PRECEDENT DECISIONS OF THE BOARD OF IMMIGRATION APPEALS IN FISCAL YEAR 2007

by Juan P. Osuna and Jean C. King[1]

In its published decisions in fiscal year (FY) 2007, the Board of Immigration Appeals (BIA or Board) published 40 precedents, more than in any single year since FY 1999. In FY 2008 to date, the Board has published 17 precedents. This article summarizes these published decisions (Interim Decisions 3545 through 3602), which covered a broad range of legal and procedural issues that come before the BIA and the Immigration Judges. One precedent issued by the Attorney General is also discussed.

Of particular note, the Board issued precedent decisions interpreting the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, §§ 103(b), 104, 119 Stat. 231, starting with the effective date provisions in *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006), and moving into the substantive asylum provisions in *Matter of J-B-N &S-M-*, 24 I&N Dec. 208 (BIA 2007) and *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007). The Board dealt extensively with claims based upon China's coercive population control policies, and set forth standards for finding an asylum application frivolous. The Board discussed eligibility provisions for cancellation of removal in three decisions, and addressed voluntary departure in two. Also discussed were provisions relating to the criminal grounds of removal, including the analysis to be used and documents that can be considered in determining whether a crime is an aggravated felony in *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007) and *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), and 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 discretionary forms of relief, procedural issues, and attorney discipline.

ASYLUM

The BIA addressed claims to refugee status based on the People's Republic of China (PRC)'s coercive population control (CPC) policies as defined in section 101(a)(42) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1101(a)(42) in five decisions. The Board discussed the term "forced abortion" within the meaning of a CPC claim in *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007). The Board found that the context and structure of the statute require that there be actual harm or a reasonable fear of harm amounting to persecutory harm. The Board concluded that an abortion is forced when "a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution."

---

[1]Juan P. Osuna is the Acting Chairman of the Board of Immigration Appeals (BIA). Mr. Osuna was appointed as a Board Member in August 2000 and began serving as Acting Chairman on October 2, 2006. Jean C. King is a Senior Legal Advisor to the Chairman of the Board of Immigration Appeals. Ms. King previously served as Attorney Advisor with the Board from1996 to 2006. The decisions summarized in this article can be obtained online from the BIA's Virtual Law Library, at www.usdoj.gov/eoir/vll/libindex.html.

In further clarifying what forms of nonphysical harm amount to persecution, the Board adopted the standard set forth in a 1978 House of Representatives report: deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. The first clause could include extraordinarily severe fines, wholesale seizure of assets, or a sweeping limitation of opportunities to continue to work in an established business or profession. The use of the word "severe" is the benchmark for the level of harm. In this case, the record did not contain sufficient evidence to determine whether the economic sanctions, principally the loss of the respondent's wife's job, would amount to persecution. This determination depended upon factors such as the respondent's financial situation, his living arrangements, how his income compared with those of other households in the region and the minimal level of income needed to provide the essentials of life in the region.

Lastly, the Immigration Judge had denied the respondent's asylum application in the exercise of discretion. The Board found that the Immigration Judge did not reconsider the denial of asylum in light of factors relevant to family reunification as required under the regulations. The Board remanded the record for further consideration of whether the economic sanctions were so severe as to amount to persecution, and to reconsider the discretionary denial.

The Board evaluated whether the respondent demonstrated that the Chinese government has a national policy of requiring forced sterilization of a parent who returns with a second child born outside of China in *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007). The respondent did not assert past persecution, but based his claim solely on a fear of future persecution because of the birth of his United States citizen children. The Board found that the evidence in this case indicated that if a returnee who has had a second child while outside of China is penalized at all upon return, the sanctions are fines or other economic penalties not severe enough to amount to persecution. Regarding specific evidence introduced, the Board placed more weight on the reports from the Department of State than the affidavits from demographer John Shields Aird. It considered documents in the record that discuss enforcement in Fujian Province and Changle City. The Board concluded that the documents introduced in the record do not support a claim that sterilization, even if it is the official policy, is enforced. The Board noted that physical coercion is officially condemned, and enforcement of the one-child policy in Fujian has historically been lax and uneven. Lastly, the Board found that the respondent's claim of persecution due to illegal departure is not on account of one of the grounds specified in the Act, and the evidence suggests the penalty for one illegal departure is a fine which does not amount to torture under the Convention Against Torture.

The Board considered whether a person who fathers or gives birth to two or more children in China, in apparent violation of China's family planning policies, may qualify on that basis alone as a refugee in *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007). In this case, the respondent's wife gave birth to daughters in 1999 and 2002. The respondent also testified to beatings at the hands of the birth control officials, but the Immigration Judge found, and the Board and the United States Court of Appeals for the Second Circuit affirmed, that the respondent's claims lacked credibility. The Court of Appeals remanded the case, however, to consider the respondent's claim for relief based solely on the undisputed birth of his two children. The Board found that the starting point for determining whether there is objective evidence supporting a well-founded fear of persecution is

proof of the details of the family planning policy relevant to each case. The respondent must then establish that he or she violated that policy. Assuming these burdens have been met, the alien must also establish that the violation of the family planning policy would be punished in the local area in a way that would give rise to an objective fear of future persecution.

The Board found that the evidence in the record showed that while China has a one-child policy, deviations from this policy are permitted, depending upon many geographic and ethnic factors. The record showed that enforcement of the policy varies greatly, and that the Chinese Government achieves compliance with birth limits using both incentives and pressure. In some instances, this has involved physical coercion, including placement in unofficial prisons, and there are reports of forced sterilizations and abortions. On balance, however, the record suggested that physical coercion is uncommon and unsanctioned. Because the respondent was not credible, the record did not show that the respondent violated the family planning policy. The respondent's first child was a girl, and a Chinese couple can apply to have a second child in that instance. The record did not reflect whether the respondent applied for the exception.

In *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), the Board addressed an alien's untimely motion to reopen based upon birth of a second child in the United States. The applicant argued that she fell within the changed circumstances exception to the motion to reopen requirements in that there is increased CPC enforcement in Fujian Province, Changle City. The Board first noted that because the applicant was found to lack credibility in her hearing below, the Board is not inclined to favorably exercise discretion. The Board then discussed the primary documents relied upon by the applicant: 2003 Changle City opinion and a Fujian Province decision in the case of Zheng Yu He; and 1999 and 2005 Q&A Handbooks. The Board found that the first group of documents, decisions regarding a Chinese national couple who had a child overseas after birth of a first child in China, show that the couple was viewed by local birth control officials as violating local family planning policies. The Board could not extrapolate that the applicant's behavior would also be so interpreted as the evidence from the Department of State in the file directly contradicted this assertion. Furthermore, there are some important factual distinctions, and, as noted in *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007), these documents do not show that sanctions would amount to persecution. The Q&A Handbooks do not show a change in country conditions and do not indicate that *forcible* sterilizations are mandated. The applicant did not meet her burden with the remaining documents standing alone or in conjunction with the above documents to show changed circumstances in China and a prima facie case for a grant of asylum.

Finally, 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, 8 U.S.C. § 1158(a)(2)(D), 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 motions 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 BIA considered issues that arise from claims based upon female genital mutilation (FGM) in three cases. In *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007), the Board considered whether an alien may establish eligibility for asylum or withholding of removal based solely on a fear that his or her daughter will be harmed by being forced to undergo FGM upon return to the alien's home country. The respondent is a native and citizen of Senegal and feared that his two United States citizen daughters would be forced to undergo FGM if he were returned. The Immigration Judge granted withholding, and the Board reversed. The Board first distinguished authority from the United States Court of Appeals for the Sixth Circuit (*Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004)) which found that an alien was eligible for asylum due to the fear of FGM to a child, because the children in that case were not citizens of the United States. The Board also found that FGM is common only in certain areas of Senegal and the government is working to eradicate it. The Board further noted that acts of persecution against family members do not establish a risk of future persecution to the applicant absent a pattern of persecution tied to the applicant, or some indication that a political opinion would be imputed to the alien upon return. Derivative asylum is reserved for spouses or children of applicants; it is the applicant who must establish eligibility, not the other way around. The Act does not provide for derivative withholding. Finally, the Board found no evidence that the respondent would be subject to persecution due to a social group of fathers who oppose FGM to their children, or due to a political opinion.

The Board considered whether a past experience with FGM is a continuing harm in *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007). The respondent, a native and citizen of Mali, underwent FGM when she was a young girl and is opposed to the practice. The Immigration Judge found, and the Board affirmed, that the respondent was ineligible for asylum due to the one-year bar. The Board held that assuming the respondent suffered past persecution on account of a social group, "any presumption of future FGM persecution is ... rebutted by the fundamental change in respondent's situation arising from the reprehensible, but one-time infliction of FGM upon her." The Board distinguished *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003), which found forced sterilization to be continuing persecution. The Board found that *Matter of Y-T-L-* was a departure from the ordinarily applicable principles in asylum and withholding of removal that those who have experienced past persecution but have no well-founded fear of future persecution may only obtain refugee status if they demonstrate compelling reasons for being unwilling to return to their country arising out of the severity of the past persecution, or they face a reasonable possibility of some other harm. To treat sterilization due to China's coercive population control policies any other way would have been to frustrate the purpose of the provision enacted by Congress. FGM, in contrast, has not been specifically identified as a basis for asylum within the definition of refugee. Finally, the Board noted that the regulations do not provide for a discretionary grant of withholding. The respondent also asserted that her father has arranged a marriage for her in Mali, and she fears the consequences

of refusing to comply. The Board found the respondent ineligible for asylum on this basis because arranged marriages are not considered per se persecution. The respondent did not present any specific evidence of the harm she fears from her family, and relocation was a reasonable alternative.

Finally, the Board found that a mother and daughter from Somalia who suffered 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- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008). The Immigration Judge denied asylum on credibility grounds, and specific 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 BIA returned to the question of what is a "particular social group" for asylum eligibility in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007). In this case, the respondents were threatened in Guatemala, and a family member was kidnaped for ransom and was wounded by gunshot. The social group the respondents sought to identify was described in various terms to include wealth, affluence, upper income level, socio-economic level, the monied class, and the upper class. The Board applied *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), and found that affluent Guatemalans are not a cognizable social group. The Board did not find sufficient background evidence in the record that wealthy Guatemalans would be recognized as a group that is at a greater risk of crime, noting that violence and crime in Guatemala are pervasive at all socio-economic levels. The Board found that the characteristic of wealth is too subjective, inchoate and variable to provide the sole basis for membership in a particular social group. Depending upon perspective, affluent Guatemalans could encompass anywhere from one percent to 20 percent of the population. Lastly, the Board found that there was insufficient evidence to show any other motive for the threats.

In a decision addressing the asylum provisions of the REAL ID Act of 2005, the BIA considered the effective date of credibility determinations in *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). This provision specifies the factors to be considered by the trier of fact in making a credibility determination. The issue in the case was whether this provision applied to the date an application is initially filed with an asylum officer of the Department of Homeland Security (DHS), or the date it is subsequently filed in Immigration Court. The REAL ID Act effective date provision states that the provision shall take effect on May 11, 2005, and "shall apply to applications for asylum, withholding, or other relief from removal made on or after such date." REAL ID Act §101(a)(2), 119 Stat. at 305. The alien filed his asylum application July 19, 2004, with DHS, and June 16, 2005, with the Immigration Court. The Board reasoned that other provisions in the Act regarding asylum applications, such as the one-year deadline and employment authorization, apply to the date the application is filed with DHS. Further, the language of the provision refers to the date the application is made, not the date it is referred to the Immigration Court. The Board concluded that when a respondent files an application for relief with an asylum officer prior to May 11, 2005, and renews the application in removal proceedings subsequent to that date, the Real ID Act credibility provision in section 208(b)(1)(B)(iii) does not apply. The Immigration Judge in this case had applied the REAL ID Act to the case, basing an adverse credibility determination on

inconsistencies and omissions regardless of whether they go to the heart of the claim. As this standard conflicted with the law of the circuit, the Board remanded the case for a new credibility determination.

The Board next considered the substance of the REAL ID Act in *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). The respondents presented a claim which arose from a land dispute in Rwanda. The Board noted that the language of the REAL ID Act requires that one of the five protected grounds under the Act must be "at least one central reason, " but not "a central reason" as was originally proposed in the legislation. This language confirms that aliens whose persecutors were motivated by more than one reason continue to be protected under the Act. The legislative history and citations show that the protected ground cannot be incidental or tangential, however. The Board concluded that its standard in mixed motive cases has not been radically altered. *See Matter of S-P-*, 21 I&N Dec. 486 (1996). In this case, the respondents asserted that they received threats and harassing telephone calls because they were natives of Burundi (but citizens of Rwanda) and/or repatriated refugees. The Board found that there was no evidence that these grounds were anything more than a tangential motivation for the threats against the respondents.

The Board again addressed the REAL ID Act in *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007), focusing on the credibility provisions. The respondent presented an asylum claim based upon alleged persecution in China due to his Christian faith. The Immigration Judge made an adverse credibility finding based upon inconsistencies between the testimony of the respondent and his sister, inconsistent statements made by the respondent at the airport interview, the respondent's demeanor, implausibilities, and the failure to produce corroborative evidence. The Board found that the inconsistencies were present, and that the inconsistencies do not need to go to the heart of the claim under the REAL ID Act. As regards the airport statement, the Board noted that the respondent did not argue that the airport interview was unreliable and did not attempt to explain the inconsistencies about the passport he used. Finally, the Board noted that Congress codified in the REAL ID Act the Board's corroboration standards set forth in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). The Board found that the absence of corroboration of the respondent's attendance at home churches in China or the United States, or affidavits from his relatives without a satisfactory explanation of the absence, contributed to the adverse credibility and ultimately the failure of the burden of proof.

Finally, in *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007), the Attorney General remanded to the Board a case involving the application of the bar to asylum and withholding for providing material support to a terrorist organization, in this case the Chin National Front in Burma. The Immigration Judge had found, and the Board affirmed in a published decision, that the Chin National Front was a terrorist organization, and the alien had engaged in terrorist activity, and was barred from asylum despite establishing a well-founded fear of persecution in Burma. *See* sections 212(a)(3)(B)(i)(I) and (B)(iv)(VI); *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). The Attorney General certified the case due to the Secretary of Homeland Security's designation of the Chin National Front as an exception to the bar. On remand, the Board is to determine what further proceedings, if any, are necessary.

The Board interpreted the effect of the North Korean Human Rights Act of 2004, Pub. L. 108-333, 118 Stat. 1287 (NKHRA), on two respondents' asylum applications in *Matter of K-R-Y- & K-C-S-*, 24 I&N Dec. 133 (BIA 2007). The respondents are natives of North Korea and citizens of South Korea. The Immigration Judge and the Board had previously found that neither respondent suffered past persecution or a well-founded fear of persecution. The issue was whether the NKHRA provided an independent basis for granting asylum to the respondents, and whether the acquisition of South Korean citizenship precluded them from establishing asylum as to North Korea due to firm resettlement. The Board found that the NKHRA does not provide an independent basis for granting citizenship. The NKHRA only provides that North Koreans cannot be barred from asylum because South Korea gives them the right to apply for citizenship. The NKHRA states that it is not intended to apply to former North Koreans who, like the respondents in this case, actually avail themselves of the right to become South Korean citizens.

In *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), the Board addressed the requirements for determining whether an asylum application is frivolous. In this case, the Immigration Judge based a frivolous finding upon inconsistent accounts by the respondent of whether his wife had a child, had an abortion, or adopted a child in the People's Republic of China. The Board found that an Immigration Judge must address the question of frivolousness separately and make specific findings that the applicant deliberately fabricated material elements of the asylum claim. Regarding the burden of proof, the Board found that an Immigration Judge's finding of frivolousness must be supported by a preponderance of the evidence. The Board rejected the suggestion advanced by the United States Court of Appeals for the Second Circuit that concrete and conclusive evidence of fabrication should be required, noting that proof of knowing or deliberate conduct may be demonstrated by circumstantial evidence. *See United States v. MacPherson*, 424 F.3d 183 (2d Cir. 2005). Lastly, the Board found that the respondent must be afforded a sufficient opportunity to explain any discrepancies or implausibilities. In this case, the Board found that the Immigration Judge appropriately made separate findings, findings that were supported by a preponderance of the evidence, but the Immigration Judge did not give the respondent an adequate opportunity to explain the inconsistencies. The Board vacated the frivolous finding.

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 ineligible for asylum or withholding of removal pursuant to section 241(b)(3)(B)(ii) of the Act, 1231(b)(2)(B)(ii), an 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.

DISCRETIONARY RELIEF - Adjustment of Status

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

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

In *Matter of Jara Riero and Jara Espinol*, 24 I&N Dec. 267 (BIA 2007), the Board found that an alien seeking to establish eligibility for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), on the basis of a previous marriage-based visa petition must prove that the first marriage was bona fide at its inception. At issue in the case were the regulations at 8 C.F.R. §§ 1245.10(a)(3) and (i), which set forth the grandfathering requirements and provide that the first visa petition must have been "approvable when filed." This term is defined, and requires that the visa petition was (1) properly filed, (2) meritorious in fact, and (3) not frivolous. The Board found that "approvable when filed" requires more than the existence of a marriage, that the visa petition must have been based upon a genuine marriage at its inception. This determination may require testimony at the hearing about the prior marriage. In this case, the Immigration Judge and the Board considered the district director's Notice of Intent to Deny, the testimony and arguments regarding the inconsistencies noted in the Notice of Intent to Deny, and the lack of documents submitted at the hearing in finding that the marriage was not bona fide at its inception.

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, 8 U.S.C. § 1255(i), 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 seeks 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 these sections would be to make aliens eligible who were not eligible before the passage of those provisions. 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) if the Act 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 - Waivers

The Board resolved the issue of "stand alone" waivers of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007). The question was whether a returning lawful permanent resident seeking to overcome a ground of inadmissibility may apply for a 212(h) waiver without also applying for adjustment of status. The Board found that nothing in the Act bars a stand alone 212(h) waiver for arriving lawful permanent residents. This situation was clearly contemplated by section 101(a)(13)(C)(v) of the Act, 8 U.S.C. §1101(a)(13)(C)(v), relating to when a lawful permanent resident is regarded as seeking admission, and the only regulation relating to this waiver did not cover aliens in the respondent's situation.

In another case involving a section 212(h) waiver, *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007), 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 waiver under section 212(h)

of the Act. 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.

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, 8 U.S.C. § 1186a(c)(4). The Second Circuit Court of Appeals 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.

DISCRETIONARY RELIEF - Cancellation of Removal

The Board addressed the physical presence eligibility requirement for special rule cancellation of removal under section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 (IIRIRA)(codified at section 101(a)(42)(2000)) in *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007). *See also* section 203 of the Nicaraguan Adjustment and Central American Relief Act and 8 C.F.R. § 1240.66. The issue was whether the application is a continuing one so that an applicant can continue to accrue physical presence until the issuance of a final administrative decision. The Board found that it is, reasoning that the Board has long held that suspension of deportation is a continuing application, that congressional intent appears to favor such treatment given that Congress

did not make the "stop-time" rule for cancellation of removal applicable to such applications, and the intent was ameliorative. The Board reaffirmed *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), in which the Board found an application for cancellation of removal to be a continuing one for purposes of the good moral character period, finding that the reasoning in that decision applied to physical presence for special rule cancellation. Further, the Board reasoned that the term "filed" in the applicable phrase "has been physically present in the United States for a continuous period of 7 years immediately preceding the date the application was filed" is ambiguous. 8 C.F.R. § 1240.66(b)(2). Lastly, the Board found that derivative applicants, like the respondent in this case, must meet the eligibility requirements. In this case, the Immigration Judge had found that the application was not continuous, and the application was filed on the date it was referred to the Immigration Court, which cut off the respondent's physical presence short of the required 7 years. The Board remanded the case for consideration of the respondent's application.

The Board found that a parent's lawful permanent resident status cannot be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under section 240A(a)(1) of the Act in *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007). The respondent came to the United States as a minor around the age of 4 or 5. Her mother became a lawful permanent resident when respondent was 14 or 15. The Ninth Circuit Court of Appeals held in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), that the first of two requirements for cancellation eligibility, the requirement for 7 years' continuous residence after admission in any status, can be imputed to an unemancipated minor. The Board first stated it disagreed with the reasoning in *Cuevas* and declined to apply the holding outside of the Ninth Circuit. The Ninth Circuit relied on precedent which found that the parent's intent in establishing domicile for former section 212(c) could be imputed to an unemancipated minor. The Board disagreed that domicile could be equated to residence for this purpose because residence does not contain an element of subjective intent. The Board then declined to extend the *Cuevas* holding to the lawful permanent residence requirement, reasoning that obtaining lawful permanent residence status requires compliance with substantive and procedural requirements. To ignore those requirements and allow the status of a parent to attach to a child would run contrary to the clear intent of Congress which required "lawful" admission. Further, the two requirements set forth by Congress in section 240A would essentially be merged.

The Board considered whether the respondent was eligible for cancellation of removal under section 240A(b) of the Act when the respondent had been convicted of willful cruelty or unjustifiable punishment of a child before the effective date of section 237(a)(2)(E) of the Act in *Matter of Gonzalez-Silva*, 23 I&N Dec. 218 (BIA 2007). The Board found that an offense can be one "described" in section 237(a)(2)(E) only if the conviction for that offense occurred after September 30, 1996. The Board relied on the reasoning set forth in *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003), that the description of a category of offenses incorporates the entirety of the offense, including exceptions. In this case, an offense is not one described in section 237(a)(2)(E) if it occurred before the effective date of that provision.

DISCRETIONARY RELIEF - Voluntary Departure

In *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006), the Board considered the consequences of failing to post the voluntary departure bond required by section 240B(b)(3) of the Act, 8 U.S.C. § 1229c(b)(3). The determinative question was whether the penalties and privileges pertaining to voluntary departure attach at the time of the Immigration Judge's decision at the conclusion of immigration proceedings, or upon the posting of the voluntary departure bond. The Board concluded that the posting of the voluntary departure bond is a condition precedent to permission to depart voluntarily, and therefore when an alien fails to meet this requirement, the penalties for failure to depart within the time period specified do not attach. The Board found support in its precedent decision *Matter of A-—*, 23 I&N Dec. 737 (BIA 2005), in the framework of the statute and regulations, and because, as a practical matter, an alien may find it difficult to post the required bond in the 5-day period provided.

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

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

CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY - Aggravated felony

The Board discussed the analysis to be used in determining whether an offense is an aggravated felony under section 101(a)(4)(K)(ii) of the Act (offenses described in 18 U.S.C. §§ 2421, 2422, 2423 relating to transportation for the purpose of prostitution "if committed for commercial advantage") in *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007). Analysis of this aggravated felony ground of removability requires a two-step inquiry: whether the alien was convicted of an offense described in the sections specified, and whether the offense was committed

for commercial advantage. The Board found that the first step must be made by reference to the record of conviction alone, while the second step requires an additional inquiry into the conduct underlying the offense.

The Board highlighted the distinction in the Act between crimes *committed* by an alien and crimes for which an alien *is convicted*. When the statute directs a focus on the conviction, the inquiry is restricted to the evidence in the record of conviction in the manner described in *Taylor v. United States*, 495 U.S. 575 (1990). Congress amended this aggravated felony definition in 1996 to include the *committed* language, indicating it intended that the circumstances of the crime be considered. Furthermore, the statute at issue, 18 U.S.C. § 2422, does not have as an element that the crime be committed for commercial advantage. If the inquiry was limited to the elements of the crime, the provision would have an extremely limited scope. Lastly, other aggravated felony provisions include requirements that extend beyond the elements of the offense. To give effect to the commercial advantage provision, the parties must be able to offer evidence outside the strict confines of the record of conviction. The Board found that the Immigration Judge can look at the record of conviction, the presentence report, the respondent's own admissions, and any other relevant evidence.

Building on *Matter of Gertsenshteyn*, in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), the Board considered whether the amount of loss to the victim, which must exceed $10,000 for an aggravated felony offense involving "fraud or deceit" under section 101(a)(43)(M)(i) of the Act, can be found by reference to evidence outside the "record of conviction," or whether the categorical and modified categorical approaches restrict inquiry solely to record of conviction information. In this case, the respondent was convicted of mail fraud, conspiracy to commit mail fraud, healthcare fraud and false statements under 18 U.S.C. §§ 1341 and 371. The statute contains no specific loss amounts, nor do the plea agreements or indictment, but there was a restitution order and a pre-sentence report in the record that provided some evidence of the loss. The Board found that the categorical and modified categorical approaches are not applicable in determining loss to the victim because loss to the victim is not intended to describe an element of the crime. It is a fact about the impact of an alien's convicted conduct that Congress employed as a means of excluding from the scope of the aggravated felony definition some minor offenses. When a removal charge depends upon both elements leading to a conviction and nonelement facts, the nonelement facts may be determined by means of evidence beyond the record of conviction.

The record of conviction can be dispositive on the question of loss, but it will depend upon what information is available and will generally only assist if the record shows the alien admitted the amount of loss during criminal proceedings. Sentencing factors (such as restitution orders) may offer some evidence, but the burden of proof required must be scrutinized as some states only require a preponderance of the evidence standard, which is a lesser standard than the clear and convincing evidence required to establish removability. Immigration Judges may consider other reliable evidence, including witness testimony, bearing on the loss to the victim. In this case, the Immigration Judge had not considered evidence outside the record of conviction, and the case was remanded.

In *Matter of S-I-K-*, 24 I&N Dec. 324 (BIA 2007), 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, 8 U.S.C. § 1159(a), because he had previously acquired permanent residence status.

The Board returned to section 101(a)(43)(M)(i) of the Act in *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 (4th 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 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, following *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). 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 (Seventh, First, Sixth, Ninth, Second and Third).

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 marihuana 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), (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.

CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY - Crimes involving moral turpitude

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

The Board found that the federal offense of trafficking in counterfeit goods or services is a CIMT in *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007). The statute at issue, 18 U.S.C. § 2320, prohibits intentionally trafficking or attempting to traffic in goods or services knowingly using a counterfeit mark, which is defined as a trademark. The Immigration Judge had found that because the defendant need not know that trafficking in counterfeit goods was criminal or that the trafficker specifically intended to defraud the purchaser, the crime is not one of moral turpitude. The Board acknowledged that generally only crimes involving specific intent to defraud are CIMTs, but crimes that do not require specific intent to defraud can also be CIMTs. A conviction under 18 U.S.C. §2320 requires that the offender's expropriation and use of an owner's trademark must be likely to confuse or deceive the public at large with significance adverse consequences for consumers and for the owner of the mark. Not only do consumers pay for brand-name quality but get a fake, but the offender exploits trademark owners since the brand is diluted, and the offender earns profits by capitalizing on the reputation, development costs and advertising efforts of the mark owner.

In *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), the Board found that a conviction for wilful failure to register by a sex offender who has been previously apprised of the obligation to register, in violation of section 290(g)(1) of the California Penal Code, is a CIMT. The respondent argued that California courts have interpreted the statute to include instances in which an individual failed to register because of forgetfulness which is not the type of "evil intent" usually considered to be turpitudinous. The Board found that contemporary moral standards play a significant role in determining a morally turpitudinous offense, and society outrage at child sex

crimes has led to enactment of these statutes. The risk involved in a violation of this duty owed to society is too great, and the obligation to register is so important that a failure to register implicitly involves evil intent, even if the obligation may have been forgotten.

In *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007), the Board addressed whether a conviction for assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is categorically a CIMT. The Board found that it is not because a conviction for assault and battery in Virginia does not require the actual infliction of physical injury. While a conviction requires intent to cause injury, that injury may be to the feelings or mind, as well as to the body. In *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), the BIA had indicated that to find moral turpitude in a general assault and battery statute, the offense must necessarily involve the intentional infliction of serious bodily injury. This statute does not so require. As the conviction documents provided no specific facts regarding the conviction, the Board did not need to consider whether to use a modified categorical approach. The Board terminated proceedings.

By contrast, in *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007), the Board considered whether the offense of assault in the third degree in violation of section 120.00(1) of the New York Penal Law is a CIMT. The Board held that a finding of moral turpitude in assault statutes involves an assessment of both the state of mind and the level of harm required to complete the offense. Intentional conduct resulting in a meaningful level of harm may be morally turpitudinous, but as the level of conscious behavior decreases, more serious resulting harm is required. The New York statute at issue here requires both specific intent and physical injury. The specific intent element distinguishes this New York statute from general-intent simple assaults, as does the requirement of evidence of physical impairment or "substantial pain." The Board concluded that the offense is a CIMT.

CRIMINAL GROUNDS OF REMOVABILITY/INADMISSIBILITY - Other

In *Matter of Moncada*, 24 I&N Dec. 62 (BIA 2007), the Board considered the personal use exception to the ground of deportability for a controlled substance violation under section 237(a)(2)(B)(i) of the Act. The respondent was convicted of unauthorized possession of controlled substances in prison under section 4573.7 of the California Penal Code. The record reflected that his conviction arose from his possession of not more than 28.5 grams of marijuana. The controlled substance ground of deportability does not apply to a single offense involving possession for one's own use of 30 grams or less of marijuana.

The Board held that a natural reading of the statute is that it is intended to ameliorate the harsh immigration consequences of the least serious drug violations only, and that possessing marijuana in prison is significantly more serious than simple possession because of the inherent potential for violence and threat of disorder. As possession of drugs in prison is not a simple drug possession, the Board found the respondent deportable.

In *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007), the Board considered who bears the burden of proving that a conviction was not vacated solely for immigration purposes in a

motion to reopen. In this case, the respondent was found removable by an Immigration Judge based upon a conviction for criminal sexual abuse. During the pendency of the respondent's appeal, he filed a motion to remand, alleging that his conviction had been vacated. The Board granted the motion, and on remand, the Immigration Judge sought evidence establishing the reason that the conviction had been vacated. After several continuances, the Immigration Judge found that the respondent had not established that his conviction was vacated as a result of a procedural or substantive defect in the underlying conviction. The Board noted that there is a split among the United States Circuit Courts of Appeal on the burden of proof issue, but the Circuit in which this case arose, the Seventh Circuit, had not yet ruled on the matter. The Board found that at this late stage of proceedings, the burden is appropriately placed upon the respondent.

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 the Florida Statutes. 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.

OTHER REMOVABILITY AND INADMISSIBILITY ISSUES

The Board revisited the issue of under what circumstances the Board and the Immigration Judges may terminate proceedings when a respondent has a pending naturalization application in *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007). Under 8 C.F.R. § 1239.2(f)(2006), an Immigration Judge may terminate removal proceedings when an alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors. The Board found that because the Board and Immigration Judges lack jurisdiction to adjudicate naturalization applications, neither can determine prima facie eligibility. DHS must communicate affirmatively that the alien is prima facie eligible for naturalization. This decision reaffirms the Board's holding in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975).

In this case, DHS adjudicated the naturalization application even though it does not have authority to do so when removal proceedings are pending. The Board found that DHS's adjudication of the application is not an affirmative communication. The Board noted that Congress limited DHS's authority to adjudicate naturalization applications while an alien is in removal proceedings to prevent a race between the alien to gain citizenship and the Attorney General to deport him. Lastly, the Board acknowledged that it does not have the authority to compel DHS to acknowledge the respondent's eligibility for naturalization which permits DHS to prevent

termination by its silence. However, to decide otherwise would place Immigration Judges and the Board in the position of rendering decisions on an issue over which they do not have ultimate jurisdiction and for which they do not have expertise.

The Board weighed in on an Immigration Judge's authority to reinstate a prior deportation order under the reinstatement provisions of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) in *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007). The respondent in this case was deported from the United States following deportation proceedings in 1992. He reentered the United States, and in 2005 removal proceedings were initiated against him. While proceedings were pending, DHS moved for reinstatement of the respondent's prior order of deportation under section 241(a)(5). The Immigration Judge terminated proceedings without prejudice.

The Board found that the regulations clearly set forth that an immigration officer is authorized to reinstate a prior deportation, and an alien has no right to a hearing before an Immigration Judge. 8 C.F.R. § 1241.8(a). The respondent challenged the regulation as contrary to the right to a hearing set forth in section 240(a) of the Act, 8 U.S.C. § 1229a(a). This argument was rejected by the United States Court of Appeals for the Ninth Circuit sitting en banc in *Morales-Izquierdo v. Gonzales*, 477 F.3d 691 (9th Cir. 2007). The Board agreed with the Court, which reasoned that the reinstatement and removal provisions of the Act are in separate sections and the reinstatement provisions describe limited proceedings and rights. Further, an alien has already had a full hearing. Lastly, the Board found that once the notice to appear is served, the Immigration Judge has exclusive authority to terminate proceedings, and may do so when proceedings are improvidently begun. The availability of reinstatement is a valid reason to terminate proceedings.

While not specific to a ground of removability or inadmissibility, the Board considered the status of an alien who leaves the United States for Canada to apply for refugee status there, and then returns to the United States after the application is denied in Canada in *Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007). The respondent is a native and citizen of Guinea who traveled to Canada from the United States to apply for asylum. She was returned to the United States after her application was denied. The Immigration Judge found, and the Board agreed, that the respondent departed the United States when she left, and was an arriving alien upon her return. The Board found that neither the Reciprocal Agreement nor the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Safe Third Country Agreement) identify or mandate the status of an alien deported from one country to the other. While the Supplementary Information accompanying the DHS's regulations implementing the Safe Third Country Agreement indicated that returnees from Canada would be in the same position they would be in had they not left the United States, the Board declined to follow those comments. The Board found that the case cited by DHS, *Matter of T-*, 6 I&N Dec. 638 (BIA 1955) (finding that a lawful permanent resident aboard a ship who was refused entry in any other country and was returned to the United States was not seeking entry to the United States) was clearly distinguishable, and because neither agreement nor a memorandum cited by DHS are controlling, the respondent was subject to the statutes and regulations regarding aliens seeking admission to the United States. The respondent should have been charged as an arriving alien under section 235(a)(1) of the Act, and the regulations make clear that an alien in either removal

proceedings or expedited removal proceedings is subject to the Safe Third Country Agreement.

BOND

In *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007), the BIA addressed the mandatory detention provisions of section 236(c)(1) of the Act. The Board first found that an alien who has been apprehended at home while on probation for criminal convictions, rather than released directly from criminal custody, "is released" from criminal custody within the meaning of section 236(c)(1), provided the release is after the expiration of the Transition Period Custody Rules (TPCR).

The Board then found that an alien need not be charged with the ground that provides the basis for mandatory detention in order to be subject to the mandatory detention provision. Section 236(c)(1)(B) provides than an alien is subject to mandatory detention if the alien "is deportable" under section 237(a)(2)(A)(ii) of the Act. In this case, the respondent was only charged with removability under section 237(a)(1)(B), but admitted to convictions for two CIMTs. The Board previously found that the "is deportable" language in the TPCR does not require that an alien be charged with and found deportable on the ground that provides the basis for mandatory detention. *Matter of Melo*, 21 I&N Dec. 833 (BIA 1997). The Board will look to the record to determine whether it establishes that the alien committed an offense, and whether DHS is not substantially unlikely to establish that the offense would support a charge of removability included in the mandatory detention provision. *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). The Board concluded that the respondent must be given notice of the circumstances or convictions that provide the basis for mandatory detention and an opportunity to challenge the detention.

PROCEDURAL

The Board found that Immigration Judges have jurisdiction to adjudicate de novo an alien's application for Temporary Protected Status (TPS) even if the application has previously been denied by DHS in *Matter of Barrientos*, 24 I&N Dec. 100 (BIA 2007). The Board reasoned that the plain language of the Act makes clear that an alien is permitted to assert his right to TPS in removal proceedings, which must be read as providing a de novo determination. Section 244(b)(5)(B) of the Act, 8 U.S.C. § 1254a (b)(5)(B)(2000).

The Board further explained the scope of an Immigration Judge's authority on remand in *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007). After sustaining the respondent's appeal in part and finding the respondent eligible for withholding of removal, the Board remanded proceedings for background checks. On remand, the respondent requested that the Immigration Judge consider her application for adjustment of status. The Immigration Judge found that jurisdiction continued to rest with the Board because the Board had issued a final decision.

The Board first noted that pursuant to 8 C.F.R. § 1003.1(d)(6), the Board may not issue a final decision granting any application for relief if background checks have not been conducted because the record is not complete. The Immigration Judge renders the final order in these cases. The Board clarified that when a case is remanded to an Immigration Judge for the appropriate

background checks, no final order exists and the remand is effective for all purposes. While the Immigration Judge cannot reconsider the decision of the Board, the Immigration Judge must consider any new evidence revealed by the background checks, and can consider any additional evidence presented by the parties, provided the new evidence meets the requirements for a motion to reopen. The Board noted that because there is no final order, the time and number limitations on motions to reopen do not apply, nor does the requirement to show changed country conditions if an asylum application is involved.

The Board issued a number of decisions regarding the procedures used by Immigration Judges to render 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 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.

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.

In *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006), the Board addressed the general requirements for motions to reconsider before the BIA, and also looked more specifically at the requirements when a motion requests reconsideration of an affirmance without opinion (AWO). The Board restated that the motion to reconsider must include an allegation of material factual or legal errors in the prior decision that is supported by pertinent authority. A motion raising a new legal argument that could have been raised earlier in proceedings will be denied; the additional legal arguments must flow from new law or a de novo legal determination reached by the Board in its decision.

A motion to reconsider an AWO must present some additional arguments. It must show that the alleged errors and legal arguments were previously raised on appeal, explain how the Board erred in affirming the Immigration Judge's decision under the AWO regulations, and if there has been a change in law, provide a reference to the relevant statute, regulation, or precedent and an explanation of how the outcome of the Board's decision is materially affected by the change.

In the case before the Board, the respondent's motion generally reiterated the arguments raised on appeal without any detailed application to the respondent's case. The respondent also set forth a new legal theory for his asylum claim that he was persecuted or has a well-founded fear of persecution on account of his membership in a social group. The Board denied the motion, finding that he did not raise the issue in his application, before the Immigration Judge, or on appeal, and did not set forth any new facts or evidence that would convert the motion to a motion to reopen.

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 Field Office 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.

ATTORNEY DISCIPLINE

Lastly, the Board ruled on attorney discipline regulations in four decisions. In *Matter of Shah*, 24 I&N Dec. 282 (BIA 2007), the Board considered discipline based upon misrepresentations made to another agency. In this case, the attorney was found by an Administrative Law Judge from the Department of Labor to have willfully misrepresented a material fact on a Labor Condition Application (LCA) filed with the Department of Labor. The Board found that a practitioner can be subject to discipline even though the misrepresentation was first made to another agency. The Petition for Nonimmigrant Worker (Form I-129), which is adjudicated by DHS, is supported by the LCA. By presenting the improperly obtained LCA to DHS, the respondent knowingly and willfully misled DHS.

Reinstatement was the subject of two decisions. In *Matter of Krivonos*, 24 I&N Dec. 292 (BIA 2007), the attorney was expelled from practice before EOIR and the DHS as a result of a

conviction for immigration-related fraud. He was reinstated to practice in New York and moved for reinstatement before the Board and the Immigration Courts. The Board denied the respondent's motion for reinstatement because the respondent had not demonstrated by clear, unequivocal, and convincing evidence that he possesses the moral and professional qualifications required to appear before EOIR, and that his reinstatement will not be detrimental to the administration of justice. 8 C.F.R. § 1003.107(b)(1). The Board found that the nature of the crime was serious, struck at the heart of the country's immigration laws, and denied the motion.

The Board also denied the respondent's motion to reinstate in *Matter of Jean-Joseph*, 24 I&N Dec. 294 (BIA 2007), because the respondent had practiced before the Immigration Court while under a suspension order. The practitioner had been suspended from the practice of law by the Supreme Court of Florida for 60 days, and the Board suspended the respondent from the practice of law before EOIR. The respondent was reinstated by the Florida Bar. During the period the respondent was suspended before the Immigration Courts, the respondent appeared at least five times before the Immigration Court. The Board suspended the respondent for 120 days.

The Board applied the standards set forth in *Matter of Ramos*, 23 I&N Dec. 843 (BIA 2005) in *Matter of Truong*, 24 I&N Dec. 52 (BIA 2006), finding suspension from practice before the Board, the Immigration Courts and DHS for 7 years to be appropriate where an attorney was disbarred by the highest court of the State of New York based in large part on his misconduct in a State court action, and he could not rebut the presumption with the exceptions noted in *Matter of Ramos*. The New York State disbarment was based largely upon the attorney's handling of a landlord-tenant dispute in which he was found to have offered a forged lease into evidence and given false testimony in support of the lease.