The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

H. Raymond Fasano, Section Chair

Quote of the Month

"Today, we are protecting ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe. This is fantastic. The countries of Eastern Europe have fallen under the Communist yoke—they are silenced, fenced off by barbed wire and minefields—no one passes their borders but at the risk of his life. We do not need to be protected against immigrants from these countries—on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe, to succor those who are brave enough to escape from barbarism, to welcome and restore them against the day when their countries will, as we hope, be free again. ... These are only a few examples of the absurdity, the cruelty of carrying over into this year of 1952 the isolationist limitations of our 1924 law.

In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration."

—President Harry S. Truman, in his message vetoing the Immigration and Nationality Act. It was passed over his veto.

From the Chair

The ILS recently held its Annual Memphis Seminar on May 17 - 18, 2013. I am pleased to announce that it was an overwhelming success. Our usual base line to determine whether our seminar was a success is participants gushing that it was the best seminar that they have ever attended. This year we took it one step further—participants exclaimed that this year's seminar topped all of our previous seminars that we hosted in Memphis. This is exciting news. If you have never attended our Annual Immigration Seminar, please make plans to attend next year. Not only is the seminar a fabulous and educational CLE program but it is also a yearly reunion for all attendees and presenters. We traditionally hold the seminar every year in Memphis the third week in May. This date coincides with "Memphis in May" celebrations and the International BBQ festival. Why was the seminar special this year? The planning committee tirelessly worked to organize the best speakers from the private bar, public interest and government. Our faculty included the top immigration lawyers in the nation, federal and immigration judges, government lawyers and personnel. This faculty cannot be replicated in any other forum. Our host in Memphis is the irreplaceable Barry Frager. Barry and his staff work to coordinate our hotel accommodations, CLE panels and

Editor **continued on page 2**

In This Issue

EDITOR continued from page 1

social events. I personally had the joy of getting to know Judge Carlos Lucero from the Tenth Circuit Court of Appeals on a personal level at our kick-off dinner held at Texas de Brazil and on our riverboat cruise. I would have never had this intimate opportunity but for the Memphis Seminar.

This year we honored the following ILS Board members for their distinguished service to our Section: Hon. Mimi Tsankov, Betty Stevens, Mark Shmueli and yours truly. Also, we began what will be an ILS tradition: The Barry Frager Outstanding Service Award, in honor of Barry's many years of service to the Memphis conference. I was honored to hand the award to one of my ILS mentors the Hon. Lawrence Burman, immediate past chair of the ILS.

I sincerely hope that you can make plans for our seminar next year. Be part of the seminar that will have everyone agreeing that it is the best seminar ever. ◆

H. Raymond Fasano
Chair, FBA Immigration Law Section

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For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

When Clients Lie

BY JASON DZUBOW

I once represented a Russian woman who paid a notario $10,000.00 to concoct a phony story about how the woman was a lesbian who faced persecution in her home country. The application was denied, in part because the notario failed to inform the asylum seeker about the contents of her application, and the woman was referred to immigration court.

By the time I got the case, the woman had married a U.S. citizen (a man) and was facing deportation. We had to decide how best to approach the case, given the client's previous lies. What we did is the same approach I have used many times since, because it tends to work. We admitted that she lied, explained how the lie happened (basically, a naive young woman following the advice of a high-paid crook), accepted responsibility for what she did wrong, and apologized.

In the end, the client received her green card based on the marriage. My favorite part of the case was when I informed the immigration judge that I would have an expert at trial to testify concerning country conditions in Russia: The husband was African American, and if his wife was deported, he planned to follow her to Russia, where he would likely face problems with skinheads and other racists. The judge, who was also black, told me, "I don't need an expert to tell me that there is racism in Russia." We skipped the expert and won the case.

This basic formula—admit the lie, take responsibility, and apologize—is one that has worked for my clients on numerous occasions.

Just last month, for example, we completed the case of an asylee who had been convicted of stealing money from his employer. The crime was an aggravated felony under the Immigration and Nationality Act (because he was sentenced to more than one year in prison). The refuge waiver, under section 209(c) of the INA, is one of the rare waivers that allows an aggravated felon to adjust status from asylum or refugee to lawful permanent resident. It's not an easy waiver to get, and really isn't that common (which, I hope, means that asylees rarely commit aggravated felonies).

In that case we used the same formula. The client took responsibility for his crime, apologized, and promised that he would not engage in such behavior again. We also submitted evidence of rehabilitation. The waiver was granted, the client was released from detention (after a good eight months in jail), and he received his green card.

This same strategy can be used for clients who lied to obtain a visa or who entered the country illegally. The fact finders want to hear that the alien accepts responsibility for what she did. And in asylum cases, there really is little to gain from covering up such lies, as people who falsely obtain a visa (or enter the United States illegally) in order to escape persecution are not ineligible for asylum.

The point of all this is not that the client can say the magic words and win permission to remain in the United States. Rather, the alien who accepts responsibility for what he did (and tries to turn his life around) is much more likely to receive relief than the alien who tries to cover it up or blame someone else. ◆

Jason Dzubow is a partner in Dzubow & Pilcher PLLC, Washington, D.C.

The Needs of the Many do not Outweigh the Needs of the Few

BY JASON DZUBOW

A couple of recent articles got me thinking about how the U.S. handles asylum seekers coming from countries that we view as friends—Western-style democracies that generally respect human rights.

The first is an article from the *Jewish Daily Forward* (featuring a quote from my esteemed law partner, Todd Pilcher) about asylum seekers from Israel. The article found that 18 Israeli nationals sought asylum in Fiscal Year 2011. The article found that the asylees were a "strange and quirky mix:"

One, an Arab citizen of Israel, is a gay man who convinced authorities he would face violence from his own family and tribe if forced to return to Israel. Lack of adequate action by Israeli police played a role in the approval of the request, his attorney said. Another is an Israeli woman who suffered domestic abuse. She also received asylum after making the case that Israeli authorities were not protecting her. Yet a third is the son of a founder of Hamas who, after spying on the terrorist-designated group for Israeli authorities, felt unsafe under Israeli protection and fled to the United States in fear for his life.

The second article is a follow-up on a homeschooler family that received asylum from Germany. In that case, an immigration judge found that the family faced persecution in Germany after they refused for religious reasons to send their children to public school, as required by German law. The Board of Immigration Appeals reversed the judge's decision last May, and the homeschoolers filed a petition for review with the Sixth Circuit, which recently denied the petition.

Other "Western" countries listed as source countries for asylum seekers in the United States include Argentina (nine people granted asylum in FY 2011), Brazil (20), Germany (four), Latvia (six), New Zealand (five), Poland (six), and the United Kingdom (eight). These numbers are pretty small given the total of 24,988 people granted asylum in FY 2011, but such cases raise some questions.

First, how do the source countries feel about a decision from the U.S. government that they are persecuting (or, at best, failing to protect from persecution) their own citizens? When asked by the *Forward*, an Israeli diplomat said that the scarcity of asylum cases in the United States did not require the Israeli government to bring up the issue with Washington. The official added that the few cases in which Israelis were granted asylum in America represented "unusual circumstances" and did not reflect on Israel's democracy. I'd bet that like the Israelis, most Western democracies see these asylum cases as aberrations and aren't particularly bothered by them. One country that is annoyed by our State Department's practice of evaluating the human rights situation in other countries is China. In "retaliation" for our report, China issues its own report, which describes a litany of human rights abuses in the United States.

A related issue is whether—if the number of asylum cases form a particular allied country increased—that country could raise the issue diplomatically in order to curtail asylum grants. Theoretically, asylum should be independent of politics, but the *Forward* article raises the example of Israeli conscientious objectors who received asylum in Canada. Apparently, "Canada has approved dozens of asylum requests from individuals claiming political persecution by Israel since 2000." According to the Forward, in 2006, the Israeli government protested Canada's asylum policies. And in the past two years the number of Israelis receiving asylum in Canada has declined. If this is correct, and the decline in asylum grants is related to the Israeli protest, it raises serious concerns about the integrity of the Canadian asylum system.

Another question raised by these asylum cases is, how the heck do you get granted asylum from a country like New Zealand or the UK? My guess is that these cases involve very special circumstances, like victims of human trafficking who have not received adequate protection, or maybe sexual orientation cases where the person was subject to severe abuse. Another possibility is that the immigration judge and the DHS attorney agreed to grant asylum in order to address an otherwise inequitable situation. For example, I once had a case where my client was convicted of an aggravated felony. She had been here for many years, had a family with a special needs child, and it was obvious that the only reason for her conviction was the incompetence of her criminal lawyer (her crime was *very* minor). Although it was pretty clear that she did not qualify for withholding of removal, the immigration judge would have granted relief to resolve the situation. Unfortunately, the DHS attorney did not agree. Had the attorney agreed, the client would have received relief, even though she really did not qualify. Maybe something similar is happening in some of the asylum cases at issue here.

Asylum cases from Western democracies are relatively rare. But there are enough such cases to help prove the adage, no country is safe for everyone all the time. ◆

Five Lessons from the Supreme Court

Hon. Paul Wickham Schmidt, *U.S. Immigration Judge, Arlington, Virginia*

National Asociation Of Women Judges Meeting at the U.S. Supreme Court // May 3, 2013

I am delighted to be here this afternoon to speak to you about recent U.S. Supreme Court cases in the field of immigration. We go from the rarefied perspective of my good friend Vice Chairman Adkins-Blanch to the "retail level" of our system: The immigration court, where I serve as a trial judge. I call this speech "Five Lessons from the Supreme Court."

I appear today in my official capacity with official permission for which I am deeply grateful to Director Osuna and Chief Judge O'Leary. I intend to neither embarrass them by saying anything controversial nor surprise them by saying anything profound. I must nevertheless tell you that the views I express during this presentation are mine and do not represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, my colleagues on any immigration court or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the future.

I also thank your distinguished president, Judge Joan Churchill, for inviting me. Judge Churchill and I ate lunch together on the day I reported for duty to my first legal job as an attorney advisor for the Board of Immigration Appeals in August 1973, and we have been great friends ever since. Without getting into too much detail, I want to recognize Judge Churchill as one of the pioneer women immigration judges. Her courage, determination, and hard work have opened the doors for literally scores of other women jurists in our system, for which I am deeply grateful. I congratulate *you* on *your* wisdom for having chosen her as your leader.

Before I launch into my prepared remarks, I am going to give you a "mini history lesson" tying together the Supreme Court, immigration law, and *your* organization. Fortunately, we have in our audience today one of the talented judges who entered through the doors opened by Judge Churchill. That is my good friend and colleague from the San Francisco Immigration Court, Judge Dana Leigh Marks, who will be appearing on your next panel. Please identify yourself, Judge Marks. Judge Marks also serves as the president of the National Association of Immigration Judges, a group once headed by your president, Judge Churchill.

What you might not know is this. Back in the fall of 1986, Judge Marks, then known as Dana Marks Keener, successfully argued the most important case in the history of American asylum law, *INS v. Cardoza-Fonseca*,[1] before the Supreme Court. That landmark case held that asylum applicants are entitled to a much more generous standard of proof than the government had been applying. Although I did not argue that day, I was present at the argument as the acting general counsel of the INS representing my "now-defunct" client which succumbed to Judge Marks's brilliant entreaties.

When I teach asylum and refugee law as an adjunct professor, I tell my students that Judge Marks is effectively the "founding mother" of U.S. asylum law. This is no idle claim. In 1986, on the eve of *Cardoza-Fonseca*, the asylum grant rate in immigration court was slightly over 10%.[2] Today, almost two-thirds of asylum applicants receive some type of durable protection in immigration court.[3] Effective advocacy before the Supreme Court *does* make a difference in individual lives. I also must say that "but for" the effective efforts of Judge Churchill in the 1980's when she was president of our association, immigration judges might well have been "stripped" of our authority to hear asylum cases *de novo*.

Therefore, in Judge Churchill and Judge Marks we have with us today two amazing jurists, effective far-sighted leaders, and inspirational role models who have forever changed the face of American justice.

It is a long way from where I sit at the Arlington Immigration Court to the Supreme Court, figuratively if not literally. As an immigration judge, I am about as far down the "judicial food chain" as it gets. Remarkably, however, as you can see, the work done by Immigration Judges occasionally find its way to this building. I hope to "bridge the gap" today by presenting some of the Court's recent work in the field of immigration as helpful reminders that I think about daily before taking the bench.

I will just rattle off case summaries. Instead, I will not take you beyond technical holdings, which might or might not interest those of you who do not work in immigration, and give you a practical impression of what the Supreme Court means to me as a trial judge working in a very busy system where individuals' lives and hopes daily are at stake. I have taken a bit of "judicial license" with the subject, however, because one of my select cases predates the *Padilla* decision in 2010.

I find five important lessons derived from recent Supreme Court immigration cases which should have meaning for all of us who serve, or have served, as judges at any level:

- Our work is critically important;
- Time is important;
- Be reasonable;
- Be fair; and
- Federalism is important.

Lessons continued on page 6

I.

First, I find in Justice Stevens's majority opinion in *Padilla v. Kentucky*[4]an important recognition and reaffirmation of the critical importance of our work. *Padilla* held that the concept of ineffective assistance of counsel applies to immigration advice given to a foreign national defendant in connection with a guilty plea in state criminal court. Justice Stevens devoted the entire first section of his decision to a detailed historical summary of the development of deportation laws, especially as they relate to the effect of criminal convictions on a noncitizen's immigration status.

He confirmed that over time the immigration consequences stemming from such convictions have been "dramatically raised" and that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important."[5] Justice Stevens and his colleagues recognized that, notwithstanding the nominally "civil" nature of our removal proceedings, in many cases removal from the United States is the single most drastic consequence of a criminal conviction for a resident alien, far outstripping the sometimes quite modest criminal penalties which might be imposed as a result of a plea bargain.

I remember discussing this case with my colleagues at lunch. We were impressed with the Supreme Court's deep understanding of the complex interaction between criminal and immigration laws and their willingness to probe beyond mere civil/criminal distinctions. We were also reassured and inspired by the Court's clear recognition of the emotional significance and high stakes with which we Immigration Judges deal in our courtrooms every day. To me, that is the true message of *Padilla*: That our work as judges is critically important, to our country and to those individuals who come before us seeking justice.

II.

I find my second piece of inspiration in Chief Justice Roberts's majority opinion in *Nken v. Holder*.[6] In this 2009 case, the Court held that the correct test for a stay of removal for an individual seeking judicial review of a removal order by a federal court of appeals was the traditional four-part test involving likelihood of success on the merits, irreparable harm, potential injury to the government, and public interest. The Court rejected the view of the Fourth Circuit Court of Appeals that new immigration statutes required a higher showing of "'clear and convincing evidence' that the order was 'prohibited as a matter of law.'"[7]

I focus on the first two sentences of Justice Roberts's opinion: "It takes time to decide a case on appeal. Sometimes a little; sometimes a lot." [8] As someone who has had the honor of serving as a judge at both the appellate and trial levels, I can assure you that the Chief Justice's simple, yet eloquent, observation applies equally to cases in the trial court.

In immigration court, as in many other tribunals, we face an extremely heavy workload which sometimes exerts excruciating pressure on a judge to "just keep the cases moving." While we have many routine cases that can be disposed of quickly and fairly, other cases involve complicated legal and factual issues, such as an asylum application, credibility, the proper legal definition of a "particular social group," or the correct construction of state and federal criminal laws (as referenced in *Padilla*) which require time and deliberation to produce a just result. All my immediate colleagues understand and appreciate the Chief Justice's reinforcement of the truth that time is an important element of justice and that some cases will require more time than others to achieve the fair and correct result.

III.

My third important example, concerning reasonableness, comes from the 2011 case *Judulang v. Holder*.[9] This decision, written by Justice Kagan, the newest Justice, for a unanimous Court, dealt with a now-repealed waiver of certain grounds of removal for long-time lawful permanent residents of the United States.

As many of you probably are aware, through a line of cases including *Chevron*[10] and *Brand X*,[11] the Court increasingly has deferred to the decisions of administrative authorities such as the Board of Immigration Appeals, in construing ambiguous statutory terms. The board, where Acting Vice Chairman Adkins Blanch sits, is the highest administrative tribunal in our system for adjudicating appeals and establishing precedents in removal cases.

Notwithstanding concepts of deference, Justice Kagan, acting under the Administrative Procedure Act (APA), very clearly and powerfully reminded all administrative decision makers that *discretion* in construing ambiguous statutory terms must be exercised in a "reasoned manner." Finding that the board had made eligibility for the waiver depend "on the chance correspondence between statutory categories" rather than "the alien's fitness to reside in the country," she concluded that the board's interpretation "flunked that test."[12]

The EOIR court system is part of the Department of Justice. Justice Kagan is a former solicitor general, one of highest-ranking officials in our department. Therefore, Justice Kagan would be particularly knowledgeable about, and sensitive to, our board's mission. Consequently, I view her *Judulang* opinion as an especially strong admonition that all judges and other executive decision makers must strive to be reasonable and consider the "big picture" in exercising the great discretion conferred upon us. If you wish to know more about the *Judulang* decision, I refer you to my short article in the June 2012 issue of *The Federal Lawyer,*[13] which I believe has been included in your conference materials.

IV.

My fourth source, reinforcing the historically central concept of fairness, involves last year's decision in *Vartelas v. Holder*.[14] This case involves the issue of retroactivity of a 1996 amendment to the immigration law that made a resident alien who had been convicted of certain crimes "inadmissible" to the United States upon return from even a very brief trip abroad. Under the prior law, as construed by the Court in a 1963 case, *Rosenberg v. Fleuti*,[15] a resident alien

returning to the United States after a "brief, casual, and innocent" trip abroad could not be excluded at the border.

Vartelas represents the second of three relatively recent ventures by the Court into the question of retroactivity under the immigration laws. The first was the 2001 decision in *INS v. St. Cyr*.[16] There, the Court found that an amendment eliminating an important waiver of removability for lawfully resident aliens was *not* retroactive. That actually was the same waiver I discussed earlier in connection with *Judulang*.

As in *St. Cyr*, in the absence of clear direction from Congress, Justice Ginsburg's majority decision applies the "presumption against retroactivity" to bar the new law from adversely affecting the petitioner. The Court notes that this equitable principle is "'centuries older than our republic.'"[17] This doctrine counsels against "impairing vested rights," "creating new obligations," "imposing new duties," or "attaching new disabilities" with respect to past actions.[18] Justice Ginsburg neatly ties together the recognition of the increasingly severe sanctions of the immigration laws as recognized in *Padilla*,[19] the equitable considerations present in *St. Cyr*,[20] and the flexibility of the *Fleuti* doctrine.[21]

In other words, as described by Justice Ginsburg, the presumption against retroactivity reflects and implements the important concept of *fairness* in American law. Indeed, Justice Scalia's dissenting opinion recognizes and criticizes the majority's so-called "greatly exaggerated" concern with fairness or rationality in the application of the laws.[22]

As Vice Chairman Adkins-Blanch described earlier in his summary of *Chaidez v. United States*,[23] the third recent immigration retroactivity case, the Court's reluctance to embrace retroactive applications apparently extends even to its own immigration-related decisions. Additionally, the Court echoes the "fairness theme" in its very recent decision about non-citizen minor marihuana offenders, *Moncrieffe v. Holder*,[24] also summarized by Vice Chairman Adkins-Blanch.

V.

My final reaffirmation, concerning the importance of Federalism, comes from what is probably the best known of the Court's recent immigration cases, the 2012 decision in *Arizona v. United States*.[25] This case involves a constitutional challenge by the U.S. Government to Arizona statutes intended to "discourage and deter" in that state the entry, presence, and economic activities of aliens not lawfully authorized to be in the United States.[26] Significantly, Justice Kagan recused herself, apparently because of her prior role as solicitor general. Justice Kennedy writes for the 5-3 majority.

Justice Kennedy finds three of the four state provisions at issue, those relating to alien registration, criminalization, and warrantless arrest, "preempted" by the federal scheme. In doing so, he relies on the Supremacy Clause and concepts of sovereignty. However, in remanding for further proceedings a provision relating to verification of immigration status, the majority also recognizes that "[c]onsultation between federal and state officials is an important feature of the immigration system."[27]

In my daily work at our court, I often reflect on the important interrelationship between federal and state authorities. For example, the vast majority of the criminal convictions having removability consequences in our system, as vividly described by Justice Stevens in *Padilla*, come from *state*, rather than federal, courts. Moreover, in most cases where we consider the legal effect of such convictions, we are bound by the record created in state court and cannot go beyond it to retry the criminal case. Indeed, many of my most difficult legal issues of removability involve constructions of *state* criminal law. Many of the individuals who appear before me in detention are there as a result of referrals from the state criminal justice system to the Department of Homeland Security (DHS), the federal agency charged with investigating and initiating removal cases.

Additionally, many of the detainees appearing before me by televideo are held in Virginia Regional Jails under contracts with the DHS. We also have what is known as an "Institutional Hearing Program" where we conduct hearings for foreign nationals who are actually serving sentences for state crimes within the Virginia corrections system.

I therefore find great *significance* and *satisfaction* in Justice Kennedy's recognition that while our federal immigration system is preeminent, we must consider and respect the important, and often complex, role of state authorities in supporting and assisting the federal mission.

VI.

This completes my five-point analysis. I hope I have kept my promise to avoid the profound and concentrate on the practical messages the Supreme Court delivers through its decisions:

- Our work is critically important;
- Time is important;
- Be reasonable;
- Be fair; and
- Federalism is important.

Because the cases I covered are immigration cases, these messages have *special* meaning for me as an immigration judge. But, I believe that these reminders are important for *all* judges at *all* levels of our system. I also hope that in the process, I have given you some useful information about our immigration courts and, perhaps, even *inspired* you to learn more about this critically important part of our American justice system.

Thanks again for inviting me, thanks for listening, and I hope that you enjoy the rest of your conference. ◆

Endnotes

[1]480 U.S. 421 (1987).

[2]TRAC Immigration, FY 2012: A Record Year for Asylum Cases, available online at www.trac.syr.edu/. (11% grant rate in 1986).

[3]TRAC Immigration, FY 2012: A Record Year for

Lessons continued on page 9

Immigration Trapped in the Vortex of Politics as it Stalls in the House

BY H. RAYMOND FASANO

". . . all men might be free, if they had but virtue enough to be so."[1]

One of my influences while I was in college was the writing of Gordon S. Wood and his instruction on the intellectual might that fueled the American Revolution. What struck me and led me to pursue my vocation to be a lawyer was the concept of virtue or as our nation's Founding Fathers often referred to it as, "virtus." Before Ancient Rome fell into decline, Wood reflected that "[w]hile the Romans, for example, maintained their love of virtue, their simplicity of manners, their recognition of true merit, they raised their state to the heights of glory."[2] It was the ideal of public virtue on which our nation was founded: *Putting the public good before private interest*. Wood explains that the United States was framed as a republic because "in theory no state was more beautiful than a republic, whose whole objective by definition was the good of the people." It seems that the concept of virtue has been lost in the politics that have ensnared immigration reform.

Let me be clear, we are very confident that immigration reform, in one form or another will be a reality in the near future. Indeed, those that may benefit from immigration reform, the so called "provisional immigrants,"[3] should do everything they can *now* to prepare for the reform registration, such as making sure taxes have been paid,[4] collect documentation that establishes that they were present in the United States prior to Dec. 31, 2011, obtain their immigration files if they ever had contact with immigration or border security in the United States, make sure that they are not collecting public benefits, such as food stamps, and obtain proof of income. Being prepared *now* for what will likely occur in the future is the best insurance for success.

Despite our optimism about immigration reform becoming a reality, the House of Representatives has demonstrated that politics as usual, the anathema of public virtue, is delaying what should be an expedient intellectual pursuit. The logic of immigration reform compels that the House act with deliberate speed to meet the goals of the Senate's *BSEOIMA*. It is disheartening to learn that Rep. Paul Labrador has dropped out of the House "Gang of Eight" after an impasse on whether provisional immigrants would be eligible for health care. Politico.com reported that

Rep. Raul Labrador (R-Idaho) — a key conservative who had been engaged in secret negotiations over immigration reform — said Wednesday that he will drop out of the so-called House Gang of Eight.

The problem, Labrador said, was an impasse over how the pending legislation would address the issue of health care for undocumented immigrants. That issue had recently emerged as a major sticking point between Democrats and Republicans, and the negotiations had teetered on the edge of collapse at least three times in the last several weeks before drawing closer to an agreement again. "Raul Labrador exiting House immigration group," www.politico.com/story/2013/06/house-immigration-group-trouble-92282.html#ixzz2VRpFfxHn.

The public good overrides any private interest that would be negatively affected by immigration reform. For instance, The National Pork Producer's Council supports immigration reform. Its website endorses immigration reform as follows:

NPPC supports immigration reform legislation that secures the country's borders in a way that is fair and just; allows access to a legal workforce but does not place undo burdens on employers; addresses the labor needs of specific industry sectors, including agriculture; and presents a "common sense" solution for the undocumented workers already in the United States. NPPC supports a temporary worker visa program. www.nppc.org/issues/agriculture-industry/immigration-reform/.

In addition to the agricultural market place supporting immigration reform, business and faith leaders support common sense immigration reform. Michael O'Connor, director of state government affairs for Eli Lilly has stated that "We are a nation of immigrants . . . Our strength is built on the fact that we brought diverse backgrounds" together and allowed them to work. The bill, he said, could provide a "national solution to a broken system." "Business, faith leaders call for Senator Joe Donnelly to support immigration reform." www.indystar.com/article/20130604/NEWS/306040081/Business-faith-leaders-call-Senator-Joe-Donnelly-support-immigration-reform

Those who oppose immigration reform should be reminded of the importance of public virtue. It is self evident that our immigration system is broken. If the United States is to remain competitive in this century it must embrace the fact that we live in a global era. Proponents of protectionism, border security and law and order must confront the reality that the public's need commands immigration reform. To do nothing in the face of principle does nothing but reduce the Republican Party to the permanent party of opposition that has no direction or leadership to guide the country through the turbulent waters of our era. ◆

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Endnotes

[1]*The Creation of the American Republic, 1776-1787*, Gordon S. Wood, p. 34, *quoting* Joseph Perry, *A Sermon, Preached before the General Assembly of the Colony of Connecticut, at Hartford on the Day of Their Anniversary Election, May 11, 1775* (Hartford 1775)(other citations omitted) (Copyright 1969 By the University of North Carolina Press).

[2]*Id.* at 35.

[3]*Border Security, Economic Opportunity and Immigration Modernization Act* (2013), *BSEOIMA*, Immigrant Visas, §2101(b).

[4]*The New York Times* reported that:

Under the Senate bill, the I.R.S. would impose back-tax assessments based on a review of the information provided by undocumented immigrants applying for registered provisional status to U.S. Citizenship and Immigration Services, the agency that will handle those applications. The immigrants would have to pay all taxes they owe, but they would not be subject to prosecution for failing to pay them.

There are no good estimates of how many immigrants applying for provisional status would owe unpaid taxes or how much they would owe. Even though most undocumented immigrants do not have valid Social Security numbers, many file tax returns using individual taxpayer identification numbers they can obtain from the I.R.S., "Q. And A.: The Senate Immigration Bill," (NYT April 22, 2013), www.nytimes.com/2013/04/23/us/politics/q-and-a-the-senate-immigration-bill.html?pagewanted=all&_r=0

Lessons continued from page 7

Asylum Cases, available online at www.trac.syr.edu/; EOIR, FY 2012 Statistical Yearbook, at A-2, available online at www.justice.gov/eoir/statspub/fy11syb.pdf. (55% asylum grant rate + 8% withholding grant rate = 64% success rate for asylum applicants).

[4]559 U.S. 356, 130 S.Ct. 1473 (2010).

[5]130 S.Ct. at 1480.

[6]556 U.S. 418 (2009).

[7]556 U.S. at 423 (quoting 8 U.S.C. § 1252(f)(2)).

[8]556 U.S. at 421.

[9]132 S.Ct. 476 (2011).

[10]*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[11]*National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

[12]132 S.Ct. at 484.

[13]Paul Wickham Schmidt, *Answering Questions About the Supreme Court's Judulang Decision*, Federal Lawyer, Vol. 59, No. 5 at 18 (June 2012).

[14]132 S.Ct. 1479 (2012).

[15]374 U.S. 449 (1963).

[16]533 U.S. 289 (2001).

[17]132 S.Ct. at 1486 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)).

[18]132 S.Ct. at 1486-87 (paraphrased).

[19]132 S.Ct at 1487.

[20]132 S.Ct. at 14891-92.

[21]132 S.Ct. at 1492.

[22]132 S.Ct. at 1496.

[23]133 S.Ct. 1103 (2013).

[24]2013 WL 1729220 (2013).

[25]132 S.Ct. 2492 (2012).

[26]132 S.Ct. at 2497 (quoting the notes following the Arizona statute).

[27]132 S.Ct. at 2058.

Tax Component of Immigration Legislation

BY TONY HARDIN, ROBERT ALCORN, AND SAM ROCK

The Senate's immigration reform bill does not require applicants to pay tax on undeclared income and will result in tens of billions of dollars in refundable credits. The initial crafters of the Senate legislation professed that a legalization program would require applicants seeking status to "pay back taxes" and that they would not be entitled to new government benefits. The bill does not impose any obligation on individuals to file tax returns and pay tax on undeclared income. The bill only requires proof of payment of tax obligations that exist at the time of filing. In addition, the bill will have the unintended consequence of enabling those who obtain legal status to retroactively claim tax refund checks based upon the Earned Income Tax Credit (EITC) and other refundable credits. Refundable credits are essentially welfare payments because they are paid to the taxpayer even though the taxpayer owed no tax. Refunds based on the EITC can be up to $6,000 per year and it can be retroactively claimed for three years. The one time liability relating to retroactive claims to refundable credits would be between thirty and ninety-billion. Therefore, the only back tax returns that would be filed if this bill were to become law would be those that claim refunds. Clearly this was not the intent of the drafters of the bill given all the assurances that applicants would not receive welfare benefits as a result of obtaining legal status. The prospective and retroactive cost of the EITC dwarfs the cost associated with the health care supplement.

Requiring undocumented workers to pay back taxes was one of the most widely used justifications for immigration reform. Legislators changed their talking points from requiring applicants "to file back tax returns" to having them "start paying taxes." The distinction is subtle. But it means the Senators recognize that the bill only requires applicants to pay tax on debt already owed. The Senate punted the issue to the House. The House will be much less likely to turn a blind eye toward unpaid tax liability, and the fact is that the Senate bill enables the applicants to apply for refundable tax credits after obtaining Social Security Numbers. Essentially the bill is a get away free card for individuals who never filed a tax return and lottery ticket for those who can retroactively claim the EITC.

The tax conversation seems to have been hijacked by several senators who claim that it would be too difficult for undocumented workers to file a tax return because they worked with a false social security number or for cash. Their position is simply incorrect. In tax year 2011, the IRS processed almost 2.9 million tax returns that had an Individual Tax Identification Number (ITIN) as the primary or secondary taxpayer, paying out $6.8 billion in refunds relating to those returns. ITINs are issued to individuals who are not eligible for a social security number. The majority of these taxpayers are undocumented workers. The IRS has an entire service center dedicated to the processing of ITIN applications for taxpayers, their dependents and the tax returns filed by these individuals. The IRS is set up to handle these returns and has been processing returns for undocumented workers through the ITIN program since 1996. There are between 700,000 and 1.2 million tax preparers who can assist these individuals prepare their returns and negotiate installment agreements with the IRS for debts. These cash returns are easy to prepare and can be done at minimal cost to the taxpayer. The IRS holds conventions through the country every year to train tax preparers how to complete tax returns on a myriad of issues, including tax returns for individuals who are undocumented, who work in cash, and who have to obtain an ITIN. The IRS enables individuals to enter into payment plans based upon an individual's ability to pay. The ability to pay formula considers family expenses and extraordinary events that can mitigate in favor of extremely low monthly payments.

The political arguments relating to the tax component of the immigration legislation span from those who believe applicants should provide proof that they have paid tax on all income earned since arriving in the United States to those who believe that a tax filing requirement would subvert the purpose of the legislation. Neither of those positions is fair or practicable. At a minimum the bill should require applicants to show proof of filing and payment of tax in all years that presence in the United States must be shown to qualify for the immigration benefit. Continued compliance with payment should be required to maintain status, absent extraordinary events. Congress will have to amend Section 6103 of the Internal Revenue Code to allow for information sharing between the IRS the Department of Homeland Security.

Failing to impose back-tax filing requirement constitutes a tax amnesty for those who never declared their income or had FICA withheld from their paychecks. This would be unfair to undocumented workers who had tax withheld from their checks. We estimate that between three and five million undocumented workers have not filed tax returns and would owe tax if required to declare their income. At a minimum they would owe self-employment tax on their net cash income. Their taxable income would likely be reduced to very little due to the standard deduction, personal and dependency exemptions. So their actual tax liability would be small. Self-employment tax is approximately 15 percent. If Congress imposes a filing requirement, then it would generate revenue from the cash workers who have not paid tax.

Many immigration benefits have been tied to the filing of tax returns. The Immigration Reform and Control Act of 1986 required individuals to file and pay three years of

back taxes. Currently, individuals who are in removal proceedings have to establish good moral character to qualify for a relief known as "Cancellation of Removal." Many immigration judges require the applicant to provide proof that legitimate tax returns have been filed before finding in favor of an immigrant. Judges often require the individuals to amend prior returns if they believe the returns were not correct and to file returns that have not been filed. These immigrants in removal proceedings often have to pay substantial sums in back taxes, interest and penalties in the process of obtaining their benefits. It would be unfair to these individuals who had to pay taxes to receive their immigration benefits to allow others to obtain immigration benefits under the legalization program without having to provide proof of filing and payment of any taxes.

Finally, Congress should disallow all claims to refundable credits, that are tied to a social security number, to applicants during any period of provisional status. These credits are akin to welfare benefits. If Congress fails to disallow the EITC, we estimate that over three million people will retroactively apply for this benefit in the year they qualify for their social security number. The cost of retroactive claims could be between 70 billion and 90 billion. The undocumented individuals do not expect and are not fighting for this money. They just want the right to work and live in the United States without fear of deportation. They are not clamoring for the right to refundable credits. The immigration debate would have ended before it started if protesters chanted "We want refundable credits." To the contrary, the immigrants and advocates have been saying that they do not need the benefits. Those who advocate that the EITC and other social-security based refundable credits should be available to immigrants in the provisional status should recognize that they may be carrying this torch to the detriment of their constituency. It is unlikely that conservatives would pass a bill that would result in checks being mailed to legalized workers simply because they obtained a social security number. The fact that the bill contains a fine indicates that Congress does not understand that individuals will be retroactively claiming the EITC after obtaining a social security number. The law as written will create a perverse situation wherein an applicant could receive up to $18,000 in retroactive refundable credits that could be used to pay attorney fees and other costs associated with the legalization process. Surely Congress does not intend to have refundable credits pay for the cost of the legalization to the individual.

We have never had a client who did not want to continue with an immigration case because of a tax debt. Often our clients are relieved to know they can enter into a payment plan to pay off their debt. The commitment of the undocumented population to obtain status should not be minimized by those who argue that they will not come forward if required to pay tax. ◆

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Organized Atrocities: Asylum Claims Based Upon a "Pattern or Practice" of Persecution

BY ADAM L. FLEMING

"The evidence in [the applicant's] favor consists primarily of his blanket assertion that if deported he will be persecuted because of his advocacy of freedom for an Albanian region within Yugoslavia. . . . [He] has not shown why he would be any more susceptible to persecution than any of Kosovo's approximately 1.4 million ethnic Albanians . . . ." *Shamon v. INS*, 735 F.2d 1015, 1017 (6th Cir. 1984) (quoting *Lugovic v. INS*, 727 F.2d 1109 (6th Cir. 1984) (unpublished table decision) (affirming a finding that an ethnic Albanian's fear of returning to Yugoslavia was not well founded)) (internal quotation marks omitted).

"[President Slobodan Milosevic] . . . wields absolute control over the Serbian police, a heavily armed force of some 70,000-80,000 which is guilty of extensive, brutal, and systematic human rights abuses, including extrajudicial killing. It continued a pattern of gross human rights violations and systematic repression of ethnic Albanians in the Kosovo Region." Bureau of Democracy, Human Right, and Labor, U.S. Dep't of State, *Serbia/Montenegro Country Reports on Human Rights Practices for 1993* (Jan. 31, 1994).

Introduction

It is axiomatic that an applicant for asylum cannot claim to have a well-founded fear of persecution based upon general circumstances that negatively impact an entire populace. The applicant must demonstrate that there is a reasonable possibility that he or she will be targeted for persecution because of some protected ground. But the concept of targeting loses meaning in the face of large-scale massacres. For example, in Srebrenica, the Serb military indiscriminately executed thousands of Muslim men and boys; the genocidal policies of the Khmer Rouge caused the death or suffering of innumerable Cambodians; the Third Reich's Final Solution called for the annihilation of every single Jewish person.

In these contexts it would be overly burdensome to ask an asylum-seeker to prove that he would be individually selected for persecution. As one court has observed, "[I] t would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution." *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994). To address this issue, the asylum regulations provide an alternative burden of proof for aliens who advance so-called "pattern-or-practice" claims. An applicant who makes such a claim is *not* required to provide "evidence that there is a reasonable possibility he or she would be singled out individually for persecution." 8 C.F.R. § 1208.13(b)(2)(iii) (2012).

A pattern-or-practice claim has two components. The alien must first establish that there is a pattern or practice in the relevant country "of persecution of a group of persons similarly situated to the applicant" on account of a protected ground. 8 C.F.R. § 1208.13(b)(2)(iii)(A). The alien must then "establish[] his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii)(B). An analogous standard exists for withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). *See also* 8 C.F.R. § 1208.16(b)(2).

This article will summarize the standards that courts typically apply to determine whether a pattern or practice of persecution exists in a given country. The article will then explore two of the major issues that have developed around pattern-or-practice claims. First, it will address the often-expressed concern that finding a pattern or practice means opening the doors to a flood of asylum claims; second, it will analyze the relevance of evidence of routine persecution that falls short of the pattern-or-practice standard.

What Constitutes a "Pattern or Practice" of Persecution?

As several courts have noted, the regulations do not define the phrase "pattern or practice." *See, e.g.*, *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005); *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995). That task has been left instead to be developed through case law. Each of the U.S. courts of appeals has accepted some standard close to the following articulation: The persecution must be "systematic, pervasive, or organized" and the harm must be at the hands of the government or forces that it is unwilling or unable to control. *Lie*, 396 F.3d at 537 (quoting *Ngure v. Ashcroft*, 376 F.3d 975, 991 (8th Cir. 2004)) (internal quotation marks omitted); *see also, e.g.*, *Woldemeskel v. INS*, 257 F.3d 1185, 1191 (10th Cir. 2001). The courts have generally emphasized that the term "pattern or practice" should be narrowly defined and that relief is available only in extreme cases. *Diaz-Garcia v. Holder*, 609 F.3d 21, 29 (1st Cir. 2010); *see also Raghunathan v. Holder*, 604 F.3d 371, 377 (7th Cir. 2010) ("[T]he level of persecution must be extreme for an alien to prevail under this theory.").

The pattern-or-practice regulation does not alter every other standard governing asylum eligibility. For example, an applicant for asylum still must show that his or her fear is countrywide. *See* 8 C.F.R. § 1208.13(b)(2)(ii); *see also Tantono v. Att'y Gen. of U.S.*, 300 F. App'x 167, 169 n.3 (3d Cir. 2008) ("The government may also rebut a claim based on a pattern or practice of official persecution by showing that internal relocation would be reasonable.").

The Board of Immigration Appeals has adopted the "systematic or pervasive" standard. *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005) (citing *Lie*, 396 F.3d at 537).[1] To the chagrin of at least one circuit, however, the Board has not expanded upon the particulars of the standard. *See Mufied v. Mukasey*, 508 F.3d 88, 89 (2d Cir. 2007) ("encourag[ing] the BIA to elaborate upon the 'systematic, pervasive, or organized' standard it has applied to analyzing [pattern or practice] claims"); *see also Jo v. Holder*, 330 F. App'x 287, 289-90 (2d Cir. 2009).

Another circuit court has taken its criticism one step further. *See Banks v. Gonzales*, 453 F.3d 449, 454-55 (7th Cir. 2006). Noting the recurring nature of pattern-or-practice claims, the Seventh Circuit has declared that 8 C.F.R. § "1208.13(b)(2)(iii) cries out for systemic decisions." *Id.* at 454 (arguing that frequently occurring pattern-or-pattern claims could "be handled by the sort of detailed regulations that the Social Security Administration uses").

In the absence of a regulatory overhaul, it may prove helpful for adjudicators to consider factors previously found to be significant in pattern-or-practice cases. For example, courts have found that the following situations support a pattern-or-practice argument: (1) mandatory registration and the closing of "all religious facilities not belonging to the four sanctioned religions," *Ghebrehiwot v. Att'y Gen. of U.S.*, 467 F.3d 344, 354 (3d Cir. 2006) (Pentecostals in Eritrea); (2) deliberate manipulation of political party structures and the systematic persecution of political leadership, *Tegegn v. Holder*, 702 F.3d 1142, 1147 (8th Cir. 2013) (opposition groups in Ethiopia); (3) the criminalization of a protected ground, *Bromfield v. Mukasey*, 543 F.3d 1071, 1077 (9th Cir. 2008) (gay men in Jamaica); (4) increased militarization with evidence of an intent to engage in "ethnic cleansing," *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004) (Serbs in a particular region of Bosnia-Herzegovina); (5) violence committed against every member of the proposed group, *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (a family in the Kurdish-Muslim intelligentsia in Armenia); and (6) apostasy laws that force religious adherents to "practice underground," *Kazemzadeh v. U.S. Att'y Gen.*., 577 F.3d 1341, 1354-56 (11th Cir. 2009) (Christian converts in Iran).

On the other hand, asylum applicants have failed to establish pattern-or-practice claims based upon: (1) "mere discrimination," *Hernandez v. Holder*, 493 F. App'x 133, 137-38 (1st Cir. 2012) (ethnic Mayans in Guatemala); (2) "hardship resulting from conditions of civil strife," *Balachandran v. Holder*, 566 F.3d 269, 273 (1st Cir. 2009) (ethnic Tamils in Sri Lanka); (3) a "recent rise in violent attacks" coupled with institutional discrimination, *Slapak v. Att'y Gen. of U.S.*, No. 12-2638, 2013 WL 55611 at *2 (3d Cir. Jan. 4, 2013) (unpublished) (ethnic Roma in the Czech Republic); (4) violence that was not targeted or widespread, *Khan v. Att'y Gen. of U.S.*, 453 F. App'x 220 (3d Cir. 2011) ("Americanized Muslims" in Pakistan); (5) "inconsistent and sporadic" repression, *Xue Quan Zheng v. Att'y Gen. of U.S.*, 405 F. App'x 642, 645 (3d Cir. 2010) (underground church members in China); and (6) abuse of civilians that lacked a "persecutory motive," *Malonga v. Holder*, 621 F.3d 757, 768 (8th Cir. 2010) (ethnic Lari in the Republic of Congo).

Pattern-or-practice claims often defy simple resolution. The circuit courts have attempted to draw clear lines where possible. *See, e.g.*, *Kandaswamy v. Holder*, 466 F. App'x 35, 39 (2d Cir. 2012) ("[T]he designation of temporary protected status is not required for finding a pattern or practice of persecution."); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201 (9th Cir. 2000) (stating that a pattern-or-practice finding does not require "a showing of universality—a showing that *every* individual in the vulnerable group must face such serious persecution"); *Makonnen*, 44 F.3d at 1383 (finding that it is unreasonable "to require a showing of persecution of all the members of the applicant's group"). Still, the existence of a pattern or practice of persecution remains a fact-based inquiry.

The denial of one applicant's claim does not necessarily foreclose future claims predicated upon the same country and group. *See Ingmantoro v. Mukasey*, 550 F.3d 646, 651 (7th Cir. 2008). Circumstances may change over time. More and better evidence may become available. Therefore, for now at least, adjudicators must continue to examine the evidence of each case on an individual basis, despite the recurring nature of pattern-or-practice claims.

Opening the Floodgates?

Perhaps not surprisingly, courts have been reluctant to find patterns or practices of persecution. Several circuits have expressed concern that "[o]nce a court grants asylum based on a pattern-or-practice claim, 'every member of the group is eligible for asylum.'" *Paramanathan v. U.S. Att'y Gen.*, 341 F. App'x 613, 618 n.3 (11th Cir. 2009) (quoting *Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir. 2006)); *see also Mitreva v. Gonzales*, 417 F.3d 761, 765 (7th Cir. 2005) ("[C]ourts have interpreted the regulation to apply only in rare circumstances, to prevent an avalanche of asylum-seekers."). As the Eleventh Circuit has observed, these cases place the courts "between Scylla and Charybdis. A denial of review will return the petitioner to the [repressive] regime . . . , but an erroneous grant of review could establish a precedent that rewards less than genuine fears of persecution . . . ." *Kazemzadeh*, 577 F.3d at 1345.

This is a valid concern generally, but fortunately, it is unfounded here. Strictly speaking, a pattern-or-practice finding *does not* make every member of the proposed group eligible for asylum. The fear that mere membership would qualify *all* members for asylum was actually addressed during the rulemaking process that took place during the late 1980s. This article will now briefly review that history, before highlighting a few sample cases in which mere membership (or alleged membership) was found to be insufficient to qualify an alien for asylum.

The Promulgation of the Rule. In the 1980s, immigration courts sometimes excluded relevant evidence that did not go to the direct question of whether the individual applicant would be singled out for persecution. *See* Joni L. Andrioff, Note and Comment, *Proving*

the Existence of Persecution in Asylum and Withholding Claims, 62 Chi.-Kent L. Rev. 107, 131 (1985). Circuit courts likewise sometimes expected asylum applicants to produce hyper-specific evidence. *See, e.g.*, *Youkhanna v. INS*, 749 F.2d 360, 361 (6th Cir. 1984) (affirming denials of asylum and withholding where the aliens presented only "numerous general descriptions of the lamentable religious and political conflicts in [their home country]"); *Carvajal-Munoz v. INS*, 743 F.2d 562, 577 (7th Cir. 1984) (noting that the respondent's evidence did not "refer[] to [him] specifically").

Eventually, the Department of Justice acknowledged that certain applicants could carry their burden of proof with only more generalized evidence of widespread persecution. In 1987, the Immigration and Naturalization Service (INS) proposed a rule that "recognize[d] that the flight or defection of a bona fide refugee from a country that engages in widespread persecution may leave him in a difficult position to corroborate his claim." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32,552, 32,553 (Aug. 28, 1987) (proposed rule). Among other things, the proposed rule required an "Asylum Officer to give due consideration to evidence establishing that the government of the applicant's country of nationality or habitual residence persecutes groups of persons similarly situated to the applicant." *Id*. Less than a year later, however, the INS amended its rule to correct a perceived flaw.

Specifically, the INS was concerned that the language of the rule "could lead to the assumption that mere group membership alone—however nominal—would be sufficient to establish refugee status." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11,300, 11,302 (Apr. 6, 1988) (revised proposed rule). The amended proposed rule required the applicant for asylum to "explain why he would be substantially identified with [the proposed] particular group such that there is a reasonable possibility of his suffering persecution should he return to his country." *Id*.; *see also* 8 C.F.R. § 1208.13(b)(2)(iii)(B). Two years later the final rule established that "[i]t is not necessary [for an asylum applicant] to prove he would be singled out if he can establish that there is a pattern or practice of persecuting the group of persons similarly situated, and that he can establish inclusion in/identification with such group." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,678 (July 27, 1990) (final rule); *see also* 8 C.F.R. § 1208.13(b)(2)(iii).

Mere or Alleged Membership in the Group. The current regulations require an alien to establish his or her inclusion in *and* identification with the proposed group. 8 C.F.R. § 1208.13(b)(2)(iii)(B). An alien's claim based upon a pattern or practice of persecution necessarily fails if the alien cannot establish his or her inclusion in the proposed group. *See, e.g.*, *Rasananthan v. U.S. Att'y Gen.*, 337 F. App'x 811, 813 (11th Cir. 2009) (stating that a "specific adverse credibility finding as to [the applicant's inclusion in the proposed group] would preclude a pattern or practice claim"); *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1004 (8th Cir. 2006) (finding that the respondent failed to prove "that she is similarly situated to those Jehovah's Witnesses who are targeted for harassment and discrimination" in Eritrea); *Hidayat v. Att'y Gen. of U.S.*, 139 F. App'x 433, 436 (3d Cir. 2005) (affirming an Immigration Judge's holding that even, "assuming *arguendo*, a pattern or practice of persecution of Christians [in Indonesia, the applicant's] claim would still fail because he did not establish that he was a Christian").

But even an alien who establishes his or her inclusion in the proposed group is not automatically eligible for asylum. The alien must still demonstrate identification with the group such that his or her fear is reasonable. *See, e.g.*, *Debek v. Holder*, 380 F. App'x 492, 496-97 (6th Cir. 2010) (upholding the denial of asylum on grounds that the applicant failed to produce evidence of his identification with those opposed to Hezbollah); *Ablahad v. Gonzales*, 230 F. App'x 563, 566 (6th Cir. 2007) (affirming a denial of asylum where the Immigration Judge held that the applicant failed to establish his inclusion and identification with a moneyed family in Iraq); *Ivanov v. INS*, 9 F. App'x 532, 535-36 (7th Cir. 2001) (affirming a decision holding that the applicant had not sufficiently established his inclusion in and identification with Macedonian separatists in Bulgaria); *Matter of S-M-J-*, 21 I&N Dec. 722, 731 (BIA 1997) ("[A]ssuming arguendo that there is a pattern or practice of persecution of [Charles] Taylor supporters in Liberia, . . . [i]t is not clear whether either of [the applicant's] relatives is identifiable as a Taylor supporter, and, as discussed above, it is not clear whether the applicant's association with her father and brother-in-law is identifiable."). *But see also Noorani v. Holder*, No. 12-1465, 2013 WL 440741 at *5 (7th Cir. Feb. 6, 2013) (unpublished) (holding that an applicant need not demonstrate that he would "be discovered to be" a member of the group).

This reasoning can be taken too far. In the past, the circuit courts have criticized the Board for requiring corroboration of inherently personal characteristics. *See, e.g.*, *Fessehaye v. Gonzales*, 414 F.3d 746, 756-57 (7th Cir. 2005) (stating that where the applicant "credibly claims to have converted to her spouse's religion, we see no necessity, absent exceptional circumstances, for the Board to require further corroboration"). A case may also be remanded where the Board or immigration court "unduly limits the [applicant's] claim" by defining the proposed group too narrowly. *See Tegegn*, 702 F.3d at 1146. Still, it remains the alien's burden to establish his or her "inclusion in, and identification with," any proposed group. 8 C.F.R. § 1208.13(b)(2)(iii). This second step in the pattern-or-practice analysis was intentionally included in the regulations and should not be overlooked.

The Disfavored "Disfavored Group" Analysis

Given the constricted definition that courts have applied to the phrase "pattern or practice," it is to be expected that an asylum applicant's evidence may often fall short of the standard for systematic persecution. The

circuit courts have yet to adopt a uniform approach for the treatment of evidence that relates to group-based, but not systematic, persecution.

The most clearly articulated (if least widely adopted) mechanism for handling this type of evidence has been the Ninth Circuit's "disfavored group" analysis. *See Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). Under this approach, an applicant for asylum can use evidence of group-based oppression to demonstrate a higher likelihood that he would be singled out *individually* for persecution (apart from any pattern-or-practice claim).

The applicant must make two showings to prevail: (1) membership in a "disfavored group," and (2) "an individualized risk of being singled out for persecution." *Sael*, 386 F.3d at 925. A "disfavored group" is defined as "'a group of individuals in a certain country or part of a country, all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted' but who are 'not threatened by a pattern or practice of systematic persecution.'" *Tampubolon v. Holder*, 610 F.3d 1056, 1060 (9th Cir. 2010) (quoting *Wakkary v. Holder*, 558 F.3d 1049, 1063 (9th Cir. 2009)). The two prongs of this analysis "operate in tandem." *Sael*, 386 F.3d at 925. "Thus, the 'more serious and widespread the threat' to the group in general, 'the less individualized the threat of persecution needs to be.'" *Id.* (quoting *Mgoian*, 184 F.3d at 1035 n.4).

The Ninth Circuit's "disfavored group" analysis has not been warmly received. Most of the other circuits have rejected it, arguing that it improperly lowers the standard for asylum claims. *See Agustina v. Holder*, 491 F. App'x 217, 219 (2d Cir. 2012); *Siagian v. Holder*, 478 F. App'x 201, 203 (5th Cir. 2012); *Yanes-Estevez v. U.S. Att'y Gen.*, 389 F. App'x 974, 979 n.1 (11th Cir. 2010); *Ingmantoro v. Mukasey*, 550 F.3d 646, 651 n.7 (7th Cir. 2008); *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007); *Lie*, 396 F.3d at 538 n.4. The remaining circuits have expressed varying levels of ambivalence toward the analysis. *See Kasonso v. Holder*, 445 F. App'x 76, 80 (10th Cir. 2011); *Grichaev v. Holder*, 414 F. App'x 828, 830 (6th Cir. 2011); *Winata v. Mukasey*, 287 F. App'x 544, 547 (8th Cir. 2008) (Gruender, J., concurring); *Chen v. U.S. INS*, 195 F.3d 198, 203-04 (4th Cir. 1999).

In response to this criticism, however, the Ninth Circuit maintains that its analysis has been "misunderstood by both the agency and some other circuits." *Wakkary v. Holder*, 558 F.3d at 1062. According to the Ninth Circuit, "Disfavored group analysis does not prescribe a lower-than-usual burden of proof for the asylum claims . . . . [T]he 'lesser' or 'comparatively low' burden [of the disfavored analysis] refers not to a lower *ultimate* standard, but to the lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting, that an applicant must adduce to *meet* that ultimate standard under the regulations' 'individually singled out' rubric." *Id.* at 1064.

Putting aside the semantic debate, it appears less controversial to say that group-based evidence has *some* relevance to claims that are not based on a pattern or practice. For example, even while rejecting the Ninth Circuit's approach, the First Circuit acknowledged that "in evaluating each claim on its facts, it may be that evidence short of a pattern or practice will enhance an individualized showing of likelihood of a future threat to an applicant's life or freedom." *Kho*, 505 F.3d at 55. The reality is that there may be more accord among the circuit courts than they seem to indicate. *Compare, e.g., Wakkary*, 558 F.3d at 1064, *with Chen*, 195 F.3d at 203-04 ("Individual targeting and systematic persecution do not necessarily constitute distinct theories. Rather, an applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution.").

The board has likewise recognized that the well-founded fear standard "contemplates the introduction of evidence regarding similarly situated persons to support an individual claim of persecution." *Matter of S-M-J-*, 21 I&N Dec. at 726 n.1. Therefore, whether an adjudicator operates under the disfavored group analysis or not, evidence of group-based mistreatment may be relevant. If an alien established that people who share his or her protected characteristic are regularly attacked, it stands to reason that it is at least somewhat more likely that he or she will be attacked as well. The weight and significance given to this logical conclusion often depends on the facts of the case.

Conclusion

The pattern-or-practice regulation was designed to let certain asylum applicants avoid an unreasonable burden of proof—but the rule was not crafted to be comprehensive. Its drafters anticipated that the parameters of the regulation would be ironed out through adjudication. The law continues to evolve and several issues remain to be addressed.[2] However, case by case, the courts can move toward a more fair system that will protect legitimate claims to asylum without sacrificing the legitimacy of the asylum system as a whole. ◆

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Atrocities continued on page 16

Atrocities continued from page 15

of Immigration Appeals Practice Manual.

Case update since original publication of this article:

Panchalingam v. U.S. Att'y Gen., No. 12-13506, 2013 U.S. App. LEXIS 11562 (11th Cir. Jun. 6, 2013) (remanded for the limited purpose of addressing the petitioner's claim based on a "fear of future persecution due to an alleged pattern or practice of persecution of Tamils" in Sri Lanka).

Mei Shu Cai v. Holder, No. 11-5206 NAC, 2013 U.S. App. LEXIS 9659, *6-7 (2d Cir. May 14, 2013) ("[T]he agency did not err in finding that [the petitioner] did not demonstrate a pattern or practice in China of persecution of ethnic Koreans.").

Haris v. Holder, No. 11-2168-ag, 2013 U.S. App. LEXIS 7708 (2d Cir. Apr. 17, 2013) (holding that a remand is not necessary under Mufied v. Mukasey, 508 F.3d 88 (2d Cir. 2007) where the immigration judge and Board of Immigration Appeals have already considered (and rejected) the petitioner's claim that there is a pattern or practice of persecution in a given country).

Noorani v. Holder, 501 Fed. App'x 567 (7th Cir. 2013) (remanded for, among other things, an evaluation of whether there exists a pattern or practice of persecution of United States collaborators in Pakistan).

Endnotes

[1]This case dealt with an applicant whose asylum application was time barred and whose pattern-or-practice claim was therefore considered only under the regulations governing withholding of removal. *See Matter of A-M-*, 23 I&N Dec. at 739.

[2]For example, there is a split among the circuit courts as to whether an alien bears the burden of coming forward with a pattern-or-practice claim. *Compare Aguilar-Mejia v. Holder*, 616 F.3d 699, 703-04 (7th Cir. 2010) ("[T]he asylum regulations … require the agency to make a finding on the pattern-or-practice theory whether or not the petitioner draws the rule to the agency's attention."), *with Vakeesan v. Holder*, 343 F. App'x 117, 127 (6th Cir. 2009) (stating that the regulations do "impose on the alien a burden of production and persuasion"), *and Alexandra v. Att'y Gen. of U.S.*, 278 F. App'x 112, 116 (3d Cir. 2008) (stating that it is the applicant's "obligation to demonstrate a 'pattern or practice'").

An Urgent Call for Rohingya Muslim Justice

BY JOSEPH K. GRIEBOSKI

Over the past year, tension and conflict between the minority Rohingya Muslim people and other ethnic groups have continued to increase in the country of Myanmar. Most of the violence is concentrated in the western Rakhine State, where a significant number of Rohingya Muslims reside. They make up nearly 90% of the population in northern Rakhine State; however, ethnic Rakhines form a majority of the three million people that live in the remaining territory of the Rakhine State.[1] During this time, Rohingya Muslims have been commonly subjected to discrimination and violence by security forces and inhabitants in the Rakhine State due to their background and culture. Hundreds of Rohingya people have been killed and thousands of others have been displaced to other parts of Myanmar and surrounding countries. The new democratic civilian government, which was formed in 2010 after decades of harsh military rule, has made a few minor attempts at resolving this persistent issue, but serious measures have yet to be taken. This period of intolerance and brutality will only continue until all Rohingya people have been killed or have fled Myanmar.

Before 2012, the plight of the Rohingya people received little global recognition, and even today, many of the foreign actors who do acknowledge their persecution lack a true understanding of its root causes. To understand how the Rohingya became a people without a state and a population that the United Nations considers to be the most persecuted on earth, one must consider the historical context of the region. While the persecution of the Rohingya did not begin spontaneously, the historical tension between the Rohingya Muslims and the Rakhine Buddhists came to a violent head in June 2012. However, the violence of that month was just the latest resurgence of violence in a history of oppression that dates back to 1784.

For centuries, Muslims, Buddhists, and other people of varying religions and ethnicities enjoyed relative peace and prosperity in the autonomous Arakan region, which is today Rakhine state. However, in 1784, the Burmese King Bodawpaya invaded and claimed the Arakan region as a province of Burma. The annexation of Arakan led to the massacre of tens of thousands of Arakan Muslims. An estimated 200,000 Arakan Muslims were able to escape death by fleeing to Bengal, India.[2] The Rohingya Muslims remaining in Arakan were subject to Draconian laws that limited their ability to marry, travel, work, and access public services. In addition to suffering discriminatory policies, thousands of Rohingya Muslims were stripped of their land and subject to forced labor.[3] The exodus of Rohingya Muslims from the Arakan region continued from 1784 until 1826 when England engaged Burma in the first Anglo-Burmese War.

By the time the first Anglo-Burmese War broke out in 1824, the population of the Arakan region was all but depleted. In an effort to repopulate the region following the war, officials in British-India encouraged Arakan refugees and native Muslims and Hindus living in Bengal to settle in the Arakan region and farm its arable land.[4] The repopulation of the Arakan region in 1826 marks a considerable turning point in ethnic relations within the country and currently remains at the center of citizenship disputes for Rohingya Muslims. To this day, the Myanmar government insists it was during this period that Rohingya Muslims first arrived in Burma (present day Myanmar) and refuse to recognize their existence in the country during any preceding time. At the time of repopulation, native Burmese Buddhists were distraught by the sudden influx of Muslims and Hindus from Bengal who they considered a threat to their way of life. For the remainder of the 19th century, the Rohingya Muslim population in Arakan grew exponentially, reaching 60,000 by the turn of the century[5]. As the Rohingya enjoyed a period of renewal and security under colonial British rule, native Burmese Buddhists were left to suffer through two more wars and one million pounds worth of indemnity to the British crown. The shame felt by the Burmese majority gradually developed into a strong resentment of the Muslim and Hindu minorities that flocked to Burma following the first Anglo-Burmese War. As the number of Rohingya continued to grow through the end of the 19th century and beginning of the 20th century so did the tension between the Rohingya and their Buddhist counterparts. The second great massacre of the Rohingya people came in 1942 during the tumultuous second Great War.

In defiance of the Japanese occupation in Burma throughout World War II and in opposition to the Burmese Rakhines, the Rohingya aligned themselves with the Allied forces and England, who, at the time, was still the colonial ruler of Burma[6]. Unfortunately, the Brits had few resources to spare in colonial Burma and instead focused their war efforts elsewhere, leaving the loyal Rohingya minority to fend for itself against the hostilities of Japanese soldiers and their Rakhine allies. On March 28, 1942, Burmese Rakhines with the support of Japanese forces massacred over 5,000 Rohingya Muslims. In the remaining years of the war tens of thousands more Rohingyas were raped, murdered, or displaced by Japanese and Rakhine Buddhist aggression[7]. Although, violence towards the Rohingya people in Burma traces back to the late 18th century, the events of World War II may be considered the single greatest escalation of violence.

In 1947, talks convened in London to negotiate Burma's independence following the war. In anticipation of their freedom from the British crown, the Executive

ROHINGYA continued on page 16

ROHINGYA continued from page 17

Council of Burma held the Panglong Conference on Feb. 12, 1947, which aimed to unify Burma and grant 'national race' status to Burmese minorities. [8]However, the Rohingya were excluded from this conference. Then, in 1948, in a last ditch effort for autonomy and a chance at escaping future persecution, the Rohingya organized themselves and staged an armed rebellion against Burma in 1948. The goal of the rebellion was to lay claim to the Arakan state as the autonomous territory of the Rohingya. However, the rebellion was easily suppressed and the Rohingya, who by then populated most of northern Arakan, remained under Burmese control[9].

Despite these challenges, in 1951, the Resident of Burma Registration Act was implemented, and National Registration Cards (NRC) were issued to all official residents of Burma including the Rohingya, but an NRC did not signify citizenship[10]. Despite receiving resident status, the atrocities of the 1940s still haunted the Rohingya people, many of whom then favored autonomy, thus breeding the Rohingya Mujahidin splinter group that accounts for only a small part of the Muslim community in Myanmar today[11]. In 1959, the Rohingya received unprecedented recognition from Prime Minister U Ba Sue, who acknowledged Rohingyas as a race like other races in Burma, and as such, entitled to equal rights[12]. Three years later, General Ne Win staged a military coup that overthrew the democratically elected government and set the course for the "Burmese Way to Socialism."

During the time of General Ne Win's military rule, three major events took place that contributed to the current suffering of Rohingya today. The first devastating event occurred in 1978, when Ne Win implemented 'Operation King Dragon' with the objective of purging Burma of 'illegal foreigners' include the unrecognized Rohingya in north Rakhine. This operation led to the torture and murder of thousands of Rohingya, with an estimated 250,000 fleeing to Bangladesh[13]. Then, in 1982, the Burmese government passed the Burma Citizenship Law, which granted citizenship to 135 recognized 'national races' within Burma, excluding the Rohingya. This legislation left the Rohingya without citizenship or resident status and effectively left them stateless. In 1989, the government officially changed the name of the country from Burma to Myanmar.[14]

Finally, in 1991, a new military regime, the State Law and Order Restoration Council (SLORC), implemented operation 'Clean and Beautiful Nation,' similar to "Operation King Dragon,' which resulted in the forced labor, torture, and murder of thousands of Rohingya. Another 250,000 Rohingyas fled to Bangladesh because of the operation.

Since the end of the oppressive military juntas that lasted from 1962 to 2010, Rohingya Muslims have continued to be wrongfully persecuted and attacked by security forces and other inhabitants of the Rakhine State.[15]

In 2012, violence against Rohingya Muslims began to dramatically increase after two violent episodes between Rohingya Muslims and ethnic Rakhines. On May 28, 2012, three Rohingya Muslim men raped and killed a Rakhine girl as she was returning home. This event greatly angered other Rakhines, who retaliated on June 3 by attacking a bus which they thought was carrying the attackers. Ten Rohingya Muslims were killed, none of whom were related to the previous attack. These attacks led to widespread riots in the Rakhine State, during which hundreds of properties were destroyed and thousands of individuals attacked.[16]

The government responded to these riots by declaring a state of emergency and sending over 10,000 security forces to the region, which have in many cases only increased the problems facing the Rohingyas.[17] There are numerous reports from NGOs, human rights organizations, and the media describing the rampant discrimination and violence by policemen and soldiers against the minority Rohingyas. According to Human Rights Watch,

"Some security forces in Arakan [Rakhine] State—rather than responding to the growing campaign to force Rohingya out—were destroying mosques, effectively blocking humanitarian aid to Rohingya populations, conducting violent mass arrests, and at times acting alongside Arakanese to forcibly displace Muslims."[18]

After further examining the situation in the Rakhine State, Human Rights Watch observed a level of human rights violations that it considered equal to ethnic cleansing. Security forces and others have been accused of performing organized killings of Rohingyas and using terror methods to make them flee the region, both of which are also considered crimes against humanity.[19]

Instead of helping the Rohingya, the government of Myanmar has set up or maintained discriminatory laws directed against them. Thousands of Rohingya individuals are unable to travel, go to school, and marry because of regulations enforced by the government. Constraints have also been enacted that limit family size to two children for only Rohingya Muslim families.[20] Even with these clearly discriminatory laws, President Thein Sein and other government officials repeatedly reject accusations of government involvement in persecuting Rohingya Muslims. They criticize attacks against Rohingya Muslims and tell foreign nations and organizations that they are working diligently to resolve the problem, yet in reality, they help foster the growth of discrimination.[21]

The government has done very little to ameliorate these conditions for Rohingya Muslims. On July 12, 2012 Myanmar President Thein Sein stated, "We will take care of our own nationalities, but Rohingyas who came to Burma illegally are not of our ethnic nationalities and we cannot accept them here. … The solution to this problem is that they can be settled in refugee camps managed by UNHCR."[22]

Refugee camps in foreign countries have proven to be less accessible and secure than expected. Foreign governments have made it difficult for the stateless Rohingya Muslims to seek refuge in their countries. Individuals who leave Myanmar on makeshift boats are commonly turned back by foreign naval authorities or perish at sea,

and governments of foreign countries provide little to no legal assistance to Rohingya refugees.[23] Conditions are particularly dire in Bangladesh where over 200,000 Rohingya refugees live.[24] Individuals in camps sponsored and assisted by NGOs and other organizations are not allowed to work under the law and cannot leave the premises of the camps. In unofficial refugee sites, very little humanitarian aid is given and there are no legal safeguards against unprovoked arrest and abuse. Women and girls are in constant danger of being sexually assaulted and physically attacked.[25]

The international community has been vocal against this intolerance and violence on several occasions. The United Nations Special Rapporteur on Myanmar, Tomas Ojea Quintana, has stated that the "human rights violations being committed against the Rohingya in Rakhine State are widespread and systematic."[26] He urged the government of Myanmar to investigate these violations and to arrest the individuals involved in them.

The Secretary General of the Organization of Islamic Cooperation (OIC), Professor Ekmeleddin Ihsanoglu, condemned "the continued recourse to violence by the Myanmar authorities against the members of this minority and their refusal to recognize their right to citizenship."[27]

Despite the condemnation of Myanmar by the U.N. and the OIC, many foreign actors remain hesitant to criticize the burgeoning democracy that is still taking root in Myanmar. Many leaders are concerned that an over-zealous reproach of the government may result in a backlash that compromises the fragile democracy within the country. Still, it is difficult for many leaders to accept the legitimacy of Myanmar democracy when the government allows human rights violations to continue almost unadulterated.

In late 2012, the OIC attempted to open an office in the Rakhine State to help all individuals affected by the communal conflict; however the government denied them the access due to widespread public disapproval and fear of damaging the newly formed democracy.[28] Many individuals in the community, including Buddhist monks, believed that the office would serve as a Rohingya Muslim benefactor and that the OIC had no reason to intervene since the issue was not about religion, but rather illegal immigrants living in Myanmar.[29]

Organizations such as the Arakan Rohingya Union (ARU), for which I am a member of the Advisory Board, have also formed in recent years to bring greater attention and assistance to Rohingya Muslims in Myanmar. This organization is currently working with individuals from all over the world and all backgrounds to find a political solution to the issues that Rohingya Muslims confront every day.[30]

Leaders of foreign nations have voiced their disapproval as well. During a visit by President Thein Sein to the White House, President Barack Obama discussed the United States' "deep concern about communal violence that has been directed at Muslim communities inside of Myanmar."[31] Even as President Obama held an audience with President Sein to vocalize his concerns for human rights abuses in Myanmar, officials in the former pariah state were in the process of enforcing a policy that sets a two-child limit for Rohingya women. The implementation of the policy is a blatant display of negligence for the concern voiced by President Obama and other foreign leaders for the human rights situation within Myanmar.

Despite this international criticism, aggression towards Rohingya Muslims carried on throughout 2012 and 2013, with bursts of more extreme violence in October 2012 and March 2013.[32] Much of this violence is now being attributed to the 969 movement, a nation-wide campaign led by Buddhist monks that claims to act in the interest of preserving Buddhist social and economic interest. Despite the innocent claims of monks affiliated with the 969 movement, recent reports by several major media outlets including TIME Magazine, The Diplomat, Huffington Post, The NY Times, and The Guardian fault the movement and its outspoken leadership for inciting much of the interfaith violence that has occurred in the last year. The 969 movement openly encourages Buddhists in Myanmar not to do business with, sell property to, marry, or hire Muslims.[33] In sermons, the Buddhists monks who preach the 969 movement frequently accuse Muslims of being rapists and terrorists and even go as far as to call them the "the enemy." In May, leaders of the 969 movement drafted a 15 page law that would restrict marriages between Buddhist women and Muslim men, claiming that the law would be paramount in "protecting the freedom of Buddhist women."[34]

The unofficial leader of the 969 movement, is a monk by the name of U Wirathu. In June, Wirathu was featured on the cover of TIME Magazine with the superimposed caption, "The Buddhist Face of Terror." Even as a part of the rarely prosecuted Buddhist-majority, Wirathu was jailed for eight years during the military junta for inciting hatred. Wirathu claims that he is proud to have standing as a radical Buddhist stating that, "If we are weak, our land will become Muslim."[35] The most unsettling reality of the 969 movement is not simply that it exists, but that it is widely supported throughout Myanmar. The 969 movement is an embodiment of the ignorance and stubborn lack of unaccountability that continues to hinder religious equality in Myanmar.

These increasingly frequent events and factions demonstrate that much more must be done by the government of Myanmar and the international community to guarantee that Rohingya Muslims are given their rights and protected by the law. Many politicians in Myanmar, including President Thein Sein and Nobel Laureate Aung San Suu Kyi avoid the subject matter due to its tremendous potential effect on elections.[36] The government of Myanmar must begin by holding individuals and groups accountable for their actions against Rohingya Muslims. After every attack or occurrence of discrimination the government pledges to investigate the incident, yet the majority of the time it fails to prosecute any individuals. As for the individuals who are in conflict areas, the government must ensure that they can have access to humanitarian aid. NGOs and foreign aid services need to be permitted unobstructed entry into problem

Rohingya continued on page 20

ROHINGYA continued from page 19

areas, so that they can tend to as many individuals as possible. Finally, the 1982 Citizenship Law must be modified to guarantee that no individuals will be denied citizenship rights due to their ethnic, religious, or racial background. Discriminatory laws need to be abolished immediately to allow Rohingya Muslims to enjoy the same freedoms as the other ethnic and religious groups in the country.

The international community should also take a larger role in this conflict. Neighboring and distant countries have an obligation to provide Rohingya Muslim asylum seekers immediate and easy entrance into their countries and allow humanitarian organizations to help the Rohingya Muslims from within their borders. Foreign nations must also place greater pressure on the government of Myanmar. It needs to be made clear that the persistence of this discrimination and violence will harm both political and economic relations. Only when the international community gets more involved in the issue facing Rohingya Muslims, will substantial and effective changes take place. UN Secretary General Ban Ki Moon recently gave a speech featuring his stance on the conflict in Myanmar stating,

> "…I remain concerned about the plight of the Rohingya population and their disturbing humanitarian situation. The actions that resulted in many deaths and widespread destruction are deplorable and unacceptable….commitments must be translated into concrete action…There is a dangerous polarization taking place within Myanmar. If it is not addressed urgently and firmly, underlying tensions could provoke more upheaval, undermining the reform process and triggering negative regional repercussions."[37]

The Secretary General's statement reflects the urgency surrounding the humanitarian conflict in Myanmar. After more than 200 years of persecution of the Rohingya people, the threat of delay is more severe than ever. The longer violence is allowed to continue, the more entrenched the people of Myanmar will become in conflict and the more elusive a solution for peace will become.

The Rohingya Muslims in Myanmar are considered by many organizations, including the U.N., to be one of the most persecuted groups on the planet. Their lives are plagued with uncertainty and fear due to the current discriminatory troubles that they face every day. The acceptance and tolerance of this violence by the government of Myanmar will further worsen this situation. Now is the time to pressure the Myanmar government and require it to take measures to ensure that Rohingya Muslims are no longer victims of discrimination and communal violence. Ensuring the Rohingya people have the protection of the state through citizenship is a major asset to ending violence. Still, citizenship does not ensure equality; it is necessary that increased interfaith dialogue and initiatives to cultivate awareness and understanding among the many ethnic and religious factions within Myanmar accompany the pathway to citizenship. Failure to accomplish this task will only lead to greater destruction and death, which could greatly destabilize the emerging democratic government of Myanmar. ◆

Joseph K. Grieboski is chairman and chief executive officer of Just Consulting, Alexandria, Va.

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Section News

At the Immigration Law Section meeting in Memphis, May 18, 2013, the current officers were nominated to serve for the year starting Oct. 1, 2013. As there have been no other nominations, the following were elected:

Chair: H. Raymond Fasano, New York
Vice Chair: Hon. Robin Feder, Massachusetts
Secretary: Hon. Mimi Tsankov, Colorado
Treasurer: Eileen M. G. Scofield, Georgia

* * *

Ray Fasano, section chair, also announced three new members for our governing board:

Hon. Amiena A. Khan, *Immigration Judge, Newark NJ*
Kevin Lashus, *Managing Partner, Jackson Lewis LLP, Austin TX*
Christine Poarch, *Principal, Poarch Law Firm PC, Salem, VA*

* * *

On June 19, 2013, the monthly Immigration Leadership Luncheon, co-sponsored with the D.C. Chapter, featured the Hon. Robin M. Stutman, EOIR's Chief Administrative Hearing Officer. Her presentation was frank and informative, which seems to be typical of speakers at this excellent luncheon series. Kudos to Prakash Khatri, the series organizer. ◆

Hon. Robin M. Stutman
Chief Administrative Hearing Officer, EOIR

The Unlawful Presence Bars: Think Twice

BY MELANIE J. SIDERS AND ALEXA C. MCDONNELL

Introduction

This article will examine the unlawful presence bars at sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(i)(II) and (C)(i)(I). There is sometimes confusion among practitioners regarding the application of these unlawful presence bars. This article seeks to provide a full analysis of the two bars and to identify the areas of overlap between them. The article will compare and contrast the statutory language of sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Act; note the lack of regulatory guidance on these sections of inadmissibility; discuss the legislative history of the sections; explore the contexts in which adjudicators may encounter the bars; and analyze case law dealing with these sections, particularly the Board of Immigration Appeals decisions in *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007) (*Lemus I*), and 25 I&N Dec. 734 (BIA 2012) ("*Lemus II*"), and *Matter of Arabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). The article will also discuss sources of guidance for adjudicators and provide suggestions for analyzing cases involving the unlawful presence bars.

Overview of the Unlawful Presence Bars

Definitions and Distinction. Section 212(a)(9)(B)(i)(II) of the Act states that "[a]ny alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible."

Section 212(a)(9)(C)(i)(I) of the Act provides that "[a]ny alien who . . . has been unlawfully present in the United States for an aggregate period of more than 1 year . . . and who enters or attempts to reenter the United States without being admitted is inadmissible."

Sections 212(a)(9)(B)(i)(II) and (C)(i)(I) share some essential elements, but they also contain distinctly different elements. The first basic commonality is that, like other grounds of inadmissibility, both apply to aliens who are "seeking admission." However, in referring to this element the exact language of the bars differs. Section 212(a)(9)(B)(i)(II) applies to an alien who "again seeks admission," while section 212(a)(9)(C)(i)(I) refers to aliens entering or attempting to reenter without admission. In *Lemus II*, the Board addressed the meaning of the phrase "again seeks admission" in section 212(a)(9)(B)(i)(II), explaining it is used as a term of art, defined by section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1). 25 I&N Dec. at 743 n.6. That section states that "[a]n alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this Act an applicant for admission." Therefore, all aliens with a past period of unlawful presence have previously been considered applicants for admission and are *again* seeking admission under section 212(a)(9)(B)(i)(II). Similarly, aliens who fall under section 212(a)(9)(C)(i)(I) are also seeking admission. Having entered or attempted to reenter the United States without admission, such aliens are applicants for admission pursuant to section 235(a)(1) in that they either are present after entering without being admitted or have arrived in the United States after attempting to reenter without being admitted.

One difference between the bars is that an essential element of section 212(a)(9)(B)(i)(II) is 1 or more years of unlawful presence, while section 212(a)(9)(C)(i)(I) requires an aggregate period of more than 1 year of unlawful presence. The U.S. Citizenship and Immigration Services (CIS) has stated that the unlawful presence accrued under section 212(a)(9)(B)(i)(II) must occur during a single stay—not over the course of multiple stays in the aggregate. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, et al., to USCIS Field Leadership (May 6, 2009), *reprinted in* 86 Interpreter Releases, No. 20, May 18, 2009, app. I ("Neufeld Memorandum"). Such an interpretation comports with canons of statutory construction, which state that Congress knew how to express a particular concept when it wished to do so and that its use of different phraseology in the same statute is presumed to be an intentional differentiation. However, the statutory language does not necessitate this conclusion. The statute does not clearly state that unlawful presence under section 212(a)(9)(B)(i)(II) is only that which accrued during a single stay or that it cannot be counted in the aggregate. It should be noted that the persuasiveness of the memo in which the CIS determined the calculation of unlawful presence has been called into question by the Board in *Matter of Arabally and Yerrabelly*, 25 I&N Dec. at 776 n.4. No other source of guidance has addressed the question whether section 212(a)(9)(B)(i)(II) could include aggregate periods of unlawful presence.

Sections 212(a)(9)(B)(i)(II) and (C)(i)(I) also differ significantly with respect to the penalties they impose on aliens and the availability of a waiver. Section 212(a)(9)(B)(i)(II) renders aliens inadmissible for a period of 10 years from their departure from the United States after accruing the requisite period of unlawful presence. Section 212(a)(9)(C)(i)(I), however, renders aliens permanently inadmissible if they fall within that provision. Section 212(a)(9)(B)(i)(II) may be waived if the alien is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident if a refusal of the alien's admission would result in extreme hardship to the qualifying relative. Section 212(a)(9)(B)(v) of the Act. In contrast, no such waiver is generally available for sec-

tion 212(a)(9)(C)(i)(I), although an inadmissible alien may reapply to the Department of Homeland Security ("DHS") for admission outside of the United State after 10 years. [1] Section 212(a)(9)(C)(ii) of the Act.

Individuals Covered. From the above essential elements, it is clear that section 212(a)(9)(B)(i)(II) includes the following individuals: those present in the United States seeking adjustment of status after having previously accrued 1 year or more of unlawful presence; those presenting themselves for inspection and admission at a United States port of entry after having previously accrued 1 year or more of unlawful presence; and those applying for permission to enter the United States (that is, seeking a visa) at a foreign consulate after having previously accrued 1 year or more of unlawful presence. *See Lemus II*, 25 I&N Dec. at 742-43.

Section 212(a)(9)(C)(i)(I) includes the following: individuals present in the United States who entered without inspection after previously having accrued more than 1 year of unlawful presence; and those who attempt to enter the United States, not at a port of entry, and who are apprehended on arrival after having previously accrued more than 1 year of unlawful presence in the United States.

Aliens may be barred under section 212(a)(9)(B)(i)(II), but not under section 212(a)(9)(C)(i)(I). For example, persons with 1 year or more of unlawful presence who are seeking permission to enter the United States at a foreign consulate or presenting themselves for inspection at a port of entry would be inadmissible under section 212(a)(9)(B)(i)(II), but not under section 212(a)(9)(C)(i)(I). *Lemus II*, 25 I&N Dec. 734. Also, individuals who have exactly 1 year of unlawful presence would fall under section 212(a)(9)(B)(i)(II), but not section 212(a)(9)(C)(i)(I).

However, a comparison of the above essential elements also leads to the conclusion that many aliens who fall under section 212(a)(9)(B)(i)(II) also fall under section 212(a)(9)(C)(i)(I). Any alien who is present in the United States pursuant to an entry without inspection and who is seeking adjustment of status after having previously accrued more than 1 year of unlawful presence falls under section 212(a)(9)(B)(i)(II) as an alien who is again seeking admission after previously accruing unlawful presence. This same alien also falls under section 212(a)(9)(C)(i)(I) as an alien who entered the United States without inspection after previously accruing more than 1 year of unlawful presence. The inevitable conclusion is that many, if not all aliens falling under section 212(a)(9)(C)(i)(I) also fall under section 212(a)(9)(B)(i)(II). If section 212(a)(9)(B)(i)(II) includes aggregate periods of unlawful presence, then all aliens falling under section 212(a)(9)(C)(i)(I) would also fall under section 212(a)(9)(B)(i)(II), because they would be aliens who have been unlawfully present in the United States for more than 1 year and would be again seeking admission pursuant to section 235(a)(1). If section 212(a)(9)(B)(i)(II) does not include aggregate periods of unlawful presence, only those aliens who accrued more than 1 year of unlawful presence in a single stay would fall under both sections 212(a)(9)(B)(i)(II) and (C)(i)(I).

In this sense, section 212(a)(9)(B)(i)(II) is more comprehensive than section 212(a)(9)(C)(i)(I), almost entirely encompassing aliens inadmissible under section 212(a)(9)(C)(i)(I) and also a larger class of aliens seeking lawful admission, either in the United States or abroad. With such vast areas of overlap, there is reason to question Congress' rationale for creating two substantially similar bars, which result in inconsistent and sometimes apparently irrational outcomes. Of particular consequence is the result that aliens who fall under both sections 212(a)(9)(B)(i)(II) and (C)(i)(I) may be able to obtain a waiver of inadmissibility under section 212(a)(9)(B)(i)(II), but not section 212(a)(9)(C)(i)(I). The effect of such a statutory scheme is to permanently bar aliens based on the same conduct that is waivable under another section of the Act.

Contexts in Which Issues Arise. Adjudicators will most frequently encounter sections 212(a)(9)(B)(i)(II) and (C)(i)(I) in the context of applications for adjustment under section 245(i). Applicants for section 245(i) adjustment include individuals who entered the United States without inspection and are therefore likely to have accrued some period of unlawful presence. *See* section 212(a)(9)(B)(ii) of the Act. The bars generally do not apply in the context of adjustment of status under section 245(a), which requires aliens to show that they are present pursuant to an admission (or parole) to be eligible. However, these bars also apply in other contexts. For example, section 212(a)(9)(B)(i)(II) may apply to aliens who seek consular processing, having applied to the Department of State for a visa under section 221 of the Act, 8 U.S.C. § 1201, after accruing a year of unlawful presence during a previous visit to the United States.

With respect to certain types of relief, Congress has explicitly excepted the application of the unlawful presence bars. For example, section 212(a)(9)(B) is not applicable to aliens seeking relief under either the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538 (HRIFA), or section 202 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193, 2193 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA"). *See also* 8 C.F.R. §§ 1245.13(c)(1), 1245.15(e)(1). Section 212(a)(9)(C) remains applicable to adjustment applicants under section 202 of NACARA and the HRIFA, but a waiver of this ground is available. *See* 8 C.F.R. §§ 1245.13(c)(2), 1245.15(e)(3). Additionally, aliens eligible for Temporary Protected Status may seek a waiver of their unlawful presence under section 212(a)(9)(B)(i)(II) or (C)(i)(I) "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Section 244(c)(2)(A)(ii) of the Act, 8 U.S.C. § 1254a(c)(2)(A)(ii).

However, no such waiver of the bars has been found to apply to applications for section 245(i) relief. Rather, based on the existence of the above-noted explicit waivers in the Act, the Board concluded that Congress knew how to provide for waivers when it wished to do so and that, in the context of section 245(i) relief, no implicit waivers

Unlawful continued on page 24

UNLAWFUL continued from page 19

of sections 212(a)(9)(B)(i)(II) and (C)(i)(I) should be read into the Act. *See Lemus II*, 25 I&N Dec. at 738.

History and Purpose of the Bars

The Illegal Immigration Reform and Immigration Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), created sections 212(a)(9)(B) and (C). As noted by the Board in *Matter of Arabally and Yerrabelly*, the legislative history of these sections is "rather sparse." 25 I&N Dec. at 776. IIRIRA's legislative history provides little explanation of the purpose of sections 212(a)(9)(B)(i)(II) and (C)(i)(I), or of the differences between them. However, the Board found that the "manifest purpose" of the provisions at section 212(a)(9) is to "compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter." *Id.* at 776 (quoting *Matter of Rodarte*, 23 I&N Dec. 905, 909 (BIA 2006)) (internal quotation marks omitted). Such a distinction focuses on the idea that individuals subject to section 212(a)(9), as opposed to only section 212(a)(6), have previously run afoul of U.S. immigration laws. In *Lemus I*, the board noted that the general purpose of the Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762 (2000) (LIFE Act), which extended section 245(i) availability, supported the conclusion that aliens subject to section 212(a)(9)(B)(i)(II) are ineligible for section 245(i) relief, because they have not "played by the rules." 24 I&N Dec. at 379-80 n.6 (citing 146 Cong. Rec. S11263, S11265 (daily ed. Oct. 27, 2000), 2000 WL 1608338).

A common distinction between the two bars has been drawn such that section 212(a)(9)(C)(i)(I) is said to target recidivist aliens who repeatedly violate inspection and admission procedures. For example, in *Matter of Briones*, 24 I&N Dec. 355, 365-66 (BIA 2007), the Board noted that section 212(a)(9)(C) applies to aliens who are recidivists in that they have accrued unlawful presence while in the United States, departed, and then reentered or attempted to reenter. The Board concluded that such an interpretation was supported by the title of the section, "Aliens Unlawfully Present After Previous Immigration Violations," and the legislative history. *Id.* at 366 (citing *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991)). The board emphasized that the Conference Committee Report issued at the IIRIRA's enactment stated that the section was to apply to aliens who *subsequently* enter or attempt to enter after having been present unlawfully in the United States. *Id.* In *Lemus II*, the board affirmed its position that section 212(a)(9)(C)(i)(I) is focused on recidivism, while it asserted that section 212(a)(9)(B)(i)(II) is not. 25 I&N Dec. at 742.

On the other hand, the board has held that section 212(a)(9)(B)(i)(II) is primarily focused on aliens who are seeking admission after having already accrued a prior period of unlawful presence. Such aliens need not have reentered the United States unlawfully. *Lemus II*, 25 I&N Dec. at 742. It should be noted, though, that aliens *could* have reentered unlawfully and be in the same position.

It is possible that Congress provided a waiver of inadmissibility under section 212(a)(9)(B)(i)(II) but not under section 212(a)(9)(C)(i)(I) because it viewed immigration violations under the latter as more serious and thus deserving of a harsher punishment in the form of a permanent bar from the United States (with an opportunity to reapply for admission after 10 years).[2] However, because of the definition of "applicant for admission" in section 235(a)(1) of the Act, many, if not all, individuals targeted by section 212(a)(9)(C)(i)(I) also fall under the terms of section 212(a)(9)(B)(i)(II), and yet are not able to obtain a waiver. Thus, although there may be some theoretical distinction between the classes of individuals who have accrued unlawful presence in both sections 212(a)(9)(B)(i)(II) and (C)(i)(I), the drafting of the statutes has inexplicably blurred the line between the two classes.

Summary and Analysis of Case Law

Precedential decisions addressing the unlawful presence bars have done so within the context of the specific set of facts and issues raised on appeal, and no one decision has fully construed the complex interplay between sections 212(a)(9)(B)(i)(II) and (C)(i)(I). Although many aliens are subject to both bars, the cases generally focus on one or the other, rather than on addressing the overlap or parallel concerns of both.

For example, in *Rodarte*, the board addressed the bar at section 212(a)(9)(B)(i)(II) but not the overlap of applicants who are also inadmissible under section 212(a)(9)(C)(i)(I). 23 I&N Dec. 905. The board addressed the unlawful presence bar under section 212(a)(9)(C)(i)(I) as it relates to entry without inspection under section 212(a)(6)(A) in the context of section 245(i) adjustment of status in *Briones*, but it did not reach the question of inadmissibility pursuant to section 212(a)(9)(B)(i)(II). 24 I&N Dec. 355. In *Briones*, to which at least seven circuits have afforded *Chevron* deference,[3] the board determined that an alien subject to section 212(a)(9)(C)(i)(I) was ineligible for section 245(i) adjustment of status absent a waiver of inadmissibility, which, as previously noted, is generally unavailable. *Id.* at 371; *see also supra* note 2 and accompanying text. The Board held the same in *Lemus I and II* with respect to an alien who was determined to be inadmissible under section 212(a)(9)(B)(i)(II) but who may also have been ineligible to adjust based on section 212(a)(9)(C)(i)(I). *See* 25 I&N Dec. at 744-45.

In *Lemus I*, the board held that an alien is inadmissible under section 212(a)(9)(B)(i)(II) if he departs the United States, whether or not through a removal or voluntary departure order, after having accrued 1 year of unlawful presence in the United States. 24 I&N Dec. 373. The board stated that "for purposes of section 245(i) adjustment, we

see no reason to distinguish between aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act . . . and aliens who, like the respondent, accrued more than 1 year of unlawful presence, illegally reentered the country, and then sought admission through adjustment of status within the United States." *Id.* at 378.[4] That decision was appealed to the Seventh Circuit, which found that the board did not "pay sufficient heed to the difference between" sections 212(a)(9)(B)(i)(II) and (C)(i)(I), and remanded the case. *Lemus-Losa v. Holder*, 576 F.3d 752, 761 (7th Cir. 2009).

Following the Seventh Circuit remand, the board stated that the bars in sections 212(a)(9)(B)(i)(II) and (C)(i)(I), rather than being "practically the same" are, in fact, "substantially different," although they each deserve the same treatment for purposes of section 245(i) of the Act. *Lemus II*, 25 I&N Dec. at 742. The board explained that section 212(a)(9)(C) applies exclusively to recidivist immigration violators, while section 212(a)(9)(B) applies to both recidivists and nonrecidivists. Thus, an alien who is not a recidivist immigration violator and is seeking consular processing may be ineligible for an immigrant visa despite the attempt to play by the rules this time. Further, the board pointed out that an alien is only inadmissible under section 212(a)(9)(B)(i)(II) if he applies for admission within 10 years after having departed; in contrast, an alien who reenters the United States without being admitted is inadmissible under section 212(a)(9)(C)(i)(I) regardless of how much time passed between his departure and reentry. *Id.* at 745-46.

In spite of these differences, the board stated that the bars should not be differentiated based on the perceived lawfulness of the actions falling under the two bars (with section 212(a)(9)(C)(i)(I) referring to the more clearly unlawful conduct of recidivist entry without inspection), as presumed by the Seventh Circuit.[5] Rather, individuals inadmissible under section 212(a)(9)(B) may be just as culpable as aliens covered under section 212(a)(9)(C)(i)(I). Inadmissibility under section 212(a)(9)(C)(i)(I) is usually dispositive of the case, since it bars adjustment of status and cannot be waived in removal proceedings; thus, where section 212(a)(9)(C)(i)(I) applies, there is generally no need to reach the applicability of section 212(a)(9)(B)(i)(II). Perhaps as a result, neither *Lemus II* nor any other published decision acknowledges that section 212(a)(9)(C)(i)(I) is, in fact, substantially, if not wholly, encompassed by section 212(a)(9)(B)(i)(II). However, the board hinted at the overlap between the two bars by remanding to the immigration judge to decide both whether the passage of time changed the applicability of 212(a)(9)(B)(i)(II) and whether the alien was covered by section 212(a)(9)(C)(i)(I). *Lemus II*, 25 I&N Dec. at 745-46 (noting that section 212(a)(9)(B)(i)(II) provides for the inadmissibility of an alien who seeks admission within 10 years of having departed and, as a result of the time that passed while the case was on appeal, the alien's triggering departure date was more than 10 years before).

Although the board's 2012 decision in *Arabally and Yerrabelly* addressed the unlawful presence bar under section 212(a)(9)(B)(i)(II) as it relates to a departure pursuant to advance parole, it did not examine the section 212(a)(9)(C)(i)(I) bar under the unique facts of the case and therefore does not offer any insight into the interaction between the two. *See* 25 I&N Dec. 771. The board did, however, call into question several DHS memoranda addressing advance parole and the meaning of a departure for purposes of the unlawful presence bars. *Id.* at 776 n.4. While these memoranda gave some level of guidance in applying the unlawful presence bars under section 212(a)(9), the board has explicitly disavowed at least some of that guidance, raising doubts regarding their persuasive power for purposes of applying the unlawful presence bars.

Sources of Guidance

The unlawful presence bars do not have regulatory counterparts to guide in their interpretation or application. In the absence of regulations, Immigration Judges may look to DHS memoranda addressing the unlawful presence bars as potentially persuasive guidance for administration of the bars. For example, a memorandum from Louis Crocetti, associate commissioner of the former Immigration and Naturalization Service, which was issued shortly after enactment of the IIRIRA, clarifies that an alien must depart the United States in order to be inadmissible under section 212(a)(9)(B) or (C). Memorandum from Louis D. Crocetti, Jr., Assoc. Comm'r, Office of Examinations, to INS officials (May 1, 1997), *reprinted in* 74 Interpreter Releases, No. 18, May 12, 1997, app. II at 791-94. That memorandum also maintains that such individuals who depart the United States and return will be regarded as inadmissible for adjustment of status under section 245 of the Act. *Id.*

Other agency memoranda on the topic between 1997 and 2009 were consolidated into an interoffice memorandum by Acting Associate Director of USCIS Donald Neufeld. Neufeld Memorandum, *supra*. This is the memo that the board specifically called into question in *Arabally and Yerrabelly*, finding that the determination regarding advance parole as a departure was not adequately explained and did not address counterarguments. 25 I&N Dec. at 776 n.4. For its part, the Neufeld memorandum does acknowledge that aliens may be inadmissible under *both* sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Act. Neufeld Memorandum, *supra*, at 19. However, the memorandum does not address the consequences that attach when both sections apply, nor does it resolve the confusion that arises from the overlapping application of those provisions in the context of the availability of a hardship waiver for inadmissibility under section 212(a)(9)(B)(i)(II). *Id.* at 46-47. Furthermore, in the wake of *Arabally and Yerrabelly*, it is unclear whether these memoranda are entitled to deference by adjudicators, given that portions of them were criticized by the board in that case.

Conclusion

Although sections 212(a)(9)(B)(i)(II) and (C)(i)(I) are not always brought as charges of inadmissibility, the unlawful presence bars affect a large number of applications for

Unlawful continued on page 26

Unlawful continued from page 25

admission into the United States. For individuals already in the United States and seeking adjustment of status, the application of the bars is particularly significant because they may be subject to a permanent bar to admission under section 212(a)(9)(C)(i)(I), without the possibility of a waiver. In the absence of regulatory guidance or case law definitively analyzing section 212(a)(9)(C)(i)(I), adjudicators must base their application of the unlawful presence bars on a close reading of the statutory language, the board's holdings as to the applicability of section 212(a)(9)(B)(i)(II), and the portions of DHS memoranda that have not been criticized. Adjudicators should be particularly vigilant in carefully considering the applicability of both bars when the alien has accrued more than one year of unlawful presence. ◆

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Endnotes

[1]A waiver of section 212(a)(9)(C)(i) inadmissibility may be available in limited circumstances to certain VAWA (Violence Against Women Act) self-petitioning aliens under section 212(a)(9)(C)(iii) of the Act. However, EOIR adjudicators have no jurisdiction over these waivers, which are granted by the DHS.

[2]While recent board decisions tend to recognize this distinction, historically this has not always been the case. For example, in *Matter of Rodarte*, 23 I&N Dec. at 909, the board stated that "[i]t is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent." Thus, the board appeared to view all provisions under section 212(a)(9) as targeting recidivist immigration violators, not just those inadmissible under section 212(a)(9)(C)(i)(I). Moreover, as this article describes, it is clear that many, if not all, recidivist violators under section 212(a)(9)(C)(i)(I) also fall under the bar in section 212(a)(9)(B)(i)(II).

[3]*See Cheruku v. Att'y Gen. of U.S.*, 662 F.3d 198, 206 (3d Cir. 2011); *Garfias-Rodriguez v. Holder*, 649 F.3d 942, 948 (9th Cir. 2011); *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1152 (10th Cir. 2011); *Renteria-Ledesma v. Holder*, 615 F.3d 903, 908 (8th Cir. 2010); *Ramirez v. Holder*, 609 F.3d 331, 335-37 (4th Cir. 2010); *Mora v. Mukasey*, 550 F.3d 231, 239 (2d Cir. 2008); *Ramirez-Canales v. Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008).

[4]The board also noted in footnote 3 that it believed Congress had committed a drafting mistake in describing individuals inadmissible under 212(a)(9)(B)(i)(II) as "again" seeking admission since such individuals were not described as having previously sought admission. 24 I&N Dec. at 376 n.3. As discussed earlier in this article, the board later clarified this position in *Lemus II*, explaining that the statute used "seeks admission" as a term of art and that all aliens with a past period of unlawful presence have at some point been applicants for admission pursuant to section 235(a)(1) of the Act. 25 I&N Dec. at 743 n.6. It is precisely this use of the term "seeks admission" that continues to cause uncertainty regarding the distinction between the unlawful presence bars. The fact that entrants without inspection are construed to be constructive applicants for admission renders aliens who are inadmissible under section 212(a)(9)(C)(i)(II) *also* inadmissible under section 212(a)(9)(B)(i)(II). *See* section 235(a)(1) of the Act.

[5]The Third Circuit, in *Cheruku*, also acknowledged that aliens subject to inadmissibility under section 212(a)(9)(B) remain culpable as previous immigration violators. 662 F.3d at 207. The Third Circuit did not, however, acknowledge that many of the "more culpable" aliens encompassed by section 212(a)(9)(C)(i)(I) are also encompassed by section 212(a)(9)(B)(i)(II).