



Immigration Law Advisor

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The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.

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Emerging Trends in the Circuits: Asylum Claims Based on Female Genital Mutilation

By Patricia Allen

Eleven years ago the Board of Immigration Appeals decided *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), which held that fear of persecution in the form of female genital mutilation (FGM) can be a basis for asylum. Since its publication, the United States Circuit Courts of Appeals have added to the ever expanding spectrum of treatment of claims based on FGM. This article will identify and examine two trends that have emerged. These trends involve the particular social group and objective fear of persecution asylum analyses. Due to the interrelated nature of these analyses, they will be discussed concurrently.

Although the circuits are virtually unanimous in recognizing FGM as persecution for purposes of asylum and withholding of removal claims, they are scattered on the next step of the persecution analysis. The circuit courts are divided on the nature of the social group to which the respondent must belong. *Kasinga*, the first case to address the issue, identified the respondent's social group as "young women of the Tchamba-Kunsuntu Tribe [of Togo] who have not had FGM, as practiced by that tribe, and who oppose the practice." *Kasinga, supra* at 365. The Board was guided by the test it had created in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), which defined a social group by "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." *Id.* at 233. Furthermore, while the circuits agree on what merits a finding that the respondent had a subjective fear of persecution, they vary on what constitutes sufficient evidence to support an objective fear of persecution in cases that involve FGM.

The Ninth and Tenth Circuits looked to *Acosta* for guidance as the Board did in *Kasinga* but emerged with a much slimmer and simpler social group than what was identified by the Board. These circuits recognized gender and membership of a tribe that subjected its females to FGM as a social group. *Mohammed v. Gonzales*, 400 F.3d 785, 796-97 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005). In effect, the Ninth and Tenth Circuits expressly disposed of the final requirement that the respondent oppose the practice. *Mohammed*, *supra* at 797 n.16 (observing that the “shared characteristic that motivates the persecution is not opposition”); *Niang*, *supra* at 1200 (concluding that “opposition is not a necessary component of a social group otherwise defined by gender and tribal membership”). The Eighth and Ninth Circuits took this simplification a step further by allowing Somali females as a cognizable social group after considering the extreme prevalence of FGM in Somalia. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Mohammed*, *supra* at 797. The Eighth Circuit very briefly and sweepingly addressed the objective fear analysis by holding that “a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM”. *Hassan*, *supra* at 518. The Ninth Circuit also took a broad approach to the objective fear analysis when it predicted that the respondent would shoulder her burden of proof in light of State Department reports informing that FGM was not outlawed in Somalia and remained “a near-universal practice.” *Mohammed*, *supra* at 798; *see also Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (finding an objective fear of FGM based on State Department reports informing that FGM is “nearly universal” in Ethiopia and that the government “does not, as a practical matter, enforce laws intended to curb harmful traditional practices”).

The Seventh Circuit very loosely applied and interpreted *Kasinga* when it recognized “women who fear being circumcised should they return to their home countries” as a social group. *Agbor v. Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007). The Court then launched into a “region-specific, rather than country-wide” or tribe-specific objective fear analysis. *Id.* at 503; *see also Balogun v. Ashcroft*, 374 F.3d 492, 507 (7th Cir. 2004) (finding “given the incidence of FGM often varies significantly from state to state,” region-specific information is “much more probative than the national figures”). Observing that the respondent lived in the Southwest Province of

Cameroon, where reports inform that FGM affects 40% of women, the Court discredited other sources setting the figure at 3%. *Agbor*, *supra* at 503. The Court also found that the respondent’s “extensive and consistent testimony” greatly outweighed State Department report language that FGM is “usually” performed on an age group to which the respondent does not belong. *Id.* (rejecting the Board’s implication that “usually” meant “exclusively”). The Court refused to accept the Board’s assertions that FGM “is mainly practiced among Muslims in Cameroon” in light of personal correspondence submitted by the respondent, a Christian, corroborating her testimony and “not negligible figures” reflecting that, in the Southwest Province, 100% of Muslim women and 63% of Christian women are affected. *Id.* at 504.

The Second Circuit took a more specific approach to the social group analysis when it identified a more detailed social group consisting of “women of the Nkumssa tribe [of Ghana] who did not remain virgins until marriage.” *Abankwah v. INS*, 185 F.3d 18, 21 (2^d Cir. 1999). Although the respondent was granted asylum on account of her membership in this social group, this narrow designation originally proved a liability to the respondent in establishing that her fear of persecution was objectively reasonable. The Immigration Judge discounted the respondent’s fear as a “personal problem” and, subsequently, the Board found that the respondent’s witnesses and documentary evidence failed to directly address the specificity of the respondent’s social group. *Id.* It was only after applying a broader evidentiary standard that the Second Circuit reversed the Board’s finding that the respondent failed to present sufficient evidence to support her claim that she would be punished by being subjected to FGM after her tribe discovered that she was not a virgin. *Id.* at 26.

The Second Circuit described the Board’s evidentiary requirements as “too exacting both in quantity and quality of evidence that it required.” *See Abankwah*, *supra* at 24. The Board had found that although the respondent’s testimony was credible, she did not have an objective fear of persecution because the country reports failed to single out the respondent’s tribe as one that practiced FGM or that FGM was used as a punishment for lack of virginity. *Id.* The Second Circuit countered that “INS regulations do not require that credible testimony – that which is consistent and specific – be corroborated by objective evidence” and found that because the

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS for SEPTEMBER 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeals in cases reviewing Board decisions in September 2007 was 14.2 % compared to last month's 12.4 %. The chart below provides the results from each circuit for September 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	16	15	1	6.3
2nd	80	69	11	13.8
3rd	25	22	3	12.0
4th	10	9	1	10.0
5th	16	15	1	6.3
6th	5	5	0	0.0
7th	8	4	4	50.0
8th	1	1	0	0.0
9th	96	81	15	15.6
10th	5	5	0	0.0
11th	13	10	3	23.1
All:	275	236	39	14.2

Relatively few decisions were issued in September with far below the usual numbers in the Second and Ninth Circuits. As usual, most reversals came from the Second and Ninth Circuits. The Seventh Circuit reversed in four of its eight decisions.

Ninth Circuit reversals covered a wide range of issues. Only two of the Ninth Circuit cases involved asylum issues (one involving faulty imputed political opinion analysis, the other involving the shift of burden of proof as to well-founded fear to the government after a finding of past persecution.) Remarkably, none of the Ninth Circuit reversals found fault with an adverse credibility determination. Several reversals involved aggravated felony determinations under the (B) controlled substance, (F) crime of violence, and (M) \$10,000 fraud provisions as well as the question of whether an accessory after the fact conviction was a crime involving moral turpitude. Five reversals involved motions to reopen, one for ineffective assistance of counsel, one for non-receipt

respondent's testimony and affidavit were sufficiently detailed and consistent, additional evidence supporting her objective fear was unnecessary. *Id.*; see also *Uanreroro v. Gonzales*, 443 F.3d 1197, 1209 (10th Cir. 2006) (holding that, while country reports "need not contain detailed information corroborating [the respondent's] account of [FGM] within her ethnic group . . . information about laws banning FGM provides substantial evidence to directly rebut or undermine her claims"). The Court forgave the respondent's admitted lack of knowledge of the specifics regarding her tribe's practice of FGM as used as a punishment for lack of virginity and held that "such specificity of knowledge . . . is not required." See *Abankwah*, *supra* at 26. The Court also stressed the common failure of refugees to collect all corroborating documents during their flight. *Id.* Notwithstanding, the Court noted the country reports submitted on the issue but found that information reflecting the criminalization of the practice and that between 15 and 30% of all females in Ghana had been subjected to FGM was outweighed by reports of an "insignificant" number of prosecutions. *Id.* at 25.

While the circuit courts have both simplified and complicated the Board's original design of a social group based on FGM, they have stayed true to *Acosta* guidelines. The circuits have also taken differing approaches to finding an objective fear of persecution by FGM. The approaches have included inquiries that have been broadly conclusive, region-specific, or credibility-heavy.

The foregoing was only a mere snapshot of the spectrum of circuit court treatment on the evolving issue of asylum claims based on FGM. Recently the Board of Immigration Appeals released two additional published decisions relating to FGM. In *Matter of A- T-*, 24 I & N Dec 296 (BIA 2007), the Board held that FGM does not qualify as "continuing persecution"; and in the *Matter of A-K-*, 24 I. & N. Dec 275 (BIA 2007), the Board found that a respondent may not establish eligibility for asylum or withholding of removal based solely on fear that his or her daughter will be subjected to FGM upon returning to the respondent's country of origin. No doubt with this recent emergence of Board precedent the spectrum will eventually take on a new shimmer.

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of the Board's decision, and three involving aliens who departed the United States after the motion to reopen was filed for consideration under the recent decision in *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007) (finding the regulation barring reopening after departure inapplicable when departure and motion occur after the conclusion of proceedings).

The Second Circuit reversed in a number of asylum cases, two involving credibility, one in which aspects of past persecution were overlooked, one concerning the persecutor bar, a frivolousness determination, and a remand to consider whether forcible insertion of an IUD amounted to persecution. Two late motion to reopen denials were remanded to address whether documents relevant to birth of a second child in the United States demonstrated a material change in country conditions. The Court also reversed an aggravated felony (M) \$10,000 fraud determination.

The Seventh Circuit's four reversals included credibility determinations in cases from Cameroon and Liberia and a case from Somalia in which the Court found that the Board neglected to address critical evidence in the record, as well as a case involving the question of adequate notice of hearing.

The chart below shows numbers of decisions for January through September 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	82	56	26	31.7
8th	64	51	13	20.3
2nd	920	753	167	18.2
9th	1776	1489	287	16.2
6th	87	74	13	14.9
3rd	254	227	27	10.6
11th	227	208	19	8.4
10th	54	50	4	7.4
5th	151	140	11	7.3
4th	138	128	10	7.2
1st	58	55	3	5.2
All:	3361	2837	524	15.6

Last year at this point (January through September 2006) we had a total of 4107 decisions with 732 reversals for a 17.8 % overall reversal rate.

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To Be Continued . . . When Do We Need a Further Episode?

by Edward R. Grant

From Jack Armstrong, the All-American Boy, to Jack Bauer, the All-American Counter-Terrorist, audiences have thrived on the action serial. And writers and directors have pondered the questions: when and how do we *end* this?

While the action in their courtrooms is far less swashbuckling, those latter questions are the *panem quotidianum* of Immigration Judges across the country. When should I grant a continuance? When not? And, increasingly in some Circuits, when *must* I grant a continuance? On this last question, the complexity of the plot lines rivals anything that Joel Surnow and crew may have concocted for Season 7 of *24*.

Episode 1: Return of the Jurisdiction

The authority for the conduct of immigration court proceedings has been fixed by statute since 1996. "An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." "The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." Section 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(1). Regulations specifically address the issue of continuances: "The Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (2007).

Since the conduct of hearings is under the authority of Immigration Judges, and such judges "may" grant continuances when requested, it would seem that the decision to grant or to deny a continuance would fall within the scope of discretionary decisions taken by the Attorney General that are made non-reviewable under

section 242(a)(2)(B) of the Act, 8 U.S.C. § 1252(a)(2)(B). *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983) (finding that the decision to grant or deny a continuance is within “sound discretion” of Immigration Judge.)

Not so simple. A majority of the circuits and, notably, the Department of Justice, now take the position that federal courts have the authority to review what all admit are discretionary decisions by an Immigration Judge to deny a continuance. See *Alsamhour v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar v. Att’y Gen.*, 461 F.3d 1357, 1360-62 (11th Cir. 2006); *Khan v. Att’y Gen.*, 448 F.3d 226, 232-33 (3^d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 436-37 (5th Cir. 2006); *Sanusi v. Gonzales*, 445 F.3d 193, 198-99 (2^d Cir. 2006); *Abu-Khalil v. Gonzales*, 436 F.3d 627, 633-34 (6th Cir. 2006); *Medina-Morales v. Ashcroft*, 371 F.2d 520, 528-29 (9th Cir. 2004). See also *Iqbal Ali v. Gonzales*, _F.3d_, 2007 WL 2684825 (7th Cir. Sept. 14, 2007) (describing, and rejecting, Government’s position on appeal that Court of Appeals has jurisdiction to review discretionary denial of continuance); *Yerkovich v. Ashcroft*, 381 F.3d 990, 993-95 (10th Cir. 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004).

These circuits rely on the fact that the “no jurisdiction” provision of section 242(a)(2)(B)(ii) applies only to “decision[s] or action[s] . . . the authority for which is specified under this title [Title II of the Act].” They note that since the authority to grant continuances is conferred only by *regulation*, that authority is not one specified in Title II, and thus, not covered by the jurisdiction-stripping provision. See, e.g. *Medina-Morales* at 528; *Sanusi* at 198.

The Sixth Circuit takes an arguably more circuitous route to the same destination: it held in *Abu-Khalil*, *supra*, that the authority to grant or deny a continuance is, indeed, one conferred by Title II of the Act because the grant of authority to conduct immigration proceedings implies the authority to decide *when* to conduct the hearings. *Id.* at 634. However, it stated that since that authority is one conferred by the Act on *Immigration Judges*, as opposed to the *Attorney General*, section 242(a)(2)(B)(ii), which mentions only discretionary decisions of the Attorney General, does not apply. (It is not hereby suggested that Immigration Judges in Detroit, Cleveland, Cincinnati, and Memphis certify their decisions on continuances to the Attorney General.)

So ends Episode One: the *discretionary* decisions of Immigration Judges to deny a continuance are, in most circuits, nevertheless subject to judicial review.

Episode 2: Moonstruck Over Chicago?

Iqbal Ali, *supra*, while asserting the non-reviewability of a denial of continuance, reminds its readers that in the cases where such a denial matters most – when continuance is sought on account of an incipient application for adjustment of status – the decision is, well, reviewable after all.

Subhan v. Ashcroft, 383 F.3d 591 (7th Cir. 2004), remains a decisive character in our drama. In *Subhan*, an Immigration Judge denied a request for a third continuance from a respondent who was awaiting adjudication of his Labor Certification Application (LCA); the Immigration Judge, who was affirmed by the Board, stated that while the respondent might “eventually” become eligible for adjustment of status, he was not eligible at the present time.

The Seventh Circuit curtly noted that this was not a “reason” for denying the continuance, but merely a “statement of the obvious: that the [state and federal] labor departments hadn’t yet acted.” *Id.* at 593. Intimating without deciding that it did not have jurisdiction to review the denial of the continuance, the Court nevertheless held that such a denial would frustrate the Congressional intent in enacting section 245(i) of the Act to “entitle illegal aliens to seek an adjustment of status” upon successful completion of the labor certification process. *Id.* at 594. Concluding that the Immigration Judge had given no “reason” for his denial of a continuance in light of this Congressional intent, the Court vacated the removal order decision and remanded. (*Subhan* did suggest some “reasons” that could pass muster, including that an illegal alien ought not be able to delay beyond a year the completion of his removal proceeding. Some might note that the need to promptly complete hearings is *inherently* a factor in any decision to deny a continuance.)

Later Seventh Circuit decisions further developed this rule. In *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), the Court strongly criticized an Immigration Judge decision denying an adjustment-based continuance request on grounds that the respondent had failed to comply with the Court’s order to submit a copy of

the application for adjustment of status. The Court rejected the Government's argument that as long as the Immigration Judge gives "some" reason for denial of the continuance, the requirements of *Subhan* are satisfied. "That would be a senseless distinction," the court wrote, "and is not what *Subhan* is about." *Benslimane* at 832. The Court took a different tack several months later in *Pede v. Gonzales*, 442 F.3d 570 (7th Cir. 2006), involving an adjustment applicant convicted of visa fraud connected to a smuggling enterprise operated by her U.S. citizen husband. After granting many continuances pending INS and DHS review of the alien's adjustment application, the Immigration Judge decided to end proceedings and order removal. The Circuit affirmed, concluding that sufficient reason – the "hopelessness" of the alien's adjustment application – had been provided by the Immigration Judge.

The Court's recent decision in *Iqbal Ali* follows *Pede supra*, but on different facts. The alien in *Ali* was dependent for adjustment on one of his lawful permanent resident sons obtaining citizenship. In denying a third continuance, the Immigration Judge stated that Ali was not immediately eligible for a visa, that a long continuance had already been granted based on Ali's representation that his son's application would be decided soon, and that "everyone who appears before me has family ties in the United States." *Iqbal Ali* at *2. Notably, the Immigration Judge did not mention evidence that the son's naturalization application had been denied. In affirming the denial of continuance, however the Board did cite this fact.

Ali argued to the Seventh Circuit that the Board erred because his son could move to reopen the denial of his application, and that he had other sons who were in the process of applying to be citizens. The Court rejected these arguments, however, noting that the Board legitimately concluded, on the record before it, that any further continuance would be "futile." The denial of a continuance, therefore, did not "nullify" any statutory right of Ali to adjustment of status.

Ali, in conjunction with *Pede*, appears to draw a fence around the rule pronounced in *Subhan* – namely, that a continuance sought on the basis of a pending adjustment application will be upheld if the Immigration Judge or Board legitimately conclude that there is little prospect an adjustment application will be granted. *Ali* did not indicate if the result might be different had the Board

been aware of the pending naturalization applications of the alien's other sons. Nor did it indicate whether the rationale given the Immigration Judge – which did not include the denial of the son's naturalization – would have been sufficient under *Subhan*, or, in the words of *Benslimane*, would have been the equivalent of stating that the Immigration Judge does not grant continuances "when the Moon is full." *Benslimane* at 832 (emphasis supplied).

Several weeks after *Ali*, the Seventh Circuit seemingly drew that fence tighter – and may have shot the Moon in the process. In a case of some procedural complexity, the Court dismissed for lack of jurisdiction an alien's claim that he was improperly denied a continuance of his reopened exclusion proceedings, so that DHS could complete adjudication of an employment-based adjustment application. *Potdar v. Keisler*, __F.3d__, 2007 WL 2938378 (7th Cir. Oct. 10, 2007). The Board granted the applicant's timely and unopposed motion to reopen and remand his exclusion proceedings due to the pendency of his LCA; the Immigration Judge certified the case back to the Board, stating (correctly) that he had no jurisdiction over the adjustment application. On certification, the Board agreed, and vacated its prior order reopening proceedings.

The Circuit concluded that both the Immigration Judge and the Board (in its final decision) misconstrued the original grant of reopening: it was not for the purpose of allowing the Immigration Judge to *adjudicate* the issue of adjustment, but for the Immigration Judge to consider whether to terminate or continue proceedings while the administrative labor certification, visa, and adjustment process ran its course. The issue of a continuance, therefore, was never addressed by the Immigration Judge; accordingly, no rationale for denying a continuance could have been, or was, ever given.

The Court's resolution? Apparently, to assume that the actions of the Immigration Judge and the Board served as constructive denials of any request for continuance. And it curtly affirmed those denials: "We must conclude [citing *Ali*] that we have no jurisdiction to review the denial of the continuance in Mr. Potdar's case." *Potdar* at *4 While notable in light of prior circuit precedent, it is also true (and this may have made a difference to the Court), that *Potdar* involved not the request for continuance of an ongoing case, but reopening of a final

decision. Thus, it seems incorrect to conclude that *Potdar* eclipses the lunar analogy provided in *Benslimane – la Bella Luna* may inspire all sorts of mischief and romance, but it probably remains insufficient grounds to grant or deny a continuance.

3. Episode Three: Green Card Can Wait

For those judges not under the jurisdiction of the Seventh Circuit – and who theoretically have higher odds of seeing their decisions on continuances subject to judicial review – the plot lines are less complex. A number of Circuits have taken the position – contrary, perhaps, to *Subhan* and *Benslimane* – that the fact that an LCA or visa petition has not been adjudicated is not only a “reason,” but a valid one, for an Immigration Judge to deny a request for continuance. Two recent decisions from the Second Circuit illustrate this trend.

The petitioner in *Elbahja v. Keisler*, __F.3d__, 2007 WL 2935884 (Oct. 10, 2007), having obtained one continuance of his removal proceedings on basis of a previously-filed LCA, was denied a further continuance by the Immigration Judge, who characterized as “speculative” the prospects for approval of the LCA and an I-140 visa petition. “[N]o purpose other than an unnecessary delay of the proceedings would be served by granting a continuance,” the Immigration Judge concluded. See *Elgahja* at * 3.

Finding support in decisions of the Third, Fifth, and Eleventh Circuits, the Second Circuit concluded that “it does not constitute an abuse of discretion for an Immigration Judge to decline to continue a removal proceeding in order to permit adjudication of a removable alien’s pending labor certification.” *Elbahja* at *3. See also *Khan v. Att’y Gen’l*, 448 F.3d 226, 235 (3rd Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006); *Zafar v. Att’y Gen’l*, 461 F.3d 1357, 1366-67 (11th Cir. 2006). *Zafar*, which addressed three cases of aliens placed in removal proceedings after having reported to authorities under the NSEERS program, that it is “acceptable” for an immigration judge to refuse to continue proceedings indefinitely in light of the speculative nature of the adjustment process. While citing the Seventh Circuit’s decision in *Subhan* on the issue of sufficiency of reasons, *Zafar* appeared to differ from *Subhan* in one critical respect: it specifically held that the potential availability of relief under section 245(i) of the Act does not subject the

denial of a continuance to greater scrutiny. “Certainly the plain language of § 1255(i) does not bar or stay removal by the DHS upon the mere filing of a labor certificate application with the DOL.” *Zafar* at 1367 (emphasis in original).

Another recent Second Circuit case addresses the same issue in the context of a marital visa petition – one that had been denied by the DHS, but with a pending appeal to the Board. The Court in *Pedrerros v. Keisler*, __F.3d__, 2007 WL 2851053 (2^d Cir., Oct. 3, 2007), rejected the petitioner’s claim that the Board erred in not ordering a further continuance pending its adjudication of the separate appeal from denial of the I-130. The Court declined to address the broader question of whether a continuance must be granted in such a case, instead holding that since the petitioner had failed to present “any *meaningful* argument or evidence” to prove the visa petition denial was in error, it was not an abuse of discretion to deny the request for continuance. *Pedrerros* at *3.

The Ninth Circuit, in a recent unpublished case, found that an Immigration Judge is not compelled to grant a continuance while so many uncertainties were present. *Siahaan v. Gonzales*, 2007 WL 2481850 (August 29, 2007). The alien’s wife’s employer had filed an LCA, and the Court noted that this was only a first step in a lengthy process. The Court remanded the case anyway, however, because of what it termed misstatements by the Immigration Judge regarding the alien’s eligibility for relief. The Court wanted to be sure that the Immigration Judge denied the continuance request *despite* his authority to grant it, citing to *Subhan*, *supra*. See also *Cordova v. Gonzales*, 2007 WL 2386488 (6th Cir. August 21, 2007)(unpublished)(No abuse of discretion when LCA pending); *but see Badwan v. Gonzales*, 494 F.3d 566 (6th Cir. 2007) (Immigration Judge abused his discretion in denying alien’s motion for a continuance to obtain translation of divorce decree and memorandum regarding legality to support his application for adjustment of status and DHS did not oppose motion).

Episode Four: Conclusion

On an issue such as this, any conclusion is premature. Despite the variant rulings on jurisdiction, it appears that a well-reasoned decision to deny a continuance request premised on potential eligibility for relief will not

be considered an abuse of discretion. However, courts seem to lean heavily on the “speculative” nature of the eligibility in such cases. If it appears that a visa petition, for example, is likely to be granted, courts have held that denial of a continuance may be an abuse of discretion. *Hassan v. INS*, 110 F.3d 490 (7th Cir. 1997); *Bull v. INS*, 790 F.2d 869 (11th Cir. 1986). See also *Garcia*, 16 I&N Dec. 653 (BIA 1978).

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RECENT COURT DECISIONS

First Circuit

Kho v. Keisler, __ F.3d __, 2007 WL 2994609 (1st Cir. Oct. 16, 2007). The First Circuit affirmed the denial of the petitioner’s applications for asylum, withholding of removal, and protection under the Convention Against Torture. The petitioner, a native and citizen of Indonesia, claimed he was persecuted because he was a Chinese Christian. The Court found that substantial evidence supported the Board’s finding of no past persecution. The First Circuit joined the Second, Third, Fourth and Seventh Circuits to reject the Ninth Circuit’s “disfavored group” analysis, finding there was no pattern or practice of Chinese Christians in Indonesia, and also rejected the presumed credibility doctrine which holds that when an Immigration Judge makes no credibility determination the court must deem the testimony credible. The Court found that the REAL ID Act provisions relating to credibility do not apply to the Courts of Appeals (this case was not a REAL ID Act case).

Third Circuit

Santana Gonzalez v. Att’y Gen. of U.S., __ F.3d __, 2007 WL 3052783 (3^d Cir. Oct. 22, 2007). The third Circuit granted the petition for review in an in absentia case, joining the Second, Fourth, Seventh, Eighth and Ninth Circuits in finding that the strong presumption of delivery outlined in *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995) does not apply to delivery in the case of ordinary regular mail. “The difference in the strength of presumption, and in its effect when applied, is a difference which we recognize and approve, as have other courts

of our sister circuits.” The Court directed the Board to reopen the case, and remand it to the Immigration Judge for a hearing on the issue of whether the alien received notice.

Fifth Circuit

Seung Lyong Sung v. Keisler, __ F.3d __, 2007 WL 3052778 (5th Cir. Oct. 22, 2007). The Fifth Circuit joins the Fourth in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), overturning the Board’s precedent and finding that Immigration Judges have jurisdiction to determine whether, pursuant to portability statute providing that a visa petition filed by an alien’s employer remained valid with respect to a new job if the new job was in the same or a similar occupational classification as the job for which the petition was filed, an approved employment-based visa petition remained valid for the purpose of alien’s application for adjustment of status to permanent residence when the alien changed employment.

Seventh Circuit

United States v. Pacheco-Diaz, __ F.3d __, 2007 WL 3071682 (7th Cir. Oct. 23, 2007). In a sentencing guideline case, the Seventh Circuit found that because the defendant was convicted of a prior drug possession offense, his subsequent Illinois conviction for possession of marijuana could have been punished under federal law as a felony with a penalty of up to two years imprisonment had the charge against defendant for possession of marijuana been brought in federal court; thus, the defendant’s conviction for possession of marijuana was an “aggravated felony” within the meaning of provision of the Sentencing Guidelines authorizing enhancement of base offense level for illegal re-entry conviction for previous aggravated felony conviction.

Ninth Circuit

Ahmed v. Keisler, __ F.3d __, 2007 WL 2992200 (9th Cir. Oct. 16, 2007). The Ninth Circuit granted the petitioner’s petition for review finding that substantial evidence did not support the Immigration Judge’s denial of his applications for asylum, withholding of removal, and protection under the CAT. The petitioner is a Bihari, born in East Pakistan before it became Bangladesh. The Immigration Judge denied the petitioner’s applications, finding that the petitioner had not suffered past persecution and did not have a well founded fear of future persecution. The Board affirmed. The Ninth Circuit held that the petitioner did suffer past persecution

due to the beatings he received at demonstrations on account of his political opinion. The Court also found that the petitioner had suffered persecution on account of his membership in a social group by showing that the Biharis are a “disfavored group” in Bangladesh.

Quintero-Salazar v. Keisler, __ F.3d __, 2007 WL 2916162 (9th Cir. Oct. 9, 2007). The Ninth Circuit ruled that statutory rape under California Penal Code § 261.5(d) is not a Crime Involving Moral Turpitude. California Penal Code § 261.5(d) criminalizes “[a]ny person 21 years of age or older . . . engag[ing] in an act of unlawful sexual intercourse with a minor who is under 16 years of age.”

Eleventh Circuit

Calle v. U.S. Atty. Gen., __ F.3d __, 2007 WL 3072380 (11th Cir. Oct. 23, 2007). The alien petitioned for review of the Board’s denial of her motion for reconsideration of the BIA’s denial of her motion to reopen. The Board denied Calle’s motion to reconsider as numerically barred under 8 C.F.R. § 1003.2(b)(2) as the alien had filed a motion to reconsider the Board’s denial of her appeal, then filed a motion to reopen alleging changed circumstances, and then a motion to reconsider that decision. While the Eleventh Circuit denied the petition, it held that the motions regulation does not provide that an alien may file only one motion to reconsider throughout her entire proceedings but rather, the regulation’s use of the singular terms “a decision” and “any given decision” suggests that an alien may file a motion to reconsider as to each decision by the Board. The Court ultimately denied the

BIA PRECEDENT DECISIONS

In *Matter of S-I-K*, 24 I&N Dec. 324 (BIA 2007), the Board considered whether an alien convicted of a conspiracy was properly found to have been convicted of an aggravated felony under sections 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i). The respondent was convicted, in 2004, of conspiracy and mail fraud in violation of 18 U.S.C. §§ 371 and 1341. In finding that the alien was convicted of an aggravated felony, the Board first noted that to give life to the conspiracy provision, Congress must have meant that an offense may be an aggravated felony even if it was not consummated. The proper analysis in a conspiracy case is whether the substantive crime that was the object of the conspiracy would have fit within the particular aggravated felon category had it been

successfully completed. When determining conspiracies under section 1101(a)(43)(M)(i), the Department of Homeland Security need not prove actual loss, it must prove potential loss of more than \$10,000. In this case, the alien’s plea agreement stipulated and the alien admitted that the foreseeable loss was between \$70,000 and \$120,000. Finally, the Board found the respondent did not establish eligibility for withholding of removal, and he cannot acquire status under section 209(a) of the Act, 8 U.S.C. § 1159(a) because he had previously acquired permanent residence status.

In *Matter of Singh*, 24 I&N Dec. 331 (BIA 2007), the Board considered the period in which circumstances may be considered for an extreme hardship waiver under section 216(c)(4) of the Act, 8 U.S.C. § 1186a(c)(4). The Second Circuit Court of Appeals had remanded the case, which was a petition of the Board’s denial of a motion to reopen. The Second Circuit remanded to consider the statute’s implementing regulation which provided that when considering whether extreme hardship would result from an alien’s removal, the district director shall take into account only those factors that arose subsequent to the alien’s entry as a conditional permanent resident. 8 C.F.R. § 216.5(e)(1). The statute provides for consideration of circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis. The Board applied canons of statutory construction to harmonize the two, finding that since the regulation and statute were consistent on the start date, but the regulations were silent on an end date, the Board could look to the statute. The evidence presented by the respondent pertained to a time period outside of the relevant period and did not support his motion to reopen for a hearing on the waiver application. In any event, the Board concluded that the respondent’s motion did not meet the regulatory requirements for a motion to reopen, and the motion should be denied in the exercise of discretion.

In *Matter of N-A-M*, 24 I&N Dec. 336 (BIA 2007), the Board found that in order for an offense to be considered a particularly serious crime within the meaning of section 241(a)(3)(B)(ii) of the Act, 1231(b)(2)(B)(ii), an offense need not be an aggravated felony under section 101(a)(43) of the Act. In this case, the respondent had a June 2005 Colorado conviction for felony menacing for which the respondent received 4 years deferred judgment and 4 years probation. The Immigration Judge found that the alien had established past persecution and a

clear probability of future persecution, but found that the crime was a particularly serious crime. The Board affirmed, finding that throughout the statutory changes, Congress has never confined the concept of particularly serious crimes to the aggravated felony categories. The Board disagreed with a Third Circuit precedent holding to the contrary. *Alaka v. Att'y Gen.*, 456 F.3d 88 (3^d Cir. 2006). Once the elements of an offense are found to potentially be a serious crime, Board precedent indicates that an Immigration Judge can look beyond the traditional record of conviction and consider all reliable information in making the determination. In this case, the Board looked at the elements of the offense to find that the crime is a particularly serious crime, noted that the alien was required to register as a sex offender, and considered the Statement in Support of Warrantless Arrest.

REGULATORY UPDATE

DEPARTMENT OF STATE

22 CFR Part 42

Federal Register: Oct. 30, 2007 (Volume 72, No. 209)

Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Consular Officer Procedures in Convention Cases

ACTION: Final Rule

SUMMARY: This rule amends Department of State regulations to provide for intercountry adoptions that will occur pursuant to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) and the Intercountry Adoption Act of 2000 (IAA). This rule addresses consular officer processing of immigration petitions, visas, and Convention certificates in cases of children immigrating to the United States in connection with an adoption covered by the Convention.

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Federal Register: Oct. 29, 2007 (Volume 72, No 208)

Termination of the Designation of **Burundi** for **Temporary Protected Status**; Automatic Extension of Employment Authorization Documentation for Burundi TPS Beneficiaries

ACTION: Notice.

SUMMARY: Following a review of country conditions and consultations with the Secretary of State and other appropriate Government agencies, the Secretary of

Homeland Security has determined that the temporary protected status (TPS) designation for Burundi should be terminated. This termination will not take effect until May 2, 2009, to provide for an orderly transition. This Notice informs the public of the termination of the TPS designation for Burundi and sets forth procedures for nationals of Burundi (or aliens having no nationality who last habitually resided in Burundi) with TPS to re-register for TPS benefits. Re-registration is limited to persons who have previously registered for TPS under the designation of Burundi and whose application has been granted or remains pending. Burundians (or aliens having no nationality who last habitually resided in Burundi) who have not previously been granted TPS, or who do not already have a pending application for TPS under the designation for Burundi, may not file under Late Initial Filing (LIFs) provisions, which are only allowed during an extension of a designation of TPS.

Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security (DHS) recognizes the possibility that re-registrants may not receive a new Employment Authorization Document (EAD) until after their current EAD expires on November 2, 2007. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Burundi for six months, through May 2, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the May 1, 2009, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 204, 213a, 299, and 322

Federal Register: Oct. 4, 2007 (Volume 72, No. 192)

Classification of Aliens as Children of United States Citizens based on Intercountry Adoptions Under the Hague Convention

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends Department of Homeland Security ("DHS" or "the Department") regulations relating to intercountry adoptions by U.S. citizens. First, to facilitate the ratification of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, signed at The Hague on May 29, 1993 ("Convention"), the rule establishes new administrative procedures for the immigration of children who are habitually

resident in Convention countries and who are adopted by U.S. citizens. Second, the rule makes other amendments to DHS regulations relating to the immigration of adopted children to reflect the changes to those provisions necessary to comply with the Convention. The Senate consented to ratification of the Convention in 2000 conditioned on the adoption of the necessary implementing regulations. Accordingly, this rule is necessary to establish the regulations necessary for the United States to ratify the Convention.

DEPARTMENT OF STATE

Federal Register: October 5, 2007 (Volume 72, No. 193)
Bureau of Consular Affairs; Registration for the Diversity Immigrant (DV-2009) Visa Program

Action: Notice of registration for the Diversity Immigrant Visa Program.

PUBLIC NOTICE: This public notice provides information on how to apply for the DV-2009 Program. This notice is issued pursuant to 22 CFR 42.33(b)(3) which implements sections 201(a)(3), 201(e), 203(c) and 204(a)(1)(I) of the Immigration and Nationality Act, as amended, (8 U.S.C. 1151, 1153, and 1154(a)(1)(I)).

Instructions for the 2009 Diversity Immigrant Visa Program (DV-2009)

The congressionally mandated Diversity Immigrant Visa Program is administered on an annual basis by the Department of State and conducted under the terms of Section 203(c) of the Immigration and Nationality Act (INA). Section 131 of the Immigration Act of 1990 (Pub. L. 101-649) that amended INA 203 provides for a class of immigrants known as "diversity immigrants." Section 203(c) of the INA provides a maximum of up to 55,000 Diversity Visas (DV) each fiscal year to be made available to persons from countries with low rates of immigration to the United States.

The annual DV program makes permanent residence visas available to persons meeting the simple, but strict, eligibility requirements. A computer-generated random lottery drawing chooses selectees for diversity visas. The visas are distributed among six geographic regions with a greater number of visas going to regions with lower rates of immigration, and with no visas going to nationals of countries sending more than 50,000 immigrants to the U.S. over the period of the past five years. Within each

region, no one country may receive more than seven percent of the available Diversity Visas in any one year.

For DV-2009, natives of the following countries are not eligible to apply because the countries sent a total of more than 50,000 immigrants to the U.S. in the previous five years (the term "country" in this notice includes countries, economies and other jurisdictions explicitly listed in this notice):

Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, Poland, Russia, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.

Persons born in Hong Kong SAR, Macau SAR and Taiwan are eligible. The Department of State implemented the electronic registration system beginning with DV-2005 in order to make the Diversity Visa process more efficient and secure. The Department utilizes special technology and other means to identify those who commit fraud for the purposes of illegal immigration or who submit multiple entries.

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