U.S. Department of Justice
Executive Office for Immigration Review *http://eoirweb/library/lib-index.htm*

Immigration Law Advisor

February 2007 *A Monthly Legal Publication of the Executive Office for Immigration Review* *Vol 1. No. 2*

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.

In this issue...

Misdemeanor Assault, Battery, and Harassment as Crimes of Violence–A Circuit Court Split

by Stephen O'Connor

When an alien is convicted of an offense such as assault, battery, or harassment, he or she may face removal if the offense meets the federal definition of "crime of violence." Proceedings involving aliens charged with crimes of violence pose challenges, as there are several unresolved legal questions pertaining to crimes of violence in the immigration context. Two prominent examples involve (1) whether the underlying statute's mens rea is sufficient to establish a crime of violence (see *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005), interpreting *Leocal v. Ashcroft*, 543 U.S. 1 (2004)); and (2), if the underlying statute is divisible, the degree to which the alien's actual conduct, as reflected in the record of conviction, may be examined (see, *e.g.*, *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004)).

This article will look at a third such unresolved legal issue. This issue arises when an alien is convicted of a misdemeanor assault, battery, or harassment offense that criminalizes "offensive physical contact" or other similar acts. In cases arising in and out of the immigration context, United States Circuit Courts of Appeal have split on whether these crimes constitute crimes of violence, with the First, Eighth, and Eleventh Circuits ruling that these are crimes of violence, and the Seventh and Ninth Circuits reaching the opposite conclusion. This article will focus on this split of opinion and its effect on immigration cases, with particular emphasis on representative decisions by the Seventh and Eleventh Circuits.

In the immigration context, there are two situations in which an alien may be removable for a "crime of violence" conviction. First, aliens convicted of certain crimes of violence are removable as aggravated felons within the meaning of section 101(a)(43)(F) of the Immigration and Nationality Act (INA). Second, aliens convicted of crimes of domestic violence are removable under section 237(a)(2)(E)(i) of

the INA. Both of these statutory provisions incorporate the definition of "crime of violence" in 18 U.S.C. § 16, which includes two subsections. The first subsection, 18 U.S.C.§ 16(a), applies to misdemeanors and encompasses "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

A body of case law in the Seventh and Ninth Circuits holds that misdemeanor offenses criminalizing "offensive physical contact" or similar acts are not crimes of violence under 18 U.S.C. § 16(a). *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), an immigration case, is representative of these decisions. There, the Seventh Circuit ruled that misdemeanor battery in Indiana is not a crime of violence under 18 U.S.C. § 16(a). The Indiana battery statute prohibits "[k]nowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner . . . result[ing] in bodily injury." In ruling that misdemeanor battery in Indiana is not a crime of violence under 18 U.S.C. § 16(a), the *Flores* Court distinguished the physical force required by 18 U.S.C. § 16(a) from the mere physical contact required for conviction by the Indiana statute. The *Flores* Court cited contact with a spitball or paper airplane as examples of mild physical contact not involving applications of physical force. According to the *Flores* Court, a holding that all physical contact or movement constituted physical force would have absurd implications. For example, cashing a check obtained by embezzlement could be seen as a violent act because the perpetrator would necessarily employ force to lift and carry the check.

Two Ninth Circuit immigration decisions also conclude that misdemeanor harassment and battery offenses are not crimes of violence under 18 U.S.C. § 16(a). In *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004), the Ninth Circuit ruled that misdemeanor harassment in Oregon, defined as intentionally "[h]arass[ing] or annoy[ing] another person by [s]ubjecting such other person to offensive physical contact," is not a crime of violence under 18 U.S.C. § 16(a). Similar to the Seventh Circuit in *Flores*, the Ninth Circuit reasoned that physical contact does not always rise to the level of physical force. For example, the Ninth Circuit stated that an individual's spitting on another person, which presumably could result in a conviction under the Oregon harassment statute as "offensive physical contact," would not involve the physical force necessary to satisfy 18 U.S.C. § 16(a).

In *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006), the Ninth Circuit ruled that misdemeanor battery in California, defined as "any willful and unlawful use of force or violence upon the person of another," is not a crime of violence under 18 U.S.C. § 16(a). Citing *Singh's* holding that physical contact does not always rise to the level of physical force, the *Ortega-Mendez* Court reasoned that misdemeanor battery in California is not a crime of violence as California courts have held that the most minor degree of physical contact may suffice for conviction. Subsequently, in *Matter of Sanudo,* 23 I&N Dec. 968 (BIA 2006), the Board's only published decision on this type of offense as a crime of violence, the Board noted that *Ortega-Mendez* "is binding on this Board and the Immigration Judges in cases arising in the Ninth Circuit."

In contrast to the above case law, decisions in the First, Eighth, and Eleventh Circuits can be cited for the alternative proposition that misdemeanors involving "offensive physical contact" or similar acts *are* crimes of violence under 18 U.S.C. § 16(a). These decisions conclude that such offenses can be misdemeanor crimes of domestic violence under 18 U.S.C. § 921(a)(33)(A). Though these decisions do not arise in the immigration context, they are relevant to immigration proceedings as 18 U.S.C. § 921(a)(33)(A) employs language identical to 18 U.S.C. § 16(a) in defining misdemeanor crimes of domestic violence as "ha[ving], as an element, the use or attempted use of physical force."

United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006), is representative of the body of case law holding that misdemeanors involving "offensive physical contact" or similar acts are crimes of violence. There, the Eleventh Circuit ruled that misdemeanor battery in Georgia can be a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A). The Georgia battery statute at issue prohibits "intentionally mak[ing] physical contact of an insulting or provoking nature with the person of another." In contrast to the Seventh Circuit in *Flores*, the Eleventh Circuit in *Griffith* refused to draw a distinction between physical contact and physical force. Quoting *Black's Law Dictionary*, the *Griffith* Court observed that the plain meaning of "physical force" is "[p]ower, violence, or pressure directed against a person," "consisting in a physical act." Black's Law Dictionary 673 (8th ed.1999). The *Griffith*

Court reasoned that it is impossible to make physical contact, particularly of an insulting or provoking nature, without exerting some level of physical force.

Similarly, the Eighth Circuit ruled in *United States v. Smith,* 171 F.3d 617 (8th Cir. 1999), that a subsection of an Iowa misdemeanor assault statute criminalizing "[a]ny act which . . . is intended to result in physical contact which will be insulting or offensive to another" can be a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A) because it includes, as an element, the use or attempted use of physical force. The *Smith* Court did not distinguish between physical contact and physical force, stating "physical contact, by necessity, requires physical force to complete." Finally, in *United States v. Nason*, 269 F.3d 10, 12 (1st Cir. 2001), the First Circuit ruled that a subsection of a Maine misdemeanor assault statute criminalizing "intentionally, knowingly, or recklessly caus[ing] . . . offensive contact to another" can be a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A). In reaching this conclusion, the First Circuit cited the Eighth Circuit's reasoning in *Smith* that no distinction exists between physical force and physical contact.

The above case law will influence decisions as to whether an alien may be removed for a crime of violence following a conviction for a misdemeanor that criminalizes "offensive physical contact" or similar acts. The Seventh and Ninth Circuit decisions support the proposition that such offenses are not removable offenses as crimes of violence under 18 U.S.C. § 16(a). By contrast, the decisions by the First, Eighth, and Eleventh Circuits appear to support the proposition that such offenses are removable offenses as crimes of violence under 18 U.S.C. § 16(a). Though the decisions by the First, Eighth, and Eleventh Circuits arise under 18 U.S.C. § 921(a)(33)(A) rather than 18 U.S.C. § 16(a), they appear to apply to the immigration context as the two statutes' definitional language is identical. Outside the five circuits listed above, the issue of whether aliens convicted of these offenses are removable for crimes of violence appears to be an open question.

Stephen O'Connor is a Judicial Law Clerk with the Dallas Immigration Court.

FEDERAL COURT ACTIVITY

Federal Court Review: High Dismissal Rate on Petitions for Review Continues

by Edward R. Grant

Since our last publication, the Federal Circuit Courts of Appeals have issued rulings on 240 petitions for review (PFRs) from decisions of the Board of Immigration Appeals, bringing the year's total to 505. PFRs were granted in 29 of these new cases, or 12 percent. Considering 2007 as a whole, 74 PFRs have been granted, or 14.6 percent of the total. Two circuits, the Second (15) and the Ninth (9), account for most PFR grants. (Counting the 123 February cases decided as of February 20, ten were grants, or 8 percent.)

The substantive trends noted in our last column also hold true. About half of granted cases involve findings of error in adverse credibility determinations (7) or in the failure to properly consider evidence (7) in asylum cases. The remaining grants fall into about 10 different categories, the most numerous being abuse of discretion in denying motions to reopen (5). In general, the majority of grants do not find "outcome-determinative" error, but rather, require a remand for further consideration of the evidence; in such cases, of course, the ultimate result may not change.

In a recently-published article in the Catholic University Law Review, I examined why, despite press coverage indicating the contrary, the circuit court affirmance rate for EOIR decisions remains relatively high, and did not markedly change in the wake of the 2002 regulatory reforms of the BIA.

Among the many reasons for this, the article maintains, is the growing respect for the work of Immigration Judges, a point illustrated by quotations from Article III jurists (both in judicial opinions and off-the-bench speeches). See *Guyadin v. Gonzalez*, 449 F.3d 465, 470 (2d Cir. 2006) ("The BIA's members and the dedicated corps of immigration judges . . . should be applauded for their continuing diligence, their integrity, and – as is shown in the records of nearly all the immigration cases we encounter in this Court

AILA InfoNet Doc. No. 07030199. (Posted 3/1/07)

– their earnest desire to reach fair and equitable results under an almost overwhelmingly complex legal regime"); *Guchshenkov v. Ashcroft,* 366 F.3d 554, 560 (7th Cir. 2004) (Evans, J., concurring) ("I write separately to express my concern, and growing unease, with what I see as a recent trend by this court to be unnecessarily critical of the work product produced by immigration judges who have the unenviable duty of adjudicating these difficult cases in the first instance.").

That trial judges should be given deference on issues such as credibility determinations, weighing of evidence, and findings of fact is hardly remarkable. There is history to this: a salutary reason for the BIA's former *de novo* authority was the fact that, until 1983, trial adjudicators were housed in the same agency, INS, that prosecuted immigration cases.

Those days, of course, are long past. Thus, the diminution of the BIA's *de novo* authority in the 2002 "reform" regulations struck a new balance between Immigration Judges and the Board that reflects the typical balance between trial and appellate courts.

Congress has also played a role in these developments. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 gave statutory recognition to the position of Immigration Judge, limited the authority of the Federal courts to review discretionary decisions of Immigration Judges and the BIA, and codified the "no reasonable adjudicator" (or "substantial evidence") standard for reviewing asylum cases.

Nevertheless, some tension remains within the circuit courts over the scope of deference to be accorded the work of Immigration Judges, as illustrated in several recent decisions.

A Ninth Circuit panel, in *Don v. Gonzales*, _ F.3d _, 2007 WL 430585 (9th Cir. 2007), concluded over a vigorous dissent that substantial evidence supported the adverse credibility determination entered against a Sri Lankan asylum application, based on an inconsistency regarding a crucial date, the implausibility of the applicant's fear of the LTTE rebel force, and the applicant's demonstrated propensity for dishonesty. (The applicant had never been harmed in Sri Lanka, only allegedly threatened by the LTTE for disclosing that one of his employees was affiliated with the group.)

While the nature of the discrepancies in this case merit study – the applicant, for example, gave different dates for his hiring of the employee whose activities were at the core of his claim – the turning point in the panel's split decision was interpretation of the standard of review. The dissenting judge contended that the majority violated circuit precedent by affirming a poorly drafted Immigration Judge decision, and by going outside the record and engaging in speculation to support its decision. The panel, in contrast, charged that the dissent's approach "amounts to an impermissible reweighing of the evidence . . . . Respectfully, the dissent makes a number of points that may well have led a majority of this panel to conclude differently than the IJ, were we reviewing the matter *de novo*. However, we cannot say that the evidence *compels* a contrary result."

Perhaps more notable is the 2-1 decision of the Seventh Circuit in *Apouviepseakoda v. Gonzales*, _ F.3d _, 2007 WL 286300 (7th Cir. 2007), affirming a denial of asylum to a respondent from Togo, and rejecting claims that the immigration judge's conduct and questioning of the respondent violated her right to a fair hearing. The circuit's opinion is lengthy and resists easy summarization, so is worth reading in its complete form. But the major points it addresses have wide application throughout the EOIR ranks.

First, the panel majority concluded that the Immigration Judge's conduct during six hours of hearing, while not always "a model of patience and decorum," did not violate due process. "Although the form of the [IJ's] interruptions was occasionally jarring, their function was to focus [the respondent's] testimony on matters than either needed clarification or went to the heart of her credibility. . . .The hearing followed this pattern throughout. [Respondent's] counsel would draw attention to a particular set of issues and ask some initial questions; inevitably the IJ would interrupt for clarification or to test the consistency and logic of her explanations. When the IJ was satisfied or out of questions, counsel could proceed and either raise unasked questions or begin questioning [respondent] on a new topic."

The BIA, in its affirmance of the Immigration Judge, concluded that the respondent had "failed to cite instances of misconduct on the part of the Immigration Judge to support the notion that the decision was based on anything other than his understanding and

AILA InfoNet Doc. No. 07030199. (Posted 3/1/07)

knowledge of the applicable laws and regulations and what he adduced from his participation in the case." The circuit majority agreed, noting that during the extended course of the hearing, the Immigration Judge gave counsel frequent opportunity to complete the record, thus negating any argument that the respondent did not have "a reasonable opportunity to be heard."

Second, the panel majority rejected claims that the Immigration Judge's acceptance (with approval of respondent's counsel) of offers of proof in lieu of testimony from two of respondent's witnesses had also violated due process. The panel noted both the length of the hearing, and counsel's acquiescence, as factors that would distinguish this case from a circumstance where an Immigration Judge barred live testimony simply in order to expedite a hearing.

Third, after a detailed discussion of discrepancies in the respondent's testimony and other evidence, the panel found that substantial evidence supported the adverse credibility determination entered by the Immigration Judge and affirmed by the BIA.

Finally, the panel responded to the strong dissent of Judge Richard Posner, which concluded that "yawning chasms" in the Immigration Judge's adverse credibility determination required both reversing the decision, and remanding the case to a different Immigration Judge. The panel noted that its decision did not conclude that the respondent had "lied," but did conclude that this respondent, like others, had succumbed to the temptation to embellish and exaggerate her story. "Immigration judges recognize this," the panel wrote. "So should august court of appeals judges." The panel also cited the "highly deferential review" given to Immigration Judge credibility rulings, and stated that "[w]e should honor these pronouncements, not merely mouth them and then proceed to pick apart what an IJ has done."

The panel did agree with Judge Posner on one issue: that Immigration Judges struggle with difficulty in dealing with "horrendous" workloads, "all without law clerks, bailiffs, stenographers, and often competent lawyers." All of which points to the fact that the circuit courts as a whole both respect the work done by EOIR adjudicators, and understand the sometimes difficult conditions in which that work is done.

Edward R. Grant is a Board Member with the BIA.

CIRCUIT COURT DECISIONS FOR JANUARY 2007

by John Guendelsberger

The United States Courts of Appeal issued nearly 400 decisions in January 2007, affirming the Board in 313 and reversing in 74. The Second and Ninth Circuits issued about 70 % of the total decisions and accounted for about 80 % of the reversals. There were no reversals from the First Circuit (5 decisions) or the Eleventh Circuit (26 decisions). The highest reversal rates were in the Eighth Circuit which reversed in two of four decisions and the Seventh Circuit which reversed in four of ten decisions. The overall reversal rate of 19.1 % compares to 17.5 % for calendar year 2006.

The following chart provides the results from each circuit for January 2007 based on electronic service reports of published and unpublished cases.

Circuit	Total	Affirmed	Reversed	%
1st	5	5	0	0.0
2nd	107	80	27	25.2
3rd	18	17	1	5.6
4th	19	17	2	10.5
5th	21	19	2	9.5
6th	13	10	3	23.1
7th	10	6	4	40.0
8th	4	2	2	50.0
9th	159	127	32	20.1
10th	5	4	1	20.0
11th	26	26	0	0.0
All:	387	313	74	19.1

AILA InfoNet Doc. No. 07030199. (Posted 3/1/07)

The Second Circuit reversed in 27 of its 107 cases (25.2 %). Most of the reversals involved asylum. Eight of the cases found a deficiency in the adverse credibility determination. A common thread in at least 12 of the cases was a finding that either the Immigration Judge or the Board had overlooked evidence or failed to address an issue, including:

* Immigration Judge failed to address explanations for inconsistencies;
* Immigration Judge did not address aspects of the evidence regarding extent of past persecution;
* Immigration Judge failed to discuss disproportionate punishment in evaluating nexus;
* Immigration Judge failed to consider testimony of two witnesses in denying cancellation;
* No discussion of pattern or practice of persecution in well-founded fear analysis;
* Board did not address country conditions evidence relevant to well-founded fear;
* Board failed to address issue of well-founded fear;
* Board did not address exceptions to late motions in denying motion to reopen;
* Board did not fully address new evidence presented in denying motion to reopen.

In *Rotimi v. Gonzales*, 473 F.3d 55 (2d Cir. 2007), the Court remanded with a request that the Board construe the meaning of "lawfully resided continuously in the United States" as that phrase is used in section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), in particular whether it may include residence during the time an asylum application is pending. The Court also remanded two more cases involving motions to reopen based on birth of a second child in the United States.

The Ninth Circuit reversed in 32 of 159 cases (20.1 %). About half of the reversals involved asylum issues, among which 5 cases were found to have flawed adverse credibility determinations. The Ninth Circuit also reversed several denials of motions to reopen based on ineffective assistance of counsel, equitable tolling, and proper notice of hearing. The Court also reversed a denial of a motion to reopen by an alien who had departed the United States and returned after a final order, reasoning that the bar to motions to reopen at 8 C.F.R. §1003.23(b)(1) applies only to an alien who departs while still in immigration proceedings. *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007).

The Ninth Circuit also returned three cases involving cancellation of removal to the agency. In two cases the Court found that the agency applied an incorrect standard in addressing hardships; in a third, the Court found that the residence of the parent should have been imputed to a minor child.

In five cases the Ninth Circuit found fault with a Board affirmance without opinion which changed the Immigration Judge's voluntary departure order from 60 days to 30 days. These five cases were not included in the count of reversals and remands.

Outside the Second and Ninth Circuits, all the other circuit courts combined decided 121 cases and reversed in 15 (12.4 %). The Seventh Circuit's four reversals all involved asylum: deficient credibility finding in a case involving a claim to religious persecution in Bangladesh; flawed well-founded fear analysis in a claim by an Albanian applicant; flawed nexus analysis in a claim by an applicant who protected a Coptic Christian in Egypt; and too conclusory denial of a motion to reopen based on changed conditions by an Ethiopian applicant. The other decisions from these circuits involved a variety of issues including asylum, Convention Against Torture, and motions.

John Guendelsberger is the Senior Legal Counsel to the BIA Chairman

Recent Circuit Court Decisions

Third Circuit

Jeune v. Attorney General of United States, __ F.3d __, 2007 WL 512510 (3rd Cir. Feb. 20, 2007) (**35 Pa. Cons. Stat. Ann. §§ 780-113(a)(30); aggravated felony/ Misdemeanor)**, the Third Circuit signaled that it is closely scrutinizing aggravated felony drug trafficking determinations. The respondent was convicted of manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance under 35 Pa. Cons. Stat. Ann. §§ 780-113(a)(30) and was sentenced to five years of probation. The Court found that the record of conviction provided no details of the conduct for which respondent was convicted. Under the trafficking analysis, the penalties suggested no criminal enterprise, and the minimum conduct the statute could criminalize included

possession of marijuana plants for one's own use which would arguably not be a trafficking offense. Under the hypothetical Federal felony analysis, the Court found that the analogous statute, 21 U.S.C. § 841, contains a provision in 21 U.S.C. § 841(b)(1)(D) and (b)(4) that a person who violates Section 841(a) "by distributing a small amount of marihuana for no remuneration" shall be punished as a misdemeanor. Because the Pennsylvania statute does not have remuneration as an element, and the record of conviction did not indicate otherwise, the conviction cannot be said to be analogous to a Federal crime, and is therefore not an aggravated felony.

Sixth Circuit

Randhawa v. Gonzales, _ F.3d _, 2007 WL 220171 (6th Cir. Jan. 30, 2007) (**MTR; Tolling**) settled the issue in the 6th Circuit of whether the filing of a petition for review tolls the time limit for filing motions to reconsider before the Board. The Court found that it does not.

Eigth Circuit

Tamenut v. Gonzales, _ F.3d _, 2007 WL 473274 (8th Cir. Feb. 15, 2007) (**Ethiopia; MTR; Untimely**), the Eighth Circuit departed from the jurisprudence of other circuits and found that it had jurisdiction over a decision by the Board not to reopen proceedings *sua sponte*. The Court reached this conclusion based upon other decisions of the circuit that scrutinized the Board's discretionary determinations, even though the Court's jurisdiction in those cases was not directly challenged. *See Recio-Prado v. Gonzales*, 456 F.3d 819, 821-22 (8th Cir.2006) ("[W]e will find an abuse of discretion if the denial was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis (such as race).") *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1162 (8th Cir. 2005). The Court invited an en banc panel to revisit the issue. In this case, the Court found that the Board did not abuse its discretion.

Ninth Circuit

Bravo-Pedroza v. Gonzales, _ F.3d _ , 2007 WL 329142 (9th Cir. Feb. 6, 2007) (**Res judicata**), the Ninth Circuit held that DHS was barred by res judicata from instituting a second deportation case on the basis of a charge that could have been brought in the first case, when, due to a change of law that occurred during the course of the first case, the Board had vacated the IJ's removal order and terminated removal proceedings. The petitioner, a native and citizen of Colombia, sought review of an order from the Board, which upheld an Immigration Judge's ruling that petitioner was removable based on burglary, robbery, and petty theft convictions. The petitioner was admitted as a lawful permanent resident of the United States in 1977. Petitioner was convicted of robbery in 1985 and burglary in 1986. An Immigration Judge found him deportable on the basis of these two convictions but granted him relief under former section 212(c). Subsequently, petitioner was convicted of petty theft with priors in 1996 and was sentenced to prison for seven years. In 2002, the BIA upheld an order of removal based on the petty theft conviction. However, the BIA vacated the removal order and terminated removal proceedings after the Ninth Circuit decision in *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002), holding that a petty theft conviction is not an aggravated felony. Five days later, the Secretary of Homeland Security filed new charges of removability on grounds that the convictions for robbery, burglary, and petty theft with priors were crimes of moral turpitude.

The Court began with the proposition that Courts may assume "that Congress has legislated with an expectation that [res judicata] will apply except when a statutory purpose to the contrary is evident" *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991). The Court also relied on its holding in *Ramon-Sepulveda v. INS*, 824 F.3d 749 (9th Cir. 1987), that res judicata bars the government from bringing a second case based on evidence (a birth certificate) that it could have presented in the first case. The Court noted that under the regulations, the DHS could have taken account of the change in law that resulted in termination of the first case and moved to reopen with the new charges any time between June 6, 2002 (the date of the Ninth Circuit decision in *Corona-Sanchez*) and May 30, 2003 (the date the Board applied *Corona-Sanchez* to vacate the IJ's order of removal and terminate proceedings).

Morales-Izquierdo v. Gonzales, _ F.3d _ , 2007 WL 329132 (9th Cir., Feb. 6, 2007), the Court majority, in an en banc decision, rejected challenges to the regulation authorizing immigration officers in DHS, rather than Immigration Judges in DOJ, to issue reinstatement orders. This decision rejects the reasoning of an earlier panel decision in this case which found that a removal order could only be reinstated by an immigration judge. See *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (now superseded).

In *Matter of A-M-E-* and *J-G-U-*, 24 I&N Dec. 69 (BIA 2007), the Board discussed the meaning of "particular social group" in finding that affluent Guatemalans do not constitute a particular social group within the definition of refugee set forth in section 101(a)(42)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(42)(A). The respondents were threatened in Guatemala, and a family member was kidnaped for ransom and was wounded by gunshot.

The group the respondents sought to identify was described in various terms to include wealth, affluence, upper income level, socio-economic level, the monied class, and the upper class. The Board applied its recent precedent in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), which reaffirmed the importance of social visibility and particularity as factors in the social group determination, and found that affluent Guatemalans did not meet these requirements. The Board did not find sufficient background evidence in the record to indicate that wealthy Guatemalans would be recognized as a group that is at a greater risk of crime, noting that violence and crime in Guatemala are pervasive at all socio-economic levels. As to particularity, the Board found that the characteristic of wealth is too subjective, inchoate and variable to provide the sole basis for membership in a particular social group. Depending upon perspective, affluent Guatemalans could encompass anywhere from 1 percent to 20 percent of the population. Lastly, the Board found that there was insufficient evidence to show any other motive for the threats.

In *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007), the Board interpreted the effective date of the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002)("CSPA"). The issue presented was whether the respondent, whose visa petition was approved before the effective date of the CSPA, but who filed his adjustment of status application after that date, retained his status as a child. The Department of Homeland Security urged an interpretation that the CSPA age out protections only apply to individuals whose adjustment applications were filed before the effective date, August 6, 2002. The Board found that the respondent retained his status as a child, is therefore an immediate relative, and is eligible to adjust his status.

The CSPA provides "age out" protection for certain individuals who were classified as children at the time that a visa petition or application for permanent residence was filed on their behalf, but who turned 21 before their petition or application was ultimately processed. The Board found that the effective date provision of the CSPA was ambiguous, that both interpretations were reasonable. In resolving the ambiguity, the Board first looked at other provisions of the statute, and found that in other sections, Congress specifically restricted particular provisions of the CSPA to those whose visa petitions and adjustment applications were pending, and provided a time limitation in another provision. The Board then looked at the legislative history, and found that there was no indication that Congress intended to exclude aliens in the respondent's situation. The evolution of the provision through the legislative process permitted a reasonable conclusion that Congress intended to reach a middle ground by expanding coverage of the statute beyond those individuals whose visa petitions and applications were pending before the effective date, but limiting coverage to those whose visa petitions were approved before the effective date, but only if their applications had not been finally adjudicated.

In *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), the Board found that it lacks authority to apply an "exceptional circumstances" or other equitable exception to the penalty provisions for failure to depart within the time period afforded for voluntary departure under section 240B(d)(1) of the Act, 8 U.S.C. § 1229c(d)(1). The Board pointed out that prior versions of the voluntary departure statute contained an "exceptional circumstances" exception for failing to depart, but this was eliminated in 1996 with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Board found that Congress did not intend to permit equitable exceptions to section 240B(d) for several reasons: voluntary departure is unlike statutes of limitations in that it is a quid-pro quo arrangement between an alien and the Government and the statute mandates that warnings be given. Furthermore, Congress has since amended the Act to delineate specific exceptions to the penalty provision, which, along with the repeal of the general exceptional circumstances provision, indicates an intention to limit the exceptions

AILA InfoNet Doc. No. 07030199. (Posted 3/1/07)

to those specifically described in the statute.

The Board also discussed the meaning of the phrase "fails voluntarily to depart the United states" in the penalty provision of section 240B(d). The Board stated that the voluntariness exception is a narrow exception limited to situations in which an alien, through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart. This would not include situations in which departure within the period granted would involve exceptional hardships or where lack of funds does not permit departure. In the case before the Board, the respondent demonstrated ineffective assistance of counsel in that her accredited representative failed to inform her of the Board's reinstatement of voluntary departure until after the period had expired. The Immigration Judge had also erroneously informed the respondent of an exceptional circumstances exception. The Board found that the respondent did not "voluntarily" fail to depart, and reopened proceedings to permit the respondent to pursue adjustment of status.

In *Matter of Tejwani*, 24 I&N Dec. 97 (BIA 2007), the Board found that the offense of money laundering in violation of 470.10(1) of the New York Penal Law is a crime involving moral turpitude (CIMT). The statute at issue prohibits the exchange of monetary instruments that are known to be the proceeds of "any criminal conduct" with the intent to conceal those proceeds. The respondent argued that the concealment of funds from criminal conduct that does not necessarily involve a CIMT cannot be a CIMT. The Board rejected the argument, finding that someone who conceals proceeds from criminal activity in a deceptive manner impairs the government's ability to detect and combat crime. The Board noted that concealment of crimes and interference in governmental functions are inherently

REGULATORY UPDATE

72 Fed. Reg. 4888 (2007)

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

8 CFR Part 103
[CIS No. 2393-06; Docket No. USCIS-2006-v0044]
RIN 1615-AB53

Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule
AGENCY: U.S. Citizenship and Immigration Services
ACTION: Proposed rule

SUMMARY: This rule proposes to adjust the immigration and naturalization benefit application and petition fees of the Immigration Examinations Fee Account. Fees collected from persons requesting these benefits are deposited into the Immigration Examinations Fee Account. These fees are used to fund the full cost of processing immigration and naturalization benefit applications and petitions, biometric services, and associated support services. In addition, these fees must recover the cost of providing similar services to asylum and refugee applicants and certain other immigrants at no charge.

The fees that fund the Immigration Examinations Fee Account were last updated on October 26, 2005, solely to reflect an increase in costs due to inflation. The last comprehensive fee review was conducted in fiscal year 1998. U.S. Citizenship and Immigration Services conducted a new comprehensive review of the resources and activities funded by the Immigration Examinations Fee Account and determined that the current fees do not reflect current processes or recover the full costs of services that should be provided. Therefore, this rule proposes to increase the immigration and naturalization benefit application and petition fee schedule by a weighted average of $174, from an average fee of $264 to $438. These increases will ensure sufficient funding to meet immediate national security, customer service, and standard processing time goals, and to sustain and improve service delivery. Furthermore, the rule proposes to merge the fees for certain applications so applicants will pay a single fee rather than paying several fees for related services. The rule would permit U.S. Citizenship and Immigration Services to devote certain revenues to broader investments in a new technology and business process platform to improve substantially its capabilities and service levels.

This rule also proposes generally to allocate costs for surcharges and routine processing activities evenly across all form types for which fees are charged, and to vary fees in proportion to the amount of adjudication decision-making and interview time typically required. This rule proposes to eliminate fees for interim

benefits, duplicate filings, and premium processing by consolidating and reallocating costs among the various fees. The rule also proposes to exempt applicants for T nonimmigrant status, for status under the Violence Against Women Act from paying certain fees, and modify substantially the availability of individual fee waivers by limiting them to certain specified form types.

72 Fed Reg. 4372 (2007)

UNITED STATES SENTENCING COMMISSION
Sentencing Guidelines for United States Courts

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considerin promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also provides multiple issues for comment, some of which are contained within proposed amendments.

The specific proposed amendments and issues for comment in this notice are as follows:

(A)Proposed amendment to §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.4 (Involuntary Manslaughter), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault), 2A2.4 (Obstructing or Impeding Officers), 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or a Ferry), 2A6.1 (Threatening or Harrassing Communications; Hoaxes), 2B1.1 (Fraud, Theft, and Property Damage), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defrau by Interference with Governmental Functions), 2B2.3 (Trespass), 2K1.4 (Arson; Property Damage by Use of Explosives), 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), 2Q1.1(Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)), 2X5.2 (Class A Misdemeanor Offenses (Not Covered by a Specific Offense Guideline)), Appendix A, and issues for comment regarding implementation of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177 (hereinafter the ''PATRIOT Act'') and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59, as these laws pertain to transportation offenses;

(B) proposed amendment to Chapter Two, Parts A and G, §§ 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct), 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email), 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information), 2J1.2 (Obstruction of Justice), 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), 5D1.3 (Conditions of Supervised Release), Appendix A, and issues for comment regarding implementation of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 (hereinafter the ''Adam Walsh Act'');

(C) proposed amendment to re-promulgate as a permanent amendment the temporary, emergency amendment to § 2B5.3 (Criminal Infringement of Copyright or Trademark), effective September 12, 2006 (see USSG Supplement to Appendix C (Amendment 682)), and issues for

comment regarding implementation of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109-181;

(D) proposed amendment to Chapter Two, Parts D and X, §§ 2A1.1, 2A1.2, 2B1.1, 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes), 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K1.4, 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorism Organizations of For a Terrorist Purpose), 2M6.1, 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), 2X1.1, 2X2.1 (Aiding and Abetting), 2X3.1 (Accessory After the Fact), Appendix A, and issues for comment regarding implementation of the PATRIOT Act and the Department of Homeland Security Appropriations Act, 2007, Pub. L. 109-295, as these laws pertain to terrorism offenses and border protection;

(E) proposed amendment to §§ 2D1.1, 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy), Appendix A (Statutory Index), and issues for comment regarding implementation of the PATRIOT Act and the Adam Walsh Act as these laws pertain to drug offenses;

(F) proposed amendment to §§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L1.2 (Unlawfully Entering or Remaining in the United States), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport);

(G)(1) proposed amendment to § 2B2.3 (Trespass) to implement the Respect for America's Fallen Heroes Act, Pub. L. 109-228; (2) proposed amendment to § 2H3.1 to implement the Violence Against Women an Department of Justice Reauthorization Act of 2005, Pub. L. 109-162; and (3) issue for comment regarding implementation of the SAFE Port Act, Pub. L. 109-347;

(H) proposed amendment to (1) §§ 2B1.1, 2D1.11, 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and 2L1.1 to correct typographical errors; and (2) Chapter Three, Part D (Introductory Commentary) and § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to address cases involving multiple counts contained in multiple indictments;

(I)issue for comment regarding § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons);

(J) issues for comment regarding application of certain criminal history rules under § 4A1.2 (Definitions and Instructions for Computing Criminal History);

(K) issue for comment regarding implementation of section 4 of the Telephone Records and Privacy Protection Act of 2006, Pub. L. 109-476, which provides the Commission with emergency amendment authority to amend the guidelines applicable to persons convicted of an offense under 18 U.S.C. § 1039; and (L) issue for

EOIR Immigration Law Advisor

Juan P. Osuna, Acting Chairman,
Board of Immigration Appeal

David L. Neal, Acting Chief Immigration Judge,
Office of Chief Immigration Judge

Karen Drumond, Editor
(703) 605 - 1102
EOIR Law Library

Jean King, Senior Legal Advisor
(703) 605-1744
Board of Immigration Appeals

Anne Greer, Assistant Chief Immigration Judge
(703) 305-1247
Office of the Chief Immigration Judge

Layout by: Hasina Rahman and Kimberly Camp