



# Immigration Law Advisor

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## Relief in Their Own Right: Asylum for the Children of Victims of Coercive Population Control Policies

By Elizabeth Donnelly

### Introduction

**S**ection 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat 3009-586, 3009-689, which was codified at 101(a)(42) of the Immigration and Nationality Act, U.S.C. 1101(a)(42), defines four classes of refugees against whom enforcement of a coercive population control program constitutes persecution on account of a political opinion:

1. Persons who have been forced to abort a pregnancy;
2. Persons who have been forced to undergo involuntary sterilization;
3. Persons who have been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program; and
4. Persons who have a well-founded fear that they will be forced to undergo such a procedure or be subject to persecution for such failure, refusal, or resistance.

In 2008, the Attorney General held that the spouse of a person forced to undergo an abortion or sterilization is not per se eligible for asylum but may nonetheless qualify for relief under either the third or fourth prong of the analysis, or, for that matter, any other ground enumerated in the Act. *See Matter of J-S-*, 24 I&N Dec. 520, 527 (A.G. 2008). Federal appellate courts have since followed suit. *See Ni v. Holder*, 613 F.3d 415, 423 (4th Cir. 2010) (collecting cases).

A related problem is playing out in the appellate courts: whether and under what circumstances the children of individuals who run afoul of

coercive population control (“CPC”) policies may qualify for asylum. The issue is a particularly sensitive one, in part because it may arise in cases involving unaccompanied minors. See, e.g., *Shi Chen v. Holder*, 604 F.3d 324, 328 (7th Cir. 2010); *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1242 (9th Cir. 2005); *Xiu Ming Chen*, 113 F. App’x 135, 136 (6th Cir. 2004). As explained below, the courts have delineated theories as to when relief may be available—but determining an individual applicant’s eligibility remains a challenge, both legally and factually.

### Legal Theories

Federal appellate courts, some even well before *Matter of J-S-*, have held that children are not automatically eligible for asylum based on a parent’s forced abortion, sterilization, or resistance to CPC policies. See, e.g., *Shi Chen*, 604 F.3d at 331-32; *Tao Jiang v. Gonzales*, 500 F.3d 137, 141 (2d Cir. 2007) (relying on reasoning in *Shi Liang Lin*, 494 F.3d 296 (2d Cir. 2007)); *Xue Yun Zhang*, 408 F.3d 1239 (9th Cir. 2005); *Neng Long Wang v. Gonzales*, 405 F.3d 134, 142-43 (3d Cir. 2005); see also *Jian Hui Li v. Keisler*, 248 F. App’x 852 (10th Cir. 2007); *Cai Hong Wang v. Att’y Gen. of U.S.*, 176 F. App’x 969, 970 (11th Cir. 2006); *Xiu Ming Chen*, 113 F.App’x at 138-39. Although the persecution of the parent remains relevant, see, e.g., *Shi Chen*, 604 F.3d at 331, a child applicant cannot typically stand in the parent’s shoes for purposes of asylum. As the United States Court of Appeals for the Third Circuit has noted, a child may have an even more tangential claim to relief than the spouse of an individual subjected to CPC policies: “whereas a husband has a direct interest in whether his wife can have additional children, a child is in a very different position as the family planning policies as applied to his parents can affect him only as a potential sibling and not as a parent.” *Neng Long Wang*, 405 F.3d at 143; see also *Shao Yan Chen v. U.S. Dep’t of Justice*, 417 F.3d 303, 305 (2d Cir. 2005) (reasoning that “because the procreative rights of children are not sufficiently encroached upon when their parents are persecuted under coercive family planning policies, children are not *per se* as eligible for relief under § 601(a) as those directly victimized themselves”); *Xue Yun Zhang*, 408 F.3d at 1245. Consequently, the courts have agreed that a child must craft a claim of independent eligibility based on an enumerated ground.

The courts of appeal have most readily accepted arguments based on imputed political opinion. See *Shi Chen*, 604 F.3d at 332; *Tao Jiang*, 500 F.3d at

141; *Xue Yun Zhang*, 408 F.3d at 1246-47. As the Seventh Circuit has recognized, a child may fall under “the third and fourth classes of refugees under § 1101(a)(42)(B)—those who have a well-founded fear of involuntary sterilization . . . or those who fear persecution for refusing sterilization or otherwise resisting a coercive population-control program.” *Shi Chen*, 604 F.3d at 332. Such a claim is a “specific application” of a more generally recognized theory, namely that persecutors “have mistreated or will mistreat [the applicant] because they attribute someone else’s—often a family member’s—political beliefs to him.” *Id.*; see also *Xue Yun Zhang*, 408 F.3d at 1246-47. This theory permits the applicant to rely in part on the parent’s persecution to establish eligibility for relief. *Shi Chen*, 604 F.3d at 332. Of course, as detailed below, the applicant must provide some evidence that the political opinion the parent is deemed to hold was or will be, in fact, actually imputed to him. *Id.*; see also *Tao Jiang*, 500 F.3d at 142.

Applicants have also advanced claims based on membership in various social groups. In this context, an applicant’s immediate family may qualify as a particular social group. *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir. 2004). This legal theory comes laden with factual issues, however. For example, the applicant’s claim may remain “too closely connected with the alleged mistreatment of his parents. Because his parents will almost always suffer more severe personal hardship and potential persecution than will their child, the circumstances affecting a child are overshadowed by those affecting his parents.” Brian Erdstrom, *Assessing Asylum Claims From Children Born in Violation of China’s One-Child Policy: What the United States Can Learn from Australia*, 27 Wis. Int’l L.J. 139, 164 (2009). The child, therefore, may encounter difficulty in demonstrating the harm he or she personally suffered is sufficiently severe to constitute persecution. As discussed more fully below, the Third Circuit’s decision in *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005), illustrates this concern. Additionally, “while basing a claim for asylum on family as a particular social group makes sense for accompanied children, it makes less sense when a child is leaving his family behind.” Kristi M. Deans, Comment: *Less than Human: Children of a Couple in Violation of China’s Population Control Laws and the Barriers They Face in Claiming Asylum in the United States*, 36 Cal. W. Int’l L.J. 353, 373 (2006).

The applicant in *Shi Chen*, 604 F.3d at 324 (7th Cir. 2010), proposed a social group of the *hei haizi*, or

children born illegally in China. As a member of the *bei haizi*, he asserted that he suffered various economic hardships as well as the denial of certain rights, including that “he is denied access to health care and other governmental services; is excluded from higher education and many types of employment; and will be denied the right to marry and have children, the right to own property, and the right to freely travel within and outside of China.” The court found that the agency failed to fully analyze the “cumulative significance” of the hardships on the applicant as a member of this group. *Id.* at 333. It remanded in part for the agency to conduct a more complete analysis of the evidence and to determine whether the respondent warranted relief.

Other proposed social groups have met with less success. In *Neng Long Wang*, the applicant argued for a social group consisting of “poor and uneducated Chinese who are forced to pay a heavy fine far larger than they can afford” for violating the CPC policy. 405 F.3d at 140. The applicant, who was smuggled into the United States, theorized that “the heavy fine . . . forces members of this particular social group to turn to international smuggling operations to search for work in foreign lands and the Chinese government directly and indirectly supports those smuggling organizations.” *Id.* The Immigration Judge rejected this claim “due to a lack of evidence that ‘official Chinese government policy is either to encourage alien smuggling or to support such endeavors.’” *Id.* The applicant essentially abandoned this claim before the Third Circuit, which noted that the record did not, in any event, support a substantial argument on this theory.

### Factual Issues

A significant challenge that child applicants face is proving that they individually have suffered or will suffer harm rising to the level of persecution. Overall, the case law suggests that the inquiry is highly fact specific. Typically, applicants assert a pattern of ongoing past mistreatment against the entire family and various forms of nonphysical abuse that impact them individually. Common aspects of these claims include being forced into hiding with their families; limitation or deprivation of educational opportunities; confiscation or destruction of property; fines and other financial consequences amounting to economic persecution; and emotional trauma stemming from the applicant’s or family members’ interactions with authorities. See *Shi Chen*, 604 F.3d at 329; *Tao Jiang*, 500

F.3d at 139; *Xue Yun Zhang*, 408 F.3d at 1247-48; *Neng Long Wang*, 405 F.3d at 136-37; see also *Jian Hui Li*, 248 F.App’x at 853-54. Particularly in the absence of violence against the applicant, appellate courts have emphasized the need to consider any mistreatment cumulatively. *E.g.*, *Shi Chen*, 604 F.3d at 333; *Xue Yun Zhang*, 408 F.3d at 1249. Some courts have also expressed sensitivity to harm the applicant endured as a young child. The Ninth Circuit has noted that “[t]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution.” *Xue Yun Zhang*, 408 F.3d at 1247 (quoting INS Policy and Procedural Memorandum from Jack Weiss, Acting Director, Office of International Affairs, to INS officers 19 (Dec. 10, 1998), available at 1998 WL 34032561(INS) (entitled *Guidelines for Children’s Asylum Claims*) (internal quotation marks omitted). Several other courts have made the same point in other contexts. See, *e.g.*, *Kholjavskiy v. Mukasey*, 540 F.3d 555, 570 (7th Cir. 2008); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004); see also Memorandum from Jack Weiss, *supra*, at 26.

The Third Circuit’s decision in *Neng Long Wang* highlights an applicant’s potential difficulties in establishing sufficiently individualized harm. The alien asserted that the cumulative harm amounted to past persecution on account of his membership in his family where the Chinese Government:

- (1) imposed a fine grossly disproportionate to their income on his parents for violating the family planning policies;
- (2) engaged in a lengthy pattern of destruction of the Wang family’s property, including total destruction of the family home;
- (3) destroyed equipment necessary to the family business;
- (4) left the family with no choice but to leave their home temporarily to run from the government;
- (5) caused family separation at several points in time; and
- (6) refused to acknowledge the payments the family made towards the family planning fine.

405 F.3d at 142. The court assumed, without deciding, that these acts amounted to persecution of Wang’s parents. Nonetheless, the Third Circuit refused to disturb the

*continued on page 14*

**I**t was a monumental loss for EOIR when Board Member Lauri S. Filppu retired in July of 2011. That loss was compounded when he passed away on October 30.

Few can match Lauri's long and distinguished career in immigration law. He served with the Department of Justice for more than three and a half decades: 3 years as a staff attorney with the Board of Immigration Appeals; 19 years with the Office of Immigration Litigation, including a tenure as Deputy Director; and 16 years with the Executive Office for Immigration Review, as a Member of the Board. Lauri's dedication and distinction as a public servant are almost legendary, and among his many accolades, he received the Attorney General's Distinguished Service Award in 1994 and the John Marshall Award in 1987. Seemingly unaware of his colleagues' deep admiration for his work, Lauri was profoundly humble. When Lauri retired last summer, he appeared at times genuinely surprised by the many heartfelt expressions of affection and respect from his colleagues and co-workers. But that was Lauri. Despite his incredible intellect and stature in his profession, he never thought of himself as anyone special. Those of us who were fortunate enough to work with him knew better; we realized that we were saying goodbye to a brilliant lawyer, a good friend, and one who had profoundly and indelibly influenced those around him.

Lauri was a true professional, and a gentleman to everyone that he worked with. He was unwaveringly faithful to the law and to EOIR's mission. He often spoke of his role as a Board Member as a public service that he performed on behalf of the Attorney General and the President, and for the American people. He invoked our greatest public servants, never cognizant of how all of us counted him among them.

Lauri was a master of his trade. His knowledge of immigration law was prodigious. He worked tirelessly to perfect his decisions, editing each sentence and phrase to capture the correct nuance, always ensuring that his analysis was logical and as true as possible to the language of statute, regardless of ambiguities and unanswered questions. Lauri also had an unrivaled gift for crafting hypotheticals

to illustrate his position, driving his points home and uncovering angles that no one else had considered. And through the sheer volume of scholarship and imagination that he brought to every conversation, Lauri challenged us all. He was a tough mentor and a crucible to enhance our legal reasoning and judicial drafting, unyielding before sloppy conclusion, incomplete analysis, and inadequate research. For those of us who have sparred with Lauri over the years, we will remember the deft precision of his argument, the not-quite-subdued passion of his dialectic, and the twinkle in his eye when he had cornered us with a rhetorical, "Well, am I right?" And yet, despite the fact that he usually had the winning argument, you never felt diminished from such discussions with Lauri. Quite the contrary. You walked away with the realization that you had been in the presence of a master, who by the force of gentle persuasion, precise reasoning, and an unparalleled ability to listen had challenged you to think about the subtleties and implications of an issue in ways that you had not fathomed before you walked into his office. His intellectual integrity as a judge, a teacher, and a colleague was truly inspirational.

Perhaps the greatest reason that we grieve over Lauri's passing is the loss of his personal presence. Yes, he made innumerable and incomparable contributions to the law and to the Department of Justice. But his lasting legacy is the dignity and vitality he brought to the halls of EOIR. Although passionate for his work, he was gentle with everyone around him but vibrant in every interaction, particularly when theatrically punctuating an absurdity in the law. He was available to all who sought his advice. He was a steady presence during the hard times, and a joyful friend during the good times. We will desperately miss how he coupled civility with high intellectual standards, his humor with his reach for excellence.

None of us will ever forget Lauri. He leaves a legacy that will last far into the future.

Someone once said that the true measure of a person's wealth is how much he is loved by others. If that is true, then Lauri Filppu is today a very wealthy man.

*Juan P. Osuna,  
Director, Executive Office for Immigration Review*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR SEPTEMBER 2011

*by John Guendelsberger*

The United States courts of appeals issued 149 decisions in September 2011 in cases appealed from the Board. The courts affirmed the Board in 128 cases and reversed or remanded in 21, for an overall reversal rate of 14.1% compared to last month's 12.5%. There were no reversals from the First, Fourth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for September 2011 based on electronic database reports of published and unpublished decisions.

| Circuit  | Total | Affirmed | Reversed | % Reversed |
|----------|-------|----------|----------|------------|
| First    | 0     | 0        | 0        | 0.0        |
| Second   | 42    | 38       | 4        | 9.5        |
| Third    | 18    | 17       | 1        | 5.6        |
| Fourth   | 6     | 6        | 0        | 0.0        |
| Fifth    | 11    | 10       | 1        | 9.1        |
| Sixth    | 5     | 5        | 0        | 0.0        |
| Seventh  | 4     | 2        | 2        | 50.0       |
| Eighth   | 1     | 1        | 0        | 0.0        |
| Ninth    | 40    | 29       | 11       | 27.5       |
| Tenth    | 6     | 6        | 0        | 0.0        |
| Eleventh | 16    | 14       | 2        | 12.5       |
| All      | 149   | 128      | 21       | 14.1       |

The 149 decisions included 76 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 36 direct appeals from denials of other forms of relief from removal or from findings of removal; and 37 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

|              | Total | Affirmed | Reversed | % Reversed |
|--------------|-------|----------|----------|------------|
| Asylum       | 76    | 67       | 9        | 11.8       |
| Other Relief | 36    | 28       | 8        | 22.2       |
| Motions      | 37    | 33       | 4        | 10.8       |

The nine reversals or remands in asylum cases involved past persecution (two cases); nexus (two cases);

Convention Against Torture (two cases); well-founded fear; humanitarian asylum; and the changed conditions exception to the 1-year filing bar.

The eight reversals or remands in the "other relief" category addressed a variety of issues, including aggravated felony grounds of removal, application of the modified categorical approach, a continuance request, and denial of adjustment of status in the exercise of discretion.

The four reversals in motions cases included three cases from the Ninth Circuit addressing the regulatory departure bar to motions to reopen and a motion to reconsider involving an aggravated felony ground in the Second Circuit.

The chart below shows the combined numbers from January through September 2011 arranged by circuit from highest to lowest rate of reversal.

| Circuit  | Total | Affirmed | Reversed | % Reversed |
|----------|-------|----------|----------|------------|
| First    | 12    | 9        | 3        | 25.0       |
| Seventh  | 42    | 33       | 9        | 21.4       |
| Ninth    | 1366  | 1117     | 249      | 18.2       |
| Third    | 250   | 223      | 27       | 10.8       |
| Tenth    | 33    | 30       | 3        | 9.1        |
| Sixth    | 80    | 74       | 6        | 7.5        |
| Eighth   | 27    | 25       | 2        | 7.4        |
| Eleventh | 166   | 155      | 11       | 6.6        |
| Second   | 424   | 400      | 24       | 5.7        |
| Fourth   | 95    | 91       | 4        | 4.2        |
| Fifth    | 116   | 112      | 4        | 3.4        |
| All      | 2611  | 2269     | 342      | 13.1       |

Last year's reversal rate at this point (January through September 2010) was 11.5%, with 3260 total decisions and 374 reversals.

The numbers by type of case on appeal for the first 9 months of 2011 combined are indicated below.

|              | Total | Affirmed | Reversed | % Reversed |
|--------------|-------|----------|----------|------------|
| Asylum       | 1291  | 1118     | 173      | 13.4       |
| Other Relief | 551   | 461      | 90       | 16.3       |
| Motions      | 769   | 690      | 79       | 10.3       |

Correction Note: The July 2011 report in the August 2011 issue of the ILA showed a spike in the year-to-date reversal rate from 13.4% at the end of June 2011 to 17.6% at the end of July 2011. The year-to-date reversal rate through July should have been reported as 13.1%. This error has been corrected in the online version of the August 2011 ILA.

*John Guendelsberger is a Member of the Board of Immigration Appeals.*

### **The Heart of *Silva-Trevino*: Still Beating?**

*by Edward R. Grant and Patricia M. Allen*

Everybody knows  
That you've been untrue  
You've gone and broke my heart  
And made me blue

Turn my head around  
When you tore me down

– Yo La Tengo, “Tore Me Down”

*They Tore Out My Heart and Stomped That Sucker Flat*

– Lewis Grizzard

If precedents had personalities, such could be the laments of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), after its recent rebuff by the Eleventh Circuit in *Fajardo v. U.S. Attorney General*, Nos. 09-12962, 09-14845, 2011 WL 4808171 (11th Cir. Oct 12, 2011). Not as bad as the blow administered by the Third Circuit in *Jean-Louis v. Attorney General of the U.S.*, 582 F.3d 462 (3d Cir. 2009), but painful nonetheless. Several precincts have yet to be heard from: a Fourth Circuit oral argument in September ought to result shortly in another verdict on *Silva-Trevino*, and one must assume that immigration-laden circuits such as the Second, Fifth, and Ninth will be heard from before too long. But like poor Lewis Grizzard’s heart, *Silva-Trevino* may need a saving intervention if, in cases involving ambiguous “official” records of conviction, it will continue to determine which such convictions are for crimes involving moral turpitude

(“CIMT”). For prior analysis in these pages, see Geoffrey Gilpin and Brad Hunter, *Moral Turpitude After Silva-Trevino*, Immigration Law Advisor, Vol. 3, No.7 at 1 (July 2009), and Edward R. Grant, *The Top Twenty: Cases To Remember from 2009*, Immigration Law Advisor, Vol. 3, No. 12 at 1, 15-17 (Dec. 2009) (analyzing *Jean-Louis*).

The petitioner in *Fajardo*, a lawful permanent resident, was convicted in Florida of false imprisonment, misdemeanor assault, and misdemeanor battery, all arising out of a single domestic incident in which the victim was his wife. While seeking reentry into the United States, he was apprehended by Customs and Border Protection on the basis of these convictions and placed in removal proceedings. The Department of Homeland Security conceded that the assault and battery convictions were not for CIMTs. The Immigration Judge found that the conviction for false imprisonment under section 787.02 of the Florida Statutes was for a CIMT. Section 787.02 is divisible, covering a range of conduct that includes nonviolent and nonforceful restraint. Since the charging document for the false imprisonment count closely tracked pertinent language of section 787.02(1)(a) (defining “false imprisonment”), it could not resolve the question whether the respondent had been convicted of morally turpitudinous conduct. The Immigration Judge turned to the remaining counts of the criminal information and, based upon the factual allegations underlying the convictions for assault and battery, concluded that the offense of false imprisonment was, in this case, a CIMT.

The Immigration Judge ruled in 2007, before *Silva-Trevino* was issued. By the time the Board decided the respondent’s appeal, the Attorney General’s precedent was on the books. The Board, while citing *Silva-Trevino*, did not primarily rest its decision on any of the intervening precedent’s most notable holdings: its clarification of the level of scienter required to find a CIMT, its application of the “reasonable probability” standard in determining whether a prosecution under the statute at issue could reach nonturpitudinous conduct, or its noted “step three,” permitting recourse to reliable evidence outside the formal record of conviction to determine if an alien was, in fact, convicted of morally turpitudinous conduct. Rather, after assuming that the statute could reach noncoercive conduct, the Board concluded that under “step two” of *Silva-Trevino*, the formal record of conviction, which included all counts in the criminal information, established that the respondent had falsely imprisoned his victim by

unlawfully and intentionally threatening and touching or striking her. The Board rejected the respondent's argument that the assault and battery counts were not part of the record of conviction for the false imprisonment offense, because the respondent pled guilty to each charge, and each charge was predicated on the same event, with the same victim. Only as an alternate ground did the Board conclude that "step three" of *Silva-Trevino* also supported reliance on the assault and battery counts.

The Eleventh Circuit disposed quickly of the Board's conclusion that the assault and battery counts could be considered in the assessment of the respondent's conviction for false imprisonment. *Fajardo*, 2011 WL 4808171, at \*4; see also *Jaggernaut v. U.S. Atty Gen.*, 432 F.3d 1346, 1355 (11th Cir. 2005) (holding that the second count of a conviction arising out of the same incident could not be used, under the modified categorical approach, to establish that the petitioner's larceny conviction was for an aggravated felony theft offense). Thus, the Board's footnoted, alternate reliance on "step three" was squarely in the court's sights and was disposed of almost as quickly.

The statutory reference point, the court held, is the definition of a "conviction" in section 101(a)(48) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48), particularly its reference to a "formal judgment of guilt." That phrase, the court explained, is not ambiguous and has consistently been interpreted by the Federal courts to require a "categorical" inquiry into whether a conviction under a particular statute is a conviction for a CIMT. Under that approach, in both its "pure" and "modified" formats, recourse may be had only to the formal record of conviction. Congress, the court held, is presumed to have been aware of this consistent judicial interpretation in its various enactments, especially those establishing inadmissibility for an alien "convicted" of a CIMT. Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

The court rejected the Government's argument, premised on *Silva-Trevino*, that inherent ambiguity in the concept of CIMT (often described as "nebulous") permits the limited conduct-based inquiry called for in "step three" of that decision. The court reasoned that the word "involving" does not create ambiguity because it is a statutory term of art. Likewise, the fact that an alien may be rendered inadmissible by admitting to having committed a CIMT creates no ambiguity in cases where

the charge under section 212(a)(2)(A)(i)(I) is based on a conviction. *Fajardo*, 2011 WL 4808171, at \*5. "Crime involving moral turpitude," the court noted, is a legal term of art predating the immigration statutes. In short, while that term may be ambiguous, the standard for determining whether an alien has been "convicted" of such an offense is not.

The court thus found that "Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude." *Id.* at \*5. "As the Third Circuit explained, the 'ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute.'" *Id.* (quoting *Jean-Louis*, 582 F.3d at 473).

The Eleventh Circuit did not go as far as the Third Circuit in "stomping on the heart" of *Silva-Trevino*. As discussed more thoroughly in our 2009 "Top 20" summary, *Jean-Louis* rejected not only the Attorney General's "step three," but also gave full-throated defense to the "least culpable conduct" standard in making the initial, categorical assessment under the first step of *Silva-Trevino*, the categorical approach. The court reasoned that "the possibility of conviction for non-turpitudinous conduct, however remote, is sufficient to avoid removal." *Jean-Louis*, 582 F.3d at 471. The statute in question included as essential elements that the perpetrator be over 21 years of age and the child-victim be under 12; the court hypothesized that the statute could be used to convict a reckless driver who struck a car with a child occupant. *Id.* at 468. *Jean-Louis* likewise rejected the "actual conduct" inquiry at the core of the third step of *Silva-Trevino*.

*Fajardo* also claimed the support of the Eighth Circuit. However, that court's observation that it would follow its own precedents in establishing whether there has been a conviction for a CIMT was less pointed than that of either the Eleventh or Third Circuits. *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010). In that case, the petitioner, having been convicted of misuse of a social security number, argued that the Board violated his right to due process when it allegedly did not apply *Silva-Trevino* in its analysis of whether his offense constituted a CIMT. The Eighth Circuit dismissed this argument as having no merit, adhered to its precedent, and cited to the Third Circuit's conclusion in *Jean-Louis* that "deference is not owed to *Silva-Trevino's* novel approach" in support.

*Id.* (quoting *Jean-Louis*, 582 F.3d at 470) (internal quotation marks omitted). *Guardado-Garcia* brings to three the number of circuits that cast doubt, at least, on the third step of *Silva-Trevino*.

The Seventh Circuit's decision in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), was heavily relied upon in *Silva-Trevino*, and that court has in turn endorsed the Attorney General's three-step inquiry. *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010). *Mata-Guerrero*, however, adds an extra step not contemplated in *Silva-Trevino*. Under the Attorney General's standard, the Immigration Judge or the Board "stops" at whichever step in the inquiry establishes conviction for a CIMT. In other words, if the determination is made that the offense is a categorical CIMT under the first step of the inquiry, there is no need to proceed further. *Silva-Trevino*, 24 I&N Dec. at 704 (stating that an adjudicator proceeds to the second and third stages of inquiry, respectively, if the prior step "does not resolve" the CIMT issue). Nothing in *Silva-Trevino* suggests, for example, that the "third stage" can be employed by an alien to escape the consequences of having been convicted of a CIMT as determined under the "first stage" inquiry.

The Seventh Circuit does not see it that way. In its view, *Silva-Trevino* abrogated the categorical approach, entirely, on the determination whether an offense constitutes a CIMT. The court held that the Board "abandoned" the categorical approach in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), and that *Silva-Trevino* finished the task. The Board erred, therefore, in applying a categorical approach to determine that Mata-Guerrero's offense of failure to register as a sex offender constituted a CIMT. *Mata-Guerrero*, 627 F.3d at 260. The Board was directed, on remand, to apply all three stages of the *Silva-Trevino* analysis and to make an individualized inquiry into whether the petitioner was convicted of conduct involving moral turpitude.

The Seventh Circuit's interpretation illustrates the intrinsic difficulty of any standard to determine, especially in today's context of complex, codified criminal statutes, whether an alien has been convicted of a CIMT. While *Silva-Trevino* suggests at certain points that an alien not guilty of turpitudinous conduct should not suffer immigration consequences, it is a stretch to conclude that the Attorney General abandoned altogether the categorical approach altogether. In fact, he refashioned that approach, overturning the "least culpable conduct"

standard in favor of the "reasonable probability" approach. If anything, this would seem to give new vigor to the categorical approach, at least in the sense of permitting a greater scope of crimes to be described as categorical CIMTs because there is no reasonable probability they would be extended to nonturpitudinous conduct.

The heart can break from too little love, and sometimes from too much. The Seventh Circuit's approach to *Silva-Trevino* may be an example of the latter. In any event, we await the verdict of the Fourth Circuit, and perhaps others, to determine whether the heart of *Silva-Trevino* will beat on.

*Edward R. Grant is a Board Member at the Board of Immigration Appeals. Patricia M. Allen is Associate General Counsel, Office of the General Counsel, Executive Office for Immigration Review.*

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## RECENT COURT OPINIONS

### ***Third Circuit:***

*Malik v. U.S. Att'y Gen.*, No. 08-3874, 2011 WL 4552466 (3d Cir. Oct. 4, 2011): The Third Circuit denied the petition for review filed by a lawful permanent resident ("LPR") who was ordered removed under section 237(a)(1)(A) of the Act for being inadmissible at entry because he procured a visa through fraud. The petitioner was admitted to the U.S. in 1996 as an LPR, based on his marriage to a U.S. citizen. In 2005, he was placed into removal proceedings, where an Immigration Judge concluded that the qualifying marriage was fraudulent. The Immigration Judge further rejected the petitioner's argument that the institution of proceedings was time barred under section 246(a) of the Act, because more than 5 years had passed since the time of his admission as an LPR. The Board affirmed the Immigration Judge's decision on appeal, and reaffirmed it on remand from the Third Circuit following the court's decision in *Garcia v. Attorney General*, 553 F.3d 724 (3d Cir. 2009). On appeal, the court rejected the petitioner's statute of limitations argument. The court distinguished the present facts, in which the petitioner was admitted as an LPR after consular processing, from the facts in *Garcia* and *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996), where both petitioners had obtained LPR status through adjustment of status. The court pointed out that there are two distinct paths to LPR status—adjustment and consular processing—and because the language of section 246(a) explicitly discusses only adjustment, and nothing

in the status suggests the applicability of a statute of limitations to an alien who never adjusted his/her status, the court found the petitioner's argument unpersuasive. The court also upheld the Immigration Judge's finding of marriage fraud. The court ruled that substantial evidence supported the Immigration Judge's finding that the petitioner and his wife lacked the intent to establish a life together and that the Immigration Judge permissibly relied on the couple's post-marriage conduct in reaching that conclusion.

***Sixth Circuit:***

*Ettienne v. Holder*, No. 10-3896, 2011 WL 4582549 (6th Cir. Oct. 5, 2011): The Sixth Circuit dismissed the petition for review of a Board order that affirmed an Immigration Judge's denial of non-LPR cancellation of removal ("cancellation B"). The petitioner, who is a citizen of Trinidad, entered the U.S. in 1987, when she was 16 years old. In 1990, she signed an affidavit admitting that she participated in marriage fraud in an attempt to obtain LPR status. However, the legacy Immigration and Nationality Service ("INS") took no action until the petitioner remarried and applied for adjustment of status in April 2001. At that point, the INS denied her adjustment application and initiated removal proceedings against her, charging her with unauthorized presence under section 237(a)(1)(B) of the Act and participation in marriage fraud under section 237(a)(1)(G)(ii). The petitioner conceded the first charge but contested the second, claiming a lack of involvement in the marriage fraud scheme. She sought both an immigrant spousal visa, and cancellation B. The Immigration Judge sustained the marriage fraud charge and found that the petitioner failed to establish the requisite "exceptional and extremely unusual hardship" to her U.S. citizen husband and their two sons. The Immigration Judge added that even if the requisite hardship had been established, he would have denied relief in the exercise of discretion based on the petitioner's involvement in marriage fraud. On appeal, the Board declined to address the marriage fraud in light of the petitioner's concession of the unauthorized presence charge and affirmed the Immigration Judge's hardship finding. On petition for review, the court initially denied the Government's motion to dismiss for lack of jurisdiction because the petitioner claimed that the Board failed to follow its own precedent (by not considering all of the hardship factors in their totality) in reaching its hardship conclusion. The court explained that it has jurisdiction to consider "questions of law," such as "whether the BIA

adhered to legal standards or rules of decision articulated in its published precedent." However, the court lacks jurisdiction "over claims that can be evaluated only by engaging in head-to-head comparisons between the facts of the petitioner's case and those of precedential decisions." The court noted that the petitioner claimed a failure of the Board to follow *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), as to its requirement to weigh the hardship factors in the aggregate. The court explained that it would have jurisdiction to review the argument if the Immigration Judge had applied an alternative standard for his hardship determination. However, the Immigration Judge had twice articulated the proper standard for evaluating hardship, so the appeal was outside the scope of the court's review power. The court therefore dismissed the petition for lack of jurisdiction.

***Eighth Circuit:***

*Osuji v. Holder*, No. 10-2259, 2011 WL 4578441 (8th Cir. Oct. 5, 2011): The Eighth Circuit denied the petition for review of the Board's decision affirming an Immigration Judge's denial of asylum for a Christian from Nigeria. The petitioner's asylum claim cited two attacks on his Christian high school's bus by Muslim gang members, who made religious-motivated threats. In the second incident, the petitioner sustained a cut to his knee. He also claimed harassment by Muslim members of his soccer team. The petitioner's father relocated the family to Belgium for several years on account of the ongoing religious harassment. From there, the petitioner came to the U.S. in 2004. His parents returned to Nigeria in 2006, where they have remained without incident. The Immigration Judge found the petitioner credible but ruled that he had not met his burden of establishing either past persecution or a well-founded fear of future persecution, or that the Nigerian Government was unable or unwilling to control the perpetrators. The court found the petitioner's challenge to these findings unavailing. The court noted that persecution "is a rigorous standard" and, quoting *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1003 (8th Cir. 2006), stated that in the absence of physical harm, the subjection of a religious minority "to hostility, harassment, discrimination, and even economic deprivation is not persecution unless those persons are prevented from practicing their religion or deprived of their freedom." The court also found that the petitioner failed to submit evidence that the Nigerian Government condoned religious harassment. The State Department report, which was in the administrative record, noted the

prevalence of such harassment but concluded that it was not condoned by the Government. The court also found that the petitioner failed to establish a “pattern or practice” of persecution in Nigeria and that there was no error by the Board in finding that the claim was “diminished” by the fact that the petitioner’s parents continue to live, work, and practice their religion in Nigeria unharmed.

*Lovan v. Holder*, No. 10-3031, 2011 WL 4835811 (8th Cir. Oct. 13, 2011): The Eighth Circuit reversed the Board’s decision finding the petitioner ineligible for a section 212(c) waiver and affirming an Immigration Judge’s order of removal. The petitioner, an LPR, was convicted in 1991 of sexual abuse of a child and was sentenced to 13 months’ imprisonment. In 2002, he traveled abroad for 1 month using an INS-issued permit. He was readmitted without challenge when he returned from his trip but was placed into proceedings after he applied for naturalization later that year. The INS claimed that the petitioner was removable based on the 1991 conviction because in 1996 Congress made sexual abuse of a minor an aggravated felony. Relying on *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), the Board ruled that the petitioner was ineligible for a section 212(c) waiver because the category of aggravated felony applicable to him (i.e., sexual abuse of a minor) lacked a corresponding ground of inadmissibility under section 212(a) of the Act. In 2009, the Eighth Circuit remanded to the Board to reconsider whether *Blake* was applicable where the petitioner, after being convicted of the aggravated felony in question, departed the U.S. and reentered prior to the commencement of removal proceedings. The court pointed to *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 284-87 & n.6 (BIA 1990; A.G. 1991), where the Attorney General held that deportation proceedings commenced after a similar departure and reentry were “the equivalents of exclusion proceedings.” The Attorney General had also declined to overrule two older precedent decisions (*Matter of L-*, 1 I&N Dec. 1 (A.G. 1940), and *Matter of G-A-*, 7 I&N Dec. 274 (BIA 1956)) where, under similar fact patterns, the aliens were allowed to apply for section 212(c) waivers nunc pro tunc, without regard to whether a corresponding exclusion ground existed. On remand, the court instructed that if the Board would have made the petitioner eligible for a waiver nunc pro tunc prior to the repeal of section 212(c) in 1996, then the Board erred in finding him ineligible for the waiver. However, if the Board were to find that the court had misinterpreted n.6 of *Hernandez-Casillas*, it was instructed to clearly explain

why *Blake*, and not *G-A-*, should apply. On remand, the Board (in a divided panel decision) found *Blake* applicable and held that *L-* and *G-A-*, although not overruled, did not preclude the application of the statutory counterpart analysis. However, the court stated that the Board did not address the issue of impermissible retroactivity under *INS v. St. Cyr*, 533 U.S. 289 (2001). The court found that if the petitioner had departed and returned to the U.S. after his 1991 conviction but prior to repeal of 212(c), he would have been eligible for a section 212(c) waiver nunc pro tunc under *Matter of G-A-*, as interpreted by *Hernandez-Casillas*. And if such relief was granted, he could not have later been deported based on the same criminal conviction, without regard to the statutory counterpart analysis applied in cases in which the alien *did not* travel abroad. The court therefore granted the petition, remanded, and directed “the Attorney General to exercise his § 212(c) discretion and decide whether *Lovan* warrants a waiver of deportation.”

#### ***Ninth Circuit:***

*Meza-Vallejos v. Holder*, No. 07-70638, 2011 WL 4792882 (9th Cir. Oct. 11, 2011): The Ninth Circuit granted the petition for review of the Board’s decision denying the petitioner’s motion to reopen as untimely. In 2004, an Immigration Judge had denied the petitioner’s application for asylum and granted voluntary departure. The Board dismissed the petitioner’s appeal and granted 60 days’ voluntary departure, until Saturday, July 16, 2005. On Monday, July 18, 2005, the petitioner filed with the Board a motion to reopen and emergency request to extend his period of voluntary departure, based on the petitioner’s marriage to a United States citizen 2 weeks earlier. The Board denied the motion as untimely. The petitioner’s initial petition for review was remanded to allow the Board to consider its decision in light of a then-recent decision of the 9th Circuit, *Barroso v. Gonzalez*, 429 F.3d 1195 (9th Cir. 2005). In *Barroso*, the petitioner had been granted a period of 30 days’ voluntary departure, with the 30th day falling on a Saturday. The petitioner in that case filed a motion to reconsider the following Monday, which was timely, because by statute, where a motion deadline falls on a weekend, the filing deadline extends to the next business day. However, the regulations are silent as to whether a similar extension is proper where a deadline to voluntarily depart falls on a weekend. In *Barroso*, the court held that where the deadlines for filing a motion and voluntarily departing fall on the same day, the proper solution is to deem both deadlines to be extended to

the next business day. However, on remand the Board found *Barroso* inapplicable because the 60-day voluntary departure period did not coincide with (and actually preceded by 30 days) the 90-day deadline for filing a motion to reopen. The Board held that where the filing and departure deadlines do not coincide, there is no basis for treating the latter differently where it falls on a weekend. Unlike the filing of a motion, which can only occur on a business day, departing the U.S. can be accomplished on weekdays or weekends alike. The Board thus concluded that because the petitioner had failed to timely depart, he was barred from adjusting his status. While finding that the Board's logic was not unreasonable, the court held that the departure period should nevertheless be extended to the next business day to ensure that an alien would not be precluded from filing a motion to reopen where, for example, a coup occurs in his/her home country over the weekend in which he/she is required to depart. The court remanded with instructions to consider the merits of the motion to reopen.

#### ***Eleventh Circuit:***

*Fajardo v. U.S. Att'y Gen.*, Nos. 09-12962 and 09-14845, 2011 WL 4808171 (11th Cir. Oct. 12, 2011): The Eleventh Circuit granted the petitioner's petition for review of the Board's decision upholding an Immigration Judge's order of removal. The Immigration Judge had ruled that the petitioner's conviction for false imprisonment under section 787.02(1)(a) of the Florida Statutes rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as an alien convicted of a crime involving moral turpitude. In reaching that conclusion, the Immigration Judge relied on extraneous information outside the record of the false imprisonment conviction, namely, information regarding the petitioner's separate conviction for assault and battery. (In a footnote, the court noted that the record was not clear as to whether the two crimes occurred simultaneously.) On appeal, the Board relied on *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), in affirming the Immigration Judge's decision. The court considered whether *Silva-Trevino* was entitled to *Chevron* deference. The court noted that deference is generally due to an agency interpretation of a statute that is silent or ambiguous where the interpretation is based on a reasonable construction of the statute. The Eleventh Circuit observed that courts have generally *not* found immigration statutes premising removability on a conviction for a particular type of crime to be ambiguous. The court additionally found

that for nearly a century, courts have interpreted the term "conviction" (as defined in section 101(a)(48)(A) of the Act) "to require adjudicators to apply the categorical and modified categorical approach." The court considered the consistency among the circuits over so many decades to be significant, noting that if Congress had disagreed with their interpretation, it could have clarified its intent "during any one of the forty times the statute has been amended since 1952." The court also rejected the Government's arguments that the use of various terms in the statute ("committed" and "committing" in the parts of section 212(a)(2)(A)(i)(I) dealing with admissions or the word "involving" in the term "crime involving moral turpitude") render the statute ambiguous by inviting an individualized inquiry into a person's particular conduct or acts. In a footnote, the court distinguished the facts involved in *Nijhawan v. Holder*, 557 U.S. \_\_\_, 129 S. Ct. 2294 (2009) (involving the construction of a different statute, which did not, as here, employ a "well-established, generic term of art ('crime involving moral turpitude')"), and thus found the holding in *Nijhawan* inapplicable. Accordingly, the court joined the Third and Eighth Circuits in limiting crime involving moral turpitude determinations to analysis under the categorical and modified categorical approaches only. The court remanded the record for the Board to determine in the first instance whether the false imprisonment conviction qualifies as a crime involving moral turpitude under the categorical analysis.

## BIA PRECEDENT DECISIONS

**I**n *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011), the Board considered whether the respondent's second-preference status (2A-preference category) conferred upon him by his lawful permanent resident mother converted automatically upon his mother's naturalization when he was 22, before his priority date became current. The respondent, a native and citizen of Mexico, was born on March 3, 1987. On August 25, 2004, when the respondent was 17, his mother (then a lawful permanent resident) filed an I-130 visa petition on his behalf. The I-130 petition was approved on March 22, 2007. On July 24, 2009, when the respondent was 22 and before the respondent's priority date became current, his mother naturalized. The respondent argued that he could retain his "child" status by applying the formula found at section 203(h)(1) of the Immigration and Naturalization

Act, 8 U.S.C. § 1153(h)(1). The Board stated that section 201(f)(2) of the Act, 8 U.S.C. § 1151(f)(2), provides that the alien's age on the date of a parent's naturalization governs whether an alien qualifies as an immediate relative upon the naturalization of the petitioner. The Board next found that because the respondent was over the age of 21 when his mother naturalized, his petition automatically converted to a first-preference category visa petition pursuant to 8 C.F.R. § 204.2(i)(3). The Board acknowledged that although historically the first-preference category has been more current than the 2A-preference category, at the moment the 2A-category is more current, and the respondent would have a current visa if he fell within the 2A-category. Section 204(k)(2) of the Act, 8 U.S.C. § 1154(k)(2), allows an alien to "opt out" of automatic conversion from the 2B-preference category to the first-preference category upon a petitioner's naturalization; however, there is no similar provision allowing an alien to elect to remain in the 2A-preference category upon a petitioner's naturalization. The Board found that a visa was not currently available to the respondent as a first- or 2B-preference category immigrant from Mexico.

In *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), the Board held that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under section 101(a)(43)(E)(i) of the Act, 8 U.S.C. § 1101(a)(43)(E)(i). The proceedings were initiated after the respondent, returning from abroad, applied for admission to the United States. The Notice to Appear charged the respondent with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on separate convictions for attempted arson and uttering a forged instrument. The respondent sought cancellation of removal.

The Board found that the statutory language of the New York Penal Code is substantially the same as the statutory language of 18 U.S.C. § 844(i), which is referenced in section 101(a)(43)(E)(i), lacking only the jurisdictional element of the Federal law. The Board concluded that the analysis in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), regarding the irrelevance of any purely jurisdictional element appearing in crimes enumerated as aggravated felonies, is applicable here and that the contested language in § 844(i) is purely

jurisdictional. The respondent also argued that the term "maliciously," included in the Federal law, requires greater culpability than the mens rea requirement in the New York statute, the specific intent to destroy property. The Board found that the United States Court of Appeals for the Third Circuit has stated that the "malicious" standard, as found in § 844, means "intentionally or with disregard of the likelihood [of damage]," a definition which is not cognizably different from the specific intent standard of the New York arson statute. *McFadden v. United States*, 814 F.2d 144, 146 (3d Cir. 1987). The Board therefore found that the respondent was ineligible for relief.

In *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011), the Board found that the Department of Homeland Security ("DHS") bears the burden of establishing, by evidence that is clear and convincing, that a returning lawful permanent resident is to be regarded as seeking an admission under section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C). On August 7, 1992, the respondent was convicted in New York of the offense of offering a false instrument for filing in the second degree in violation of section 175.30 New York Penal Law, for which a sentence of 1 year of conditional discharge was imposed. On May 26, 2000, the respondent was convicted in the United States District Court for the Southern District of New York of the offense of accessory after the fact, in violation of 18 U.S.C. § 3, for which he was sentenced to 2 years' probation, was assessed \$100, and was required to pay restitution of \$154,496. On March 29, 2007, the respondent applied for admission to the United States as a returning lawful permanent resident. On September 7, 2007, he was served with a Notice to Appear charging him with removability under section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a crime involving moral turpitude. The Immigration Judge found that the respondent was not removable as charged and terminated removal proceedings. The DHS appealed.

The Board found no reason to depart from its longstanding caselaw that the DHS bears the burden of establishing by clear and convincing evidence that the respondent is to be regarded as an applicant for admission. The Board declined to reach the remaining question of who then bears the burden of showing admissibility once it has been determined that the alien is an applicant for admission. The exception in section 101(a)(13)(C) that applies to the respondent, that he has committed an offense

identified in section 212(a)(2) of the Act, coincides with the ground of inadmissibility charged by DHS; accordingly, if the DHS meets its burden of demonstrating that the respondent is an applicant for admission it will have de facto demonstrated that the respondent is not admissible. The Board also found that the offense of accessory after the fact is a crime involving moral turpitude where the underlying offense is a crime involving moral turpitude. The Board distinguished *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997), which involved an offense of accessory after the fact to a drug-trafficking crime, noting that helping a base criminal escape justice is more reflective of a breach of duty owed to society than when the principal has committed an offense that is not itself base or vile. The Board remanded the case to allow the Immigration Judge to determine whether the respondent's convictions are for crimes involving moral turpitude under the framework set forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

## REGULATORY UPDATE

**76 Fed. Reg. 67,099 (Oct. 31, 2011)**

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1208 and 1240

### **Forwarding of Asylum Applications to the Department of State**

**SUMMARY:** The Department of Justice is planning to amend its regulations to alter the process by which the Executive Office for Immigration Review (EOIR) forwards asylum applications for consideration by the Department of State (DOS). Currently, EOIR forwards to DOS all asylum applications that are submitted initially in removal proceedings before an immigration judge. The proposed rule would amend the regulations to provide for sending asylum applications to DOS on a discretionary basis. For example, EOIR could forward an application in order to ascertain whether DOS has information relevant to the applicant's eligibility for asylum. This change would increase the efficiency of DOS's review of asylum applications and is consistent with similar changes already made by U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS). **DATES:** Written comments must be postmarked and electronic comments must be submitted on or before December 30, 2011.

**76 Fed. Reg. 63,629 (Oct. 13, 2011)**

DEPARTMENT OF HOMELAND SECURITY

### **Designation of Republic of South Sudan for Temporary Protected Status**

**SUMMARY:** This Notice announces that the Secretary of Homeland Security (Secretary) has designated the Republic of South Sudan (South Sudan) for Temporary Protected Status (TPS) for a period of 18 months, effective November 3, 2011 through May 2, 2013. Under section 244(b)(1) of the Immigration and Nationality Act (INA), the Secretary is authorized to grant TPS to eligible nationals of designated foreign states or parts of such states (or to eligible aliens having no nationality who last habitually resided in such states) upon finding that such states are experiencing ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions that prevent nationals from returning safely.

This designation allows eligible South Sudan nationals (and aliens having no nationality who last habitually resided in the region that is now South Sudan) who have continuously resided in the United States since October 7, 2004 to obtain TPS. In addition to demonstrating continuous residence in the United States since October 7, 2004, applicants for TPS under this designation must demonstrate that they have been continuously physically present in the United States since November 3, 2011, the effective date of the designation of South Sudan. The Secretary has established November 3, 2011, as the effective date so that the 18-month designation of South Sudan will coincide with the 18-month extension period of TPS for Sudan, which is also being announced today. Although November 3, 2011, is a future date, applicants may begin applying for TPS immediately.

This designation is unique because on July 9, 2011, South Sudan became a new nation and independent from the Republic of Sudan, which has been designated for TPS since 1997. Some individuals who are TPS beneficiaries under the current designation of Sudan may now be nationals of South Sudan, calling into question their continued eligibility for TPS under the Sudan designation. These individuals may, however, now qualify for TPS under the South Sudan designation. This Notice sets forth regular procedures and special procedures necessary for nationals of South Sudan (or aliens having no nationality who last habitually resided in the region that

is now South Sudan) to register and to apply for TPS and Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Given the timeframes involved with processing TPS applications, the Department of Homeland Security (DHS) recognizes that individuals who have EADs under Sudan TPS that expire November 2, 2011 may not receive new EADs under South Sudan TPS until after their current EADs expire. Accordingly, the validity of EADs issued under the TPS designation of Sudan has been automatically extended for 6 months, through May 2, 2012. This automatic extension includes individuals who are now applying for TPS under the designation of South Sudan but were granted TPS and were issued an EAD under the Sudan designation. This Notice explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and how the extension affects employment eligibility verification (Form I-9 and E-Verify) processes. This Notice also describes examples of acceptable evidence of South Sudanese nationality required for TPS registration under the South Sudan designation.

DATES: This designation of South Sudan for TPS is effective on November 3, 2011 and will remain in effect through May 2, 2013. The 180-day registration period for eligible individuals to submit initial TPS applications begins October 13, 2011, and will remain in effect until April 10, 2012.

**76 Fed. Reg. 61,288 (Oct. 4, 2011)**

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 216 and 245

**Treatment of Aliens Whose Employment Creation Immigrant (EB-5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998; Correction**

SUMMARY: The Department of Homeland Security corrects an inadvertent error contained in the proposed rule titled Treatment of Aliens Whose Employment Creation Immigrant (EB-5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998 published in the Federal Register on September 28, 2011. The docket number referenced in the proposed rule should read "DHS Docket No. USCIS-2009-0029".

DATES: You must submit written comments on or before November 28, 2011.

**Relief in Their Own Right:** *continued*

Board's conclusion that Wang had not established that the harm *he experienced* rose to the level of persecution, reasoning as follows:

As the BIA pointed out, Wang "was not arrested, detained or fined in China, and testified that neither he nor his sister had any trouble attending school." Thus, the BIA observed that the worst effect on him of the actions against his parents was the destruction of their home, but "he testified the family was able to live in a different home that was not as good."

*Id.* at 143 (citation omitted).

In short, the court concluded that Wang's claim amounted to an assertion of economic detriment that was not particularly severe, namely, that the economic harm to his parents caused him to be separated from them periodically and eventually forced him to live in an inferior house. Without more, the court held that this harm did not rise to the level of persecution. As the court summarized:

[O]ur result has the disadvantage of being uncertain in its application as compared to a bright-line rule that persecution only of parents never can be regarded as persecution of a minor child who is a member of the parents' household or always should be so regarded. Thus, application of the principles here will require that immigration judges and the BIA decide cases on an individual basis.

*Id.* at 144.

Child applicants have also asserted independent claims of future persecution. For example, some argue that they are more likely to be subjected to forced abortion or sterilization because family planning officials more closely scrutinize people whose parents or other close relatives have violated CPC policies. *See, e.g., Shi Chen*, 604 F.3d at 332; *see also Jie Chen v. Holder*, 375 F.App'x 56, 58 (2d Cir. 2010); *Qiu Lin v. Mukasey*, 337 F.App'x 99, 100 (2d

Cir. 2009); *Jun Kai Zhang v. Mukasey*, 275 F.App'x 77, 78-79 (2d Cir. 2008). Such claims have been considered speculative, particularly where the applicant is unmarried and childless. See *Jie Chen*, 375 F.App'x at 58; *Qiu Lin*, 337 F.App'x at 100.

Proving a nexus to a protected ground also presents challenges. A mixed-motive analysis may be necessary, but not sufficient, to establish this aspect of a claim. In *Tao Jiang*, 500 F.3d 137, the Second Circuit upheld the Board's determination that the applicant had failed to show adequate nexus to an imputed political opinion.

Jiang was the second-born child in his family. Three months after his birth, the Chinese Government forcibly sterilized his mother, causing lingering health effects. His mother became less productive in her work and his father was forced to care for the children on a regular basis. This ultimately resulted in economic detriment to the family. The applicant worked during his school years and dropped out after elementary school. When his father died, Jiang came to the United States to escape poverty. The Board found that the family's post-sterilization economic hardship did not constitute persecution because "there is no evidence that the government deliberately imposed substantial economic disadvantage upon the applicant and his family, especially on account of a protected ground." *Id.* at 139-40.

The Second Circuit assumed, without deciding, that the harm rose to the level of persecution but affirmed on a lack of nexus. It noted that an applicant may establish past persecution where he or she shares, or is perceived to share, a characteristic that motivated the persecutor to harm the applicant's family member, was within the "zone of risk" when the family member was harmed, and suffered "some continuing hardship after the incident." *Id.* at 141. Jiang fell outside these parameters, failing to adduce sufficient evidence that the Chinese Government imputed a political opinion to him:

[T]he persecution Jiang's mother suffered was not inflicted on account of some characteristic Jiang shared with his mother. . . . § 1101(a)(42) provides that those who have been subject to forced sterilization are "deemed" to have suffered persecution by reason of political opinion; but this constructive political opinion—whatever its exact contours—cannot be presumed to have been imputed to the family of the

individual who undergoes the procedure; there must be some evidence that it was so imputed. . . . The government appears to have taken no further action against the family after persecuting Jiang's mother. And Jiang has adduced no evidence that government actors imputed to him the political opinion his mother is deemed to have had by virtue of the forced sterilization.

*Id.* at 142 (citations omitted).

## Conclusion

Several appellate courts have spoken on the availability of asylum for children of CPC violators. All agree that Immigration Judges may consider persecution of the applicant's parents, but the case law reveals that the mere fact that one is the offspring of an individual who is a victim of CPC policies does not by itself establish eligibility for relief. Cases based on imputed political opinion are now widely recognized and some courts have indicated willingness to entertain social group theories; although factual matters may still present significant hurdles to applicants. Some courts have cautioned Immigration Judges to resist isolating instances of mistreatment and encouraged them to consider the relative age of the applicant when he or she experienced the harm. However, the case law indicates that children swept up in the hardships their families endure must nonetheless establish relatively individualized and targeted harm to be eligible for relief.

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