000, a sentence to "one year."

You might think the answer to Habibi's argument was obvious. In one sense, yes: the Ninth Circuit previously rejected the argument that a sentence to "365 days" does not amount to a "year" because of that extra 5 hours, 49 minutes, and 1 second that it takes the Earth to complete its orbit. *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), *overruled on other grounds*, *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc). However, in *Lagandaon v. Ashcroft*, 383 F.3d 983, 985 (9th Cir. 2004), the court held that "a year, other than a leap year, is 365 days." That holding arose in the context of an alien who last entered the United States on May 14, 1987, and was served with his notice to appear on May 13, 1997—the 365th day of the 10th year. Reversing the Board of Immigration Appeals, *Lagandaon* held that the respondent *had* acquired 10 years of continuous physical presence prior to service of the notice to appear and thus was eligible for cancellation of removal under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1), because his presence on May 13, 1997, must be counted as completing 10 years of presence. The court rejected Government arguments that the petitioner was "several hours short" of 10 years, noting that under the common law, it was the calendar, not the clock, that controlled, and fractions of a day are not considered. *Lagandaon*, 383 F.3d at 990-91.

Habibi concluded that a focus on the *specific* calendar for a given year would lead to arbitrary results: whether a 365-day leap year sentence counted as "one year" would depend on whether the sentence began on, for example, February 1 or March 1 of that year. In the latter case, 365 days would bring one to February 28 of the following year, in the former, only to January 30. In calculating *terms* of years (the issue in *Lagandaon*), it makes sense to give equal measure to leap and conventional years—otherwise, the same types of absurdities would arise, depending on how many of the years in question were leap years. However, in defining the length of a *single* year, the standard measure of 365 days is consistent with the common law and thus, in the court's view, entitled to deference. *Habibi*, 658 F.3d at 982-83.

The calendar was also the issue in *Meza-Vallejos v. Holder*, 660 F.3d 1083 (9th Cir. 2011), specifically, whether the expiration of a voluntary departure ("VD") period on a Saturday warrants an extension of the period to file a motion to reopen to the following Monday. The court ruled in favor of the petitioner, concluding that where the VD period ends on a day where the Board is not open to receive a motion, a motion filed the following Monday is timely. While the court termed the Government's position "reasonable," it concluded that enforcement of the strict time limit would deprive the alien whose VD period concludes on a weekend from the benefit of the

full 60 days to file a motion seeking affirmative relief (which would otherwise be barred by application of the 10-year penalty for failing to depart during the 60-day period). *Id.* at 1089-90; section 240B(d)(1) of the Act, 8 U.S.C. § 1229c(d)(1).

19. Does Adjustment Constitute an Admission?—*Lanier v. U.S. Attorney General*, 631 F.3d 1363 (11th Cir. 2011): An alien "who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" is subject to restrictions on eligibility for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h): he or she must have 7 years of continuous residence and no convictions for an aggravated felony. In *Lanier*, the Eleventh Circuit joined the Fifth Circuit in holding that these restrictions do not apply to an alien who gained lawful permanent resident ("LPR") status through adjustment of status—even if the alien was *never* lawfully admitted to the United States in any status. As noted previously in these pages, it remains to be seen whether the trend is picked up in other circuits. *See* Edward R. Grant, *Circuit Bracketology: Lots of Upsets, But No Clear Favorites*, Immigration Law Advisor, Vol. 5, No. 2, at 6, 9-10 (Feb. 2011).

17. & 18. (Tie) Does Parole Constitute an "Admission in Any Status"? How About an Approved I-130 or Employment Authorization?—*Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011); *Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011); *Vasquez de Alcantar v. Holder*, 645 F.3d 1097 (9th Cir. 2011): The question of "admission" continues to vex many courts, and these cases could easily justify a higher ranking—but for the fact that they are riffs on a still-sui generis Ninth Circuit precedent expanding the concept of admission beyond the definition provided in section 101(a)(15) of the Act. *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006) (holding that an alien admitted into the Family Unity Program ("FUP") was "admitted in any status" for purposes of establishing continuous residence). *Garcia v. Holder* extended the holding of *Garcia-Quintero* to an alien who was deemed "paroled" pursuant to section 245(h)(1) of the Act, 8 U.S.C. § 1255(h)(1), for purposes of adjusting to LPR status as a Special Immigrant Juvenile ("SIJ"). *Guevara* and *Vasquez de Alcantar* declined to extend *Garcia-Quintero* to aliens with approved visa petitions or employment authorization documents.

Taking the latter two cases first (because they were first decided), the Ninth Circuit distinguished the status of being a mere *applicant* for LPR status from the special protections legislated by Congress for those in the Family Unity Program. Both Vasquez and Guevara entered the U.S. illegally; both had applications for LPR status pending, which, if recognized as a trigger for "admission in any status," would have conferred the requisite 7 years of continuous residence in section 240A(a)(2) of the Act. But merely applying for LPR status and receiving an approved I-130 (or Employment Authorization Document ("EAD") pending adjudication) is not equivalent to FUP benefits.

> The FUP was created to allow eligible spouses or unmarried children of legalized aliens to apply for the benefits of the program, including protection from deportation and authorization to work in the United States. . . . Though beneficiaries under the FUP and beneficiaries of I-130 visa petitions are provided similar benefits, such as the ability to remain in the United States and seek employment while awaiting adjustment to LPR status, participants in the FUP are provided congressionally mandated benefits, and must meet additional requirements for eligibility [including entry into the United States before May 5, 1988]. Thus, the mere approval of an I-130 visa petition (without more) is not the equivalent of participation in the FUP.

Vasquez de Alcantar, 645 F.3d at 1104 (citations omitted); *accord Guevara*, 649 F.3d at 1093 ("[T]he FUP was enacted by Congress to assist a very narrow group of aliens. . . . [I]t set forth heightened standards of eligibility . . . [and] was enacted to prevent the separation of families . . . ." (citations omitted)).

The circumstances of the petitioner in *Garcia v. Holder* were distinct from those of the "ordinary" illegal entrant or overstay who claims eligibility for adjustment of status. Garcia entered the United States in 1992 at age 9, after enduring a tragic early childhood, including serious physical injury. He quickly passed into the California foster care system, was declared a dependent of the juvenile court in 1994, and by court order, was assisted by child services officials with his application for LPR status as an SIJ, filed in 1994. His application was granted in 2000. Five years later, he committed two theft offenses and was placed into removal proceedings in 2006. The DHS contended that he was ineligible for cancellation of removal under section

240A(a) of the Act because he had not "resided in the United States continuously for 7 years after having been admitted in any status." Section 240A(a)(2) of the Act. The Immigration Judge and the Board agreed.

The Ninth Circuit reversed, concluding that SIJ parolees are similarly situated to FUP participants because they form a "narrow class" of juvenile aliens who must meet heightened eligibility requirements, including a court declaration that they are eligible for long-term foster care due to abuse, neglect, or abandonment. The judge must also determine that it is not in the juvenile's interests to return to his or her home country, and those in SIJ status enjoy special protections enacted by Congress. *Garcia*, 659 F.3d at 1270-71.

In short, the court concluded, aliens with SIJ status, like those in the FUP, form a narrow class of aliens with strong claims to remain in this country; those applying for an I-130 or adjustment of status are a far broader group with weaker claims. *Id.* at 1271. Why this difference translates to a holding that the former class has been "admitted" remains not entirely clear—the qualifier "admitted *in any status*" in section 240A(a)(2) of the Act refers most plausibly to the many nonimmigrant and immigrant statuses in which an alien can be "admitted," as defined in section 101(a)(15). Thus far, no other circuit has addressed the question in a published decision.

Finally, in an analogous ruling rejecting an alien's claim to have been "paroled," the Ninth Circuit held that presence under an order of "departure control" issued by Immigration and Customs Enforcement ("ICE") did not constitute any form of lawful presence. The alien, therefore, who had entered illegally and had overstayed a grant of voluntary departure, was "illegally or unlawfully in the United States" for purposes of 18 U.S.C. § 922(g)(5)(A) (possession of a firearm by an illegal alien). *United States v. Anaya-Acosta*, 629 F.3d 1091 (9th Cir. 2011). *See* Edward R. Grant and Patricia M. Allen, *Speaking of Parole: Who's In, and Who's Out*, Immigration Law Advisor, Vol. 5, No. 1, at 7, 9-10 (Jan. 2011).

16. Do "Adjusted" or "Admitted" LPRs Enjoy a Statute of Limitations on Removal Proceedings?—*Alhuay v. U.S. Attorney General*, 661 F.3d 534 (11th Cir. 2011); *Malik v. Attorney General of U.S.*, 659 F.3d 253 (3d Cir. 2011): The Eleventh Circuit in *Alhuay* rejected the Third Circuit's ruling in *Garcia v. Attorney General*, 553 F.3d 724 (3d Cir. 2009), that the 5-year period for administrative rescission of adjustment of status in section 246(a) of the Act, 8 U.S.C. § 1256(a), constitutes a statute of limitation against bringing deportation charges based on an improperly obtained adjustment. Here the trend is getting clearer: *Alhuay* accurately describes *Garcia* as an outlier because five circuits have now held that section 246(a) does not establish a statute of limitation applicable in deportation or removal proceedings. *Alhuay*, 661 F.3d at 544-45 & n.10.

In *Malik*, the Third Circuit clarified that its rule in *Garcia* applies only to aliens who have *adjusted* their status to that of a lawful permanent resident. Aliens who are *admitted* in LPR status through the consular process are not subject at all to section 246(a) of the Act and thus cannot claim the 5-year "statute of limitations" against the institution of removal proceedings.

15. The Wages of Crying Due Process—*Portillo-Rendon v. Holder*, No. 11-1642, 2011 WL 5319855 (7th Cir. Nov. 7, 2011): To establish eligibility for cancellation of removal under section 240A(b) of the Act, an alien must demonstrate good moral character ("GMC") during the requisite 10 years of continuous physical presence. The petitioner in *Portillo-Rendon* was found to fall short in this category as a result of numerous convictions for drunk driving and driving *sans* license. The Seventh Circuit rejected his argument that the GMC determination was subject to plenary review as a question of law. While GMC is a statutory requirement, it is not defined in the Act, and thus, "the decision *whether* an alien has the required character reflects an exercise of administrative discretion." *Id*. at *1. Continuing, the court noted that "[t]he IJ and BIA thought that this record shows poor moral fiber; that is a discretionary call and thus is not subject to judicial review." *Id.*

Judge Easterbrook, writing for the court, was not quite finished. Portillo-Rendon raised a nonspecific due process claim, "the sort of flabby, unfocused argument that we have deprecated." *Id.* at 2. Without a liberty or property interest—which is not present in an application for discretionary relief from removal—there is no "legitimate claim of entitlement . . . ; hope for a favorable exercise of administrative discretion does not qualify." *Id.*

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CIRCUIT COURT DECISIONS FOR OCTOBER 2011

by John Guendelsberger

The United States courts of appeals issued 184 decisions in October 2011 in cases appealed from the Board. The courts affirmed the Board in 158 cases and reversed or remanded in 26, for an overall reversal rate of 14.1% compared to last month. There were no reversals from the First, Fourth, Fifth, and Sixth Circuits.

The chart below shows the results from each circuit for October 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	26	24	2	7.7
Third	22	19	3	13.6
Fourth	5	5	0	0.0
Fifth	9	9	0	0.0
Sixth	8	8	0	0.0
Seventh	5	4	1	20.0
Eighth	6	5	1	16.7
Ninth	74	57	17	23.0
Tenth	3	2	1	33.3
Eleventh	24	23	1	4.2
All	184	158	26	14.1

The 184 decisions included 81 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 58 direct appeals from denials of other forms of relief from removal or from findings of removal; and 45 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	81	71	10	12.3
Other Relief	58	49	9	15.5
Motions	45	38	7	15.6

The 10 reversals or remands in asylum cases were all from the Ninth Circuit. These cases involved credibility, level of harm for past persecution, particular social group nexus, Convention Against Torture, the particularly serious crime bar, relocation (2 cases), and DHS rebuttal of the presumption of a well-founded fear after a finding of past persecution (2 cases). The nine reversals or remands in the "other relief" category addressed a variety of issues, including application of the modified categorical approach, ineffective assistance of counsel, cancellation of removal, the section 212(c) waiver, adjustment of status, and voluntary departure. The seven reversals in motions cases included the regulatory departure bar, rescission of an in absentia order for lack of notice, changed country conditions, section 212(c) waiver eligibility, and a motion to reconsider a denial of asylum.

The chart below shows the combined numbers from January through October 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
First	14	11	3	21.4
Seventh	47	37	10	21.3
Ninth	1440	1174	266	18.5
Tenth	36	32	4	11.1
Third	272	242	30	11.0
Eighth	33	30	3	9.1
Sixth	88	82	6	6.8
Eleventh	190	178	12	6.3
Second	450	424	26	5.8
Fourth	100	96	4	4.0
Fifth	125	121	4	3.2
All	2795	2427	368	13.2

Last year's reversal rate at this point (January through October 2010) was 11.2%, with 3650 total decisions and 407 reversals.

The numbers by type of case on appeal for the first 10 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1372	1189	183	13.3
Other Relief	609	510	99	16.3
Motions	814	728	86	10.6

CIRCUIT COURT DECISIONS FOR NOVEMBER 2011

The United States courts of appeals issued 206 decisions in November 2011 in cases appealed from the Board. The courts affirmed the Board in 188 cases and reversed or remanded in 18, for an overall reversal rate of 8.7% compared to last month's 14.1%. There were no reversals from the First, Second, Fifth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for November 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	78	78	0	0.0
Third	26	22	4	15.4
Fourth	8	7	1	12.5
Fifth	7	7	0	0.0
Sixth	9	8	1	11.1
Seventh	7	6	1	14.3
Eighth	3	3	0	0.0
Ninth	48	38	10	20.8
Tenth	1	1	0	0.0
Eleventh	16	15	1	6.3
All	206	188	18	8.7

The 206 decisions included 92 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 42 direct appeals from denials of other forms of relief from removal or from findings of removal; and 72 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	92	81	11	12.0
Other Relief	42	37	5	11.9
Motions	72	70	2	2.8

The 11 reversals or remands in asylum cases involved credibility (5 cases), particular social group nexus (2 cases), and various evidentiary issues (4 cases). The five reversals or remands in the "other relief" category addressed application of the modified categorical approach (three cases), cancellation of removal, and NACARA eligibility. The two reversals in motions cases involved ineffective assistance of counsel and an in absentia order of removal.

The chart below shows the combined numbers from January through November 2011, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	54	43	11	20.4
Ninth	1488	1212	276	18.5
First	17	14	3	17.6
Third	298	264	34	11.4
Tenth	37	33	4	10.8
Eighth	36	33	3	8.3
Sixth	97	90	7	7.2
Eleventh	206	193	13	6.3
Second	528	502	26	4.9
Fourth	108	103	5	4.6
Fifth	132	128	4	3.0
All	3001	2615	386	12.9

Last year's reversal rate at this point (January through November 2010) was 11.4%, with 3884 total decisions and 441 reversals.

The numbers by type of case on appeal for the first 11 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1464	1270	194	13.3
Other Relief	651	547	104	16.0
Motions	886	798	88	9.9

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RECENT COURT OPINIONS

First Circuit:

Gonzalez-Ruano v. Holder, No. 11-1138, 2011 WL 5120696 (1st Cir. Oct. 31, 2011): The First Circuit dismissed in part and denied in part a petition for review of a decision of the Board affirming an Immigration Judge's denial of the petitioner's application for NACARA special rule cancellation of removal. The court acknowledged that its jurisdiction was limited to constitutional issues and

questions of law. Otherwise, it was prohibited by section 242(a)(2)(B) of the Act from reviewing "any judgment regarding the granting of relief" as to cancellation of removal. The court found that the DHS's amending of the I-261 5 days prior to the petitioner's merits hearing before the Immigration Judge was not a due process violation, because the petitioner lacked a reasonable basis for challenging the DHS's ability to amend the charges. Furthermore, a legal memorandum filed by the petitioner a month prior to the hearing (which showed his awareness of the criminal record and its potential consequences), and his refusal of the Immigration Judge's offer to continue the proceedings caused the petitioner's claim of unreasonable notice to "ring hollow." The court further rejected two claims by the petitioner of legal error. The court rejected the petitioner's claim that one of his criminal cases did not result in a "conviction," because the sentence of probation and restitution issued by the State court did not amount to a "punishment, penalty, or restraint on liberty" under section 101(a)(48)(A) of the Act. The court noted that such statutory requirement applies only where an "adjudication of guilt has been withheld" and was therefore inapplicable here because the petitioner had pled guilty to the charged crime. The court also rejected the petitioner's claim that the Board erred in rejecting his challenge to the legitimacy of the State court convictions. The court noted that this argument was not preserved for review by the petitioner and further that the petitioner failed to establish how the Board's ruling was erroneous. The court found that it lacked jurisdiction to review the discretionary rulings of the Immigration Judge and Board and dismissed the petition from that part of the decision.

Third Circuit:

Valdaviezo-Galdamez v. Att'y Gen. of U.S., No. 08-4564, 2011 WL 5345436 (3d Cir. Nov. 8, 2011): The Third Circuit declined to afford *Chevron* deference to the Board's requirement that a particular social group ("PSG") must possess the elements of "social visibility" and "particularity." Citing to its decisions in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), the Board found the proposed social group of "young men who had been recruited by gangs and had refused to join" lacked the requisite particularity and social visibility to constitute a PSG. The Board determined that the proposed group constituted a "potentially large and diffuse segment of society" that was "too broad and inchoate" to satisfy the "particularity" requirement. The Board additionally held that the group lacked the requisite "social visibility" because individuals who resist gangs were not shown to be a recognizable segment or group in Honduran society. Although acknowledging that the First, Second, Eighth, Ninth, and Eleventh Circuits have approved of the Board's "social visibility" requirement and accorded it *Chevron* deference, the Third Circuit declined to do the same. It instead agreed with concerns regarding the requirement raised by the Seventh Circuit in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), and *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009), and found the "social visibility" requirement inconsistent with the Board's precedent decisions interpreting PSG before *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). In reaching this conclusion, the Third Circuit focused on the Seventh Circuit's rejection in *Benitez Ramos* of what it characterized as the Government's "emphatic" argument that "social visibility" should be literally interpreted to mean that a stranger could identify a member of the group upon encountering him/her on the street based on "appearance, gait, speech pattern, behavior or other discernable characteristic." The Third Circuit rejected the Government's argument in *Valdiviezo-Galdamez* that the term does not actually refer to "on-sight visibility" but rather to "the existence of a unifying characteristic" that makes the members understood or recognized by others in society as a discrete social group. The Third Circuit noted the Government's "apparent concession" to the "on-sight visibility" interpretation in *Benitez Ramos* and rejected the Government's argument in *Valdiviezo-Galdamez* as an attempt to add gloss to the Board's interpretation of the term. Moreover, the court stated that it had a "hard time understanding why the government's definition does not equate to 'on-sight visibility.'" To emphasize the tension between this "on-sight visibility" interpretation of the Board's "social visibility" requirement and the Board's other PSG case law, the Third Circuit concluded that the "social visibility" requirement would have resulted in denials of asylum to the applicants in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), and *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988). The court stated that each of the defined groups in those cases ("women who are opposed to female genital mutilation," "homosexuals required to register in Cuba," and "former members of the El Salvador national police," respectively) "have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question . . . unless and until the individual member chooses to make that characteristic known." The court

similarly rejected the Board's "particularity" requirement. Specifically, the court rejected the Government's argument that while "'social visibility' assesses whether the applicant has identified a group with a unifying characteristic that is perceived as discrete or set apart by the society, . . . 'particularity' examines whether the proposed unifying characteristic for the proposed group is definable, as opposed to being too diffuse or subjective." Instead, the court found that "particularity" and "social visibility" appear to be different "articulations of the same concept." Like the "social visibility" requirement, the court found the "particularity" requirement inconsistent with prior Board PSG case law. Concluding that the Board has not articulated a "principled reason" for its adoption of the "social visibility" and "particularity" requirements, the court remanded the record for further proceedings.

Eighth Circuit:

Ortiz-Puentes v. Holder, Nos. 10-2793, 11-1308, 2011 WL 5984289 (8th Cir. Dec. 1, 2011): The Eighth Circuit upheld the decision of the Board affirming an Immigration Judge's denial of asylum and withholding of removal, and the Board's subsequent denial of a motion to reopen claiming ineffective assistance of prior counsel. The petitioners were three siblings from Guatemala, who claimed persecution by criminal gangs based on their political opinion and membership in a particular social group comprised of young Guatemalans who refused to join gangs and were beaten as a result. The court agreed with the Board's holding in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), that the claim (entailing criminal violence and recruitment efforts by a Guatemalan gang) lacked the requisite nexus to a protected ground. The court also agreed that the proposed group lacks the visibility and particularity required to meet the statutory definition of a PSG. In their motion to reopen, the petitioners' claimed that former counsel did not advise their father to naturalize to allow him to file adjustment applications on the petitioners' behalf. The court further upheld the Board's denial of the motion to reopen as speculative, where petitioners offered no evidence that the naturalization petition was subsequently filed by the father, or that he filed the required I-130 and I-485 petitions on behalf of the petitioners. The court also found the petitioners' additional claim in their motion, that prior counsel failed to make additional arguments in appealing the asylum denial, to be "of no significance" in light of the Board's proper finding of a lack of nexus.

Ninth Circuit:

Carrillo de Palacios v. Holder, No. 09-72059, 2011 WL 5986605 (9th Cir. Dec. 1, 2011): The Ninth Circuit denied a petition for review of the Board's decision holding that section 212(a)(9)(C)(i)(II) of the Act rendered the petitioner ineligible to adjust her status. The petitioner had been deported from the U.S. in 1984 and reentered the U.S. without inspection in 1992 and again in September 1997. The Board reversed an Immigration Judge's grant of adjustment, finding that the petitioner was statutorily barred as one who had been ordered removed and reentered without being admitted. On appeal, the court held that the law is now settled in the Ninth Circuit that aliens who are inadmissible under sections 212(a)(9)(C)(i)(I) and (II) are ineligible for adjustment of status under section 245(i) of the Act. The court upheld the Board's findings that the petitioner was "previously removed" by virtue of her 1984 deportation and that she subsequently entered without being admitted. The court rejected the petitioner's argument that she was eligible for the exception to inadmissibility found in section 212(a)(9)(C)(ii) of the Act, allowing an alien to seek readmission more than 10 years after the date of last departure. The court explained that this exception requires the alien to have been absent from the U.S. for more than 10 years and to obtain consent to return prior to the alien's reembarkation. The court deferred to the Board's decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), holding that an alien may not circumvent the statutory 10-year requirement by reentering unlawfully before requesting the waiver. Accordingly, the petition was denied.

Lezama-Garcia v. Holder, No. 06-74703, 2011 WL 5966204 (9th Cir. Nov. 30, 2011): The Ninth Circuit held that an alien with an outstanding deportation order from 1997 did not abandon his pending application for adjustment of status under section 202 of NACARA when he inadvertently departed the U.S., was denied reentry, and was detained 4 days later while trying to reenter without inspection. An Immigration Judge had ruled that the petitioner self-deported, and that his adjustment application was deemed abandoned upon his departure. The Immigration Judge relied on the language of 8 C.F.R. § 245.13(k), stating that except where an advance parole application was approved prior to departure, an application for NACARA adjustment is deemed abandoned at the moment of the applicant's departure

from the U.S. The Immigration Judge noted that the regulatory language did not speak to the intent to depart. Accordingly, the Immigration Judge found the petitioner to be inadmissible under section 212(a)(7)(A)(i)(I) of the Act. The Board affirmed. On appeal, the court noted that the regulation relied on by the Immigration Judge, requiring advance parole to avoid abandonment of the adjustment application upon departure, is prefaced with the language "[i]f an applicant . . . *desires* to travel outside, and return to, the United States." Since the petitioner's departure here was clearly not desired, the court found the regulatory language inapplicable, meaning that the adjustment application was not abandoned. Addressing the Immigration Judge's conclusion that the petitioner had self-deported upon leaving the country and was thus an inadmissible arriving alien, the court held that the petitioner would nevertheless remain eligible as an arriving alien who was inadmissible under either section 212(a)(6)(A) or 212(a)(7)(A)(i) of the Act to adjust his status under the ameliorative provisions of NACARA. The petition for review was accordingly granted to allow for adjudication of the pending adjustment application.

Garcia v. Holder, 659 F.3d 1261 (9th Cir. 2011): The Ninth Circuit granted a petition for review of a decision of the Board finding the petitioner ineligible for cancellation of removal because he had not established 7 years of continuous residence after having been admitted "in any status." The petitioner was born in 1984; in 1992 he entered the U.S. without inspection and was soon placed in foster care in California. After suffering severe physical abuse, the petitioner was declared a ward of the State of California, and in 1994, pursuant to a Juvenile Court order, the Los Angeles Department of Children and Family Services filed an I-360 petition for Special Immigrant Juvenile ("SIJ") status on the petitioner's behalf. The former INS approved the I-360 petition in February 2000 and granted him lawful permanent resident status. In November 2005, the petitioner was arrested for bicycle theft; he was arrested again the following month for shoplifting. The petitioner was convicted of both crimes, and in October 2006, was placed in removal proceedings for having been convicted after admission of two crimes involving moral turpitude. An Immigration Judge rejected the petitioner's arguments that he satisfied the 7-year continuous residence requirement for cancellation of removal because such residence should have been deemed to have commenced (1) upon the filing of the I-360 on his behalf in 1994 (which under section 245(h) of the Act is deemed a parole); or (2) upon his being declared a ward of the State, after which an admission should be imputed to him as it would through a parent under the Ninth Circuit's holding in *Cuevas-Gaspar v. Gonzales* , 430 F.3d 1013, 1029 (9th Cir. 2005). The Immigration Judge thus found the petitioner to be ineligible for cancellation of removal solely because he lacked the requisite 7 years of continuous residence. The Board affirmed. It held that the although the petitioner was deemed to be "paroled" as a Special Immigrant Juvenile, the plain language of section 245(a) of the Act, permitting individuals who have been "inspected and *admitted or paroled*" to adjust their status, established that parole is not admission. The Board further found the relationship of a ward to the State to be materially distinguishable from a parent–child relationship and thus declined to extend *Cuevas-Gaspar* to cover the former. The court noted that *Chevron* deference is not owed to unpublished, single Board member decisions. It further declined to extend *Skidmore* deference because of what the court termed the "summary nature" of the Board's decision. The court observed that the phrase "admitted in any status" is not defined in the Act, but that prior circuit case law has held an alien to be admitted without having been inspected and authorized to enter at the border. The court cited from its decision in *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1100 (9th Cir. 2011), that the "clause 'in any status' has been interpreted to create alternative methods for aliens, who do not enter after inspection and authorization, to meet the 'admitted in any status' requirement." The court then considered whether Special Immigrant Juvenile parolees may constitute one such instance. The court addressed the Government's citing on appeal to section 101(a)(13)(B) of the Act, which states that an alien paroled under section 212(d)(5) of the Act "shall not be considered to have been admitted." The court distinguished parole under section 245(h) from that under section 212(d)(5) and held that the statute's specific preclusion of the latter, while remaining silent as to other forms of parole, could indicate that Congress did not intend for other types of parolees to be viewed as not having been admitted. The court next considered whether a Special Immigrant Juvenile parolee is analogous to an alien accepted into the Family Unity Program, which the circuit had held to be an admission in any status for cancellation purposes in *Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006). The court found Special Immigrant Juvenile Status similar to the Family Unity Program, in that both were enacted for similar purposes

by Congress. Furthermore, both types of status benefit "a narrow class of . . . aliens who must meet heightened eligibility requirements" to obtain such status, which in both cases affords "special benefits set by Congress." The court concluded that these benefits afford both groups strong claims to remain in this country. The court thus distinguished such claims from the broader groups of aliens who had filed I-130 petitions or employment authorization applications, who are entitled "only to a chance to seek admission" and thus possess "much weaker claims to remain in this country." (The court previously declined to extend its holding in *Cuevas-Gaspar* to these latter classes in it decisions in *Vasquez de Alcantar* and *Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011).) Having found Special Immigrant Juvenile parole to be analogous to admission into the Family Unity Program, the court held that the petitioner had been "admitted in any status" upon his designation as a parolee under *Garcia-Quintero* and thus possessed the requisite period of continuous legal residence to be eligible to apply for cancellation of removal. The court found no need to reach the question whether residence should have been imputed to him as a ward of the State.

BIA PRECEDENT DECISIONS

In *Matter of Guerrero*, 25 I&N Dec. 631 (BIA 2011), the Board addressed two issues: (1) whether the offense of solicitation is an aggravated felony under section 101(a)(43)(U) of the Act, which is defined as "an attempt or conspiracy to commit" an aggravated felony described in the Act; and (2) whether a felony conviction for solicitation to commit assault with a dangerous weapon in violation of sections 11-1-9 and 11-5-2 of the General Laws of Rhode Island is a conviction for a crime of violence and therefore an aggravated felony under section 101(a)(43)(F) of the Act, when a sentence of 1 year or more has been imposed.

The lawful permanent resident respondent was convicted of soliciting another individual to commit assault with a dangerous weapon. The Board first concluded that solicitation is not an aggravated felony under section 101(a)(43)(U), because solicitation is a different offense from an attempt or conspiracy.

Applying the categorical approach, the Board then examined section 11-1-9 of the General Laws of Rhode Island, which proscribes soliciting another person to commit *any* felony. Since the statute was broad enough to include acts that would not constitute a crime of violence, the Board also considered the record of conviction, which established that the respondent was convicted of soliciting another person to commit assault with a dangerous weapon in violation of section 11-5-2. The Board noted that in *Lopes v. Keisler*, 505 F.3d 58, 63 (1st Cir. 2007), the First Circuit determined that assault under Rhode Island law requires the presence of physical force and concluded that any such assault qualifies as a crime of violence under 18 U.S.C. § 16(a) and therefore as an aggravated felony under the Act. Citing *Almon v. Reno*, 214 F.3d 45, 46 & n.3 (1st Cir. 2000), the Board also observed that the First Circuit has specifically held that assault with a deadly weapon in violation of section 11-5-2 is a "crime of violence" and constitutes an aggravated felony under section 101(a)(43)(F) of the Act.

The Board concurred with the reasoning of the Ninth and Tenth Circuits that solicitation of an offense constituting a crime of violence creates a substantial risk of violence, so that solicitation is, in itself, a crime of violence under 18 U.S.C. § 16(b). The Board reasoned that just because a substantial risk may not exist at the time of the solicitation to commit a violent crime, the solicitation offense may result in a substantial risk that force will be used during completion of the crime. Agreeing with the Ninth Circuit, the Board rejected the assertions that Congress intentionally excluded solicitation from the definition of an aggravated felony and that interpreting section 101(a)(43)(F) to include inchoate offenses permits courts to circumvent section 101(a)(43)(U). The Board therefore concluded that the respondent's solicitation to commit assault with a dangerous weapon qualified as an aggravated felony crime of violence and that he was removable under section 237(a)(2)(A)(iii) of the Act.

Matter of Islam, 25 I&N Dec. 637 (BIA 2011), presented the issue of how to determine whether an alien's convictions for two or more crimes involving moral turpitude arose out of a "single scheme of criminal misconduct" as contemplated by section 237(a)(2)(A)(ii) of the Act. The Board concluded that it would uniformly apply in all circuits its decision in *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992), where it held that a single scheme must take place at one time with no substantial interruption that would provide the perpetrator the opportunity to disassociate himself and reflect on the criminal enterprise.

The respondent was a lawful permanent resident who was convicted of fourth degree criminal possession of stolen property and of third degree forgery after making five purchases in four locations in adjoining counties over a period of a few hours using another person's credit and debit cards. The Board first stated that forgery and possession of stolen property have routinely been deemed to be crimes involving moral turpitude. Assessing its prior precedents, the Board noted its finding that the single scheme exception referred to acts which were separate crimes performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of the other or where two crimes stem from one another and are the natural consequence of a single criminal act.

Matter of Islam arose in the Second Circuit, which had decided in *Nason v. INS*, 394 F.2d 223 (2d Cir. 1968), that it would broadly construe the meaning of a "single scheme of criminal misconduct." However, the Board pointed out that *Nason v. INS* was issued prior to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which provided that an agency's interpretation of a silent or ambiguous statute should be given deference if it is based on a permissible construction of the statute. The Board noted that in *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000), which was decided subsequent to *Nason v. INS*, the Second Circuit reserved the question whether *Chevron* deference was due *Matter of Adetiba*, but that the First, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits have afforded deference to *Matter of Adetiba*. The Board reasoned that "single scheme of misconduct" is an ambiguous term, so that it was within the Board's purview to develop a reasonable interpretation of the phrase, which is due deference from the courts under *Chevron* and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). The Board concluded that its definition of a "single scheme of misconduct" is controlling and would be applied throughout the circuits. The Board then found that the respondent, who had traveled to different venues to obtain items of value with stolen credit and debit cards from several retailers, had committed offenses not arising from a "single scheme" of criminal misconduct, despite the fact that the crimes occurred in the same day.

In *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), the Board found that under the "stop-time rule" in section 240A(d)(1) of the Act, any period of continuous residence or continuous physical presence of an alien applying for cancellation of removal ceases upon service of a notice to appear, even if the notice does not include the date and time of the initial hearing. The respondent had been served with a notice to appear, which indicated that the hearing date and time was "To be set."

The Board interpreted the provisions of the "stop-time" rule under section 240A(d)(1) of the Act, which references the service of a notice to appear "under section 239(a)." Addressing the respondent's argument that this means that all the provisions of that section must be met, the Board noted that section 239(a)(1)(G) of the Act requires the notice to appear to include the "time and place at which the proceedings will be held." Finding that the key phrase under 240A(d)(1) is "served a notice to appear," the Board determined that Congress only intended the subsequent phrase "under section 239(a)" to specify which document the DHS must serve on the alien to effectuate the "stop-time rule." The Board reasoned that section 240A(d)(1) referenced section 239(a) (which includes several paragraphs) in its entirety, indicating that Congress envisioned circumstances beyond the DHS's control that may require a change in the hearing date and specifically provided that notification of such a change could occur after the notice to appear was issued. Finding additional support in the legislative history of the "stop-time" rule and in 8 C.F.R. § 1003.18(b), which states that the time, place, and date of the initial removal hearing must be provided in the notice to appear only "where practicable," the Board concluded that the respondent was ineligible for cancellation of removal because the service of her notice to appear triggered the "stop-time" rule, precluding her from establishing the requisite term of continuous residence.

In *Matter of Espinosa Guillot*, 25 I&N Dec. 653 (BIA 2011), the Board held that an alien who has adjusted status to that of lawful permanent resident pursuant to the Cuban Refugee Adjustment Act of November 2, 1996, Pub. L. No. 89-732, 80 Stat. 1161, as amended ("Cuban Adjustment Act"), has been admitted to the United States and is subject to charges of removability under section 237(a) of the Act. The respondent, after adjusting his status under the Cuban Adjustment Act, was convicted of drug trafficking and was placed in removal proceedings, where he was charged with removability under sections 237(a)(2)(A)(iii) and (B)(i) of the Act as an alien convicted of an aggravated felony and a controlled

substance violation. The Immigration Judge found that the respondent had not been "admitted" to the United States and therefore was not removable under section 237(a).

Considering the DHS's appeal, the Board, citing *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999), *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), and *Matter of Carrillo*, 25 I&N Dec. 99 (BIA 2009), explained that adjustment of status generally constitutes an admission. The Board distinguished the instant case from *Lanier v. U.S. Attorney General*, 631 F.3d 1363 (11th Cir. 2011), where the Eleventh Circuit considered the language of section 212(h) of the Act and emphasized that a waiver is unavailable to "an alien who has previously been *admitted* to the United States *as an alien lawfully admitted for permanent residence*." The Eleventh Circuit concluded that the definition of "lawfully admitted for permanent residence" includes every person with lawful permanent residence status, including those who entered as lawful permanent residents and those who adjusted their status while already living in the United States. However, the Eleventh Circuit held that the term "admitted," as defined in section 101(a)(13) of the Act, is limited and does not include a post-entry adjustment of status.

The Board pointed out that the Eleventh Circuit reached its conclusion relying on the particular language in section 212(h), while the Cuban Adjustment Act expressly authorizes an alien who is a native or citizen of Cuba and has been "paroled into the United States" to adjust status to that of "an alien lawfully *admitted* for permanent residence." The Board also noted that section 237(a), the statute which charged the respondent with removability, only requires the alien to be "in and admitted to the United States." The Board found that since neither section 237(a) nor the Cuban Adjustment Act contained the unique language at issue in *Lanier v. U.S. Attorney General*, that case was inapt to the issue presented here.

According to the Board, a finding that the respondent, who had been convicted of drug trafficking, was excluded from the class of "deportable aliens" enumerated in section 237(a) of the Act would create an absurd result contrary to the plain language of the statute. Thus, the Board concluded that the respondent had been admitted to the United States and was properly charged with removability under section 237(a).

REGULATORY UPDATE

76 Fed. Reg. 69,119 (Nov. 8, 2011)
DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

Commonwealth of the Northern Mariana Islands Transitional Worker Classification: Correction

ACTION: Final Rule; Correction.
SUMMARY: The Department of Homeland Security (DHS) is issuing a final rule to restore text that was inadvertently deleted in a September 7, 2011, final rule entitled Commonwealth of the Northern Mariana Islands Transitional Worker Classification. In that rule, we had sought to modify the title of a paragraph, but inadvertently removed the body of the paragraph. This correction restores the text of the paragraph.
DATES: This final rule is effective November 8, 2011.

76 Fed. Reg. 68,498 (Nov. 4, 2011)
DEPARTMENT OF HOMELAND SECURITY

Extension of the Designation of Nicaragua for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Nicaraguan TPS Beneficiaries

ACTION: Notice.
SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Nicaragua for temporary protected status (TPS) for 18 months from its current expiration date of January 5, 2012 through July 5, 2013. The Secretary has determined that an extension is warranted because the conditions in Nicaragua that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting from Hurricane Mitch, and Nicaragua remains unable, temporarily, to handle adequately the return of its nationals.

This Notice also sets forth procedures necessary for nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) (Forms I–766) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously

registered for TPS under the designation of Nicaragua and whose applications have been granted or remain pending. Certain nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

USCIS will issue new EADs with a July 5, 2013 expiration date to eligible Nicaraguan TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the imeframes involved with processing TPS re-registration applications, DHS recognizes that all re-registrants may not receive new EADs until after their current EADs expire on January 5, 2012. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Nicaragua for 6 months, through July 5, 2012, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Form I–9 and E–Verify processes.

DATES: The 18-month extension of the TPS designation of Nicaragua is effective January 6, 2012 and will remain in effect through July 5, 2013. The 60-day re-registration period begins November 4, 2011 and will remain in effect until January 5, 2012.

76 Fed. Reg. 68,488 (Nov. 4, 2011)
DEPARTMENT OF HOMELAND SECURITY

Extension of the Designation of Honduras for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries

ACTION: Notice.
SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Honduras for temporary protected status (TPS) for 18 months from its current expiration date of January 5, 2012 through July 5, 2013. The Secretary has determined that an extension is warranted because the conditions in Honduras that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to handle adequately the return of its nationals.

This Notice also sets forth procedures necessary for nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) (Forms I–766) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Honduras and whose applications have been granted or remain pending. Certain nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

USCIS will issue new EADs with a July 5, 2013 expiration date to eligible Honduran TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that all re-registrants may not receive new EADs until after their current EADs expire on January 5, 2012. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Honduras for 6 months, through July 5, 2012, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Form I–9 and E-Verify processes.

DATES: The 18-month extension of the TPS designation of Honduras is effective January 6, 2012 and will remain in effect through July 5, 2013. The 60-day re-registration period begins November 4, 2011 and will remain in effect until January 5, 2012.

Super Circuit?: *continued*

Still not done, Judge Easterbrook continued:

> Why lawyers in immigration cases continue to be fascinated by the due process clause bewilders us—for it is appropriate to consider the Constitution only if the statute and regulations are deficient. Congress has given aliens significant procedural entitlements. *See* [section 240 of the Act,] 8 U.S.C. §1229a. Regulations have added more. Portillo-Rendon does not contend that these entitlements are constitutionally deficient. Nor does he contend that the agency failed to provide him with all process required by the statute and regulations with respect to

> his moral character. If the agency should fall short, then [section 242(a)(2)(D) of the Act, 8 U.S.C.] § 1252(a)(2)(D)[,] would allow us to provide relief on statutory grounds; the lack of a constitutional liberty or property interest would not matter. This is yet another reason why aliens who have procedural objections to the handling of their cases should rely on the statute and the regulations rather than intoning "due process" in the hope that it will cover all bases. It won't.

Id.

14. Continuances and Abuse of Discretion—*Simon v. Holder*, 654 F.3d 440 (3d Cir. 2011), and *Freire v. Holder*, 647 F.3d 67 (2d Cir. 2011): While *Portillo-Rendon* cautions against diffuse due process claims, *Simon* and *Freire* are reminders that the Federal courts take seriously claims that the Board has failed to follow its own precedents—in these cases, involving motions for continuance pending adjudications for immigrant status before the United States Citizenship and Immigration Services ("USCIS").

Simon held that by denying a continuance solely on grounds that the "future availability of a visa number is speculative," the Board abused its discretion by violating its holdings in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), and *Matter of Rajah*, 25 I&N Dec. 127, 130 (BIA 2009), that visa availability is but one of several factors that must be considered. *Simon*, 654 F.3d at 441, 443.

> Visa availability is one part of the *Hashmi-Rajah* analysis [which includes factors such as the prima facie validity of the visa petition, the DHS response, the alien's immigration history, and discretion]. Once an immigration judge considers all of the *Hashmi-Rajah* factors, including visa availability, he or she has the discretion to deny a continuance where visa availability is too speculative; but this should only be done after all of the factors are considered. The BIA, in this context as in others, must follow its own precedents, unless it makes a reasoned determination to change or adapt its policy.

Id. at 443.

The court noted that the number of continuances already granted was factored in by the Immigration Judge. The respondent had two approved visa petitions, an I-140 and an I-130, misleadingly referred to by the court as an "immediate relative petition" (were it truly such a petition, the visa would be immediately available). But the failure to *explicitly* discuss the other *Hashmi-Rajah* factors was fatal.

Freire reversed a Board decision, issued prior to *Hashmi*, that declined to grant a continuance pending adjudication by the USCIS of the petitioner's (an arriving alien) application for adjustment of status. The Board wrote:

> [W]e cannot find it within our authority to grant relief based on an application over which we ultimately have no jurisdiction. To do so would leave us open to the whims and time lines of other agencies which might or might not communicate the outcome of a particular application to us.

Freire, 647 F.3d at 69 (quoting the Board's decision). Following its decision in *Sheng Gao Ni v. Board of Immigration Appeals*, 520 F.3d 125 (2d Cir. 2008), the court held that Board's reluctance, "as a general practice," to grant continuances pending USCIS adjustment proceedings failed to give due consideration to the specific facts in the petitioner's case. *Freire*, 647 F.3d at 71. Absent a clear rationale based on the record, the Board abused its discretion in denying the motion to remand for proceedings to be continued. *Id.*

13. Must a "Conviction" Be "Final"?—*Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011): In the wake of the 1996 amendment adding the definition of "conviction" to the Act, debate has persisted over whether a criminal conviction must be "final"—with all appeals of right exhausted—before it can constitute grounds for removal. Section 101(a)(48)(A) of the Act (providing that "conviction" means that a court has entered "a formal judgment of guilt of the alien"); *see also Matter of Punu*, 22 I&N Dec. 224 (BIA 1998). Faced with this question in *Planes*, the Ninth Circuit had no difficulty resolving it. Since the plain language of section 101(a)(48)(A) includes no requirement other than formal adjudication of guilt, there is no corollary requirement that all appeals be exhausted or waived. Other circuits had previously so

held or indicated, but *Planes* makes this the functional majority view throughout the country. *See Puello v. Bureau of Citizenship and Immigration Serv.*, 511 F.3d 324, 332 (2d Cir. 2007); *United States v. Saenz-Gomez*, 472 F.3d 791, 794 (10th Cir. 2007); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Griffiths v. INS*, 243 F.3d 45, 50-51 (1st Cir. 2001); *Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999).

12. Is the BIA Appeal Deadline Jurisdictional?—*Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (U.S. 2011); *Irigoyen-Briones v. Holder*, 644 F.3d 943 (9th Cir. 2011): The Board held in *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), that it lacked authority to extend the regulatory 30-day time limit for filing an appeal from a decision of an Immigration Judge and that a short delay by an overnight delivery service was not a "rare or extraordinary event" that would warrant consideration of an untimely appeal on certification. 8 C.F.R. § 1003.1(c). The Board rejected the Ninth Circuit's suggestion, in *Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005), that it had broader discretionary authority to waive the time limit. *Liadov*, 23 I&N Dec. at 993. The Board also relied, in part, on Supreme Court rulings that filing deadlines must be strictly applied. *United States v. Locke*, 471 U.S. 84 (1985).

In the wake of *Irigoyen-Briones*, the *Liadov* rule is a dead letter in the Ninth Circuit; in the wake of *Henderson*, the rule may warrant more thorough-going reconsideration.

Some background is warranted. In 1990, Congress authorized the Attorney General to issue regulations setting time limits for administrative appeals in deportation proceedings. Immigration Act of 1990, Pub. L. No.101-649, § 545(d)(2), 104 Stat. 4978, 5066. The then-current deadline, 10 days, was held in 1994 to violate due process. *Gonzalez-Julio v. INS*, 34 F.3d 820 (9th Cir. 1994). Regulations issued in 1996 lengthened the appeal period to 30 days and provided for direct filing (by mail, courier, or hand-delivery) at the Board. Since that time, Board decisions dismissing untimely appeals have been treated as jurisdictional in nature; hence, the Board accepts motions in such cases only if they pertain to the lateness of the appeal. The Supreme Court, meanwhile, has issued a recent series of decisions clarifying that time limits analogous to the Board's appeal period are "claims-processing rules"—rules that promote the orderly progress of litigation—not jurisdictional limitations.

> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court. . . . Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling with a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). *But see Bowles v. Russell*, 551 U.S. 205, 214 (2007) (stating that time limit for appeals to Federal circuit courts of appeals is mandatory and jurisdictional).

Henderson followed this line, holding that the 120-day statutory deadline for filing an appeal with the Court of Appeals for Veterans Claims was not jurisdictional. The Court held that no "magic words" were required to make a time limit jurisdictional, but that the context of the time limit, and prior judicial rulings, are relevant. The Court unanimously held that because the 120-day time limit was not couched in jurisdictional terms and appeared in a subchapter labeled "Procedure," it should not be considered jurisdictional in nature. The Court also concluded that the "harsh consequences" imposed by a jurisdictional rule would be inconsistent with the overall scheme of veterans benefits adjudication. *Henderson*, 131 S. Ct. at 1206.

Relying on *Henderson* and its antecedents, *Irigoyen-Briones* held, first, that *Liadov* (without using the word "jurisdiction") had stated a rule of jurisdiction and, second, that the rule could not be sustained. "There is no ambiguous statute that would entitle the [Board] to deference . . . , just an administrative claim-processing rule that must be treated as non-jurisdictional." *Irigoyen-Briones*, 644 F.3d at 949. The court then rejected, with just a trace of *ironie*, the Board's exhortation that an appeal should be filed as far in advance as possible. *Liadov*, 23 I&N Dec. at 992. In this case, the court determined, the Board abused its discretion by not granting an exception

where the appeal was sent on the 29th day via Postal Service overnight delivery, but the USPS failed to deliver until day 31.

> The alien owns the thirty days, and all of them are likely to be essential. Aliens' appeals are not, by and large, handled by giant spare-no-expense law firms, in which a partner can command a senior associate who can command a junior associate to have something on his desk by 9:00 A.M. Monday without fail, and then fly a courier to Washington D.C. to assure timely filing in Falls Church. The record here describes the details of a typical case. The pro se alien had lost his case before the IJ just before Christmas and came to a lawyer's office during her first appointment slot right after New Year's. The lawyer could not do anything without listening to the Immigration Court's tapes, and the alien needed a few days to raise the money for her retainer. . . . As is common, all thirty days were reasonably necessary for the task [of preparing the appeal] . . . . An appellant who has deposited his notice of appeal to the BIA with the U.S. Postal Service or an approved carrier the day before it is due, for guaranteed next-day delivery, has done all that reasonable diligence requires. Requiring some uncertain earlier date would deprive him both of notice of the due date and of time often necessary to perform the necessary work.

Irigoyen-Briones, 644 F.3d at 950 (footnote omitted). The court concluded by exhorting the Board to adopt electronic filing. *Id.* at 951.

11. Is Possession With Intent to Deliver a Categorical Drug Trafficking Offense?—*Moncrieffe v. Holder*, No. 10-60826, 2011 WL 5343694 (5th Cir. Nov. 14, 2011); *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011): Under the "hypothetical federal felony" approach to determining whether a State drug offense is a "drug trafficking crime" as defined in 18 U.S.C. § 924(c), and thus an aggravated felony, a circuit split has emerged in cases involving State convictions for possession with intent to distribute marijuana. There is clearly a Federal analogue to such offenses: the felony offense described in 21 U.S.C. § 841(a)(1) (criminalizing possession with intent to distribute a controlled substance). The question is whether the Federal "misdemeanor exemption" for distribution, with no remuneration, of small amounts of marijuana requires the DHS to establish that a State conviction was not for such less culpable conduct. 21 U.S.C. § 841(b)(4) (providing that nonremunerative distribution is treated as misdemeanor possession); *compare Julce v. Mukasey*, 530 F.3d 30, 34-36 (1st Cir. 2008) (stating that § 841(b)(4) does not create a stand-alone misdemeanor offense, but is a mitigating sentencing provision), *with Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), *and Jeune v. Att'y Gen.*, 476 F.3d 199 (3d Cir. 2007) (both holding that State possession with intent offenses could not be categorical aggravated felonies because the "least culpable conduct" might have included small distribution for no remuneration).

The circuit split took another swing in 2011, with both *Moncrieffe* and *Garcia* joining the First Circuit and finding the offenses at issue to be drug-trafficking crimes. The flaw in the "least culpable conduct" approach, both courts held, is that the "default" sentencing provision for possession with intent to distribute marijuana is the felony provision of 18 U.S.C. § 841(b)(1)(D), not the misdemeanor provision in § 841(b)(4). It is the defendant's burden to produce mitigating evidence to qualify for misdemeanor treatment. *Garcia*, 638 F.3d at 516. Notably, both the Fifth and Sixth Circuits relied on their own criminal jurisprudence in making this determination; they reasoned that in a hypothetical Federal prosecution for the same conduct leading to the State convictions, the aliens in question would have borne the burden of establishing eligibility for the misdemeanor exemption. Other circuits may well get into the scrap, but the battle lines of a clear circuit split are now firmly entrenched.

10. Does the Burden Shift for Criminal Aliens Seeking Discretionary Relief?—*Rosas-Castaneda v. Holder*, 655 F.3d 875 (9th Cir. 2011); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Young v. Holder*, 634 F.3d 1014 (9th Cir. 2011), *reh'g en banc granted*, 653 F.3d 897 (9th Cir. 2011): In *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), the Board aimed to harmonize the law regarding an alien's burden of proof to establish eligibility for discretionary relief where the alien has suffered a

conviction that might—or might not be—a disqualifying offense. *Almanza* held that submission of an inconclusive record of conviction does not meet the alien's burden; it distinguished the Ninth Circuit's ruling to the contrary in *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), as having been issued before the REAL ID Act's clarification of the respondent's burden of proof. Section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4).

As reported earlier, the Ninth Circuit in *Young* and *Rosas-Castaneda* rejected the argument that section 240(c)(4) trumps *Sandoval-Lua*. *See* Grant, *Circuit Bracketology*, *supra*, at 6, 7. While *Almanza* was addressed in neither decision (although it is considered in the dissenting opinion in *Rosas-Castaneda*), its reasoning was implicitly addressed and was found wanting.

The *Almanza* rule fared better in the Fourth Circuit, which held in May that an alien's presentation of an inconclusive record of his conviction for larceny did not meet his burden to establish that he was not convicted of an aggravated felony theft offense and was thus eligible for cancellation of removal under section 240A(a) of the Act. *Salem*, 647 F.3d at 14 (finding a larceny statute divisible because it punished acts of fraud as well as theft). Once again, a circuit split has developed: *Salem* followed the reasoning of the Tenth Circuit, which held in 2009 that the plain language of sections 240A(a)(3) and 240(c)(4)(A)(i) of the Act required the petitioner to demonstrate his eligibility for relief by proving his conviction was not for an aggravated felony. *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). *Garcia* held that presentation of an inconclusive record of conviction would "effectively" nullify the prescribed burden of proof, even if the ambiguity in the record of conviction is not the fault of the alien. *Id.* at 1290.

One suspects there will be further development on this frequently litigated question. Perhaps a playoff?

9. The Departure Bar Takes Its Final Bows?—*Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011): Like an aging diva playing to dwindling audiences, the "departure bar" (barring the pursuit of motions and appeals by aliens who have left the United States) forces a smile and takes its bows. *Luna* is just one of many cases, the others being chronicled previously in these pages, signaling that it is about time for the show to be over. *See* Edward R. Grant and Patricia M. Allen, *When Cousins Are Two of a Kind*, Immigration Law Advisor, Vol. 5, No. 7, at 5, 8-9 (Aug. 2011); Grant, *Circuit Bracketology*, *supra*, at 10-11.

Luna addressed the departure bar question in a unique context: the petitioner sought extension of the 30-day deadline for filing a petition for review (which, as discussed above, is both mandatory and jurisdictional), citing ineffective assistance of counsel. Enforcement of the deadline, the petitioner continued, would violate the Suspension Clause, because it would deprive him of any opportunity to raise plausible claims of constitutional violations in his removal proceedings (a petition for review being, by statute, the "sole and exclusive means" of challenging a final order of removal in Federal court). *Luna*, 637 F.3d at 86. The Government contended that the statutory motion to reopen process before the Board provided an opportunity for constitutionally adequate review. Specifically, an alien deprived of Federal court review due to negligence of counsel could ask the Board to reopen the proceedings and issue a new decision, thus starting a new clock for purposes of the 30-day deadline. Should the Board deny the motion, *that* decision could also be appealed by filing a timely petition for review. *Id.* at 89. Appointed counsel for the petitioner agreed in principle but noted that the Government could defeat the process by removing the alien and invoking the departure bar at 8 C.F.R. § 1003.2(d). *Id.* Likewise, the Board could tailor its denials of such motions to reopen as "discretionary," thus eliminating or reducing the right of meaningful review in Federal court.

The Second Circuit agreed with both arguments and thus joined the clear majority of circuits concluding that the departure bar regulation is not jurisdictional and cannot obviate the "statutory" right to a motion to reopen. "For a motion to reopen to be a constitutionally adequate substitute for habeas, it cannot be 'subject to manipulation' by the Government." *Id.* at 99. The Board's holding in *Matter of Armendariz-Mendez*, 24 I&N Dec. 646 (BIA 2008), wrongfully contracted the jurisdiction given by Congress to address motions to reopen, because Congress did not make that jurisdiction depend on the alien's presence in the United States or provide that jurisdiction was withdrawn upon a movant's departure. *Luna*, 637 F.3d at 100-01. The court also concluded that since timely motions to reopen are statutory (and that "timeliness" is subject to equitable tolling), the Board may not address time solely on discretionary grounds. Constitutional claims and alleged errors of law would

also be decided de novo by the court of appeals, thus preserving the petitioner's right to a "constitutionally adequate" review of such claims. *Id.* at 102-03.

8. Ninth Circuit Ditches Federal First Offender Act Limitation on Drug-Related Charges—*Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), *overruling Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and *Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009): The Ninth Circuit's rule in *Lujan-Armendariz*, treating first-time drug offenders with expunged convictions as not having been convicted of a controlled substance offense for purposes of the Act, did not travel well. No other circuit adopted the rule, and even within the Ninth, the rule was never extended to cases other than those analogous to the Federal First Offender Act. *See* Grant and Allen, *When Cousins Are Two of a Kind*, *supra*, at 11-12. The full impact of this change, however, may not be felt until long after some of us take retirement: the Ninth Circuit made the new rule entirely prospective, meaning that it applies only to controlled substance convictions entered after the date of the decision. Two sets of rules, therefore, will continue to be the modus operandi for our courts in the Pac-12 (excluding Denver, that is).

7. Past Persecution—Capricious Adjudication? Or Landmark Decisions?—*Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011): The Big 10 may no longer be the definitive heart and soul of college football (too many fast guys in the Fifth, Eleventh, and Ninth), but it always manages to land a few teams in the top 20. So, too, the Seventh Circuit, often on style points alone. Judge Easterbrook's take on due process (Number 15, above) is surpassed in sheer reach by Judge Posner's critique of the "capricious adjudication" of claims of past persecution both by the Board and by the Federal courts. *Id.* at 949. The Seventh's sister circuits might disagree. *See* Grant, *When Cousins Are Two of a Kind*, *supra*, at 9-10; Edward R. Grant and Patricia M. Allen, *Enchanted April: Love, Hope, and Section 212(c) All Spring Eternal*, Immigration Law Advisor, Vol. 5, No. 4, at 3-4, 13-14 (Apr. 2011).

As discussed in *Enchanted April*, the Ninth Circuit issued decisions on two critical past persecution issues: where the alleged persecution must take place, and whether purely "private" persecution is cognizable for purposes of the Act. *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011) (holding that sexual abuse was not past persecution where the acts were not inflicted by government actors and the petitioner failed to establish that reporting to the police would have been futile), *amended and superseded on denial of reh'g*, No.08-70343, 2011 WL 6016162 (9th Cir. Dec. 5, 2011); *Gonzalez-Medina v. Holder*, 641 F.3d 333 (9th Cir. 2011) (holding that domestic abuse that occurred in the United States cannot constitute past persecution). Family abuse claims, sadly, are often based on events on both sides of the border, and acts of "private" persecution are frequently the basis of asylum and withholding claims. *Gonzalez-Medina* and *Castro-Martinez*, while not addressing the precise issue (the *level* of harm) addressed in *Stanojkova*, might prove to have more enduring influence, perhaps even as landmarks.

6. The Exclusionary Rule, Further Clarified—*Garcia-Torres v. Holder*, 660 F.3d 333 (8th Cir. 2011); *Lopez-Gabriel v. Holder*, 653 F.3d 683 (8th Cir. 2011); *see also Martinez-Medina v. Holder*, No. 06-75778, 2011 WL 855791 (9th Cir. Mar. 11, 2011), *superseding* 616 F.3d 1011 (9th Cir. 2010): The constrictions on an alien's ability to suppress evidence of alienage and identity in removal proceedings are, as previously discussed, not analogous to the TV version of Fifth Amendment suppression motions. Edward R. Grant and Patricia M. Allen, *Life Does Not* Always *Imitate Television: The "Exclusionary Rule" in Immigration Proceedings*, Immigration Law Advisor, Vol. 5, No. 3, at 6 (Mar. 2011). The subsequent decisions in *Garcia-Torres* and *Lopez-Gabriel* further clarify that not every violation of the Fourth Amendment will result in exclusion of evidence relating to immigration status.

The petitioner in *Garcia-Torres* was arrested after police officers entered his restaurant, without a warrant, on complaint of after-hours drinking. No charges were filed, but after the arrest, he was transferred to ICE, presumably because local police believed he was a foreign national without evidence of status. An interview with the ICE officers confirmed this, and he was placed in proceedings. *Garcia-Torres*, 660 F.3d at 334-35.

The Eighth Circuit agreed with the Board that suppression of the evidence, on grounds of the warrantless entry and arrest, was not required. "Petitioner points to nothing more than a warrantless entry of business premises and arrest, mere garden-variety error, if a Fourth Amendment violation at all. . . . [E]ven assuming that the search and seizure here constituted a violation of the Fourth Amendment, any such violation is not 'egregious.'" *Id.* at

336-37. The evidence was thus admissible to establish alienage and removability.

The petitioner in *Lopez-Gabriel*, stopped according to police reports for driving a car with a heavily cracked windshield, was found not to have a valid driver's license or identification; he had been previously cited for the same violation. He claimed that his subsequent arrest was based on his Latino appearance and that, otherwise, he would have been allowed to pay a fine and go home. He also claimed that subsequent interrogations by ICE officers, done at the local jail, were conducted under duress because he was in custody and had not been given *Miranda* warnings. The Eighth Circuit concluded:

> The case for exclusion of evidence is even weaker where the alleged misconduct was committed by an agent of a separate sovereign [the local police]. If evidence were suppressed in a federal civil immigration proceeding, any deterrent effect on a local police officer would be highly attenuated. . . . Especially where, as here, there is no evidence that federal officers participated in the allegedly unconstitutional seizure, or that the state officer making the seizure acted solely on behalf of the United States, *we doubt that even an egregious violation by a state officer would justify suppression of evidence in a federal immigration proceeding*.

Lopez-Gabriel, 653 F.3d at 686 (emphasis added) (citations omitted). Finally, the court concluded that since there was no objective basis for the petitioner's claim that he was stopped on account of his Hispanic appearance, he was not entitled to a hearing before the Immigration Judge on the claim, particularly in light of the police report establishing the ostensible cause for the traffic stop and arrest. *Id.* at 686-87.

5. Can Anti-Gang Witnesses, and Their Families, Be a Particular Social Group?—*Garcia v. Attorney General of U.S.*, No. 10-1311, 2011 WL 5903780 (3d Cir. Nov. 28, 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011); *Demiraj v. Holder*, 631 F.3d 194 (5th Cir. 2011): As we discussed in our February issue, *Crespin-Valladares* established that the relatives of those who opposed gangs by agreeing to be prosecution witnesses, and who suffered persecution on account of their family ties, constitute a cognizable "particular social group" ("PSG"). Sections 101(a)(42)(A), 208(b)(1)(A) of the Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A); Grant, *Circuit Bracketology*, *supra*, at 7-8. *Garcia* extended PSG status to those who testify as prosecution witnesses. The petitioner, the Third Circuit concluded,

> shares a "common, immutable characteristic" with other civilian witnesses who have the "shared past experience" of assisting law enforcement against violent gangs that threaten communities in Central America. It is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members of this group can recant their testimony, they "should not be required to" do so.

Garcia, 2011 WL 5903780, at *6 (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)). The facts in *Garcia* established a pervasive series of threats against the petitioner-witness, extending to her time in witness protection in her native Guatemala, her period as a refugee in Mexico, and her presence in the United States.

The Board and other circuits, notably the Second and Ninth, have been reluctant to confer PSG status on either police informants or their families. *Lespinasse v. Holder*, 408 F. App'x 455 (2d Cir. 2011); *Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009); *Matter of C-A-*, 23 I&N Dec. 951, 959-61 (BIA 2006), *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006). One difficulty in such cases is distinguishing whether persecution has occurred or been threatened on account of one's membership in the group or is simply motivated by revenge, seeking to punish a victim for his actions, not his status as a member of the putative group. The Fifth Circuit, in *Demiraj*, concluded that threats against the family of a material witness in the United States' prosecution of one Bedini, a fellow Albanian allegedly engaged in human trafficking, fell into the category of "revenge."

> The crucial finding here is that the record discloses no evidence that Mrs. Demiraj would be targeted for her membership in the Demiraj family *as such*. Rather,

> the evidence strongly suggests that Mrs. Demiraj, her son, and Mr. Demiraj's nieces were targeted because they are people who are important to Mr. Demiraj—that is, because hurting them would hurt Mr. Demiraj. No one suggests that distant members of the Demiraj family have been systematically targeted as would be the case if, for example, a persecutor sought to terminate a line of dynastic succession. Nor does the record suggest that the fact of Mr. and Mrs. Demiraj's marriage and formal inclusion in the Demiraj family matters to Bedini; that is, Mrs. Demiraj would not be any safer in Albania if she divorced Mr. Demiraj and renounced membership in the family, nor would she be any safer if she were Mr. Demiraj's girlfriend of many years rather than his wife. The record here discloses a quintessentially personal motivation, not one based on a prohibited reason under the INA.

Demiraj, 631 F.3d at 199.

Defining a PSG has long been a matter of contention; it will remain so, dependent largely on the respective views of the circuits on the "particularity" and "social visibility" standards that have evolved in recent Board jurisprudence. Which happens to be the focus of this year's Number 4.

4. "Social Visibility" and "Particularity" Take a Hit, Get a Defense—*Valdiviezo-Galdamez v. Attorney General of U.S.*, No. 08-4564, 2011 WL 5345436 (3d Cir. Nov. 8, 2011); *Rivera Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011); *Lizama v. Holder*, 629 F.3d 440 (4th Cir. 2011): The Third Circuit's decision in *Valdiviezo-Galdamez* is uncommonly long, resulting largely from its effort to recount the historical development of the term "particular social group" as a protected characteristic in the definition of "refugee," both internationally and domestically. *Valdiviezo-Galdamez*, 2011 WL 5345436 at *8-16. The court's conclusions, however, were relatively straightforward:

(1) the "social visibility" standard constitutes an unwarranted departure from the standards set forth in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), for defining a PSG, because, inter alia, many groups recognized under *Acosta* would flunk the social visibility standard;

(2) the Government's defense of the social visibility standard as not requiring "on-sight" visibility is disingenuous, and the standard would thus make it more difficult for members of threatened groups who aim to minimize their visibility to obtain asylum; and

(3) the "particularity" standard is indistinguishable from that of social visibility and suffers from the same infirmities. *See id.* at *18-22.

Valdiviezo-Galdamez relied heavily on the Seventh Circuit rulings critical of the Board's allegedly "new" standards. *Id.* at *18-20; *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *see also* Edward R. Grant, *Disparity? Or Diversity? Contested Issues in Asylum Law*, Immigration Law Advisor, Vol. 3, No. 9, at 5, 15-16 (Sept. 2009). Relegated to a footnote were citations to five circuits that have approved of, and accorded *Chevron* deference to, the "social visibility" requirement. *Valdiviezo-Galdamez*, 2011 WL 5345436, at *17 n.16. No mention was made to *Rivera Barrientos* or *Lizama*, which brings to seven the number of circuits that have explicitly endorsed or deferred to the Board's standard. (To complete the circuit picture, the Sixth Circuit apparently still employs an *Acosta*-based approach and has favorably cited *Gatimi* and *Benitez Ramos*, although it has not specifically considered or rejected the criteria of particularity and social visibility. *Urbina-Mejia v. Holder*, 597 F.3d 360, 365-67 (6th Cir. 2010). The Fifth Circuit has not addressed the question.)

Valdiviezo-Galdamez and *Rivera Barrientos* present a notable contrast, because they differ not merely in ultimate result, but on whether "social visibility" and "particularity" are distinct criteria. The Third Circuit's assessment concluded that the two criteria

> appear to be different articulations of the same concept and the government's attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating. Indeed "Particularity" appears to be little more than a reworked definition of "social visibility" and the former suffers from the same infirmity as the latter.

Valdiviezo-Galdamez, 2011 WL 5345436, at *22.

Rivera Barrientos, in contrast, applied both criteria to address whether the putative social group of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" was cognizable under the Act. *Rivera Barrientos*, 658 F.3d at 1228-29. Neither "particularly" nor "social visibility" run counter to the Act, the court held, rejecting arguments of the petitioner and the United Nations High Commission for Refugees, as amicus. "[T]he particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a '*particular* social group.'" *Id.* at 1230. As a "matter of logic," the court held, it is reasonable to limit cognizable social groups to those that are defined with some specificity, so as to discourage amorphous definitions. *Id.* The court disagreed with the Board, however, that the proposed group could not be defined with particularity. While broadly defined in other respects, "the specific trait of having resisted gang recruitment is not so vague. A discrete class of young persons sharing the past experience of having resisted gang recruitment can be a particularly defined trait." *Id.* at 1231.

Turning to social visibility, *Rivera Barrientos* rejected the *Gatimi/Benitez Ramos* interpretation, i.e., that the Board has effectively required "on-sight" visibility. *See Benitez Ramos*, 589 F.3d at 430 (stating that "social visibility" means that an alien can be a member of the group only if a complete stranger encountering him on the street would identify him as a group member). "[W]e see no need," the Tenth Circuit stated, "to interpret social visibility as demanding the relevant trait be visually or otherwise easily identified. The BIA decision adopting this test does not appear to contemplate such a narrow definition." *Rivera Barrientos*, 658 F.3d at 1233 (citing *Matter of C-A-*, 23 I&N Dec. 951). Also in sharp contrast to *Gatimi*, *Rivera Barrientos*, and, later, *Valdiviezo-Galdamez*, the Tenth Circuit *accepted* the Board's characterization of the social visibility test as embracing such previously recognized "*Acosta*-standard" groups, including those with kinship ties, former police officers, and tribal opponents of female genital mutilation. *Rivera Barrientos*, 658 F.3d at 1233. The court agreed with the Board that, absent evidence "that Salvadoran society considers young women who have resisted gang recruitment to be a distinct social group," the social visibility standard could not be met. *Id.* at 1234.

With the score now 7-2 (and only 11 points can be scored) in favor of deference, the Tenth Circuit appears to have adopted the position that the Board has not required "on-sight" visibility for an individual to be "socially visible" and therefore a member of a particular social group. The Seventh and Third Circuits presumed that the Board *must* do so because, on their interpretation, that is what "visibility" must mean. Both courts dismissed as risible arguments that *social* visibility focuses on the perception of civil society, not an anonymous, isolated man on the street. The Tenth Circuit accepted the Board's statements that this is what *it* meant by the term; the true test, it implied, is whether the Board follows that meaning, or in a particular case, employs either social visibility or particularity to unduly restrict the concept of particular social group.

Valdiviezo-Galdamez did not purport to end the discussion—rather, it remanded to the Board for further explanation of how the "new" standards for defining a PSG are consistent with *Matter of Acosta*, or whether those standards are intended to replace *Acosta*. *Rivera Barrientos*, not considered by the Third Circuit, may answer those questions.

3. *Silva-Trevino*—A Step (Three) Too Far?—*Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011): *Fajardo*, dissected in last month's edition, adds to the small consensus that the Attorney General went a step too far in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), in permitting recourse to documents outside the formal record of conviction to determine whether an alien has been convicted of a crime involving moral turpitude. Edward R. Grant and Patricia M. Allen, *The Heart of* Silva-Trevino: *Still Beating?*, Immigration Law Advisor, Vol. 5, No. 9, at 6 (Oct. 2011). As noted, the Fourth Circuit is expected to rule shortly on the question, and it is difficult to believe that other circuits will not join the discussion in 2012.

2. The "Missing Element" Test Goes Missing—*United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011): Notwithstanding its potential merit in advancing the jurisprudence of the "modified categorical approach," *Aguila-Montes de Oca* demonstrates why fans sometimes do not desire a rematch. (Listening, BCS?) The decision overruled, *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), had all the attributes of a football game decided 9-6 in overtime. The panel

split 6-5, and only one judge, the author, agreed with the entirety of the opinion of the court. The rule that emerged—that a statute of conviction may be deemed "divisible" only if it includes a specific element that could match it to a generic deportable offense, *id.* at 1073—was unworkable. The game was played again in *Aguila-Montes de Oca*, with a different result, but again with only 2 judges out of 11 agreeing in full with the opinion of the court.

The key details have been addressed in these pages, but as indicated, deeper analysis of how *Aguila-Montes de Oca* alters the landscape of the modified categorical approach is warranted and forthcoming. *See* Grant and Allen, *When Cousins Are Two of a Kind*, *supra*, at 12-13.

The Ninth Circuit did, at year's end, add a coda to clarify whether a violation of section 459 of the California Penal Code for burglary of a dwelling can ever constitute a categorical aggravated felony. The answer is yes: such an offense is a categorical crime of violence under 18 U.S.C. § 16(b) and thus, when coupled with a 1-year sentence, an aggravated felony under section 101(a)(43)(F) of the Act. *Lopez-Cardona v. Holder,* No. 09-71661, 2011 WL 5607634 (9th Cir. Nov. 18, 2011).

1. "Comparable Ground" Test for Section 212(c) "Arbitrary and Capricious"—*Judulang v. Holder*, No. 10-694, 2011 WL 6141311 (U.S. Dec. 12, 2011): Fifteen years after its repeal, and 10 years after what we all assumed was the Supreme Court's last word on the subject, the world of adjudicating applications for relief under section 212(c) of the Act is back in play, thanks to the High Court's season-ending shutout (9-0) decision in *Judulang*. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Aliens formerly ineligible for section 212(c) relief under the "comparable ground" standard set forth in Board precedents will now be eligible. *See Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005); *Matter of Blake*, 22 I&N Dec. 722 (BIA 2005). Moreover, the Court established a new interpretation of the scope of section 212(c) relief and also required that exercise of the Board's statutory "gap-filling" function "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang*, 2011 WL 6141311, at *8.

The Court concluded that *Blake* and *Brieva* constituted "arbitrary and capricious" agency action in violation of the Administrative Procedures Act. *Id.* at *3. Concluding—after a brief history of section 212(c) and its application to deportation proceedings—that the "comparable ground" approach was of relatively recent vintage, Justice Kagan's decision excoriated the standard for producing anomalous results. "By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner." *Id.* at *7. If petitioner Judulang (previously convicted by guilty plea of voluntary manslaughter) "were seeking entry" into the United States, the Court found, he would be eligible to apply for section 212(c) relief because his conviction would fall under the exclusion ground for a crime involving moral turpitude; he would not be chargeable as an aggravated felon under section 237(a)(2)(A)(iii) of the Act. The Court declined to resolve the petitioner's lead argument—that *any* distinction between excludable and deportable aliens in regard to section 212(c) eligibility is impermissible. But, comparing the comparable ground rule to flipping a coin, the Court determined that the rule failed to be based on "non-arbitrary, 'relevant factors.'" *Id.* at *8 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins Co.*, 463 U.S. 29, 43 (1983)).

Critical to understanding the Court's ruling is that it considered the comparable ground standard as something untethered to the text of the Act—a point discussed in more detail below. Rather, it viewed the rule simply as a limitation on *discretionary* eligibility—a point made clear in this passage:

> The problem with the comparable-grounds policy is that it does not impose such a reasonable limitation. Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions. Recall that the BIA asks whether the set of offenses in a particular deportation ground lines up with the set in an exclusion ground. But so what if it does? Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not? The comparison in no way changes

> the alien's prior offense or his other attributes and circumstances. So it is difficult to see why that comparison should matter. Each of these statutory grounds contains a slew of offenses. Whether each contains the same slew has nothing to do with whether a deportable alien whose prior conviction falls within both grounds merits the ability to seek a waiver.

Id. The Court also noted the conundrum of an alien who would be excludable (and thus section 212(c) eligible) for committing the turpitudinous offense of sexual abuse of a minor, but not if charged as a deportable aggravated felon for the same offense. Such distinctions make no sense, the Court concluded, because they "may rest on the happenstance of an immigration official's charging decision," *id.* at *9; were the alien charged only under the moral turpitude ground of deportation, there *would* be a comparable ground under section 212(a) of the Act.

Such potential arbitrary results clearly drove the Court's decision, as well as its disregard for the Government's arguments in defense of *Blake* and *Brieva*. It is safe to say that the Court, while acknowledging the difficulty of drawing rules for the application of section 212(c) to matters (deportation proceedings) Congress did not clearly intend, considered this not at all a close case. The key jurisprudential maneuver is that the comparable ground rule had nothing to do with the fact, generally assumed for decades, that "[f]ormer section 212(c) of the Act provided for a discretionary *waiver of certain grounds of inadmissibility*" under section 212(a) of the Act for aliens, lawfully admitted for permanent residence, who met other standards of eligibility. *Matter of Blake*, 23 I&N Dec. at 724; *see also Matter of Gordon*, 20 I&N Dec, 52, 54, 55 (BIA 1989) (referring to "waiver of inadmissibility" under section 212(c)). The "comparable ground" rule, at its heart, is that in order to be waived, a ground of *deportability* must bear connection to a ground of inadmissibility that is waivable under section 212(c).

Judulang flatly rejects this historical understanding of section 212(c), calling it "an inaccurate description of the statute." *Judulang*, 2011 WL 6141311, at *11. Section 212(c) states that certain aliens "may be admitted in the discretion of the Attorney General" as long as they are not inadmissible under specified grounds of national security and child abduction. *Id.* "At that point, the alien is eligible for relief, *and the thing the Attorney General waives is not a particular exclusion ground, but the simple denial of entry*." *Id.* (emphasis added). Board precedent has stated that a grant of section 212(c) relief does not waive the crime or offense underlying the ground of inadmissibility, but that it does waive the ground of inadmissibility (or deportability) itself, meaning that the charge cannot be again brought. *Matter of Balderas*, 20 I&N Dec. 389, 391 (BIA 1991) (stating that a section 212(c) grant "waives" the finding of excludability or deportability; but a single crime waived under section 212(c) can form the basis for a subsequent charge of commission of two crimes involving moral turpitude).

Alternatively, the Court concluded that even if section 212(c) were regarded as a waiver of inadmissibility, the comparable grounds approach has no foundation in the statute.

> That is because § 212(c) simply has nothing to do with deportation: The provision was not meant to interact with the statutory grounds for deportation, any more than those grounds were designed to interact with the provision. Rather, § 212(c) refers solely to exclusion decisions; its extension to deportation cases arose from the agency's extra-textual view that some similar relief should be available in that context to avoid unreasonable distinctions.

Judulang, 2011 WL 6141311, at *11. To which one might say, no good deed, indeed, goes unpunished.

While the Court did not foreclose further attempts to limit the availability of section 212(c) to aliens charged with deportation grounds, it offered no hint what an acceptable rule would include. Nor—while this issue will require sorting out—does the Court's language indicate that its ruling would apply only to new or pending cases. Motions will inevitably follow.

Conclusion—And a "Plus One"

The year past settled some old scores and opened some new points of conflict. Once again, the Ninth Circuit appeared to dominate the rankings, but like it or not, it is

the SEC of immigration law. The Supreme Court will be heard from again, in no less than four immigration-related decisions, all previewed in these pages, plus the decision involving the constitutionality of the Arizona immigration enforcement statute. *See Gutierrez v. Holder*, 411 F. App'x 121 (9th Cir.), *cert. granted*, 132 S. Ct. 71 (2011); *Sawyers v. Holder*, 399 F. App'x 313 (9th Cir. 2010), *cert. granted*, 132 S. Ct. 71 (2011); *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 70 (2011); *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010), *cert. granted in part*, 131 S. Ct. 2900 (2011); *see also* Edward R. Grant and Joshua A. Altman, *Déjà Vu All Over Again: SCOTUS Takes Up Imputation and Retroactivity*, Immigration Law Advisor, Vol. 5, No. 8, at 10 (Sept. 2011); Edward R. Grant, *Fruit or Vegetable? Supreme Court To Decide if Tax Fraud is "Fraud" Under Section 101(a)(43)(M)(i) of the Act*, Immigration Law Advisor, Vol. 5, No. 5 (May-June 2011). All in all, 2012 shapes up to be a very significant year in immigration jurisprudence.

But among all the dusty analysis of legal issues, it is often the unheralded, even unpublished, circuit court decision that catches our eye—particularly those with a clear human element.

Such it is with our initial nomination for Number 1 for 2011—before it was preempted by *Judulang—Skokos v. U.S. Department of Homeland Security*, 420 F. App'x 712 (9th Cir. 2011). Mr. Skosos sought immigrant status as an "alien of extraordinary ability" under section 203(b)(1)(A) of Act, 8 U.S.C. § 1153(b)(1)(A); unfortunately, he failed to establish that he had made "original" contributions having a "major significance" in his field of endeavor or that he commanded a high salary compared to others in his field. *See, e.g.*, *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996) (considering a National Hockey League "enforcer's" salary versus other NHL players). Skokos tried, but failed, to persuade the DHS or the courts that his was not a pedestrian career, but one of a high-level consultant, supervising others, making arrangements in foreign countries, and ensuring that his duties were covered on a 24-hour basis.

The Ninth Circuit was not persuaded. Apparently, being the "security consultant" for Celine Dion did not qualify Mr. Skokos as an "alien of extraordinary ability." Perhaps his problem was a comparative lack of muscle in performing his duties. After all, back in 1996, Stu Grimson of the Detroit Red Wings satisfied the district court in Chicago of his "unquestioned ability as an enforcer," and the premium salary that skill commanded. *Grimson*, 934 F. Supp. at 969. No doubt energized by his victory in court, Grimson's career as an enforcer blossomed, marked by epic on-ice fisticuffs with the late Robert Probert, himself the plaintiff in a landmark case on detention of criminal aliens. *Probert v. INS*, 954 F.2d 1253 (6th Cir. 1992). But Grimson was no one-dimensional man, and far calmer off the ice than his antagonist Probert: married, father to four children, leader (!) of the NHL's Christian Fellowship, and, currently, a practicing lawyer in Nashville. One might say, a model immigrant.

And that's the way the puck bounces as we end 2011. Much happiness and prosperity for the holidays and the New Year.

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