The Green Card

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

Larry Burman, Section Chair

Quote of the Month

"If you wish in the world to advance ...
your merits you're bound to enhance ...
you must stir it and stump it
and blow your own trumpet
Or, trust me, you haven't a chance. "

Sir William Gilbert

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From the Editor

Well, the Green Card is moving along. Please send your contributions, news items, etc. This is YOUR Section newsletter, so express yourself!

The biggest event of the ILS year is rapidly approaching. And by that, I mean the Memphis TN immigration seminar (May 18-19, 2012). This year you will have to choose between a night at the International BBQ Festival, and a fabulous river cruise, with great food and name entertainment. The menu is a Chinese/Southern Home-style buffet—is that international enough? Get your registration in quickly; attendance is limited to 400. Unfortunately our FBA block of rooms at the Marriott is full, but check the FBA/ ILS website for alternate hotels, and the seminar brochure.

Incidentally, Section members are always needed for panels and presentations. If you would like to participate next year, contact Barry Frager in September.

The annual meeting of the Section will be held in Memphis on Saturday, May 19, 2012 at 4:30 pm. If you are in Memphis for the seminar (as you should be!), please attend. We will nominate officers for the coming year (starts October 1), and transact any other business that comes before the meeting.

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News You Can Use

Newark NJ – The Immigration Court has moved, to another floor in the same building. The new address is 970 Broad Street, Room 1200, Newark, NJ 07102.

Washington DC - Section member, immigration genius, and our regular columnist, Hon. Paul W. Schmidt, has accepted appointment as adjunct professor of immigration law at Georgetown University Law School.

Send your "News You Can Use" notices to Larry Burman at lburman@aol.com. ◆

In This Issue

Prudencio v. Holder: *Fourth Becomes Fourth Circuit to Reject the Attorney General's Ruling in* Matter of Silva-Trevino

Hon. Paul Wickham Schmidt

In *Prudencio v. Holder*,[1] the Fourth Circuit joins three sister circuits[2] in rejecting the "third step" of the test set forth by former Attorney General Mukasey in *Matter of Silva-Trevino*.[3] The overall issue involves determining whether a respondent is removable for having been "convicted of a crime involving moral turpitude."[5]

In making this determination, under the "third step," the attorney general authorizes an immigration judge (IJ) to consider evidence outside the "record of conviction" when the IJ deems it "necessary and appropriate." In rejecting this step, the Fourth Circuit holds that an IJ "applying the moral turpitude standard may consider only the alien's prior conviction and not the conduct underlying that conviction."[5]

Judge Keenan writes the majority opinion which Chief Judge Traxler joins. Judge Shedd dissents.

What is the "three step test" set forth in *Silva-Trevino*?

Under the "first step" of *Silva-Trevino*, the IJ starts with the "categorical approach" to the statute under which the respondent was convicted. If that statute either "requires or excludes conduct involving moral turpitude," the IJ's inquiry into removability ends.[6]

However, if, as is often the case, the IJ finds a "realistic probability" that the statute could cover *both* conduct that *does* and *does not* involve moral turpitude, the statute is considered "divisible." Then, the IJ must proceed to the "second step," known as the "modified categorical approach."

The "modified categorical approach" requires the IJ to review the "record of conviction" to determine whether that conviction is under that portion of the divisible statute involving moral turpitude. In cases involving guilty pleas, such as this one, the "record of conviction" consists of "the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge."[7]

According to the attorney general, if the "modified categorical approach" is inconclusive, the IJ should proceed to "step three." Under this third step, the attorney general directs the IJ to "'consider any additional evidence or fact finding'" that the judge 'determines is necessary or appropriate to resolve accurately the moral turpitude question.'"[8]

The Fourth Circuit endorses the use of the categorical and modified categorical approaches as set forth in the first and second analytical steps. The court takes issue *only with the third step* which authorizes the IJ to consider information *outside of the record of conviction* that might reveal the respondent's *actual conduct* in committing the crime for which he was convicted.

What are the relevant facts in Prudencio's case?

The respondent, Prudencio, became a lawful permanent resident in September 2005.[9] In October 2009, he was charged in Virginia with carnal knowledge, without use of force, of a 13-year-old girl. Later, in March 2010, he pleaded guilty to an amended charge of contributing to the delinquency of a minor. He was sentenced to 12 months incarceration with six months suspended. The Department of Homeland Security (DHS) began removal proceedings against Prudencio in June 2010 under the provision directing the removal of any alien who within five years of admission was convicted of a crime involving moral turpitude carrying a potential sentence of one year or longer.[10]

How does the IJ decide the case?

The IJ applies the three-step framework established in *Silva-Trevino*.[11] Under the first step, he finds that the crime of contributing to the delinquency of a minor in Virginia is *not* categorically a crime involving moral turpitude because that crime encompassed both acts that did and some that did not involve moral turpitude. In other words, he finds that the statute is "divisible."

Consequently, he proceeds to step two, consulting the record of conviction. Upon finding this inconclusive, he considers additional evidence outside the record of conviction under step three of *Silva-Trevino*.

Under step three, the IJ finds that a narrative police report prepared in connection with the original charges against the respondent was "necessary and appropriate" evidence in the context of this case. The police report shows that the respondent had sexual relations with a 13-year-old girl when he was over the age of 18. The IJ concludes that this evidence shows that the respondent was convicted under the moral turpitude portion of the divisible statute and therefore orders the respondent removed.

The respondent appeals to the Board of Immigration Appeals (BIA) which upholds the IJ's decision. Thereafter, the respondent petitions the Fourth Circuit for review of the removal order.

Why does the Fourth Circuit reject step three of *Silva-Trevino*?

First, contrary to the attorney general's analysis in *Silva-Trevino*, the Fourth Circuit finds "that the plain language of the moral turpitude statute is not ambiguous."[12] As the Fourth Circuit explains, "in a case such as the present one in which the only issue is the alien's prior conviction, the stat-

ute unambiguously directs that an adjudicator consider only the conviction itself, and not any underlying conduct."[13]

Second, the court rejects the government's appellate argument that a "circumstance specific inquiry" is permitted because the term "moral turpitude" is not an element of any state or federal crime. The Fourth Circuit counters with the observation that "courts nevertheless have been able to interpret this phrase for over a century, and a robust body of law has developed in this regard."[14]

Third, the Fourth Circuit dismisses the government's argument that a "circumstance specific" inquiry is authorized by the Supreme Court's decision in *Nijhawan v. Holder*.[15] That case involved a statutory modification to the removal provision involving the generic crime of "fraud or deceit" that restricted its applicability to situations "in which the loss to the victim or victims exceeds $10,000."[16] By contrast, the Fourth Circuit points to the lack of a comparable statutory modifier of the term "crime involving moral turpitude."[17] Consequently, the court finds *Nijhawan* distinguishable.

Fourth, the court expresses concern about requiring an evidentiary evaluation by an IJ unfamiliar with the criminal case and the "questionable veracity" of documents outside the record of conviction. Noting that "police reports and warrant applications "often contain little more that unsworn witness statements and initial impressions," the court concludes that using them as a basis for findings of fact in removal proceedings "accords these documents unwarranted validity."[18]

For all of these reasons, the Fourth Circuit determines that the attorney general's analysis leading to step three of *Silva-Trevino* is not entitled to "deference" under the Supreme Court's ruling in the so-called *Chevron*[19] case.[20] Accordingly, the court limits the IJ's inquiry in this type of case to steps one and two (the categorical and modified categorical approaches) and forbids the IJ from considering conduct underlying the conviction under step three of *Silva-Trevino*.[21]

What happens after the Fourth Circuit rejects step three?

The court applies the categorical and modified categorical approaches. In doing so, the court finds: (1) "the record of conviction is composed of the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge;"[22] (2) the police report is not "part of the record of conviction;"[23] (3) because Prudencio pleaded guilty to an *amended* charge, allegations relating to the *original* charge could *not* be considered admitted by his guilty plea;[24] (4) the IJ's findings of fact can *not* be considered under the modified categorical approach because they were *not* part of the "record of conviction;"[25] and (5) the original charge is irrelevant and Prudencio's admission to the BIA of the nature of the original charge thus is not an admission of any particular conduct.[26]

The Fourth Circuit concludes (as did the IJ) that the results of the categorical and modified categorical approaches are inconclusive on the controlling issue of moral turpitude. Consequently, because the DHS bears the burden of establishing removability, the court vacates the IJ's order of removal and enters final judgment in favor of Prudencio.[27]

Musings continued on page 4

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

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Why does Judge Shedd disagree with his colleagues in the majority?

First, Judge Shedd says that the "categorical approach adopted by the majority is a doctrine created by the judicial branch to address issues of concern to the judicial branch—protection of Sixth Amendment rights and efficient use of judicial resources."[28] Judge Shedd concedes that the attorney general is free to adopt the categorical approach, but finds he is under no obligation to do so. He adds that he himself would not adopt "this difficult, almost unworkable, limiting analysis" for immigration cases.[29]

Second, Judge Shedd notes that the IJ made an undisputed finding of fact that "Prudencio had a sexual encounter with a 'child 13 years of age,' and that his conviction was for a crime involving moral turpitude."[30]

Third, Judge Shedd agrees with the Seventh Circuit,[31] which upheld *Silva-Trevino*, that "'the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction.'"[32] He also associates himself with the view of Justice Alito[33] that the categorical approach creates numerous circuit splits and produces unclear results.[34]

Fourth, Judge Shedd finds it "difficult—if not impossible—to accept that Congress intended for persons such as Prudencio to remain in the United States 'simply because there might have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment.'"[35]

Fifth, turning to the question of "*Chevron* deference" to the attorney general, Judge Shedd agrees with the majority that the term "convicted" is unambiguous.[36] But, he finds that "the statute is simply silent as to what approach immigration judges may use in applying the 'moral turpitude' provision."[37] Therefore, in Judge Shedd's view, the attorney general's *Silva-Trevino* methodology, "a measured approach" to this issue, deserves deference from the court.[38] He further notes that civil immigration proceedings are different from the criminal proceedings that gave rise to the categorical approach and that: "The efficient operation of the executive branch is simply not the judiciary's responsibility."[39]

Sixth, Judge Shedd believes that the term "moral turpitude," which is absent from state or federal criminal statutes, warrants a "circumstance specific" approach as approved by the Supreme Court in *Nijhawan*.[40] Judge Shedd notes that, relying on *Nijhawan,* both the Fourth Circuit[41] and the Fifth Circuit[42] have previously indicated "that the categorical approach is not always required in immigration cases."[43]

For all of these reasons, Judge Shedd would defer to the attorney general's approach in *Silva-Trevino* and allow the IJ to consider evidence beyond the record of conviction in an appropriate case involving a conviction for a crime involving moral turpitude. Applying *Silva-Trevino's* third step, Judge Shedd concludes that "Prudencio was convicted of a crime involving moral turpitude: as a 20-year-old he had sexual intercourse with a 13-year-old, infecting her with a sexually transmitted disease. Prudencio's crime is the kind of 'vile' or 'depraved' act the moral turpitude provision was enacted to address."[44] Consequently, Judge Shedd would dismiss the petition for review and uphold the order of removal against Prudencio.

Does the Fourth Circuit's ruling have implications beyond the area of moral turpitude?

By its own terms, the three-step test set forth in *Silva-Trevino* applies only in cases involving removal or inadmissibility based on conviction for a *crime involving moral turpitude*. The attorney general did *not* purport to address the separate provision for removal on the basis of conviction for an "aggravated felony."[45] Because the Fourth Circuit invalidates only the third step of *Silva Trevino*, the use of the categorical and modified categorical approaches in *aggravated felony* cases remains unaffected.

Additionally, as noted above, the "circumstance specific" analysis approved by the Supreme Court in *Nijhawan* continues to be used for certain aggravated felonies relating to fraud or deceit "in which the loss to the victims exceeds $10,000,"[46] for transportation for the purposes of prostitution "if committed for commercial advantage,"[47] money laundering "if the amount of the funds exceeded $10,000,"[48] and certain alien smuggling and document forgery offenses where the respondent affirmatively shows that he or she was helping only "a spouse, parent, or child (and no other individual)."[49] All of those aggravated felony provisions have *modifiers* that would not normally be part of the generic state or federal crime.[50]

However, Judge Shedd's dissent raises an interesting point concerning the Fourth Circuit's prior decision in *Salem v. Holder*,[51] a case involving an the aggravated felony provisions. Relying on the categorical and modified categorical approaches, the IJ in *Salem* ruled that the record of conviction was inconclusive. Accordingly, that IJ found that the DHS failed to sustain its burden of establishing removability by "clear and convincing" evidence, but that the *respondent* likewise failed to sustain *his burden* of establishing statutory eligibility for cancellation of removal because he could not prove by a preponderance of the evidence that he was *not* an aggravated felon.

In approving the removal order in *Salem*, the Fourth Circuit declined to decide "whether the evidentiary limits imposed by that [categorical] approach should apply when the burden shifts to the noncitizen to prove his eligibility for cancellation of removal" because Salem "made no attempt to offer additional evidence to the IJ beyond the record of conviction."[52] The court noted, however, that in *Nijhawan* "the Supreme Court has expressed some reservation about the wholesale adoption of the categorical approach in the immigration context."[53]

Consequently, the Fourth Circuit precedents leave open the possibility that, notwithstanding the rejection of the third step of *Silva-Trevino*, evidence beyond the record of conviction might be considered by the IJ in determining whether a respondent has satisfied his burden of overcoming the con-

viction-related bars to relief from removability. Interestingly, in a recent precedent arising in the Fourth Circuit, the BIA authorized the use of evidence outside the record of conviction in determining whether the respondent had established a "circumstance specific affirmative defense" to the removal statute relating to trafficking in marijuana.[54]

Additionally, because there is now a clear conflict among the circuits regarding the validity of the third step of *Silva-Trevino*, the Supreme Court might eventually be called upon to decide this issue.

What is the bottom line?

The Fourth Circuit limits IJs to the "categorical and modified categorical approaches" and the documents contained in the "record of conviction" in determining whether a respondent was "convicted of a crime involving moral turpitude" for removal purposes. This is also the case in the Third, Eighth, and Eleventh Circuits which reject *Silva-Trevino*.

In the Seventh Circuit, which approves *Silva-Trevino*, and in the other circuits which have not ruled on this question, *Silva-Trevino* remains controlling for IJs. In these jurisdictions, where the categorical and modified categorical approaches produce inconclusive results, IJs may continue to consider evidence outside the "record of conviction" where it is "necessary and appropriate" to resolving the moral turpitude issue. ◆

These are the views of the author, and they do not represent the official position of the attorney general, the Executive Office for Immigration Review, the Office of the Chief Immigration Judge, the Federal Bar Association, his colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent the author's position on any case that he decided in any capacity in the past, that is pending before him, or that might come before him in the future. These views also are not legal advice and are not a substitute for reading the applicable statutes, regulations, precedents, and practice manuals. The author was the immigration judge in Prudencio.

Endnotes

[1]*Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2102) (hereafter cited as "*Prudencio*").

[2]*See Jean-Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009); *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010); *Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011).

[3]*Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (hereafter cited as "*Silva-Trevino*").

[4]INA § 237(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

[5]*Prudencio, supra*, 669 F.3d at 484.

[6]*Id*. at 479.

[7]*Id.* at 485.

[8]*Id.* at 479, quoting *Silva-Trevino, supra*, 24 I&N Dec. at 708.

[9]The facts are taken from *Prudencio, supra*, 669 F.3d at 476.

[10]INA § 237(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

[11]This description of the IJ's analysis is taken from *Prudencio, supra*, 669 F.3d at 477.

[12]*Prudencio, supra*, 669 F.3d at 482.

[13]*Id.*

[14]*Id.* at 482.

[15]*Nijhawan v. Holder*, 557 U.S. 29 (2009).

[16]INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43(M)(i).

[17]*Prudencio, supra*, 669 F.3d at 483.

[18]*Id.* at 483-84.

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

[20]*Prudencio, supra*, 669 F.3d at 484.

[21]*Id.*

[22]*Id.* at 485.

[23]*Id.* at 486.

[24]*Id.*

[25]*Id.*

[26]*Id.*

[27]*Id.*

[28]*Id.* at 486.

[29]*Id.*

[30]*Id.* at 487.

[31]*Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

[32]*Prudencio, supra*, 669 F.3d at 488, quoting from *Ali v. Mukasey, supra*, 521 F.3d at 743.

[33]*Chambers v. United States*, 555 U.S. 122, 133 (2009) (Alito, J., concurring).

[34]*Prudencio, supra*, 669 F.3d at 488.

[35]*Id*. at 488, quoting from *Marciano v. INS*, 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisile, J., dissenting).

[36]*Prudencio, supra*, 669 F.3d at 489.

[37]*Id.*

[38]*Id.* at 489-90.

[39]*Id.* at 490.

[40]*Id.* at 491.

[41]*Salem v. Holder*, 647 F.3d 111, 119 (4th Cir. 2011).

[42]*Bianco v. Holder*, 624 F.3d 265, 272-73 (5th Cir. 2010).

[43]*Prudencio, supra*, 669 F.3d at 491.

[44]*Id.* at 492.

[45]*Silva-Trevino, supra,* 24 I&N Dec. at 707 n.6. "Aggravated felony" is defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

[46]INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43(M)(i).

[47]INA § 101(a)(43)(K)(ii), 8 U.S.C. § 1101(a)(43(K)(ii).

[48]INA § 101(a)(43)(D), 8 U.S.C. § 1101(a)(43)(D).

[49]INA §§ 101(a)(43)(N), (P), 8 U.S.C. §§ 1101(a)(43)(N), (P).

[50]*Nijhawan v. Holder*, 557 U.S. 29, 129 S.Ct. 2294, 2300-01 (2009).

[51]*Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011).

[52]*Id*. at 119.

[53]*Id*.

[54]*Matter of Castro Rodriguez*, 25 I&N Dec. 698 (BIA 2012).

Immigration Rant

Dear Client: I Am Not Your Mommy

JASON DZUBOW

Some clients just don't get it. No matter how often you tell them what evidence they need for their case, they bring you bupkis.

Generally, when I start an asylum case, I ask the client to give me the general story about why he needs asylum. I then prepare a detailed list of documents that he should get: letters from witnesses, school records, work records, medical reports, police reports, etc., etc. I explain to the client why he needs to get these documents, and why, under the REAL ID Act, he should try to get the documents even when he thinks he will not be able to obtain them. (For those of you lucky enough not to be familiar with the REAL ID Act, the act requires an asylum seeker to obtain evidence that is reasonably available. If the alien cannot obtain a particular piece of evidence, he must explain why he could not get it. Thus, if the client tries to get all relevant evidence—even if he fails—at least he will be able to explain to the adjudicator what efforts he made to obtain the evidence and why he failed to get it.)

I make analogies to help the client understand (evidence is like the foundation upon which a house, i.e., your case, is built). I make them sign a document indicating that it is their responsibility to obtain the evidence on the list, and that if they fail to get the evidence, they could lose their case.

Is all this excessive? You would think so. You would think that a person who fears persecution in her homeland and who shells out a pretty penny for attorney's fees would be motivated to do everything possible to win her case.

Many clients do, in fact, make diligent efforts to get evidence in their cases. It is surprising, however, the number of asylum seekers who do nothing or very little to help themselves. Such clients greatly reduce their chances for a successful outcome.

So what can be done about these slacker-clients? One possibility, of course, is to do nothing. If the client does not care enough about his case to collect evidence, maybe it is best to prepare the case with the available evidence and let the chips fall where they may. This does not seem like a very satisfactory solution, though. For one thing, there may be a legitimate reason why the client is not cooperating. Perhaps he does not understand what is needed or why such evidence is important. Maybe he is afraid or embarrassed to ask friends or relatives to help him with his case, or maybe he does not want to dredge up painful memories of the events that caused him to seek asylum. Also, he might fear that the people sending evidence will be endangered. Some of these problems might be offset by carefully explaining why documents are needed and that all such communications are confidential. Also, perhaps referral to a support group for asylum seekers would be appropriate to help the client cope with stress and other mental health issues. For obvious reasons, many asylum seekers are mistrustful of government workers (and lawyers, who often seem like government workers), and getting them to trust you—and getting them to trust "the system"—requires patience.

Another way to encourage clients to gather evidence is to nag them. "Nagging" or, more politely, "repeatedly reminding" clients to get evidence may work, but it takes time to stay on top of each client's case. In my practice, I don't have a lot of extra time to chase after my clients. I do, however, try to remind them once or twice about the need for evidence.

I find that giving the client a check list of needed documents is helpful. When it comes time to remind them about gathering evidence, I always refer them to the check list. It helps me remember their case as well. A check list signed by the client has an added benefit—if the case is unsuccessful, the client cannot complain that you failed to advise her about the need for evidence.

Asylum seekers are not always the easiest clients. As lawyers, we need to use our limited time efficiently. That means informing the clients about the need for documents, and periodically reminding them about what is needed. For those clients who don't make an effort to get documents, a bit of cajoling, threatening, and/or nagging from the attorney might encourage them to gather needed evidence. And that could make the difference between a successful case and a denial. ◆

Reforming Illegal Immigration One Social Security Number at a Time: E-Verify 101

EILEEN M.G. SCOFIELD AND KYLE R. WOODS

The recently-enacted Georgia Illegal Immigration Reform and Enforcement Act of 2011, or IIREA (formerly Georgia HB 87), is the further spread of E-Verify at a state level. The purpose of this article though is to assist all employers in understanding their obligations under E-Verify.

E-Verify is an internet-based system operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration. The service allows employers to enter information regarding new hires into the online database and receive confirmation that a person is or is not authorized to work in the United States. Since IIREA will eventually require all employers in Georgia with more than 10 employees to use E-Verify for new hires, a summary of the E-Verify process will prove useful.

E-VERIFY 101

The first step in using E-Verify is to enroll. Enrollment involves entering into a Memorandum of Understanding (MOU) with USCIS. The MOU is a non-negotiable form document outlining the rules and procedures of E-Verify, and it is available on the USCIS website. Enrollment takes only a few minutes, and the MOU can be signed electronically during the online enrollment process.

Once enrolled, employers must begin using E-Verify for all new hires. E-Verify operates in tandem with the traditional I-9 process and does *not* replace the employer's need to retain completed I-9 forms. After completing the I-9, the employer must input the employee's I-9 data into the online E-Verify system. This must be done within three days of hiring a new employee.

Generally within seconds of submitting the I-9 data, the employer will receive either a confirmation, a social security tentative nonconfirmation (TNC), or a Department of Homeland Security verification notification. A confirmation indicates that the employee is authorized to work, and the employer can close the E-Verify case at this point. Similarly, a DHS notification is handled by the department of homeland security and requires no further employer action. If a TNC is issues, however, the employer must take additional steps.

In the event of a TNC, the employer must notify the employee as soon as possible. E-Verify provides a notification form. The employee may then decide whether or not to contest the TNC and should sign the notice form. If the employee does not contest the TNC, the employer may close the E-Verify case and may terminate the employee with no civil or criminal liability.

If the employee decides to contest the TNC, the employer must not terminate the employee while the case is outstanding. The employee should be referred to the Social Security Administration (SSA). The employee then has eight business days to contest the TNC with the SSA. When this is finished, the SSA will either issue a confirmation or a final nonconfirmation (FNC). Either response allows the employer to close the case, and an FNC allows the employer to terminate the employee with no civil or criminal liability. In some instances, the SSA will refer the case to the DHS, and in those circumstances, the employer will be notified of additional steps to be taken.

The final step is to resolve and close the case in the E-Verify system by filling out the online form and indicating the results. This is used for statistical and enforcement purposes by E-Verify.

TOP FIVE E-VERIFY PITFALLS

There are several mistakes that employers (particularly first-time users) are likely to make when using E-Verify. Here are five mistakes to avoid:

1. Forgetting to follow standard I-9 procedures. Remember that E-Verify is no substitute for maintaining your I-9 form, and you can still be subject to fines for failure to complete and maintain I-9 forms as required.
2. Using E-Verify as a screening tool. It is forbidden to use E-Verify to screen potential hires. You may only open an E-Verify case for someone you have actually hired.
3. Failure to terminate after an FNC. E-Verify shares its information with Immigration and Customs Enforcement (ICE), and if you fail to terminate an employee (and indicate this in the case resolution), it is highly likely that an ICE officer may contact you to audit your employment compliance.
4. Failure to close your E-Verify case. This is an important step in the process, and it is easy to overlook.
5. Using E-Verify on existing employees. This is *not allowed* unless your company is a contractor with the federal government *and* your federal contract has specific language requiting verification of existing employees. Therefore, to ensure a case has been closed, the employer must follow E-Verify prompts to close the case affirmatively.

Additional information is available at www.uscis.gov. ◆

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Article

When Cousins Are Two of a Kind: Circuits Issue Not-Quite-Identitcal Paired Decisions

EDWARD R. GRANT AND PATRICIA M. ALLEN

Among iconic 1960s sitcoms, perhaps none reflected the era better than *The Patty Duke Show*. Artfully contrived (particularly its seamless use of split-screen technique), relentlessly effervescent, and possessing of a theme song that sticks like Bazooka to the bottom of your brain, its 104 episodes sent the timeless message that for the most part, teenage angst is something to be laughed at/with, rather than wallowed in. Today, of course, the cousin from Brooklyn Heights (Patty Lane) would be just as likely to adore a crêpes suzette as her cousin from Scotland (Cathy). And her father would probably be a hedge fund manager, not a newspaper editor. But as the proud uncle of eight nieces, one author can attest that cousins still can be two (or three, or four) of a kind.

Not by contrivance, but coincidence, our federal circuits occasionally issue decisions that can likewise be described as cousins, if not always identical. Recent months have seen several such "paired" cases, ranging from the validity of the statutory requirements for cancellation of removal to the reach of the "fugitive disentitlement" doctrine. The Ninth Circuit was also responsible for its own "two of a kind" pair of decisions and, in the process, profoundly impacted the adjudication of criminal grounds of removal.

Constitutional Challenges to Cancellation of Removal Standards

This past July, both the Third and Seventh Circuit Courts of Appeals addressed constitutional challenges to the standards applied in the adjudication of applications for cancellation of removal filed by nonpermanent resident aliens under § 240A(b) of the act, 8 U.S.C. § 1229b(b). *Flores-Nova v. Att'y Gen. of U.S.*, No. 10-2044, 2011 WL 2989709 (3d Cir. July 25, 2011); *Marin-Garcia v. Holder*, No. 10-3912, 2011 WL 3130273 (7th Cir. July 22, 2011). Both circuits rejected the petitioners' assertions, which concerned violations of due process, equal protection, and international law.

In *Flores-Nova*, 2011 WL 2989709, the immigration judge found that the petitioners, the parents of three American-born children (ages 5, 10, and 11), did not maintain the requisite continuous presence in the United States because of their 176-day absence. The board affirmed and the Third Circuit denied the petition for review. First, the Third Circuit gave short shrift to the petitioners' argument that the board had impermissibly construed § 240A(d)(2) of the act, thus depriving it of *Chevron* deference. Seeing no ambiguity in the provision relating to the circumstances in which continuous physical presence is considered broken, the court dismissed this argument as "meritless." *Id.* at *2.

The court also rejected the petitioners' second argument that the continuous physical presence requirement itself is a violation of their equal protection rights under the Due Process Clause. *Id.* The court stated that the petitioners, as nonpermanent resident aliens who were denied cancellation of removal based on their departure from the United States for an extended period of time, were not similarly situated to permanent resident aliens seeking naturalization, so the statute governing cancellation of removal did not violate equal protection based on disparate treatment of aliens. *Id.* The court reasoned that "[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not [mean] that all aliens are entitled to all the advantages of citizenship" and stated that the clause does not establish that "all aliens must be placed in a single homogeneous legal classification." *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 78 (1976)) (internal quotation marks omitted). Finally, the court rejected the petitioners' assertion that the statutory provision is unconstitutional, finding that it does not involve a suspect class and there is no basis to conclude that it "is not rationally related to a legitimate government purpose." *Id.*

The petitioners also alleged that the United States must ensure their right to a meaningful hearing as directed under a decision made by the Inter-American Commission on Human Rights (IACHR), certain provisions of the American Declaration of the Rights and Duties of Man, and Article 3(1) of the United Nations Convention on the Rights of the Child. The final arguments were deemed unpersuasive by the court because the petitioners did not establish that any of these laws were actually binding on the United States. *Id.* at *3-4.

The petitioner in *Marin-Garcia*, father of three American-born children (between 10 and 15 years of age), presented the Seventh Circuit with an entirely different constitutional argument. The petitioner alleged that the board's framework analysis of the exceptional and extremely unusual hardship standard in § 240A(b)(1)(D) of the act, which was applied in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), is unconstitutional because it "compares the hardship of citizen-children to the hardship of aliens in general, rather than comparing the hardship of citizen-children to the 'citizen children population at large." *Marin-Garcia*, 2011 WL 3130273, at *2 (internal quotation mark omitted). Before addressing the argument, the court recalled

that it had previously indicated its skepticism about a "nearly identical argument" made in another case, *Leyva v. Ashcroft*, 380 F.3d 303, 305 (7th Cir. 2004). In that case, the petitioners argued that it was a violation of due process to compare his U.S. citizen children to "other similarly situated youngsters who have grown up in the United States and faced the prospect of relocating to a country abroad with their alien parents,' instead of comparing them to all citizen children." *Id.* (internal quotation mark omitted). However, the court in *Leyva* did not have the jurisdiction at the time to address this issue. *Id.* at 305-06.

Having the authority to take up this argument in *Marin-Garcia*, the Seventh Circuit first observed that the petitioner's argument "is based on an erroneous reading of the board's decision in *Matter of Monreal*." *Marin-Garcia*, 2011 WL 3130273, at *2. The court dismissed the first half of the petitioner's argument by acknowledging that the framework applied in *Matter of Monreal* is consistent with the statutory provision, is straightforward, and contained thoughtful, as well as comprehensive, analysis. *Id.* at *4. The court further recognized that the framework applied in *Matter of Monreal* does not require that the hardship of the citizen-relatives of the alien "must or could be compared to the hardship endured by the aliens themselves" or "make distinctions on the basis of race," as argued by the petitioner. *Id.* In addressing the second half of the petitioner's argument, the court, as it did in *Leyva*, expressed its confusion as to how this argument actually would aid the petitioner, where the suggested comparison group would likely greatly raise the hardship standard because "it would seem that the shorter the time period htat a family has remained in the United States, the stronger the cultural, familial, and economic ties to the country from which the family emigrated." *Id.*

Finally, the Seventh Circuit addressed an argument it acknowledged as the petitioner's "real (if never fully articulated) contention" concerning the due process concerns raised by the constructive removal of United States citizen children of parents who "are forced to leave." *Id.* at *5. The court recognized how the children of United States citizens "will not face the specter of being taken to a land they have never known" and quoted from a 1922 U.S. Supreme Court Chinese Exclusion Act case holding that "being effectively forced to leave the country may deprive a person of 'all that makes life worth living." *Id.* (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (internal quotation mark omitted). The court also recognized Congress' "expansive" authority over the removal of individuals who have unlawfully entered and that the constitution "does not require things which are different in fact ... to be treated in law as though they were the same." *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal quotation marks omitted)). Taking the foregoing into account and stressing the "legitimate and long-recognized Congressional policy of protecting the integrity of the family unit" and the provisions in the act, which allow aliens the chance to cancel removal if they have citizen relatives, the court did not find any constitutional violation. *Id.*

The court also dismissed the petitioner's assertion that his removal proceedings before the immigration judge did not conform to the constitutional due process requirements set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), by finding that cancellation of removal "is a discretionary form of relief, [and therefore] does not confer onto [the petitioner] a liberty or property interest." *Marin-Garcia*, 2011 WL 3130273, at *6 (quoting *Champion v. Holder*, 626 F.3d 952, 957 (7th Cir. 2010) (internal quotation marks omitted). The court also rejected the petitioner's contention that his removal would "unconstitutionally burden the voting rights of his daughters," by observing that the petitioner's daughters are free to return to the United States upon reaching voting age or voting through absentee ballots. *Id.*

Are You a "Fugitive" if DHS Knows Your Address?

The "fugitive disentitlement" doctrine has been employed by several circuit courts to dismiss petitions for review filed by aliens who have ignored notices from the Department of Homeland Security (DHS) to report for removal ("bag and baggage letters"). *See Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007); *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007); Edward R. Grant, *The "Fugitive Disentitlement Doctrine" and Other Limits on Circuit Court Review*, Immigration Law Advisor, Vol. 1, No. 3, at 4 (Mar. 2007). *But see Wenqin Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009) (stating that the doctrine was not applicable during a pending petition for review where the alien's whereabouts were known to the DHS, counsel, and the court).

The Second Circuit recently clarified its position in *Gao*, holding that the doctrine ought not apply where the petitioner, while the recipient of a bag-and-baggage letter, had also received two contemporaneous stays of removal from the court of appeals and had continued to reside at the address on file with the DHS. *Nen Di Wu v. Holder*, 646 F.3d 133 (2d Cir. 2011) (*Nen Di Wu II)*; *see also Nen Di Wu v. Holder*, 617 F.3d 97 (2d Cir. 2010) (*Nen Di Wu I)*.

The court concluded that none of the four interests underlying the doctrine supported its imposition against Wu. First, the DHS did not establish that any action by Wu, other than his failure to respond to two bag-and-baggage letters, would make it difficult to enforce the order. He lived at the same address, and only 14 months had passed from the issuance of those letters, in contrast to the 7 years that elapsed in *Gao*. Second, there was no "disdain" of an order of the Second Circuit—particularly since the court had granted two stays of removal while Wu's petition was pending. Wu was obligated to respond to the DHS notices; but the court held this to be defiance of "executive command" rather than a court order. Conflating the two, the court reasoned, "ultimately weakens rather than protects the court's unique dignity, which is, after all, the doctrine's focus." *Nen Di Wu II*, 646 F.3d at 137.

Third, the court concluded that application of the doc-

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trine to "simple immigration cases like this one" would not "promote the efficient operation of the courts by preserving judicial resources." *Id.* (quoting *Gao*, 481 F.3d at 177) (internal quotation marks omitted). The court's streamlined docket for resolving nonargument appeals already "minimizes the expenditure of judicial resources," and it is "unlikely that disposing of more of these cases via motions to dismiss would save any additional judicial resources." *Id.* Doing so might save Department of Justice resources by obviating the need for a brief, but the court already disposed of that claim in *Nen Di Wu I*, holding that a motion to dismiss on fugitive disentitlement should be decided only after full merits briefing of the case. *Nen Di Wu I*, 617 F.3d at 100. Interestingly, *Nen Di Wu I* suggested that the government reissue the "bag-and-baggage" letter and see if there was any response. The DHS did so, and there was none, nor an explanation for this failure. *Nen Di Wu II*, at 646 F.3d at 134-35.

Finally, the court concluded that Wu's fugitive status had not prejudiced the government's case. Because of the stays granted by the court of appeals, the government would still have been compelled to brief the merits even if Wu had responded to the notices. Wu's lack of response diminished the equities in his favor, but unlike the petitioner in *Gao*, he did not abuse the system by absconding for 7 years, then filing an untimely motion to reopen based on events occurring during his fugitive status. Gao's story, the court concluded, represents "an extreme situation and Wu's the more normal case." *Id.* at 138. The court thus declined in the exercise of discretion to dismiss the petition, but in a separate summary order, it denied the petition on the merits.

On facts somewhere between those in *Gao* and *Nen Di Wu II*, the Fifth Circuit concluded that the fugitive disentitlement doctrine *barred* its consideration of the alien's petition for review—departing considerably, it appears, from the Second Circuit's reasoning that this is a discretionary rule to be used sparingly. *Bright v. Holder*, No. 10-60300, 2011 WL 3435833 (5th Cir. Aug. 8, 2011). The petitioner, an aggravated felon, was found removable and his appeal to the board was dismissed in December 2008. He filed no petition for review and ignored a January 2009 bag-and-baggage letter, instead filing a motion to reopen in March 2009. The DHS argued successfully to the board that he did not merit a favorable exercise of discretion because of his failure to report; Bright unsuccessfully opposed this by claiming that he continued to live at the same address to which the notice was sent and made no attempt to evade authorities.

Citing *Gao*, but apparently unaware of the Second Circuit's clarification in *Nen Di Wu II*, the Fifth Circuit concluded that "[a]pplying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law." *Bright*, 2011 WL 3435833, at *2. Without explicitly addressing the Second Circuit's dichotomy between the "extreme" and "normal" case, *Bright* appears to adopt the view that any refusal to report to a DHS notice warrants imposition of the doctrine. The court cited the same factors underpinning the Second Circuit's analysis in *Nen Di Wu II*, also indicating that it understood the reach of its decision to include the "normal" bag-and-baggage" absconder.

The split in the circuits on fugitive disentitlement, therefore, appears to have deepened. No longer can *Gao* be described as a broad endorsement of the doctrine in immigration cases; meanwhile, the Fifth Circuit has at least implicitly rejected the limitations imposed by *Nen Di Wu II*.

Is the (Post-)Departure Bar About to Leave the Building?

We have previously chronicled the travails of the "departure bars" to motions to reopen set forth in 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1). *See* Edward R. Grant, *The Right To File a Motion To Reopen: An Intended Consequence of IIRIRA?*, Immigration Law Advisor, Vol. 4, No. 1, at 5 (Jan. 2010). The rout has continued over the past 18 months. *See Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (all invalidating the departure bar, at least in part); *see also* Edward R. Grant, *The 2010 Top Twenty: Few Easy Choices*, Immigration Law Advisor, Vol. 4, No. 10 at 1, 16 (Nov.-Dec. 2010). *But see Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010) (holding that the departure bar was properly invoked to deny sua sponte reopening of an untimely motion to reopen); *Toora v. Holder*, 603 F.3d 282, 288 (5th Cir. 2010) (finding that the departure bar to motions to reopen is mandatory and jurisdictional); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (finding the departure bar to be valid).

To the list must now be added the recent Third Circuit decision invalidating the "post-departure bar" and potentially the Tenth Circuit, which has granted rehearing en banc to a case decided in late 2010 that adhered to its prior upholding of the bar. *See Contreras-Bocanegra v. Holder*, 629 F.3d 1170 (10th Cir. 2010), *petition for reh'g en banc granted*, No. 10-9500, 2011 WL 3332469 (10th Cir. Aug. 2, 2011); *Prestol Espinal v. Att'y Gen. of U.S.*, No. 10-1473, 2011 WL 3314945 (3d Cir. Aug. 3, 2011).

Space does not permit a full discussion of the 2011 cases; suffice it to say that the cousins are starting to look more and more identical. As previously noted, the courts, following *Dada v. Mukasey*, 554 U.S. 1 (2008), hold that § 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-593, codified at §§ 240(c)(6) and (7) of the act, 8 U.S.C. § 1229a(c)(6) and (7), defines a "right" to file a motion to reopen that cannot be circumscribed by regulation. *See Prestol Espinal*, 2011 WL

3314945, at *3-6. The Third Circuit rejected the government's argument that the statutory provision is ambiguous, concluding that Congress left "no gap to fill" when it enacted the statutory right to file a motion and declined to include the language of the departure bar that had been added to the regulations months earlier. *Id.* at 7-8.

The Tenth Circuit not only set *Contreras-Bocanegra* for further oral argument, but it also posed four questions for the parties to address in supplemental briefing:

1. Could the attorney general's regulatory decision to limit the "jurisdiction" of the BIA through the post-departure bar (8 C.F.R. § 1003.2(d)) be characterized as a "categorical exercise of discretion"?
2. There appears to be some tension between [§ 212(a)(9)(A)'s] bar on admission of previously removed aliens and [§ 240(c)(6) & (7)'s] allowance for reopening or reconsideration in at least some circumstances. Could the post-departure bar be a reasonable regulatory response by the attorney general to this apparent ambiguity?
3. If a removed alien succeeds in a motion to reopen or reconsider, what relief can the BIA grant? How does the availability and nature of any possible relief from the BIA inform the reasonableness of 8 C.F.R. 1003.2(d)'s post-departure bar?
4. May a removed alien seek reconsideration or reopening directly from the attorney general? If so, does the ability to seek reconsideration or reopening from additional sources satisfy [§ 240(c)(6) and (7) of the act]?

Contreras-Bocanegra, 2011 WL 3332469, at *1. The questions posed here do not precisely tip the court's hand, but they do signal an interest in how, as a practical matter, post-departure cases would be handled should the court abandon *Rosillo-Puga*, 580 F.3d 1147. The court will no doubt take its best stab at answering these questions; eventually, however, a statutory and regulatory "fix" may be required to clarify the contours of the "right" to file a motion to reopen, even from abroad.

Persecution: Are There Standards Enough?

One of the most noteworthy cases of the summer was the Seventh Circuit's effort to establish more precise definitions for the elusive concept of "persecution." *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011), *as amended*, 2011 WL 2725850. The petitioners, ethnic Albanians from Macedonia, endured a nocturnal attack in their home by masked Macedonian nationalists (members of the paramilitary group called the "Lions") in July 2002. The pregnant wife was fondled and threatened with more severe sexual assault, and the husband was beaten on the head with the back of a gun, causing bruises and swelling. The wife's parents, living in the same house, were rendered unconscious by a chemical spray. Police informed the couple that they could not control the Lions, and the petitioners soon fled Macedonia and entered the United States illegally. They filed untimely for asylum, and their application for withholding of removal was denied by the immigration judge, who ruled, inter alia, that the single 10-minute assault did not rise to the level of persecution. The board affirmed, chiefly on the issue of persecution.

The Seventh Circuit likewise focused on this question and in rather severe language, found the guidance offered by decisions of both the board and its sister circuits to be wanting. "Nor can we find a useful definition [of persecution] in opinions by the board (no regulation addresses the issue either) or by the courts, although the importance of distinguishing between harassment and persecution has been noted. In terms of outcome the cases are all over the lot. Both sides of the present case are able to cite cases that support their position; we will spare the reader these citations, which cancel each other out." *Id.* at *3 (citations omitted).

The criticism is a bit curious; myriad legal questions can conjure authoritative citations seemingly coming to opposite conclusions. The question whether a particular "one-off" incident rises to the level of persecution is neither novel nor entirely without sound guidance. Nevertheless, the Seventh Circuit found the board's standard, articulated in *Matter of Acosta*, 19 I&N Dec. 211, 211 (BIA 1985), to be "vacuous," the decisions of the courts of appeals "to be of the 'I know it when I see it' variety," and the result, "well illustrated by the administrative opinions in this case," to be "capricious adjudication at both the administrative and judicial level." *Stanojkova*, 2011 WL 2725850, at *5.

In an attempt to create "minimum coherence" in the adjudication of persecution claims, *id.* at *5, the Seventh Circuit panel distinguished three forms of oppressive behavior "toward a group despised by the government or by powerful groups that the government can't or won't control." *Id.* at *4. First is unequal treatment, exemplified by India's caste system or Jim Crow laws in the U.S. Second is harassment, which involves specific targeting of the disfavored group for adverse treatment, but without the application of significant physical force—the court offers sexual harassment, even to the level of an unwanted hug, as an example. *Id.*

The third level—persecution—involves "the use of *significant* physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a person in a cell and starving him would be an example), or nonphysical harm of equal gravity—that last qualification is important because refusing to allow a person to practice his religion is a common form of persecution even though the only harm it causes is psychological." *Id.* A credible threat to cause grave physical harm may also constitute "persecution."

"The line between harassment and persecution," the court indicated, is that between "the nasty and the barbaric," or between "wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge." *Id.* The line was crossed in this case, the court concluded, by the severity of the

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attack and the lead petitioner's powerlessness against the Lions. "Why would anyone hang around in Macedonia after that if there was any way out?" *Id.*

To the extent the Seventh Circuit has broken new ground here, it is likely that the question of how much the subjective situation of a particular applicant—including, perhaps, the relative strength of the *subjective* prong of his fear of persecution—should be taken into account. The court's rhetorical question at the end of the last paragraph is more than that—it ties directly to its standard of distinguishing between individuals who merely *want* to leave their homeland, and those who feel *compelled* to do so. The court appears to be saying that the "persecution threshold" of a particular applicant must be taken into account; perhaps if the male petitioner had been an educated Albanian activist as opposed to an impecunious taxi driver, the answer to the rhetorical question, and the outcome of the case, may have been different. The concept is not entirely novel—courts have previously been solicitous to the claims of "vulnerable categories" of asylum applicants, including those who suffered persecution as children. *See Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007). But application of this standard to an adult who has suffered harm that resulted in no significant physical injury is less precedented.

Whether other circuits will agree with the Seventh's accusation of "capricious adjudication" remains to be seen. Meanwhile, two other recent decisions, from the First and Eighth Circuits, reached contrasting conclusions on fact patterns involving more pervasive patterns of harm than that present in *Stanojkova Lopez-Amador v. Holder*, Nos. 10-2376, 10-3491, 2011 WL 3557854 (8th Cir. Aug. 15, 2011); *Precetaj v. Holder*, No. 10-1109, 2011 WL 3505540 (1st Cir. Aug. 11, 2011).

Precetaj held that a partisan of the Albanian Democratic Party suffered harm rising to the level of persecution based on a series of incidents, stretching from 1991 to 2002, that included being badly beaten in 1993, a threat of retribution in 1997, a car fire in 1998, and the kidnapping of his children in 1998. The children fled to the United States independently and were granted asylum. After this, he was beaten in 2001 and threatened (by an envelope with two bullets) in 2002.

The First Circuit had no difficulty discerning the applicable standards, which it has articulated in a line of published decisions. "'Persecution' ... entails something more than the casual or occasional mistreatment that is common in many countries." *Precetaj*, 2011 WL 3505540, at *3 (citing *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000) (stating that a person's "experience must rise above unpleasantness, harassment, and even basic suffering"), and *Topalli v. Gonzales*, 417 F.3d 128, 133 (1st Cir. 2005) (stating that a finding of persecution depends on the "severity, duration, and frequency of physical abuse")). Based on these precedents, it easily concluded that the immigration judge and the board gave no "persuasive explanation" for why the decade-long pattern of threats and violence did not constitute persecution or was not on account of his support for the political opposition and his ability, as a court officer, to reveal information about abuses he encountered through his work. *Id.* But its analysis poses a striking contrast to that of the Seventh Circuit:

> True, [the petitioner] was never jailed, none of the violence sent him to a hospital, and if this were all we could not casually reject the agency judgment. The case would fall within that gray area of sporadic and limited abuse which is the lot of many persons around the world but is not the exceptional and sustained violence or other forms of persecution that compel the agency to grant asylum.
>
> But the systematic and serious abuse of the children adds another dimension. Two kidnaping[s], three beatings, and an aggravated rape of his children—specifically designed to send a message to [the petitioner]—were clearly part of the persecution of him ... .
>
> If there is a reason for discounting or ignoring these incidents, it is not explained in either decision. And if they are taken into account, it is not apparent why the sum total of the abuse directed against [the petitioner] would not qualify as persecution.

Precetaj, 2011 WL 3505540, at *3-4.

The court also criticized as too cursory the board's alternate analysis, which assumed past persecution but determined that the change in country conditions (election of the Democratic Party and reduction in political violence) rebutted any presumption of future persecution. Acknowledging that this rationale was "more powerful," *id.* at *4, the court concluded that the board nevertheless gave insufficient consideration to local conditions (where the Socialist Party still holds power). Also, the board failed to adequately address the option of "humanitarian asylum" based on the severity of the past attacks. *Id.* at *5.

Lopez-Amador, 2011 WL 3557854, involved a claim of past persecution based on three sets of incidents: sniper fire at an anti-Hugo Chavez rally in 2002; 10 stops at police checkpoints; and the impact of government policies on business that led the petitioner to quit her job. The petitioner also claimed harassment, including from police, on account of her sexual orientation. The court upheld the board's determination that these incidents, individually or cumulatively, did not rise to the level of persecution. The sniper fire, the court agreed, was not specifically directed at the petitioner, and there was no evidence that the police knew that she, personally, was in the crowd of thousands, some of whom were felled by the attack. "[T]he record only shows that Ms. Lopez was caught in the same situ-

ation as thousands of members of the public who simply happened to be present in the streets of Caracas at that moment regardless of their political affiliation." *Id.* at *4. The court also rejected the claim that the petitioner was singled out at the vehicle checkpoints; the record indicated that other vehicles were also stopped and their occupants questioned. Finally, the verbal harassment did not constitute persecution, and her claim of economic harm was speculative since she was not forced to resign her position, but she chose to do so when she left the country.

Of the three cases discussed here, *Lopez* is perhaps the least consequential. However, it illustrates, as does *Precetaj*, that the standards for resolving the question of "persecution" are perhaps not so "vacuous" after all. Lopez, no less than the Stanojkova family, may have felt that there was no point to remaining in purportedly democratic Venezuela, where she had endured shooting by government snipers, been stopped at no less than 10 checkpoints, endured sneers and harassment for being lesbian, and faced (by her standards) uncertain economic prospects. Perhaps her claim fell on the safe side of the line between the "nasty and the barbaric, or perhaps she had resources to resist the *Chavezistas* that the Stanojkova family lacked in resisting the Lions. The Eighth Circuit resolved the case using more traditional analytical tools—much as did the First Circuit in *Precetaj*, albeit with a different result clearly grounded in the severity and particularity of the harm in question.

Ninth Circuit Rewrites the Playbook on Key Criminal Law Questions

Our final discussion is a "teaser"—space does not permit analysis that would do justice to the Ninth Circuit's two recent en banc decisions overruling, respectively, its precedents on application of the Federal First Offender Act ("FFOA") to expungements of state drug crimes, *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), *overruling Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and *Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009), and on whether the modified categorical approach can be applied when the crime of conviction is missing an element of the generic crime altogether, *United States v. Aguila-Montes de Oca*, No. 05-50170, 2011 WL 3506442 (9th Cir. Aug. 11, 2011)(en banc), *overruling Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007 (en banc).

Nunez-Reyes is the more accessible of the two decisions: the court's majority (with two dissenters) surveyed the landscape and found that neither the board nor any other circuit (a total of eight had weighed in on the subject) agreed with the holding of *Lujan-Armendariz* that a state drug conviction that had been expunged for rehabilitative purposes (such as successful completion of probation and no further offenses) did not constitute a controlled substance offense under the Immigration and Nationality Act. The reasoning in *Lujan-Armendariz*—that since the FFOA permitted expungement of analogous federal convictions, expunged state convictions also should not be grounds for deportation—always had a strained quality. *See Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002). The *Nunez-Reyes* majority agreed, now rejecting the equal protection analysis that gave life to *Lujan-Armendariz*. Significantly, the Ninth Circuit had not extended *Lujan-Armendariz* to other types of expunged convictions—it applied only to cases where the FFOA might apply by analogy. *See de Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007); *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004); *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002).

Significantly—very much so for immigration judges who will have to sort through the complexities—the Ninth Circuit made its ruling prospective, applying only to aliens who are *convicted* of drug offenses after the date of the decision—Aug. 11, 2011. The reasons, to be discussed in full at a later date, revolve around two principles: that of settled law, which *Lujan-Armendariz* was for more than a decade, and the reliance interest that an alien may have in pleading guilty to an offense, knowing that the possibility of expungement (and thus, no adverse immigration consequences) awaits. *Nunez-Reyes*, 2011 WL 2714159, at *4-7. In a touch of irony, the petitioner, despite having an "old" expunged conviction, still lost his case: the court concluded that since his crime was one of being under the influence of a controlled substance, and not possession, it is "qualitatively different" from any crime covered by the FFOA. *Id.* at *8.

For analysis of *Aguila-Montes de Oca*, 2011 WL 3506442, we largely borrow from a synopsis penned by Board Member John Guendelsberger:

> At issue was a perennial, and difficult, question: whether California's residential burglary statute qualified as a "burglary of a dwelling" for sentencing enhancement purposes. Section 459 of the California Penal Code punishes "[e]very person who enters [various structures] ... with intent to commit grand or petty larceny or any felony," but it lacks an element of the offense of generic burglary, namely, that the entry must have been "unlawful or unprivileged." Because the California statute covers a wider range of offenses than generic burglary, the court applied the modified categorical approach and ultimately determined, in a 7-3 split, that the record of conviction did not establish that Aguila's conviction had been based on the type of "unlawful or unprivileged" entry required for generic burglary. Therefore, the court found that the conviction could not be used to enhance his sentence.
>
> The threshold question, however, was whether the Immigration Judge and the Board, or the court of appeals, could even reach the modified categorical approach. Here, the court departed from and overruled *Navarro-Lopez*, explaining that a statute of conviction may be "categorically broader" than a generic offense such as burglary in a number

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of ways. To illustrate, the court hypothesized a generic Federal offense of aggravated assault that has two elements: (1) harmful contact and (2) use of a gun. The court identified several ways in which a State assault offense may be categorically broader than the generic assault offense. First, a State statute might require (1) harmful contact and (2) use of a gun or an axe. Second, a State statute might require (1) harmful contact and (2) use of a weapon without spelling out a list of possible weapons. Third, a statute may only require harmful contact without specifying the use of any kind of weapon at all. *Aguila-Montes de Oca*, 2011 WL 3506442, at *10.

After reviewing the *Taylor/Shepard* line of cases and relevant circuit law, *Aguila* found that there is "no way to draw a principled distinction between a statute that contains a list of elements that includes more than what the generic statute requires, and a statute that is missing the elemental phrase altogether." *Id.* at *9. The court concluded that all three of the assault statutes described above permit resort to the modified categorical approach to determine whether the record of conviction indicates that the trier of fact was necessarily required to find use of a gun in reaching its verdict. *Id.* at *10. The court cautioned that "[a]lthough we have concluded that a missing-element statute can be examined under the modified categorical approach, a court must exercise caution in determining what facts a conviction 'necessarily rested' on. It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant." *Id.* at *18.

Turning to application of the modified categorical approach, the court first found that although section 459 does not, on its face, require that entry be "unlawful or unprivileged," California burglary law contains a "nuanced definition" of "unlawful or unprivileged" entry that is broader than the common law definition. *Id.* at 23. Under California law, an entry is considered "unlawful or unprivileged" if a defendant enters a structure open to the public with the intent to commit a felony (e.g., shoplifting) or enters a home as an invitee with intent to commit theft. *Id.* at *24-25. For generic burglary, the record of conviction would have to show entry into a structure without the owner's permission or without a license or privilege. *Id.*

The felony complaint charged that Aguila "did willfully and unlawfully enter an inhabited dwelling house ... with the intent to commit larceny and any felony." In his guilty plea Aguila admitted the factual allegations as charged. Ultimately, the court found that this record of conviction was insufficient to demonstrate conviction for generic burglary because it did not establish that Aguila entered the structure without the owner's consent. *Id.* at *26.

The majority ruling to overthrow *Navarro-Lopez* garnered the minimum six votes; five judges, led by Judge Berzon, concurred in the judgment and concluded that *Taylor v. United States*, 495 U.S. 575 (1990), mandates retention of the "missing element" bar to application of the modified categorical approach. *Id.* at *27-34. Judge Rawlinson, joined by 3 others, agreed with the reversal of *Navarro-Lopez* but not the conclusion that Aguila was not convicted of a generic burglary offense. "[T]he majority's approach to the modified categorical analysis opens the floodgates to 'nuanced' interpretations of various state defenses untethered from the basic elements of the generic crime, particularly as courts sift through state case law in search of aspects that may differ from the Model Penal Code hypotheticals." *Id.* at *57. He concludes that the majority essentially imports *Navarro-Lopez*'s rejected missing element rule into the modified categorical analysis and, in so doing, ignores the modified categorical approach, as articulated in *Taylor*, and "thwarts the intent of Congress that burglary be included as a predicate offense." *Id.* at *61.

Out of this, then, only two judges—Bybee and Rymer—fully subscribed to the twin rulings overturning *Navarro-Lopez* but finding that Aguila's conviction was not for a generic burglary offense. For that reason alone, *Aguila* cannot be the last word on this subject. Whether one's view is from Brooklyn Heights or Pacific Heights (or the heights of Falls Church), the task of applying the modified categorical approach remains treacherous. ◆

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When, how, and whether a person can become a citizen of a country is extremely significant, especially in the age of technology. The subject of citizenship is rich with possibility. Some people have access to citizenship of multiple countries, while others are stateless. Citizenship is treated frequently as an immigration issue, but it is far more, going to questions of allegiance, government, and civic responsibility.

KEYNOTE SPEAKER:

Robert Guest, Business Editor for *The Economist* and author of *Borderless Economics: Chinese Sea Turtles, Indian Fridges and the New Fruits of Global Capitalism*, a book which recounts travels through dozens of countries and 44 American states, observing how migration makes the world brainier.

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Immigration Win

Castañeda-Castillo v. Holder (Castañeda V)

Hon. William P. Joyce, section board member and retired immigration judge, won an 18-year-old case after five trips to the U.S. Court of Appeals for the First Circuit. The court stated:

"Before this court is a motion for final judgment filed by Petitioners David Eduardo Castañeda-Castillo ("Castañeda"), his wife, and his daughter. We grant this motion over the government's objection. With this judgment, this court brings to an end a case that has been pending for over eighteen years. … On February 6, 2012, the IJ granted asylum to Castañeda and his family. The government has not appealed this decision, and it is now administratively final. However, the government presents us with one more wrinkle: it claims that we lack the authority to issue a final judgment. We reject this argument. When we remanded this case to the BIA in Castañeda IV, we explicitly retained jurisdiction for the express purpose of ensuring a speedy resolution to this case. 638 F.3d at 363-64. The appropriate course for this court, therefore, is to issue a final judgment closing the case. Given that all factual and legal issues relating to Petitioners' eligibility for asylum have now been resolved in their favor by the administrative agency, the petition for review over which we retained jurisdiction in Castañeda IV is hereby dismissed as moot, and the Clerk of Court is directed to issue final judgment. In reaching this disposition, we take no position on the deadline for filing, or potential merit of, an application for attorneys' fees under the Equal Access to Justice Act. It is so ordered."

Castañeda-Castillo v. Holder (Castañeda V), Apr. 12, 2012. ◆

The Green Card

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