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crImmigration Case Law: June 2009 to August 2009

by

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crImmigration Case Law is distributed by the Law Offices of Raúl García & Associates (www.raulgarcialaw.com), a full-service immigration law firm with offices in Austin and McAllen, Texas. We assist clients with visa petitions, deportation cases, and any other immigration issues. Our attorneys regularly appear in Immigration Courts and have appealed many cases to the Board of Immigration Appeals. Through our Immigration Law Research Service (www.immigrationlawresearch.com) we also assist other attorneys in preparing well-researched briefs to help them help their clients. The attorneys at the Law Offices of Raúl García & Associates are available in Austin at (512) 828-7956 or in McAllen at (956) 630-3889 or by email at attorney@raulgarcialaw.com.

crImmigration Case Law consists of articles posted at crImmigration.com, our law firm's blog. crImmigration.com provides regular updates on the latest developments in the convergence of criminal law and immigration law.

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Table of Contents

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9th Cir.: Parent's Status and Residence Can Be Imputed Upon Child for Purposes of Cancellation of Removal

A panel of the 9th Circuit that included Judge Kim Wardlaw (one of the judges who reportedly received serious consideration to replace Justice Souter on the Supreme Court) recently held that a parent's status as a lawful permanent resident and continous presence may be imputed by a child for purposes of satisfying the eligibility requirements of Cancellation of Removal under INA 240A(a)(1). *See Escobar v. Holder*, No. 07-72843, (9th Cir. May 27, 2009).

The 9th Circuit reiterated and extended its holding in *Cuevas-Gaspar v. Gonzales* that an individual could satisfy the seven year continous presence requirement by imputing his mother's continous presence. *See Escobar*, slip op. at 6192 (citing *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005)).

In *Escobar*, the 9th Circuit faced a situation where the non-citizen was brought to the United States in the mid-1980s by her mother at approximately 5 years of age. Her mother became an LPR in 1992, but she did not become an LPR until 2003. *See Escobar*, slip op. at 6192. Just over 3 years later she was caught trying to enter the United States with an undocumented child. *See Escobar*, slip op. at 6192.

The IJ found that, under *Cuevas-Gaspar*, Escobar could impute her mother's continous presence, thus satisfying the seven year continous presence requirement. However, the IJ also found that Escobar could not impute her mother's LPR status, thus Escobar could not satisfy the five year LPR requirement. In a published decision, *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), the BIA not only affirmed the IJ— it went so far as to disagree with *Cuevas-Gaspar* entirely. *See Escobar*, slip op. at 6193.

The 9th Circuit was not pleased. After devoting several pages to the family unification policy underlying imputation and the history of imputation of a parent's status upon a child, the Court held that "the holding, reasoning, and logic of *Cuevas-Gaspar* apply equally to the resident status requirements of both section 240A(a)(1) and 240A(a)(2), and thus imputation of the custodial parent's status to the minor is compelled." *See Escobar*, slip op. at 6201. Accordingly, we hold that, for purposes of satisfying the five years of lawful permanent residence required under INA section 240A(a)(1), 8 U.S.C. § 1229b(a)(1), a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Escobar*, slip op. at 6209.

The Court then explained that it was not bound by the BIA's precedential decision in *Matter of Escobar* because the BIA in that decision adopted the same interpretation of INA § 240A(a) that the 9th Circuit found unreasonable in *Cuevas-Gaspar*. *See Escobar*, slip op. at 6201.

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AG Holder reverses Mukasey's decision regarding ineffective assistance of counsel in immigration proceedings

In a widely praised decision by the immigration bar, Attorney General Holder vacated former Attorney General Mukasey's decision in *Matter of Compean* in which Mukasey held that there was no constitutional right to effective assistance of counsel in removal proceedings. *Matter of Compean*, 25 I&N Dec. 1 (A.G. June 3, 2009). Mukasey's lengthy decision is now vacated in its entirety. The BIA and IJs "should apply the pre-*Compean* standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed." *Matter of Compean*, 25 I&N Dec. at 3.

In addition, AG Holder also held that the BIA does have discretion to reopen removal proceedings based on claims of ineffective assistance of counsel. *See Matter of Compean*, 25 I&N Dec. at 3. However, Holder left it to the BIA to articulate the proper standard for such claims. *See Matter of Compean*, 25 I&N Dec. at 3.

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5th Cir.: Second state misdemeanor conviction for possession is aggravated felony (still)

The 5th Circuit Court of Appeals last week affirmed its prior holding that a second or subsequent conviction for possession of a controlled substance constitutes an aggravated felony. *See Carachuri-Rosendo v. Holder*, No. 07-61006 (5th Cir. May 29, 2009). This case came to the 5th Circuit after the BIA issued a precedential decision in Carachuri-Rosendo's case in which the BIA concluded that it was precluded by the 5th Circuit's decision in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005). *See Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007).

In *Matter of Carachuri-Rosendo*, the BIA held that, unless circuit precedent holds otherwise, a second or subsequent possession conviction does not constitute an aggravated felony on the basis of recidivist drug offender status unless the non-citizen's recidivist status was admitted by the non-citizen at a plea hearing or determined by a judge or jury during the course of a criminal prosecution. Though the BIA's rule applied in most federal circuits, it noted that it's holding was precluded by controlling precedent in the 2nd, 5th, and 7th circuits. Since then the 2nd Circuit announced that it agrees with the BIA's decision in *Matter of Carachuri-Rosendo*. *See Alsol v. Mukasey*, 548 F.3d 207 (2nd Cir. 2008). The 2nd Circuit's decision in *Alsol* left only the 5th and 7th circuits as the jurisdictions where a second possession conviction constitutes an aggravated felony regardless of proof that the non-citizen was prosecuted under a state recidivist statute. (For more on the current circuit split, see *Carachuri-Rosendo*, No. 07-61006, slip op. at 7 n.5.)

In its decision released last week, the 5th Circuit first reviewed its holding in *Sanchez-Villalobos* and a later case, *United States v. Cepeda-Rios*, 550 F.3d 333 (5th Cir. 2008), that affirmed *Sanchez-Villalobos* in light of the Supreme Court's decision in *Lopez v. Gonzalez*, 549 U.S. 47 (2006). The 5th Circuit concluded that "*Lopez* is 'consistent with our earlier 'hypothetical' approach in *Sanchez-Villalobos*,' and determined that a second state possession offense that could have been punished as a felony under federal law qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) [INA § 101(a)(43)(B)]." *Carachuri-Rosendo*, No. 07-61006, slip op. at 5 (quoting *Cepeda-Rios*, 550 F.3d at 335-45). As before, the 5th Circuit concluded that a second state possession conviction constitutes an aggravated felony if it *could have been* prosecuted as a felony recidivist offense even if it was not.

The 5th Circuit then rejected Carachuri-Rosendo's argument that allowing the IJ to look at prior convictions violates the 5th Circuit's emphasis on the categorical approach to statutory analysis. According to the 5th Circuit,

> "We are not confined to the categorical approach in cases like Carachuri's because the Supreme Court in *Lopez* goes beyond the categorical approach. Lopez did not hold that courts or immigration officials should look to the alien's actual conduct as reflected in the record of conviction. But courts must look beyond the text of the state statute violated—a departure from the categorical approach, which confines courts to that text." *Carachuri-Rosendo*, No. 07-61006, slip op. at 6 (internal citations omitted).

This is unquestionably a bad case for non-citizens facing removal in the 5th Circuit. The only positive aspect is that it basically maintains the status quo. Immigration attorneys in the 5th Circuit

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have long had to contend with this interpretation of the recidivist offense aggravated felony. Given the drastic circuit split, though, the Supreme Court might have to become involved.

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5th Cir.: IJ can't deny continuance based solely on length of delay in approving I-130

The 5th Circuit adopted the BIA's recent holding in *Matter of Hashmi* that an IJ may not deny a continuance solely because it is likely to take a long time to approve a petition. *Wu v. Holder*, No. 08-60073, slip op. (5th Cir. June 11, 2009); *see Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). The 5th Circuit concluded that the IJ abused his discretion by denying the non-citizen's motion for a third continuance pending the adjudication of his wife's I-130 visa petition. *Wu*, No. 08-60073, slip op. at 1, 4.

The Court first reviewed the BIA's decision in *Matter of García* in which the Board

> "determined that 'discretion should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen.'" *Wu*, No. 08-60073, slip op. at 1-2 (quoting *Matter of García,* 16 I&N Dec. 653, 657 (BIA 1978)).

The 5th Circuit noted with approval that "[s]everal circuits have ruled that, based on *Garcia*, an IJ abuses his or her discretion by denying a motion to continue solely based on concerns of timing when a nonfrivolous prima facie approvable I-130 petition is pending." *Wu*, No. 08-60073, slip op. at 2 (citing *Hashmi v. Attorney Gen.*, 531 F.3d 256, 260 (3d Cir. 2008); *Hassan v. INS*, 110 F.3d 490, 492 (7th Cir. 1997); *Bull v. INS*, 790 F.2d 869, 872 (11th Cir. 1986); *Del Rosario v. Mukasey*, 295 F. App'x 180, 181 (9th Cir. 2008); *Pedreros v. Keisler*, 503 F.3d 162, 165 (2d Cir. 2007)).

Accordingly, the Court held "that the IJ abused his discretion by denying Wu's motion for continuance solely based on the length of the delay in obtaining approval of his wife's I-130 application." *Wu*, No. 08-60073, slip op. at 4.

The Court then explained with approval the BIA's 5-part analysis in *Matter of Hashmi* that "the IJ should evaluate" when considering a motion for a continuance based on a pending I-130. *Wu*, No. 08-60073, slip op. at 3-4.

> "The BIA stated that the IJ should evaluate the following five factors: (1) the DHS's position on the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors." *Wu*, No. 08-60073, slip op. at 3-4 (quoting *Matter of Hashmi*, 24 I&N Dec. at 785).

Since the IJ in Wu's case did not use *Hashmi*'s five-step process, the 5th Circuit remanded the case to the BIA with instructions to remand the case back to IJ for a consideration of the *Hashmi* factors. *Wu*, No. 08-60073, slip op. at 4.

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6th Circuit: Pending appeal isn't automatically withdrawn when DHS forcibly removes a person from USA before BIA issues a decision

In a recent published decision, the Sixth Circuit Court of Appeals held that an appeal that is pending before the BIA is not automatically withdrawn when DHS deports the non-citizen before the BIA issues a decision on the appeal. *Madrigal v. Holder*, No. 08-3132, slip op. (6th Cir. July 9, 2009). This case tested the application of 8 C.F.R. § 1003.4, which provides:

> "Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken."

The non-citizen in Madrigal was ordered removed in absentia, then filed a motion to reopen proceedings. *Id.* at 2. That motion to reopen was denied by the IJ. The non-citizen timely appealed to the BIA. *Id.* While her appeal was pending she received a notice from DHS ordering her to leave the USA by September 10, 2007. On August 24, 2007 she filed with the BIA a motion to expedite and a motion to stay removal pending disposition of her appeal. *Id.* "Before the Board ruled on either motion, the Department of Homeland Security executed the outstanding removal order, and she was deported to Mexico." *Id.* In January 2008, the BIA, pursuant to 8 C.F.R. § 1003.4, "held that the petitioner's appeal of the immigration judge's decision denying her motion to reopen had been automatically withdrawn" at the moment that she departed the USA. *Madrigal*, slip op. at 3. As a result, the BIA dismissed the appeal and the IJ's order became final. *Id.*

After dismissing the government's arguments that it lacked jurisdiction because a final order of removal had not been entered and because the non-citizen had not exhausted her administrative remedies prior to withdrawing her appeal, the Sixth Circuit addressed the BIA's withdrawal order. *Id.* at 6. The Court acknowledged that, on its face, § 1003.4 "does not distinguish between volitional and non-volitional departures." *Id.* at 6-7. Nonetheless, the Sixth Circuit was guided by a Fifth Circuit decision, *Long v. Gonzales*, in which the Fifth Circuit "recognized that 'waiver is an intentional relinquishment or abandonment of a known right or privilege' applicable to the operation of the [§ 1003.4] withdrawal provision." *Long v. Gonzales*, 420 F.3d 516, 520 (5th Cir. 2005); *see Madrigal*, slip op. at 7. As the Sixth Circuit explained,

> "drawing on the Fifth Circuit's waiver analysis, we are persuaded that the withdrawal provision should not be applied in this case. Unlike the cases in which the petitioner either deliberately or inadvertently left the United States, it cannot be said that Madrigal relinquished or abandoned the right to appeal by virtue of her own conduct. Instead, her departure was forced by the government during the pendency of her appeal and, hence, she did not take any action, either purposeful or unwitting, that can be construed as a waiver of her right to contest the immigration judge's decision." *Id.* at 8.

In addition, "principles of fundamental fairness would be violated were we to find, in every case, that

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section 1003.4 is applicable to pending administrative appeals following the departure of removable aliens regardless of the circumstances of their removal." *Id.* As such, the Sixth Circuit held that § 1003.4 was not applicable in this case. *Id.*

Trying to slow DHS's rush to deport our clients, even when an appeal is pending, is a constant struggle for many immigration attorneys. This decision of the Sixth Circuit is a promising outcome that hopefully will be followed by other circuits.

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10th Circuit: Burden on respondent to request correction of transcript errors

In a decision released last week, the Tenth Circuit considered a respondent's claim that the poor quality of the transcript of his removal proceedings constituted a violation of his due process rights. *Witjaksono v. Holder*, No. 08-9540, slip op. (10th Cir. July 17, 2009). The transcript in this case was 57 pages long and included almost 200 instances in which the proceedings were described as "indiscernible." *Witjaksono*, slip op. at 2. Though the Tenth Circuit took as "well settled that an alien in an immigration proceeding is entitled to a reasonably complete and accurate record to facilitate appellate review" and that the transcript here was "not reasonably completely and accurate," it nonetheless found against the respondent because he did not show that he was prejudiced by the poor transcript. *Witjaksono*, slip op. at 3.

The Tenth Circuit started its due process analysis by recognizing that "[a]n elementary component of due process is the right to meaningful appellate review" and that "[t]his right necessarily means one is entitled to a reasonably complete and accurate transcript, or an adequate substitute." *Witjaksono*, slip op. at 8. The Court also noted that responsibility for providing complete and accurate transcripts rests, by statute and regulation, on the government. *Witjaksono*, slip op. at 9; *see* 8 U.S.C. § 1229a(b)(4)(C); 8 C.F.R. § 1240.9.

Nonetheless, violation of this statutory and regulatory requirement is not enough to mandate reversal or remand. *Witjaksono*, slip op. at 10. "Rather, to demonstrate a denial of due process and obtain relief, an alien must show that the deficient transcript prejudiced his ability to perfect an appeal." *Witjaksono*, slip op. at 10.

The Tenth Circuit then explained certain instances where prejudice could not be shown:

> "An alien may not show prejudice if the information omitted from a transcript is immaterial, nor may a petitioner demonstrate prejudice if the omissions in the record, assuming they were corrected in the manner proposed by the petitioner, would not alter the outcome of the proceedings. Neither may a petitioner meet the required showing of prejudice when the gaps in the transcript could reasonably be recreated but the alien fails to do so." *Witjaksono*, slip op. at 11 (internal citations omitted).

The Court then explained that a respondent who wishes to contest the validity of removal proceedings based on the quality of the transcript must utilize the BIA's transcript correction process. *Witjaksono*, slip op. at 11-12. According to the Tenth Circuit, "Under these rules and practices, an alien should immediately file with the BIA Clerk's Office a 'Request for Correction of Transcript,' alerting the Board to the defect." *Witjaksono*, slip op. at 12 (citing BIA Practice Manual, ch. 4.2(f)(iii), at 51).

> "If the missing portions of a transcript can be reasonably recreated, the affidavit should attest to the missing testimony. When it would be unreasonable to expect the alien to recreate the missing portions of a transcript—if, for example, the omissions are from the testimony of a third-party witness—the alien should explain that it is impractical to do

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> so. In the latter situation, the alien should also file a motion to remand the case for further factfinding." *Witjaksono*, slip op. at 12.

Because Witjaksono's due process claim rested on "missing material in his own testimony and he did not attempt to recreate it," the Tenth Circuit denied his claim. *Witjaksono*, slip op. at 13-14.

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6th Circuit: Michigan resisting and obstructing a police officer is not a crime of violence

In a decision released today, the Sixth Circuit held that a state conviction for violation of Michigan's resisting and obstructing a police officer statute, Mich. Comp. Laws § 750.81d(1), is not a crime of violence. *United States v. Mosley*, No. 08-1783, slip op. (July 23, 2009).

This case arose in the criminal sentencing context, but the crime of violence definition is worded almost identically to the COV definition used for purposes of the aggravated felony definition. The definition of COV used in the sentencing guidelines is:

> "(a) The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a).

For its part, 18 U.S.C. § 16—the section of the U.S. Code referenced by INA 101(a)(43)(F)—defines a COV as:

> "The term "crime of violence" means--(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Subsection (1) of the Sentencing Guidelines is almost identical to subsection (a) of the U.S. Code. As such, the *Mosley* Court's discussion of (1) is of particular relevance to immigration practitioners.

The Sixth Circuit first held that the Michigan statute does not contain a use of force element. *Mosley*, slip op. at 2. "An individual may violate the statute by committing any one of several prohibited actions, and at least one of the prohibited actions does not involve the use—attempted, threatened or real—of physical force." *Mosley*, slip op. at 2. Specifically, the Sixth Circuit explained that obstruction of a police officer may occur "without attempting or threatening to use force." *Mosley*, slip op. at 2.

The Court then performed what it described as a "change[] [in] the landscape" that resulted from the Supreme Court's recent decision in *United States v. Chambers*, 129 S. Ct. 687, 690 (2009). According to the *Mosley* Court,

> "It is now clear that, before we examine the ordinary behavior underlying a conviction under the statute, we must decide at the outset how to classify violations, and most significantly we must decide whether the statute should be treated as involving more than one category of offense

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for federal crimes-of-violence purposes." *Mosley*, slip op. at 6.

The Court then explained that the Michigan statute

> "contains at least one obvious fault line. The offense not only covers an individual who 'assaults, batters, [or] wounds' a law enforcement officer, but it also covers an individual who 'obstructs' an officer, Mich. Comp. Laws § 750.81d(1), which includes "a knowing failure to comply with a lawful command," *id.* § 750.81d(7)(a). An 'assault[]' of an officer and a 'knowing failure to comply' with an officer's lawful command, it seems to us, involve 'behavior' that 'differs so significantly' that they must be treated 'as different crimes.'" *Mosley*, slip op. at 4 (citing *Chambers,* 129 S. Ct. at 690).

The Sixth Circuit then "quickly conclude[d]" that knowing failure to comply with a lawful command does not involve purposeful, violent, or aggressive conduct, thus it is not a COV. *Mosley*, slip op. at 5.

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BIA: IJ lacks jurisdiction to consider bond for person admitted through Visa Waiver Program and was in asylum-only proceedings

The BIA recently issued a published decision in which it held that an Immigration Judge lacks jurisdiction to consider a bond request from a person admitted through the Visa Waiver Program and who sought asylum and withholding of removal upon being detained by DHS. *See Matter of Werner*, 25 I&N Dec. 45 (BIA 2009).

In this rather straightforward decision, the BIA held that its 1996 decision in *Matter of Gallardo*, 21 I&N Dec. 210 (BIA 1996), in which the BIA held that an alien admitted through the VWP was entitled to a bond hearing before an IJ, was superseded by 8 C.F.R. § 1208.2(c). *Matter of Werner*, 25 I&N Dec. at 48. In a footnote, the BIA explained its understanding of the relevant regulations:

> "According to 8 C.F.R. § 1208.2(c)(1)(iv), Immigration Judges have exclusive jurisdiction over asylum applications filed by aliens who have been admitted pursuant to the Visa Waiver Program. However, 8 C.F.R. § 1208.2(c)(3)(i) provides that the Immigration Judge's scope of review under that section is 'limited to a determination of whether the alien is eligible for asylum . . . and whether asylum shall be granted in the exercise of discretion.' The regulation further states that '[d]uring such proceedings, all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.' Id." *Matter of Werner*, 25 I&N Dec. at 46 n.1.

The BIA held that IJs have authority to hear bond requests for individuals who have been issued a Notice to Appear (Form I-862) in relation to removal proceedings pursuant to 8 C.F.R. § 1240, but that they do not have authority to hear bond requests from individuals served with a Notice of Referral to Immigration Judge (Form I-863), as was served on Werner. *Matter of Werner*, 25 I&N Dec. at 45, 46.

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BIA: In absentia order entered without notice may be reopened even after non-citizen's departure from USA

In a published decision issued last week the BIA held that a non-citizen's departure from the USA while under an order of deportation or removal that was issued in absentia does not deprive the Immigration Judge of jurisdiction to consider a motion to reopen to rescind if the motion is based on a lack of notice. *See Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009). In this case, the non-citizen claimed that she left the USA after having been served an Order to Show Cause and Notice of Hearing (Form I-221) but almost a year before the date of her hearing. When she did not appear for her hearing, the IJ issued a deportation order in absentia.

The IJ denied the motion to reopen "finding that the in absentia deportation order was executed by the respondent's subsequent departure from and reentry to the United States." *Matter of Bulnes-Nolasco*, 25 I&N Dec. at 58. Section 101(g) of the INA provides that a person who has been ordered removed is considered to have been removed at the moment she leaves the USA even if she leaves of her own volition.

> "It has long been held that an alien's departure from the United States while under an outstanding order of deportation has the effect of executing the order, thereby bringing finality to the deportation proceedings and depriving the immigration courts and this Board of jurisdiction to entertain motions with respect to the underlying order." *Matter of Bulnes-Nolasco*, 25 I&N Dec. at 58 (citing *Matter of Okoh,* 20 I&N Dec. 864, 864-65 (BIA 1994); *Matter of Yih-Hsiung Wang*, 17 I&N Dec. 565, 567 (BIA 1980)).

The BIA first explained that an in absentia order issued without having properly notified the non-citizen of the hearing cannot serve as the basis for removal. *Matter of Bulnes-Nolasco*, 25 I&N Dec. at 59. Relying on the Eleventh Circuit's decision in *Contreras-Rodriguez v. U.S. Atty Gen.*, 462 F.3d 1314 (11th Cir. 2006), the BIA concluded that

> "An in absentia deportation order issued in proceedings of which the respondent had no notice is voidable from its inception and becomes a legal nullity upon its rescission, with the result that the respondent reverts to the same immigration status that he or she possessed prior to entry of the order. " *Matter of Bulnes-Nolasco*, 25 I&N Dec. at 59.

The BIA then held that an IJ does have jurisdiction to consider whether a motion to reopen is properly before the Immigration Court. *Matter of Bulnes-Nolasco*, 25 I&N Dec. at 59.

The Board concluded its decision with a passage of immense importance to immigration attorneys. Not only did the BIA explain the specific process by which an IJ must consider a motion to reopen under these circumstances, but the BIA also stated that because a rescinded order of deportation or removal has no legal effect whatsoever an individual against whom such an order has been entered is in the same legal status as before the entry of the order. As the Board explained,

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> "Before an Immigration Judge may conclude that he lacks jurisdiction to reopen by virtue of an alien's departure while under an outstanding order of deportation, he must first determine that an 'order of deportation' existed at the time of departure. If an alien establishes that his departure from the United States occurred after the entry of an in absentia deportation order that is subject to rescission, an Immigration Judge's decision rescinding that order constitutes a binding judgment that the order was void ab initio, thereby precluding it from being used as the predicate for an act of 'self-deportation' under section 101(g) of the Act. Applying the jurisdictional bar to reopening in a case involving an inoperative in absentia deportation order would give that order greater force than it is entitled to by law and would, as a practical matter, impose a limitation on motions to rescind that is not compatible with the broad language of 8 C.F.R. § 1003.23(b)(4)(iii)(A)(*2*)." *Matter of Bulnes-Nolasco*, 25 I&N Dec. at 59-60.

This holding might sound unremarkably logical to most attorneys, but to those of us who have been frustrated by the fact that a non-citizen's physical exit from the country meant the end of the legal road, this decision is a very welcomed development.

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5th Circuit: Upholds Post-Departure Bar on Motions to Reopen/Reconsider

In a decision released yesterday, the 5th Circuit upheld the post-departure bar on motions to reopen or reconsider after the non-citizen has left the USA. *Ovalles v. Holder*, No. 07-60836, slip op. (5th Cir. July 27, 2009). The challenged regulation is at 8 C.F.R. § 1003.2(d).

The non-citizen in this case was an LPR who was convicted in 2003 of attempted possession of drugs. *Ovalles*, slip op. at 2. The IJ found that he was not removable as an aggravated felon, but the BIA reversed, finding that his conviction constituted an aggravated felony. *Ovalles*, slip op. at 2. He was removed on April 14, 2004. Over two years later, the Supreme Court issued its decision in *Lopez v. Gonzales*, in which it held that a single possession conviction does not constitute an aggravated felony. 127 S.Ct. 625, 631-32 (2006). On July 27, 2007, Ovalles filed a motion to reconsider and a motion to reopen with the BIA. *Ovalles*, slip op. at 2. The BIA denied both motions by relying on the post-departure bar of 8 C.F.R. § 1003.2(d). *Ovalles*, slip op. at 2.

Section 1003.2(d) provides:

> "A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

Ovalles first argued the post-departure bar contradicts the clear language of 8 U.S.C. § 1229a(c)(6)(A) and (c)(7)(A) that an "alien may file one motion to reconsider" and "may file one motion to reopen." According to the Court, Ovalles urged it to follow the Fourth Circuit's decision in *William v. Gonzales*, 499 F.3d 329, 331-34 (4th Cir. 2007), in which the Fourth Circuit "held that the post-departure bar in section 1003.2(d) was invalid because it conflicted with the clear and unambiguous language of section 1229a(c)(7)(A) of IIRIRA." *Ovalles*, slip op. at 3-4. After tracing the evolution of the post-departure bar and providing a lengthy discusion of *William*, including a dissent that the 5th Circuit found persuasive, the 5th Circuit declined to follow *William*. Ovalles, slip op. at 9. The 5th Circuit emphasized that motions to be reconsider must be filed within 30 days of the entry of a final removal order and motions to reopen must be filed within 90 days of entry of a final administrative order of removal. *Ovalles*, slip op. at 10.

According to the Court, "Ovalles also contends that the BIA unreasonably interpreted the post-departure bar in section 1003.2(d) as trumping its *sua sponte* authority to reopen or reconsider cases under 8 C.F.R. § 1003.2(a)." *Ovalles*, slip op. at 11. Ovalles relied on the Eleventh Circuit's decision in *Contreras-Rodriguez v. U.S. Atty. Gen.*, 462 F.3d 1314, 1317 (11th Cir. 2006), a decision that the BIA recently relied on for the proposition that a post-departure motion to reopen is proper when the basis for that motion is that the underlying in absentia removal order was issued without properly notifiying the non-citizen.

The Fifth Circuit was not persuaded. First, it found *Contreras-Rodriguez* distinguishable

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because the removal order in that case was issued in absentia. *Ovalles*, slip op. at 11. Second, and more importantly, it found that this argument was foreclosed by its decision in *Navarro-Miranda v. Gonzales*, 330 F.3d 672, 675-76 (5th Cir. 2003). Citing *Navarro-Miranda*, the Fifth Circuit in *Ovalles* explained that the BIA's sua sponte authority to reopen an earlier decision is overriden by the post-departure bar. *Ovalles*, slip op. at 12.

Lastly, Ovalles argued that the post-departure bar does not apply to him because he is no longer subject to exclusion, deportation, or removal proceedings. *Ovalles*, slip op. at 13. He emphasized that the statutory use of the present-tense word "is" meant that the post-departure bar only applies to ongoing proceedings. *Ovalles*, slip op. at 13. The Fifth Circuit disagreed. "We conclude that the post-departure bar on motions to reconsider and to reopen applies and was intended to apply to aliens who depart the country following the termination of their removal proceedings." *Ovalles*, slip op. at 15.

Overall, this case serves to reinforce the post-departure bar, making efforts to fight faulty removal orders that much more difficult.

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BIA: DHS can't veto motion to reopen based on pending marriage-based petition

The BIA this week held that an Immigration Judge cannot deny a non-citizen's motion to reopen based on a pending visa petition solely because the Department of Homeland Security opposes that motion. *Matter of Lamus-Pava*, 25 I&N Dec. 61 (BIA 2009). Rather, the IJ must consider the merits of the arguments made by both parties. *Matter of Lamus-Pava*, 25 I&N Dec. at 65.

In this case, the motion to reopen was filed by a non-citizen who sought time to pursue an application for adjustment of status based on a pending visa petition filed on his behalf by his United States citizen wife. *Matter of Lamus-Pava*, 25 I&N Dec. at 62. The IJ denied the motion based on the fact that DHS opposed the motion. *Matter of Lamus-Pava*, 25 I&N Dec. at 62. The IJ did not consider the merits of DHS's opposition. *Matter of Lamus-Pava*, 25 I&N Dec. at 65.

In reaching a decision in this case, the BIA affirmed its 2002 test for deciding a motion to reopen to apply for adjustment based on a marriage entered into after commencement of removal proceedings. *Matter of Lamus-Pava*, 25 I&N Dec. at 62. In *Matter of Valverde*, 23 I&N Dec. 253 (BIA 2002), the BIA

> "held that such a motion (hereinafter a "*Velarde* motion") may be granted in the exercise of discretion, notwithstanding the pendency of an unadjudicated visa petition filed on the alien's behalf, where: (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the Government either does not oppose the motion or bases its opposition solely on *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992) (hereinafter the "fifth factor")."

("In *Matter of Arthur*, 20 I&N Dec. 475, the Board ruled that a motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of proceedings could not be granted unless the former Immigration and Naturalization Service, now the DHS, had approved the visa petition." *Matter of Lamus-Pava*, 25 I&N Dec. at 62 n.2)

The BIA quickly hinted at its holding when it characterized the issue presented as "should the DHS essentially have the unreviewable discretion to 'veto' a *Velarde* motion?" Matter of Lamus-Pava, 25 I&N Dec. at 63. Needless to say, the BIA found that DHS should not and does not have such authority. *Matter of Lamus-Pava*, 25 I&N Dec. at 64-65.

The "mere fact of a DHS opposition to a motion, in and of itself, should not be dispositive of the motion without regard to the merit of that opposition." *Matter of Lamus-Pava*, 25 I&N Dec. at 65. Rather, the IJ must consider the merits of the arguments put forth by the non-citizen and DHS. *Matter of Lamus-Pava*, 25 I&N Dec. at 65. "If the DHS's arguments are persuasive, they should prevail. If they are not, an otherwise approvable motion should not be denied simply based on the fact that an unpersuasive argument was advanced by the Government." *Matter of Lamus-Pava*, 25 I&N Dec. at 65.

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This is a bit of sunshine in an often foreboding rain of BIA decisionmaking.

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8th Circuit: § 212(c) relief available even if convicted after trial

In a case released late last week, the 8th Circuit held that relief from removal under former INA § 212(c) continues to exist for individuals who were convicted after a jury trial. *Lovan v. Holder*, No. 08-2177, slip op. (July 31, 2009) (Loken, Melloy, Benton).

This case presented the court with an appeal by a citizen of Laos who entered the USA as a refugee in 1981 and became a lawful permanent resident in 1985. In 1991 he was convicted by an Arkansas jury of sexual abuse of a child. *Lovan v. Holder*, No. 08-2177, slip op. at 2. He was sentenced to three years imprisonment, but only served 13 months. *Lovan v. Holder*, No. 08-2177, slip op. at 2. "At the time of Lovan's conviction, an alien convicted of an aggravated felony was deportable, but his sex crime did not fall within the statutory definition of aggravated felony. In 1996, Congress amended the definition of aggravated felony to include sexual abuse of a minor,'" thus rendering his conviction an aggravated felony. *Lovan v. Holder*, No. 08-2177, slip op. at 2 (internal citations omitted).

As a threshold matter, the government argued that the court lacked jurisdiction because § 212(c) no longer exists. *Lovan v. Holder*, No. 08-2177, slip op. at 3. The 8th Circuit disagreed. First, it pointed out that *INS v. St. Cyr*, 533 U.S. 289, 314-26 (2001), clearly stands for the proposition that individuals who pled guilty while § 212(c) was still in effect may still seek relief under § 212(c). *Lovan v. Holder*, No. 08-2177, slip op. at 3.

The 8th Circuit then considered the trickier issue of whether *St. Cyr*'s holding applies to individuals, like Lovan, who were convicted by a jury. After noting that there exists a circuit split on this issue, the 8th Circuit elected to follow the 3rd Circuit's decision in *Atkinson v. Attorney General*, 479 F.3d 222, 230-31 (3d Cir. 2007). In *Atkinson*, the 3rd Circuit concluded that a non-citizen does not have to show "actual reliance" to seek § 212(c) relief. 479 F.3d at 230. In this way, the 3rd Circuit—and now the 8th Circuit—disagrees with the 5th Circuit's position that a non-citizen who was convicted after a trial must show actual reliance on the possibility of § 212(c) relief to be eligible for that relief now. *See Carranza-De Salinas v. Gonzales,* 477 F.3d 200, 206-09 (5th Cir. 2007); *see also Wilson v. Gonzalez*, 471 F.3d 111, 122 (2nd Cir. 2006).

This case is great news for immigration attorneys. In the continuing saga of § 212(c) relief, the 8th Circuit has now aligned itself with the previously lonely 3rd Circuit as the most immigrant-friendly position: § 212(c) relief is available without a showing of actual reliance. *See Atkinson*, 479 F.3d at 230-31. According to the 8th Circuit's summary, the 2nd and 5th Circuit currently hold that § 212(c) relief exists for individuals convicted after a trial but only if they show actual reliance on the possibility of relief. *See, e.g., Restrepo v. McElroy*, 369 F.3d 627, 631-40 (2nd Cir. 2004); *Carranza-Salinas*, 477 F.3d at 206-09. Meanwhile, the 1st, 7th, and 9th Circuits hold that § 212(c) relief is not available to individuals who were convicted after a trial. *See, e.g., Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002).

The 8th Circuit also did a wonderful job of discussing the evolution of § 212(c), especially the comparable grounds requirement. This is one of the most comprehensible explanations of the comparable grounds requirement that I have read. *Lovan v. Holder*, No. 08-2177, slip op. at 5-8.

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4th Circuit: Maryland willful contribution to act, omission, or condition that renders child in need is sexual abuse of minor

In an unpublished opinion, the 4th Circuit held that a Maryland conviction for "willfully contributing to an act, omission, or condition that renders a child in need of assistance," Md. Code. Ann., Cts. & Jud. Proc. § 3-828, constitutes an aggravated felony. *Rivera-Rondon v. Holder*, No. 08-1683, slip op. at 3 (Aug. 3, 2009) (per curiam) (unpublished). Specifically, the 4th Circuit concluded that the non-citizen's conviction constitutes sexual abuse of a minor, a category of aggravated felony listed at INA § 101(a)(43)(A).

The 4th Circuit provided an excellent summary of Rivera's conviction:

> Rivera was convicted of violating § 3-828(a) of the Maryland Courts and Judicial Proceedings Code, which provides that "[a]n adult may not willfully contribute to, encourage, cause or tend to cause any act, omission, or condition that renders a child in need of assistance." A "[c]hild in need of assistance" is
> a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.
>
> Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (emphasis added). As used in § 3-801, "abuse" means "(1) [s]exual abuse of a child, whether a physical injury is sustained or not; or (2) [p]hysical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by [a parent or household member]." Md. Code Ann., Cts. & Jud. Proc. § 3-801(b) (2009) (emphasis added). "Sexual abuse," in this context, "means an act that involves sexual molestation or sexual exploitation of a child by . . . [a] parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child . . . or . . . [a] household family member." Md. Code Ann., Cts. & Jud. Proc. § 3-801(x)(1).
> *Rivera-Rondon v. Holder*, No. 08-1683, slip op. at 7-8.

By examining the plea colloquy, the 4th Circuit concluded that his conviction was based on a sexual incident involving his 8-year-old daughter. *Rivera-Rondon v. Holder*, No. 08-1683, slip op. at 11. Interestingly, Rivera's defense attorney stated on the record during the plea colloquy that nothing in the plea agreement should be understood as an admission by Rivera that he committed sexual abuse of a minor for immigration purposes. *Rivera-Rondon v. Holder*, No. 08-1683, slip op. at 8-9. The 4th Circuit dismissed this statement as "self-serving" and effectively irrelevant. *Rivera-Rondon v. Holder*, No. 08-1683, slip op. at 11.

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Accordingly, the 4th Circuit determined that Rivera's conviction under § 3-801 does constitute sexual abuse of a minor.

There are three small rays of hope in this decision. First, it's an unpublished decision. Nonetheless, while it's not binding, it still holds some weight with IJs. Second, the 4th Circuit's analysis is highly fact-specific. It used a modified categorical approach to look at the plea colloquy in detail. Only by doing that was it able to reach its conclusion. Perhaps the Court would have decided differently had the transcript of the plea hearing not identified a specific sexual incident. Lastly, the Maryland statute allows for convictions that do not involve sexual acts at all. Thus, this case should not be read as a statement that all—or even most—convictions under § 3-828 constitute sexual abuse of a minor.

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9th Circuit: California conviction for offering to transport heroin is controlled substance offense for immigration purposes

In a decision released last week, a three-judge panel of the Ninth Circuit held that a California state conviction for offering to transport heroine, Cal. Health & Safety Code § 11352(a), does constitute a controlled substances offense under INA § 237(a)(2)(B)(i). *See* Mielewczyk v. Holder, No. 07-7426, slip op. (9th Cir. Aug. 5, 2009) (opinion by Wardlaw; also sitting: Pregerson and Graber). The Ninth Circuit consequently upheld the BIA's affirmance of the IJ's finding that Mielewczyk was removable.

Mielewczyk, a citizen of Poland, was admitted to the USA as a refugee in 1984 when he was thirteen years old. According to the Ninth Circuit's decision, Mielewczyk signed a plea agreement in which he declared that he was accused of "possession of heroin for sale" and "transportation of heroin." Mielewczyk, No. 07-7426, slip op. at 10412. He was sentenced to 100 days in county jail and 36 months of probation. "Later, at a hearing to correct its prior order, the California Superior Court issued a *nunc pro tunc* order, finding that the factual basis for Mielewczyk's plea was 'offering to transport a controlled substance for the codefendant within the meaning of 11352 of the Health and Safety Code as a felony.'" Mielewczyk, No. 07-7426, slip op. at 10412-13.

Keeping with the usual format, the Court stated that it is required to apply the categorical approach to this case. Mielewczyk, No. 07-7426, slip op. at 10414.

The Court then turned to the text of INA § 237(a)(2)(B)(i). That section reads, in whole:

> "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

The Ninth Circuit focused on the meaning of the phrase "relating to a controlled substance." Mielewczyk, No. 07-7426, slip op. at 10414 (quoting United States v. Meza-Corrales, 183 F.3d 1116, 1127 (9th Cir. 1999)). "The ordinary meaning of the term 'relate' is 'to show or establish a logical or causal connection between.'" Mielewczyk, No. 07-7426, slip op. at 10414 (quoting Webster's New International Dictionary 1916 (3d ed. 2002)).

The Court then turned to the specific text of the statute of conviction "to determine whether it establishes a logical or causal connection to a controlled substance as defined in 21 U.S.C. § 802, section 102 of the Controlled Substances Act." Section 11352(a) of the California Health and Safety Code provides:

> "every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport [certain substances specified within the California Uniform Controlled Substances Act] shall be punished by imprisonment in the

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> state prison for three, four, or five years.
> The Court found that this language "establishes a logical connection between the law and certain controlled substances because the offense must involve one of the listed controlled substances." Mielewczyk, No. 07-7426, slip op. at 10415. Moreover, the Court explained "Even offenses that do not require personal contact with the drug have the requisite connection because 'we have construed the 'relating to' language broadly,' to incorporate laws specifically aimed at controlled substance activity, even if they do not require the use, possession, transportation, or sale of controlled substances." Mielewczyk, No. 07-7426, slip op. at 10415 (quoting *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000)).

Despite this clear language linking a conviction under § 11352 to "certain controlled substances," the Ninth Circuit concluded that a conviction under § 11352 does not "categorically" constitute a CSO under the federal Controlled Substances Act (CSA). Mielewczyk, No. 07-7426, slip op. at 10415. The key, the Court explained, is that INA § 237(a)(2)(B)(i) requires that the controlled substance involved in the commission of the criminal offense be one of the controlled substances listed in the federal CSA. Mielewczyk, No. 07-7426, slip op. at 10415. The California statute, however, "punishes activities involving controlled substances specified in the schedules of the California Uniform Controlled Substances Act" and that state drug control act defines "controlled substances" to include many substances that are not listed in the federal CSA. Mielewczyk, No. 07-7426, slip op. at 10415.

As such, the Court turned to the modified categorical approach to determine whether Mielewczyk's conviction actually involved a substances included in the federal CSA. Mielewczyk, No. 07-7426, slip op. at 10415-16.

> "Under this approach, we determine whether a conviction constitutes a predicate offense for removal by examining 'a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.'" Mielewczyk, No. 07-7426, slip op. at 10416 (*Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004)).

After examining the record of conviction, the Ninth Circuit concluded that the conviction indeed involved heroin because the charging document and plea agreement stated that heroin was involved. Mielewczyk, No. 07-7426, slip op. at 10416. Therefore, the Ninth Circuit found Mielewczyk removable under INA § 237(a)(2)(B)(i) for having been convicted of a CSO. Mielewczyk, No. 07-7426, slip op. at 10416.

This case does hold some lights of hope for immigration attorneys. First, the Ninth Circuit found that a California conviction for offering to transport heroin is not categorically a CSO for immigration purposes. Consequently, another conviction under this same statute might involve a substance that is prohibited in California but not prohibited under the federal CSA thus failing to meet

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the requirement of a CSO under INA § 237(a)(2)(B)(i). Second, the Ninth Circuit concluded that Mielewczyk's conviction involved heroin because the charging document and the plea agreement stated as much. However, charging documents and plea agreements often do not include such specific information. Or, as is not infrequently the case, charging documents and plea agreements are not available. Remember, in the deportation context it is the government's burden to prove that the non-citizen is removable. INA § 240(c)(3)(A).

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Penn. federal district court: Mandatory detention statute can't be used to detain people indefinitely

In an order issued earlier this week, Judge John E. Jones III of the U.S. District Court for the Middle District of Pennsylvania held that the mandatory detention statute, INA § 236(c), 8 U.S.C. § 1226(c), does not allow DHS to detain individuals indefinitely without a bond hearing. *Alli v. Decker*, No. 4:09-CV-0698, slip op. (Aug. 10, 2009). The two individuals in this case had been detained for 9 and 20 months respectively. *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 2.

After considering in detail *Demore v. Kim*, 538 U.S. 510 (2003), in which the Supreme Court held that INA § 236(c) does not violate due process, and *Zadvydas v. Davis*, 533 U.S. 678 (2001), in which the Court held that detention 6 months after the issuance of a final order of removal is presumptively unreasonable, Judge Jones concluded that unreasonably long detention under § 236(c) is constitutionally questionable: "The Court construes § 1226(c) as authorizing mandatory detention for the period of time reasonably necessary to promptly initiate and conclude removal proceedings." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 7. According to the district court,

> "In this case, the Court concurs with the growing consensus within this district and, indeed it appears throughout the federal courts, that prolonged detention of aliens under § 1226(c) raises serious constitutional concerns. *See, e.g.*, *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263, 267-68 (6th Cir. 2003); *Prince v. Mukasey*, 593 F. Supp. 2d 727, 734 (M.D. Pa. 2008). Although mandatory detention under § 1226(c) serves the statutory purpose of guaranteeing an alien's presence at removal proceedings, prolonged detention contravenes the intent of Congress that such proceedings proceed expeditiously." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 7.

Detention pursuant to § 236(c) is allowed only as reasonably necessary to effectuate removal. The district court succinctly held that "When it [detention under § 236(c)] moves beyond the brief and limited period reasonably necessary to accomplish removal proceedings, mandatory detention is inconsistent with both the due process required by the Constitution and the statutory purposes of the INA." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 8.

Though urged by the non-citizens to find that detention for more than 6 months is unreasonable, the district court avoided devising a bright line test or other firm deadline at which detention under § 236(c) becomes constitutionally unreasonable. Instead, it granted immigration detainees held under § 236(c) the ability to seek habeas review in federal district court:

> "If an alien detained pursuant to § 1226(c) makes a showing via a habeas petition that detention is no longer reasonable, the alien must be afforded a hearing before the habeas court at which the government bears the burden of justifying continued detention based on traditional bail factors such as the alien's risk of flight and potential danger to the community." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 11-12.

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Importantly, the district court placed the burden on the government to prove that the non-citizen represents a flight risk or danger to the community if released. *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 12.

In determining whether to grant or deny bond, courts must rely on a non-exclusive range of factors. First, courts should consider whether detention has continued beyond the average times necessary for completion of removal proceedings that were upheld by the Supreme Court in *Demore*. *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 16; see *Demore*, 538 U.S. at 530 ("the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal"). Second, consider the "probable extent of future removal proceedings." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 17. Third, consider "the likelihood that removal proceedings will actually result in removal." Alli v. Decker, No. 4:09-CV-0698, slip op. at 19. Lastly, consider "the conduct of both the alien and the government during removal proceedings"—namely, continuances and appeals requested by the non-citizen or the government that have prolonged § 236(c) detention. *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 19-20.

Because the district court recognized the novelty of this interpretation of INA § 236(c) it explained its rationale:

> "Supervision of the reasonableness of detention through the habeas process also provides justified protection of the alien's liberty interest and conserves judicial resources. If the remedy for unreasonable detention were an order directing a bond hearing under §1226(a), an alien who has already demonstrated that his detention is no longer reasonable would remain detained pending an initial custody determination by the DHS district director, 8 C.F.R. § 236.1(d)(1), a hearing before an immigration judge, *id.*, the IJ's decision, and a potential appeal to the BIA, *id.* § 236.1(d)(3). In addition, because discretionary bond decisions are not subject to direct judicial review, *see* 8 U.S.C. § 1226(e), the only recourse for an alien dissatisfied with the outcome of his bond hearing would be to return to court again and file another habeas action. *Cf. Ly*, 351 F.3d at 272. A bond hearing before the habeas court avoids this circuitous and potentially lengthy process. The habeas court's determining whether a petitioner is entitled to release also serves the "'historic purpose of the writ,' namely, 'to relieve detention by executive authorities without judicial trial.'" *Zadvydas*, 533 U.S. at 699 (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring))." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 12.

Essentially, the district court elected to use the habeas writ because it provides quick judicial action regarding detention. That, in fact, is its purpose.

Since this order was issued by a district court it obviously lacks precedential authority. Nonetheless, it provides a very good roadmap for other attorneys interested in challenging the mandatory detention statute, INA § 236(c). More importantly, it gives other federal courts a reasonable

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strategy to follow.

Mandatory indefinite detention without an individualized hearing is anathema to most ordinary principles of due process. In his order, Judge Jones explained the difficulty of dealing with this statute in these words: "the constitutionally problematic statute has forced the respondents to repeatedly interpose arguments that torture both law and logic in opposing habeas petitions of the type *sub judice*. We have fashioned a resolution that is admittedly imperfect, but which represents the best we can do given the statutory and jurisprudential minefield facing us." *Alli v. Decker*, No. 4:09-CV-0698, slip op. at 31. It is hard to imagine that Judge Jones is the only federal judge who is frustrated by the mandatory detention statute.

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IJ: Texas assault involving family violence is not crime of violence aggravated felony

An Immigration Judge in Texas last week found that a Texas conviction for assault involving family violence, Tex. Penal Code § 22.01(a), does not fall into the crime of violence category of aggravated felony. This was a great victory for one of our clients that we won based primarily on the brief we submitted.

Section 101(a)(43)(F) defines a crime of violence in relation to 18 U.S.C. § 16. In turn, 18 U.S.C. § 16 defines a crime of violence as

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

There is no doubt that Tex. Penal Code § 22.01(a) does not meet the definition of subpart (a). In *United States v. Villegas-Hernandez*, the Fifth Circuit held that "use of force is not an element of assault under section 22.01(a)(1), and [thus] the assault offense does not fit subsection 16(a)'s definition for crime of violence." 468 F.3d 874, 879 (5th Cir. 2006).

The difficult issue was whether § 22.01(a) constitutes a crime of violence as defined in subpart (b) of 18 U.S.C. 16. We argued that § 22.01(a) does not satisfy this subpart because it does not by its nature, involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

We argued as follows: "A 'substantial risk requires a strong probability that the application of physical force during the commission of the crime will occur.'" *United States v. Landeros-Gonzales*, 262 F.3d 424, 427 (5th Cir. 2001) (quoting *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 (5th Cir. 1995)). "'[F]orce,' as used in the statutory definition of 'crime of violence,' is 'synonymous with destructive or violent force.'" *Landeros-Gonzales*, 262 F.3d at 426 (quoting *Rodriguez-Guzman*, 56 F.3d at 20 n.8). In addition, "[w]hen the aggravated felony provision uses 'involves' language, we inquire whether violation of the statute necessarily entails the 'involved' behavior." *Omari v. Gonzales*, 419 F.3d 303, 307 (5th Cir. 2005). Meanwhile, "[t]he bodily injury required by section 22.01(a)(1) is 'physical pain, illness, or any impairment of physical condition.'" *Villegas-Hernandez*, 468 F.3d at 879.

In effect, our argument boiled down to this: that physical pain, illness, or impairment—the level of bodily injured required for a conviction under Tex. Penal Code § 22.01(a)—is not equivalent to the destructive or violent force required by the crime of violence definition.

Importantly, we were also able to convince the IJ that DHS was incorrect in attempting to use the criminal court's family violence finding to bolster its crime of violence argument. DHS essentially wanted the IJ to find that assault involving family violence is more violent—and thus more clearly a COV—than assault without a family violence finding. The Texas assault statute provides for an increased sentence if the criminal court finds that the victim was a member of a protected class that includes certain family members of the defendant. We successfully argued that such a finding is a

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sentencing enhancement; it is not an element of the crime. As such, under the categorical approach or the modified categorical approach, a sentencing enhancement is an inappropriate consideration.

If the argument works with one IJ hopefully it will work with others! I'm happy to provide more specifics on our argument if it would be of help to you.

Update: Since writing about this on crImmigration.com another Immigration Judge terminated removal proceedings for another of our client's based on a small variation of this argument!

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2nd Circuit: Time in USA while asylum and adjustment applications pending does not count toward continuously lawful residence required for § 212(h) waiver

The Second Circuit held last week that the time that a person spends in the USA while an asylum application or adjustment of status application is pending is does not count toward the 7 years of lawful continuous residence required to be eligible for a § 212(h) waiver of inadmissibility. *Rotimi v. Holder*, No. 06-0202-ag, slip op. (2nd Cir. Aug. 14, 2009) (Feinberg, Newman, Katzmann). Rotimi sought the § 212(h) waiver due to a conviction for attempted criminal posssession of a forged instrument in the second degree, New York Penal §§ 110.00, 170.25.

Since this case turned on the 7-year lawful residency requirement, the timeline of events is merits stating. Rotimi entered the USA on a B-2 visa on June 7, 1995, with permission to stay for up to 6 months. *Rotimi*, No. 06-0202-ag, slip op. at 3. In September 1995 he applied for asylum. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 3. On May 17, 1996, presumably after denying Rotimi's asylum application, the asylum office referred Rotimi's case to an IJ for deportation proceedings. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 3. In July 1996, while proceedings were ongoing before the IJ, Rotimi married a United States citizen who filed an immediate relative visa petition on his behalf. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 3. Rotimi filed an application for adjustment of status. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 4. After Rotimi's visa petition was approved, the former INS terminated deportation proceedings to allow his adjustment application to be adjudicated. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 4-5. The INS granted his adjustment application and Rotimi became an LPR on August 13, 1997.

Then, on May 22, 2002, in the turn of events that led to the Second Circuit's decision, Rotimi was convicted of attempted criminal possession of a forged instrument in New York. Six months later, in November 2002, Rotimi left the USA briefly and, upon return, he came to the attention of the government. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 4. The government claimed that Rotimi's conviction constituted a crime involving moral turpitude, thus rendering him inadmissible. *Rotimi v. Holder*, No. 06-0202-ag, slip op. at 4. Rotimi conceded removability and sought to apply for a waiver under INA § 212(h).

Section 212(h) waives several criminal grounds of inadmissibility, including the CIMT ground. To be eligible for the § 212(h) waiver, however, an applicant must have "lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States." Rotimi argued that he had lawfully resided continuously in this country since June 7, 1995, the date he arrived on a B-2 visa, because he had applied for asylum, then adjustment, then become an LPR since then. The IJ and the BIA disagreed.

In a precedential decision (issued after an earlier remand from the Second Circuit), *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008), the BIA provided its interpretation of § 212(h)'s lawful continuous residence requirement:

> First, the BIA examined the legislative history of § 212(h), which provides in relevant part that the "managers intend that the provisions governing continuous residence set forth in INA section 240A as enacted by this legislation shall be applied as well for purposes of waivers under

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> INA section 212(h).” H.R. Rep. No. 104-828, at 228 (1996) (Conf. Rep.). The BIA stated that this history, “while not extensive, lends some support to the proposition that an alien’s application for lawful status or other benefit that might not entail a ‘status’ must actually be approved before his or her residence in this country will be considered lawful for section 212(h) purposes.” *In re Rotimi*, 24 I. & N. Dec. at 572.

Second, the BIA looked to INA § 101(a)(20), which defines the phrase “lawfully admitted for permanent residence” to mean “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” 8 U.S.C. §1101(a)(20). The agency asserted that this supported the view that an alien does not become a lawful permanent resident simply by applying for that status. *See In re Rotimi*, 24 I. & N. Dec. at 573–74.

Third, the BIA relied on the *Merriam-Webster’s Collegiate Dictionary*, which defines “lawful” as “being in harmony with the law” or “constituted, authorized, or established by the law.” *Id.* at 574 (internal quotation marks omitted). From this, the BIA concluded that for an alien’s residence to be lawful, “it must be authorized or in harmony with the law, which requires some formal action beyond a mere request for authorization or the existence of some impediment to actual physical removal.” *Id.*

Fourth, the BIA examined case law, which it contended draws an important distinction between merely being an applicant for a privilege to remain in this country and actually being granted that privilege. *See id.* at 574–76. The BIA acknowledged that two of the cases upon which it relied – *In re Lok*, 18 I. & N. Dec. 101 (B.I.A. 1981), and this Court’s decision in *Tim Lok v. INS*, 681 F.2d 107 (2d Cir. 1982) – analyzed the “lawful domicile” requirement of former INA §212(c). It explained, however, that although §212(h) contains no domicile requirement,

> “based on the long-standing construction of the term “lawful” in the *Lok* decisions, we think that there is a distinction to be drawn between permitting an alien’s presence in this country for a limited purpose and legalizing his or her stay. It is this distinction that provides the primary basis for our refusal to count [Rotimi’s] time spent as an applicant for benefits as periods during which he “lawfully resided” here for purposes of a section 212(h) waiver. *In re Rotimi*, 24 I. & N. Dec. at 575–76.” *Holder*, No. 06-0202-ag, slip op. at 7-8.

The Second Circuit found the BIA's explanation reasonable under the deferential standard of review imposed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the Second Circuit affirmed the BIA's decision finding that Rotimi's period of residence while his asylum application and adjustment applications were pending do not count toward the lawful continuous residence requirement of § 212(h).

Notably, the Second Circuit judges were fairly clear that it would not have adopted this rationale were they given the opportunity to interpret § 212(h) in a less deferential fashion. As the Second Circuit's decision explained, “The *Chevron* framework sharply constrains this Court. As noted

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above, even if we would have interpreted the statute differently if the question had arisen first in a judicial proceeding, we are without authority to substitute that interpretation for an agency's, if the agency's view is reasonable." *Holder*, No. 06-0202-ag, slip op. at 11.

What's more, the three-judge panel that issued this decision also issued two concurring opinions, one by Judge Newman and another by Judge Katzmann with Judge Feinberg joining. All three judges, it seems, dislike the BIA's interpretation, but felt bound by the Supreme Court's holding in *Chevron* that federal courts must use a deferential standard of review when examining an administrative agency's interpretation of an ambiguous statute. As Katzmann explained,

> "Writing on a clean slate, I would have interpreted 'lawfully resided continuously' to include the period between June 13, 1996, and August 13, 1997, when Rotimi resided in the United States while his applications for asylum and (later) adjustment of status were pending." *Holder*, No. 06-0202-ag, slip op. at 1 (Katzmann, J., concurring).

Judge Newman went even further, suggesting that Congress enact a private bill to allow Rotimi to stay in the USA. *Holder*, No. 06-0202-ag, slip op. at 1 (Newman, J., concurring).

In the end, though, the BIA's interpretation stands: the § 212(h) lawful continuous residence clock does not start until lawful status has been granted.

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IJ: Possession of drug paraphernalia conviction can't be used for drug-related aggravated felony category

An Immigration Judge recently held that our client's conviction for possession of drug paraphernalia could not be used to prove that he was convicted of an aggravated felony. The IJ first concluded that possession of paraphernalia is not punishable under the federal Controlled Substances Act (CSA), then concluded that the paraphernalia conviction could not serve as the basis of a recidivist offender violation.

Our client was convicted of violating two Maryland offenses: criminal possession of a controlled dangerous substance, Md. Code Ann., Crim. § 5-601, and possession of drug paraphernalia, Md. Code Ann., Crim. § 5-619(c)(1). DHS argued that, combined, these convictions constitue an aggravated felony under INA § 101(a)(43)(B). That section provides that "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)" is an aggravated felony.

Because removal proceedings took place in Texas, the Fifth Circuit's holding that multiple possession convictions constitute an aggravated felony was controlling. In *United States v. Sanchez-Villalobos*, the Fifth Circuit held that a second state drug possession conviction constitutes an aggravated felony as a recidivist offense even where the second conviction was not prosecuted under a recidivist offender statute. *See* 412 F.3d 572, 577 (5th Cir. 2005). The Fifth Circuit's position stands in stark contrast to the position taken by the BIA in *Matter of Carachuri-Rosendo*, but, as the BIA noted in that case, the Fifth Circuit's decision is the controlling precedent. *See* 24 I & N Dec. 382, 393 (BIA 2007). Though the Supreme Court, in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), expressly disagreed with one part of the Fifth Circuit's holding in *Sanchez-Villalobos*, another part survives.

What remains of *Sanchez-Villalobos* post-*Lopez v. Gonzales* is its two-pronged analysis of potential drug trafficking crimes. According to *Sanchez-Villalobos*, first the IJ must determine whether the offense is punishable under the federal CSA and, second, whether that offense is a felony under federal law. *See* 412 F.3d at 574. Indeed, *Lopez v. Gonzales* held that convictions in state courts for drug-related offenses may constitute an aggravated felony if the state offense proscribed conduct punishable under the federal CSA or if the state offense fell within the "everyday understanding" of illicit trafficking. 127 S.Ct. at 630, 631.

We successfully argued that possession of drug paraphernalia is not an offense punishable under the federal CSA. The federal CSA does not even reference mere possession of drug paraphernalia anywhere within its many provisions. Indeed, the one reference to drug paraphernalia is an explicit prohibition of the "sell or offer for sale [of] drug paraphernalia," the "use [of] the mails or any other facility of interestate commerce to transport drug paraphernalia," and the "import[ing] or export[ing of] drug paraphernalia." 21 U.S.C. § 863(a). This sale, transport, importation, or exportation, we argued, is not synonymous with mere possession.

We also successfully argued that the Maryland possession of drug paraphernalia statute does not involve an element of commerce. The *Lopez v. Gonzales* Court explained that "ordinarily 'trafficking' means some sort of commercial dealing." 127 S.Ct. at 630. However, the Maryland statute does not require a commercial transaction of any kind.

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As a result of winning the aggravated felony battle our client became eligible for Cancellation of Removal for LPRs and was granted that relief. Hopefully some variation of this argument can work for other attorneys.

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