

## PRECEDENT DECISIONS OF THE BOARD OF IMMIGRATION APPEALS IN FISCAL YEAR 2008

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In its published decisions in fiscal year (FY) 2008, the Board of Immigration Appeals (BIA or Board) published 36 precedents. This article summarizes these published decisions (Interim Decisions 3586 through 3623), which covered a broad range of legal and procedural issues that come before the BIA and the Immigration Judges. Three precedents issued by the Attorney General are also discussed.

Of particular note this year, the Board issued precedent decisions explaining its standard of review. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008) and *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008). The Attorney General issued a landmark decision regarding claims based upon China's coercive population control (CPC) policies. *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), and the Board also addressed successive asylum applications in the context of CPC claims. The BIA addressed social group claims based on gang recruitment and affiliation in two companion cases, *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). The Board discussed recidivist drug possession crimes in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), and *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007). Other cases touched on a number of criminal grounds of removal and inadmissibility, adjustment of status, bond, and derivative citizenship.

### ASYLUM

The Board worked through claims based on the "particular social group" ground for asylum set forth in 101(a)(42) of the Immigration and Nationality Act (Act) in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). The first case presented the social group of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal moral and religious opposition to the gang's values and activities or family members of the above group. The respondents were a sister and two brothers from El Salvador. The respondents testified that MS-13 controlled their neighborhood and they all received threats, the youngest was beaten and money was stolen. A child in their neighborhood was killed for refusing to join the gang. An expert witness testified at the hearing about gangs in El Salvador.

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The Board found that the social group presented fails for lack of particularity and social visibility, referring to the Board's 2007 decision in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007). Turning to particularity first, the Board found that the proposed group does not meet the essence of particularity, which is whether the group can be accurately described in a manner sufficiently distinct that the group would be recognized in the society in question as a discrete class of persons. The respondent further defined the group, but the characteristics, male children without stable families and adult protection in middle to low income classes, is still amorphous because different people in the society might define those terms differently. Further, the evidence does not show that gang recruitment is limited to children with these characteristics. The other proposed group, family members, is likewise too amorphous as it could include any number of relationships. The Board added that the social visibility requirement must be considered within the context of the particular country. Here, there is little background evidence to indicate that Salvadoran youth who are recruited but refuse to join would be perceived as a group, or that they suffer from a higher incidence of crime than the rest of the population. The Board also considered whether a refusal to join is a political opinion, and found that under *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), the respondent failed to show a political motive in resisting gang recruitment or that the gang has imputed a political opinion to him.

In *Matter of E-A-G-*, *supra*, the social group was presented as persons resistant to gang membership or young persons who are perceived to be affiliated with gangs. The respondent was an Honduran male. He testified that two of his brothers were members of MS-13 and were killed, one by a rival gang, the other by MS-13 because he became a Christian and tried to leave the gang. Police reports and investigations did not lead to anything being done. The respondent's mother received oral and written threats although the respondent did not.

The Board found again that the first proposed social group lacks social visibility for reasons similar to *Matter of S-E-G-*, above. The Board noted that the focus of analysis is on the existence and visibility of the group in the society in question, the importance of the pertinent group characteristic to the members of the group, and that the persecution is on account of the group's identifying characteristics. The second group, persons perceived to be affiliated with gangs, is less clear-cut. While gang membership entails some social visibility, the Board rejected the social group for reasons discussed in *Arteaga v. Mukasey*, 511 F.3d 940 (9<sup>th</sup> Cir. 2007), that treating affiliation with a criminal organization as being a protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior. While the respondent has not been a member of a gang, the claim nevertheless fails because membership in a gang cannot form a basis for a particular social group.

Next year may see further development in the social group field given that the Attorney General lifted a stay imposed on the BIA by Attorneys General Ashcroft and Reno in the long-running case of *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008). In 1999, the Board issued a decision denying a claim for asylum filed by an alien who had been the victim of domestic violence in Guatemala. *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999; A.G. 2001). The respondent had asserted that she was persecuted based on a social group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under

male domination.” Attorney General Reno vacated the Board’s decision and directed the Board on remand to stay consideration of the case pending publication of a final rule which would have amended the asylum regulations pertaining to the meaning of the terms “persecution”, “on account of”, and “particular social group.” Attorney General Ashcroft certified the case, but then remanded it directing the Board to reconsider its decision in light of the final rule. *Matter of R-A-*, 23 I&N Dec. 694 (A.G. 2005). The final rule has never been published. In lifting the stay, the Attorney General indicated that in the years since the stay order, the Board and courts of appeals have issued numerous decisions that, while not directly on point, may have relevance to issues relating to domestic violence. The Attorney General indicated that the Board may proceed with reconsideration of *Matter of R-A-* and the other cases involving similarly situated aliens being held by the Board. Lastly, the Attorney General noted that the Board is free to exercise its own discretion and issue a precedent decision establishing a uniform standard nationwide when interpreting ambiguous statutory language.

The Board issued its final decision in a series begun in FY 2007 regarding claims to refugee status based on the People’s Republic of China’s coercive population control (CPC) policies as defined in section 101(a)(42) of the Act. In *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), the Board held that an alien who is subject to a final order of removal is barred by both statute and regulation from filing an untimely motion to reopen removal proceedings to submit a successive asylum application based on changed personal circumstances. The alien, a native and citizen of China who sought to file a new asylum application based on the birth of his third child almost two years after the entry of a final administrative removal order, had argued that section 208(a)(2)(D) of the Act, standing alone, is a basis for filing an additional asylum application, regardless of the time and number restrictions. The Board found that by the plain terms of the statute and regulations, it is not permitted to consider a “successive” asylum application after a final administrative order of removal that is not based upon changed country conditions. Section 208(a)(2)(D) does not apply to a situation where an alien has already been ordered removed. The Board reasoned that to hold 208(a)(2)(D) as an independent basis for filing an asylum application would render the provisions in section 240(c)(7)(C)(ii) of the Act superfluous. The interim regulations make clear that the statutory bars exempted by section 208(a)(2)(D) are separate from and apply principally at an earlier stage in proceedings than the 90-day reopening provisions.

The Attorney General had the last word on these claims, however, in a landmark decision. In *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), the Attorney General found that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is not per se entitled to refugee status under section 101(a)(42) of the Act, overruling *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). The Attorney General started with the words of the provision, finding that the ordinary or natural meaning of section 101(a)(42)’s reference to involuntary sterilization and abortion refers only to persons who have themselves undergone forced sterilization or abortion. The Attorney General found further support for this reading in that the Act separately provided for derivative asylum claims of spouses and in the provision requiring each alien to establish his or her own eligibility. See sections 208(b)(1)(B)(i) and (3)(A) of the Act. See also *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2<sup>d</sup> Cir. 2007) (en banc).

In addressing the Board's argument put forth in *Matter of S-L-L* that section 101(a)(42) does not expressly exclude spouses and is therefore ambiguous, the Attorney General noted that the circuits that have adopted the Board's view have done so with the understanding that the Board's interpretation must be accorded deference if the Board's interpretation was not unambiguously foreclosed by the statutory text. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). The Attorney General is not so limited. The Attorney General was not influenced by the long-standing nature of the policy and that courts have deferred to the Board's interpretation. *See, e.g., Chen Lin-Jian v. Gonzales*, 489 F.3d 182 (4<sup>th</sup> Cir. 2007); *Junshao Zhang v. Gonzales*, 434 F.3d 993 (7<sup>th</sup> Cir. 2006); *Wang He v. Ashcroft*, 328 F.3d 593 (9<sup>th</sup> Cir. 2003). The Attorney General also rejected the Board's reasoning in *Matter of S-L-L* that the nexus and level of harm is assumed in all cases where the asylum seeker is married to a person who was forced to undergo an abortion due to the history of the provision. This, the Board had reasoned, was due to the concept of a family entity. The Attorney General found that this reasoning was flawed as some spouses may not oppose coercive population control policies and there will rarely be evidence regarding this issue. Furthermore, unless Immigration Judges presume that the Chinese Government is aware of a family dispute over submitting to the procedure, it is difficult to understand the Board's conclusion that the Chinese Government's use of such procedures should be understood to punish the couple only in those cases where there is joint opposition. The Attorney General concluded with a discussion of policy arguments based on legislative history raised by the respondent and amici, ultimately finding that none were persuasive. The Attorney General vacated the Board's and the Immigration Judge's decision and remanded the case for consideration of whether the respondent resisted China's CPC program, suffered or has a well-founded fear that he will suffer persecution, and can show that such persecution is on account of his resistance to the CPC program.

The Board found that a mother and daughter from Somalia who suffered female genital mutilation (FGM) are eligible for a grant of asylum based on humanitarian grounds pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A), in *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008). The Immigration Judge denied asylum on credibility grounds, and specifically to the FGM claim, also found that the respondents did not have a well-founded fear of future persecution. Without specifically addressing the credibility finding, the Board found that the medical evidence was sufficient to support a finding that the respondents suffered an atrocious form of persecution which resulted in continuing pain and discomfort.

The Attorney General again stepped in, this time in the FGM context. In *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008), the Attorney General certified and then vacated the Board's decision issued last year denying respondent's claim for withholding of removal, and remanded the claim for further proceedings. The respondent sought asylum and withholding of removal based upon her claim that she had been subjected to FGM in Mali. In a published decision, *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007), the Board rejected the respondent's asylum claim as barred by the one-year filing deadline. As to the withholding claim, the Board assumed that the respondent was a member of a social group and that FGM can constitute persecution, but found that any presumption of future persecution was rebutted by the change in the respondent's situation arising from the infliction of FGM upon her.

The Attorney General found that the Board committed error in finding that FGM can only occur once, and that any future harm must take precisely the same form as past persecution. The Attorney General observed that as a factual matter, FGM can be repeated. Furthermore, the presumption that attaches after past persecution is found is that an alien's life or freedom would be threatened "on the basis of the original claim," which means that it is on account of the same statutory ground. 8 C.F.R. § 1208.16(b)(1)(i). In this case, the original claim was not FGM, but persecution on account of membership in a particular social group. The Attorney General directed the Board to consider whether the respondent is entitled to the presumption of future persecution on account of membership in a particular social group, whether the government has rebutted the presumption, and what effect, if any, the relatedness provision in 8 C.F.R. § 1208.16(b)(1)(iii) has on the respondent's claim for relief.

In *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008), the Board granted asylum to the respondent, a Christian and ethnic Chin from Burma. The respondent had previously been found barred from asylum because she had provided material support to a terrorist organization, the Chin National Front (CNF). *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). The Attorney General certified the case and then remanded the record to the Board due to the Secretary of Homeland Security's decision to exercise his authority to determine that the material support bar did not apply to an alien who provided material support to the CNF. *See* section 212(d)(3)(B)(i) of the Act; *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007). Subsequent to this decision, the President signed legislation that expanded the discretionary authority of the Secretary of Homeland Security to determine the applicability of section 212(d)(3)(B)(i), and also provided that certain groups, including the CNF, will not be considered to be terrorist organizations. Section 691(b) of the Consolidated Appropriations Act of 2008, 121 Stat. at 2365. The respondent is not therefore ineligible for asylum. The Board further clarified that its first decision in *Matter of S-K-*, which set forth the parameters for addressing the material support bar to asylum and withholding of removal, still applies to determinations involving the applicability and interpretation of the material support provisions except for those groups specifically listed in section 691(b).

In *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), the Board found that in order for an offense to be considered a particularly serious crime and therefore rendering an alien ineligible for asylum or withholding of removal pursuant to section 241(b)(3)(B)(ii) of the Act, the offense need not be an aggravated felony under section 101(a)(43) of the Act. In this case, the respondent had a June 2005 Colorado conviction for felony menacing for which the respondent received four years deferred judgment and four years probation. The Immigration Judge found that the respondent established past persecution and a clear probability of future persecution, but that the crime was a particularly serious crime. The Board affirmed, finding that throughout the statutory changes to the withholding provision, Congress has never confined the concept of particularly serious crimes to the aggravated felony categories. The Board disagreed with precedent from the Third Circuit Court of Appeals holding to the contrary. *See Alaka v. Attorney General*, 456 F.3d 88 (3d Cir. 2006). Once the elements of an offense are found to potentially be a serious crime, Board precedent indicates that an Immigration Judge can look beyond the traditional record of conviction and consider all reliable information in making the determination. In this case, the Board looked at the elements of the

offense to find that the crime is a particularly serious crime, noting that the alien was required to register as a sex offender, and considered the Statement in Support of Warrantless Arrest.

Finally, the Board found that when evaluating an application for asylum, an Immigration Judge must make a specific finding as to past persecution, and then apply the burden of proof and presumptions specified in 8 C.F.R. § 1208.13(b) in *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008). The Immigration Judge found that the respondent, a Kenyan native and citizen, had demonstrated past persecution, but denied the respondent's application for asylum because he found that the respondent could safely relocate to another part of Kenya. The Board adopted the Immigration Judge's past persecution finding, but found that the Immigration Judge did not explicitly apply the presumption and failed to shift the burden of proof to the DHS to prove by a preponderance of the evidence that the respondent can avoid future persecution by relocating to another part of Kenya, and that it would be reasonable for him to do so.

#### DISCRETIONARY RELIEF - Adjustment of Status

In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) and *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007), the Board considered whether adjustment of status under section 245(i) of the Act is available to an alien inadmissible under two grounds of inadmissibility relating to unlawful presence: section 212(a)(9)(C)(i)(I) (alien who departs the United States after accruing an aggregate period of unlawful presence of more than one year and reenters without being admitted) and section 212(a)(9)(B)(i)(II) (alien unlawfully present in the United States for a period of one year and then seeking admission within 10 years). The Board held that it is not.

The respondents argued in both cases that there is a contradiction in 245(i) in that entry without inspection is both a qualifying and disqualifying condition for adjustment of status. An INS General Counsel Memorandum in 1997 addressed this conflict, stating that section 245(i)(1)(A) of the Act falls within the prefatory language of section 212(a), which states "except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible...to be admitted to the United States." The respondents argued that sections 212(a)(9)(C)(i)(I) and (B)(i)(II) also fall within this savings clause particularly as inadmissibility under these sections arise from the circumstance that section 245(i) was intended to forgive, that is, unlawful presence. The Board found that 245(i) remains available to aliens inadmissible under section 212(a)(6)(C)(i) because a contrary interpretation would render 245(i) superfluous, but 212(a)(9)(C)(i) and (B)(i)(II) address a much smaller subsection of aliens who entered without inspection, and apply to recidivists. To include sections would be to make aliens eligible who were not eligible before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA). Congress specifically provided for waivers of section 212(a)(9)(C) in other analogous contexts. Further, the prefatory language denotes an explicit proviso or stipulation which is not present in this case. Lastly, these inadmissibility grounds were specifically enacted to compound the consequences of immigration violations.

In *Matter of Lemus*, the Board also found that an alien is inadmissible under section 212(a)(9)(B)(i)(II) even if the alien's departure was not made pursuant to an order of removal and

was not a voluntary departure in lieu of being subject to removal proceedings or at the conclusion of removal proceedings.

#### DISCRETIONARY RELIEF - Cancellation of Removal

In the only decision in FY 2008 regarding cancellation of removal, the Board found that a parent's period of residence in the United States cannot be imputed to a child for purposes of calculating the seven years of continuous residence required to establish eligibility for cancellation of removal under section 240A(a)(2) of the Act. *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008). While the U.S. Court of Appeals for the Ninth Circuit reached a contrary conclusion in *Matter of Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9<sup>th</sup> Cir. 2005), the Board found that it is bound by the reasoning set forth in its recent decision in *Matter of Escobar*, 24 I&N 231 (BIA 2007), citing to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). In *Matter of Escobar*, the Board found that a parent's lawful permanent resident status could not be imputed to a child under section 240A(a)(1) of the Act, but the Board also provided a full explanation for not imputing the lawful admission of a parent to a child who was later admitted as a lawful permanent resident.

While not directly relating to cancellation of removal, the question of good moral character arose in the context of a cancellation claim in *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008). The Board found that an alien who made a false claim to citizenship on a Form I-9 (Employment Eligibility Verification) to obtain employment may be a person who is not of good moral character, but such a finding is not automatically mandated by section 101(f) of the Act. The Immigration Judge noted the changes made to the good moral character provision that prevented certain aliens who made a false claim to citizenship but reasonably believed themselves to be United States citizens from being found lacking in good moral character. The Immigration Judge reasoned that an alien who did not fall within this exception could not show good moral character under the catch-all provision. The Board rejected this reason and sustained the respondent's appeal.

#### DISCRETIONARY RELIEF - Waivers

A waiver under section 212(h) was the subject of *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007). In this case, the Board considered whether an alien with a State conviction for possession of marijuana, less than two ounces, in a drug free zone was eligible for a 212(h) waiver. This required resolution of whether the fact of the location of the offense, which was a sentence enhancement, is treated as an element of the underlying offense which would take it out of the 212(h) simple possession exception. The Board first held that any fact, including one contained in a sentence enhancement, that serves to increase the maximum penalty for a crime and that is required by the law of the convicting jurisdiction to be found beyond a reasonable doubt by a jury, if not admitted by the defendant, is to be treated as an element of the underlying offense. The Board found that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt), required the Board to reach this conclusion and superseded its prior precedent, *Matter of*

*Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992). The Board cautioned that not all sentencing factors, if not admitted, are required to be found beyond a reasonable doubt (such as enhancements under the United States Sentencing Guidelines), and in those cases, *Matter of Rodriguez-Cortes* still controls. In this case, the “drug free zone” factor under Texas law requires a jury finding beyond a reasonable doubt if not admitted by respondent. Therefore, the enhancement is treated as an element of the offense, and the respondent is not eligible for a waiver.

The Board also addressed section 212(h) waivers in *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008). The Board found that the respondent’s 13 months as an applicant for adjustment of status or applicant for asylum does not count toward establishing that he has “lawfully resided” in the United States continuously for seven years before the initiation of removal proceedings for a 212(h) waiver. The respondent was admitted to the United States as a B-2 nonimmigrant in June 1995. Prior to expiration of that status, he filed an asylum application with the Department of Homeland Security (DHS). In May 1996, DHS denied the application and issued an order to show cause. During proceedings, the respondent filed for adjustment of status based on an immediate relative petition. The petition was approved, proceedings were terminated in May 1997, and respondent adjusted in August 1997. In May 2002, the respondent was convicted of criminal possession of a forged instrument. In November 2002, upon return from a trip abroad, he was placed in proceedings, and he filed for a 212(h) waiver of the removal charge.

The Board first found that the phrase “lawfully resided” is ambiguous as it could encompass a wide range of possible constructions. Because of the breadth of possible issues, the Board limited its holding to the facts before it. The Board found that the phrase connotes more than simple presence, and is not something that can be achieved through self-action, although an alien need not be in “status.” The Board found some support in legislative history through reference to section 240A(a) of the Act, which includes admission in *any status*. The Board rejected the respondent’s argument that the phrase would allow lawful residence to arise from any legal impediment to removal because such residence is not lawful and could encompass the vast majority of aliens entitled to a removal hearing. Lawful residence requires authorization. The respondent argued that the phrase should be the equivalent of being “not unlawfully present” as in section 212(a)(9) of the Act, but the Board concluded that tolling or exempting a category from added sanctions for staying in the country does not transform presence into lawful residence. The Board drew a distinction between permitting an alien’s presence in the country for a limited purpose and legalizing his or her stay.

In *Matter of Singh*, 24 I&N Dec. 331 (BIA 2007), the Board considered the period in which circumstances may be considered for an extreme hardship waiver under section 216(c)(4) of the Act. The U.S. Court of Appeals for the Second Circuit had remanded the case to consider the statute’s implementing regulation which provided that when considering whether extreme hardship would result from an alien’s removal, the district director shall take into account only those factors that arose subsequent to the alien’s entry as a conditional permanent resident. 8 C.F.R. § 216.5(e)(1). The statute provides for consideration of circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis. The Board applied canons of statutory construction to harmonize the two, finding that since the regulation and statute were

consistent on the start date, but the regulations were silent on an end date, the Board could look to the statute. The evidence presented by the respondent pertained to a time period outside of the relevant period and did not support his motion to reopen for a hearing on the waiver application. In any event, the Board concluded that the respondent's motion did not meet the regulatory requirements for a motion to reopen, and the motion should be denied in the exercise of discretion.

#### CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY - Aggravated Felony

The Board addressed the important issue of whether and when a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony drug trafficking crime under section 101(a)(43)(B) of the Act in a pair of cases, *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), and *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007). In *Matter of Carachuri-Rosendo*, the respondent, a lawful permanent resident, had a 2004 Texas conviction for possession of marihuana, and a 2005 Texas conviction for possession of a controlled substance. Both were misdemeanors, and the second conviction contained no reference to the first. The majority first found that decisional authority from the Supreme Court and the controlling Federal circuit court of appeals is determinative. The Board reasoned that its interpretation of criminal law is not entitled to deference. In this case, the precedent from the Fifth Circuit, which predated the Supreme Court's decision in *Lopez v. Gonzalez*, 127 S.Ct. 625 (2006), is controlling, thus the respondent's second conviction is an aggravated felony. The Board noted that six other circuits have issued precedents on this issue (7th, 1st, 6th, 9th, 2d, 3d).

The Board then addressed circuits where there is no controlling authority, and found that a State conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism unless the alien's status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for that simple possession offense. The Board noted that interpretation of recidivist possession is ambiguous because it is not a discrete offense under Federal law, and is not defined in relation to elements. In *Lopez v. Gonzalez*, the Supreme Court's concern was that section 101(a)(43)(B) should be applied to actual drug trafficking, and that a State offense can be an aggravated felony drug trafficking crime only if it proscribes conduct punishable as a felony under Federal law. In light of this, the Board stated that the State offense should correspond in some meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism. Federal recidivist felony treatment hinges not simply on potential punishment; it requires the actual invocation by a Federal prosecutor of the recidivist enhancement features of Federal law. The Board found that State recidivism prosecutions must correspond to the Federal law's treatment by providing the defendant with notice and opportunity to be heard on whether recidivist punishment is proper.

*Matter of Thomas, supra*, arose in the Eleventh Circuit, a circuit without controlling authority on the issue. In this case, the respondent had a 2002 cocaine possession conviction and a 2003 marijuana possession conviction. The respondent first argued that the 2002 conviction was not a valid prior conviction for a recidivist conviction, because it was expunged for rehabilitative purposes. The Board found that, while the Eleventh Circuit has no precedent on point, every other

circuit to decide the issue has found that an expunged conviction remains a valid prior conviction for Federal recidivism provisions. In any event, the Board held that because the record does not reflect that the 2003 conviction arose from a State proceeding in which the respondent's status as a recidivist drug offender was admitted or determined by a judge or jury, the 2003 conviction is not an aggravated felony. The respondent remains deportable, but is not ineligible for cancellation of removal.

The Board returned again to the aggravated felony drug trafficking definition in *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008). The Board found that a State misdemeanor offense of conspiracy to distribute marijuana is an aggravated felony under section 101(a)(43)(B) of the Act where its elements correspond to the elements of the Federal offense of conspiracy to distribute an indeterminate quantity of marijuana under 21 U.S.C. §§ 841(a)(1) and (b)(1)(D). The respondent was convicted in January 2007 of conspiracy to distribute a controlled dangerous substance (marijuana) in violation of Maryland law. The respondent argued that his marijuana distribution conviction is not a federal felony because the Controlled Substances Act (CSA) includes an offense, 21 U.S.C. § 841(b)(4), that treats an offender who distributes a small amount of marijuana for no remuneration as though he committed simple possession, and the conviction record does not indicate whether there was remuneration one way or the other. The Board explained that under the categorical approach as described in *Lopez v. Gonzales, supra*, “a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony.” *Id.* at 631. The elements are those facts that must be proven beyond a reasonable doubt, and mitigating factors that decrease the penalty do not need to be proven beyond a reasonable doubt. Therefore, the respondent's state offense must correspond not to the federal offense which carries the lowest penalty, but rather to the offense which may be proven to a jury upon the fewest facts. 21 U.S.C. § 841(b)(1)(D) (felony distribution) is the baseline provision because it states a complete crime upon the fewest facts. Section 841(b)(4) defines a mitigating exception to the 5-year statutory maximum. Further, the respondent bears the burden of proving the additional facts - the smaller amount for no remuneration which, in this case, he did not do.

The aggravated felony fraud and theft grounds were the subject of *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). In that case, the Board considered whether the respondent's welfare fraud conviction is a “theft offense.” The respondent argued that the portion of the law under which she was convicted, “by fraudulent device obtains...public assistance...to which he or she is not entitled” is not a theft offense, but is a separate aggravated felony - an offense that involves fraud or deceit under section 101(a)(43)(M)(i). Section 40-6-15 of the General Laws of Rhode Island. The Board agreed, and clarified its holding in *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000), which defined a theft offense as the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. The Board relied on *Soliman v. Gonzales*, 419 F.3d 276 (4<sup>th</sup> Cir. 2005), which found that fraud is a separate and distinct offense, that the two offenses are meant to be treated differently. *Soliman* defined fraud as the taking or acquisition of property with consent that has been unlawfully obtained. The critical distinction is consent, and the Board refined the definition of theft in *Matter of V-Z-S-* to specify that the “taking” of property must be “without consent.” As the respondent was charged with an

aggravated felony theft offense, and the Rhode Island statute does not include these elements, the Board terminated proceedings.

The Board returned to the theft offense aggravated felony definition in *Matter of S-I-K*, 24 I&N Dec. 324 (BIA 2007), when the Board considered whether an alien convicted of conspiracy was properly found to have been convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act. The respondent was convicted, in 2004, of conspiracy and mail fraud in violation of 18 U.S.C. §§ 371 and 1341. In finding that the alien was convicted of an aggravated felony, the Board first noted that to give life to the conspiracy provision, Congress must have meant that an offense may be an aggravated felony even if it was not consummated. The proper analysis in a conspiracy case is whether the substantive crime that was the object of the conspiracy would have fit within the particular aggravated felony category had it been successfully completed. When determining conspiracies under section 101(a)(43)(M)(i), the DHS need not prove actual loss, it must prove potential loss of more than \$10,000. In this case, the alien's plea agreement stipulated, and the alien admitted, that the foreseeable loss was between \$70,000 and \$120,000. Finally, the Board found the respondent did not establish eligibility for withholding of removal, and he cannot acquire status under section 209(a) of the Act, because he had previously acquired permanent residence status.

#### CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY - Other

The Board considered the term "crime of child abuse" under section 237(a)(2)(E)(i) of the Act in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). At issue was whether the respondent's 2001 Washington State conviction for assault in the fourth degree constituted a removable offense of child abuse. The Immigration Judge found that it was. The Board defined the term based upon a survey of Federal statutes defining child abuse, and extrapolated the following definition: "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." This definition is not limited to offenses committed by a parent or someone in loco parentis. The Board found, however, that the crime must be established categorically, and the inquiry is confined to the elements of the offense. In this case the assault statute did not have as an element that the victim was a child. Assuming the statute is divisible, the evidence relied upon by the Immigration Judge, the restitution order and no contact order, did not establish that the alien was convicted of abusing a child because neither need be proven by clear and convincing evidence. While the respondent originally plead to a charge that identified his victim as a child, the State prosecutor removed all traces of the victim's juvenile status from the amended information and then interposed the expurgated, back-dated charge into the conviction record. The Board sustained the appeal and terminated proceedings.

Addressing another criminal ground of inadmissibility, the Board found that a single act of soliciting a prostitute on one's own behalf does not constitute "procur[ing] prostitutes" under section 212(a)(2)(D)(ii) of the Act. *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008). The respondent was convicted on August 21, 2002, of disorderly conduct relating to prostitution in violation of 647(b) of the California Penal Code. The Board found that the term "procure" in the context of prostitution has a specific meaning, i.e. to obtain a prostitute for another. Under the most

reasonable interpretation of the statute, and placed in historical context, “procure” does not extend to solicitation. The Board then reasoned that even if section 212(a)(2)(D)(ii) reaches soliciting, the respondent’s conviction falls outside the statute. In *Kepilino v. Gonzales*, 454 F.3d 1057 (9<sup>th</sup> Cir. 2006), the Ninth Circuit observed a State Department regulation which included a definition of prostitution. That regulation defines prostitution to be a pattern of behavior or deliberate course of conduct limited to sexual acts. 22 C.F.R. § 40.24(b). Like the California statute in this case, the statute at issue in *Kepilino* was broader than this definition, criminalizing isolated acts not necessarily involving sexual intercourse. Further, the record of conviction in this case includes no factual details about the offense to indicate that the respondent was engaged in anything more than isolated acts. The Board remanded the case.

The Board considered whether costs and assessments imposed following a plea in a criminal proceeding constitute “punishment” such that an alien has suffered a “conviction” within the meaning of section 101(a)(48)(A) of the Act in *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). The respondent pled nolo contendere on February 26, 2007, to possession of a controlled substance in violation of Florida law. Adjudication of guilt was stayed and withheld, the sentence was suspended, and costs were assessed against him. The Immigration Judge found that costs are not a form of punishment, penalty or restraint. In sustaining the DHS’s appeal, the Board found that the State of Florida characterizes costs and fines as punishment, as have a majority of Federal courts. Courts have distinguished between civil monetary penalties and costs, surcharges and fines imposed in the criminal context. The Board noted that by way of analogy, restitution is a form of punishment rather than simply a civil penalty. The Board found that the respondent had suffered a conviction within the meaning of section 101(a)(48)(A), reinstated proceedings and remanded the record to the Immigration Judge.

Also on the subject of what is a conviction for immigration purposes, the Board found that a general court-martial qualifies as a “conviction” under section 101(a)(48)(A) of the Act in *Matter of Valencia*, 24 I&N Dec. 484 (BIA 2008). The respondent was convicted by a general court martial of carnal knowledge in violation of Article 120(b) of the Uniform Code of Military Justice. The Board first found that a courts-martial meets the definition of a conviction. Recognizing that some differences exist between civilian courts and general courts-martial, the Board has nevertheless considered judgments entered by courts-martial to be valid convictions for immigration purposes. The Supreme Court has long held that courts-martial judgments are accorded the finality of civil judgments, so in, for instance computing sentencing enhancements, courts-martial sentences are considered. The Board found that *Gubbels v. Hoy*, 261 F.2d 952 (9<sup>th</sup> Cir. 1958), which held that an alien’s conviction by a French criminal court while serving in the United States army could not serve as a basis for deportation, was distinguishable because this is not a Ninth Circuit case, 101(a)(48)(A) was not yet in existence, and the primary support for the decision, the inability of the court to make a judicial recommendation against deportation, has been eliminated. The respondent also argued that he was not informed of his consular notification rights during the criminal proceedings. The Board found this to be irrelevant to the term “conviction.” Moreover, even if there was a violation, it would not invalidate or vitiate his conviction for criminal purposes, and Immigration Judges cannot entertain collateral challenges absent evidence the conviction is void on its face. Finding the respondent removable as charged, the Board dismissed the appeal.

Lastly, in *Matter of Gonzalez-Muro*, 24 I&N Dec. 472 (BIA 2008), the Board found that a denaturalized alien who committed crimes while a lawful permanent resident and concealed them during the naturalization application process is removable on the basis of those crimes, even though the alien was a naturalized citizen at the time of the conviction. The Board distinguished the Supreme Court case of *Costello v. INS*, 376 U.S. 120 (1964) because *Costello* was predicated on former section 241(b) of the Act relating to judicial recommendations against deportation. In this case, the respondent could not have obtained a valid judicial recommendation against deportation at the time he was convicted. The respondent was a lawful permanent resident at the time he committed some of his crimes and was therefore removable then, and he lied under oath about committing crimes, which means he should have known that his citizenship was obtained through fraud, and his fraudulently obtained status would not protect him. Lastly, he entered into a settlement agreement with the United States in which he agreed that he would not rely on his fraudulently obtained naturalization to claim a right or privilege.

## BOND

The Board addressed mandatory detention and the Post Transition Period Custody Rules (TPCR) of section 303(b)(2) of IIRIRA in *Matter of Saysana*, 24 I&N Dec. 609 (BIA 2008). The question was whether the respondent's 2005 arrest for failure to register as a sex offender, a charge which was subsequently dismissed, was a "release" from non-DHS custodial setting when that arrest was not the basis for detention under section 236(c)(1)(A)-(D) of the Act and did not result in a conviction. The respondent also had a 1990 conviction for indecent assault and battery for which he received a five year prison term. The Immigration Judge had found that the 2005 arrest was a regulatory offense that did not lead to a conviction, and it was therefore not criminal custody that occurred after the expiration of the TPCR. In reversing the Immigration Judge, the Board found that the "released after" provision was intended solely to respond to practical concerns about the ability of the government to detain all aliens falling within a covered category and contains no substantive restrictions. The Board has interpreted that the release be from a non-DHS custodial setting, but it need not be from criminal custody pursuant to a conviction for a crime rendering an alien removable. The Board reasoned that the statute does not suggest that Congress intended to further limit the non-DHS custodial setting and indeed an alien need not be convicted of any offense to be removable and subject to mandatory detention. Congress was presumably aware that aliens may commit multiple offenses and come into custody in different ways, and Congress clearly indicated that it wants criminal and terrorist aliens to be detained during the pendency of their proceedings.

## PROCEDURAL

The Board issued a number of decisions regarding Immigration Judge decisions. In *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008), the Board held that if an Immigration Judge grants withholding of removal under section 241(b)(3) of the Act, the decision must contain an order of removal. This applies when asylum has not been granted. The Board reasoned that this construction is consistent with the regulatory scheme and is suggested by the title of the statute, "Detention and Removal of Aliens Ordered Removed." Furthermore, without a removal order, the DHS has no authority to remove the alien to another country, which is permitted under the Act. In the case

before the Board, the aliens were granted withholding of removal to Indonesia, but because the Immigration Judge did not enter a removal order, the proceedings are unresolved and incomplete. The case was remanded for entry of a removal order.

The Board provided guidance regarding Immigration Judge oral decisions that include attachments in *Matter of Kelly*, 24 I&N Dec. 446 (BIA 2008). The Board indicated that particular care should be used to insure a complete record.

The Board addressed its standard of review in two cases. In *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008), an Immigration Judge granted asylum, finding that the respondent had not demonstrated past persecution, but had met his burden to prove a well founded fear of future persecution by the military in Guatemala. The Board agreed that there was no past persecution, but reversed the Immigration Judge's finding of a well founded fear. The U.S. Court of Appeals for the Ninth Circuit granted the government's unopposed motion to remand for the Board to explain its statement that the issue of whether the alien met his burden of proof to show a "well-founded" fear of persecution was a question of law warranting a *de novo* review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii). The Board, considering the guidance provided in the Supplementary Information to the procedural reform regulations promulgated in 2002 at 67 Fed. Reg. 54,878 (Aug. 26, 2002), explained that it should defer to the factual findings of an Immigration Judge, unless clearly erroneous, but retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. The decision also explains that to determine whether established facts are sufficient to meet a legal standard, such as a "well-founded fear," the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record.

In *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), an Immigration Judge granted deferral of removal to the respondent, a Ukrainian, based on Jewish nationality. The Board reversed the grant of deferral, finding no clear probability of future persecution. The U.S. Court of Appeals for the Third Circuit granted the government's unopposed motion to remand for clarification of whether the Board had authority to reverse the Immigration Judge's finding. The Board found it had *de novo* review authority over an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured upon return to his native country, because the question relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met. The Board also clarified that while it reviews an Immigration Judge's factual rulings for clear error, a prediction of the probability of future torture, although it may be derived in part from "facts," is not the sort of determination limited by the clearly erroneous standard. The Board noted that the fact that the Immigration Judge's prediction derived from his acceptance of an expert witness's testimony does not affect its nature as a prediction relating to whether an ultimate legal standard has been met.

## CITIZENSHIP

The Board considered three cases addressing citizenship provisions. In the first, the Board in *Matter of Baires*, 24 I&N Dec. 467 (BIA 2008), considered whether, in order for a child to derive automatic citizenship under former § 321(a), 8 U.S.C. § 1432(a), as a result of her parent's naturalization and following a divorce, the child must have been in the naturalizing parent's legal custody on the date of naturalization or only prior to age 18. The respondent's parents divorced when the respondent was 2 years old. Her father became a United States citizen when she was 12. When she was almost 14 her mother executed an affidavit relinquishing custody, and she was admitted to the United States as an immigrant shortly thereafter. The Board found that the respondent must show that she was in the legal custody of her father before she reached the age of 18 years, but she need not show that she was in his legal custody on the date he naturalized. This interpretation is supported by Board precedent, and is the policy of the State Department and the United States Citizenship and Immigration Service. The Board remanded the case for further factfinding on whether the respondent was in her father's custody prior to reaching her 18<sup>th</sup> birthday.

In *Matter of Hines*, 24 I&N Dec. 554 (BIA 2008), the Board considered whether the respondent derived United States citizenship through his mother's naturalization by virtue of his status as a child born out of wedlock in Jamaica whose paternity has not been established by legitimation under Jamaican law. The Board found that under Jamaican law, the sole means of legitimation of a child born out of wedlock is the marriage of the child's natural parents, overruling the Board's precedent in *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981). The respondent was born out of wedlock in Jamaica on October 5, 1980, and his biological parents never married each other. In 1988 respondent was admitted on a second preference visa filed by his mother, who was a lawful permanent resident at the time. In 1991, his mother naturalized, at which time respondent was residing in her custody. In reaching its decision, the Board took note that the Jamaican Status of Children Act of 1976 eliminated all legal distinctions between legitimate and illegitimate children and provided a way for fathers to acknowledge paternity, but section 2 of the Jamaican Legitimation Act remains in effect and continues to provide that the only way to legitimate a child is by the marriage of his or her parents. This determination is consistent with the Board's decision in *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006) in the context of Guyanese law. The Board agreed with the Immigration Judge that the respondent derived citizenship.

Lastly, the Board found that in order to obtain derivative citizenship under former section 321(a) of the Act, an alien must acquire the status of an alien lawfully admitted for permanent residence while he or she is under the age of 18 years. *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). In this case, the respondent entered the United States at the age of 4 as the child of an F-1 nonimmigrant student. His father and mother naturalized when the respondent was 17, but he did not become a lawful permanent resident until he was 21. The Immigration Judge had found that the respondent demonstrated that he resided permanently in the United States while under 18 years, and the respondent need not have been residing pursuant to a lawful admission for permanent residence. Construing the term "residing permanently" in section 321(a)(5), the Board found that the term implies lawful residence since an alien remaining without authorization can be removed at any time. Similarly, an alien admitted for a temporary period cannot be considered to reside permanently in this country. This is bolstered by the parallel language in the definition of "lawfully admitted for

permanent residence,” historical treatment of derivative citizenship claims, and the fact that to read it otherwise would negate the first clause in section 321(a)(5).

## VISA PETITIONS

In a visa petition case, the Board held that section 101(b)(1)(E)(ii) of the Act does not require that an unmarried child aged 16 or 17 be adopted with or after a younger sibling in order to be considered a child. *Matter of Anifowoshe*, 24 I&N Dec. 442 (BIA 2008). The Petitioner adopted the beneficiary on May 1, 2002, when the beneficiary was 17. On May 29, 2003, the petitioner adopted the beneficiary’s natural siblings, who were then under 16 years of age. The DHS director denied the petition, finding that section 101(b)(1)(E)(ii) required that an adopted child who is under the age of 18 may be considered a child if the child is adopted with or after a natural sibling who is also considered a child under the Act, but not before. The Board found that the plain language of 101(b)(1)(E)(ii) does not require siblings to be adopted in any particular order. A 1999 memorandum from the former Immigration and Naturalization Service construing the provision is not binding on the Board. Furthermore, while the title of the public law adding section 101(b)(1)(E)(ii) supports the DHS’s interpretation, the title cannot limit the plain meaning of the text. The purpose of the public law was to preserve family unity, a purpose that is not frustrated by this interpretation.

The Board addressed the requirements for establishing the dissolution of a customary tribal marriage in Ghana in *Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008), also a visa petition case. In *Matter of Kumah*, 19 I&N Dec. 290 (BIA 1985), the Board held that pursuant to the Foreign Affairs Manual, the essential element of proof of a customary divorce is a court order. In this case, DHS submitted evidence from the Library of Congress indicating that *Matter of Kumah* has been superseded by amendments to statutory Ghanaian divorce law. These amendments allow for heads of families, i.e. fathers of the husband and wife, to declare the divorce final following the customary tribal divorce proceeding. Based on this evidence, the Board found that *Matter of Kumah* is modified such that affidavits may be sufficient to prove the dissolution of a customary tribal marriage in Ghana provided they meet certain evidentiary requirements detailed in the decision.

## RECOGNITION AND ACCREDITATION

The Board addressed recognition and accreditation standards in two decisions, *Matter of EAC, Inc.*, 24 I&N Dec. 556 (BIA 2008), and *Matter of EAC, Inc.*, 24 I&N Dec. 563 (BIA 2008). Specifically, the Board discussed the requirement that the organization have at its disposal knowledge, information, and experience in immigration law and procedure. Previously the Board had required access to a library, but access to adequate information may now be shown via electronic or internet access to immigration legal resources. An organization must show that it has either a licensed attorney on staff, offering pro bono services, or providing consultation, or an accredited representative or partially accredited representative with access to additional services. The Board does not require an organization that offers a limited range of immigration services to have a staff with a full range of experience, but the organization should be able to recognize when to seek other assistance. The Board approved the application for recognition of EAC, Inc. which

demonstrated access to immigration source books and the internet, an arrangement with a licensed, experienced immigration attorney, and submitted the resumes of its legal consultant and nonattorney employee with substantial training in immigration law. The Board also approved the request for partial accreditation of EAC, Inc.'s nonattorney employee. The Board noted that all accredited representatives must have a broad knowledge of immigration law, even if they only provide limited services, so that the accredited representative is able to identify immigration issues outside the services provided and refer an alien elsewhere where necessary. EAC, Inc. submitted recommendations and a resume showing the employee's many years of experience providing naturalization and citizenship services and completion of 10 training sessions in various aspects of immigration law.