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In this issue...

The Current Status of Section 212(c): Considering *Abebe v. Holder*

by Sara J. Bergene

Introduction

One commentator has stated, and perhaps accurately so, that "confusion" may best represent the significance of the "(c)" in former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), because the word all too well describes the decades-long jurisprudence involving section 212(c).[1] Recently, a long-standing circuit split on section 212(c) returned to the forefront of immigration law with the decision of the United States Court of Appeals for the Ninth Circuit in *Abebe v. Holder*, 554 F.3d 1203 (9th Cir. 2009), *reh'g denied*, 577 F.3d 1113 (9th Cir. 2009). This article offers a brief look at the historical development of section 212(c), the court decisions reviewing the Board of Immigration Appeals' decision in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), regarding the statutory counterpart test, and an examination of the Ninth Circuit's recent approach in *Abebe*.

The Historical Development of Section 212(c)

Section 212(c) of the Act stated in part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unreliquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of [section 212(a) of the Act, which describes classes of inadmissible aliens] . . . .

While section 212(c) of the Act appears straightforward under a plain language reading of the statute, the Second Circuit's landmark holding in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), nearly 25 years after its codification, set the statute's course. In *Francis*, the Second Circuit

held that there was no rational basis for limiting section 212(c) relief to aliens who had temporarily departed the United States after becoming inadmissible. Therefore, the court extended section 212(c) eligibility to aliens, like Francis, who never left the country following a conviction that rendered them deportable. The court held that all aliens "similarly circumstanced shall be treated alike," and that "individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest." *Id*. at 272-73. According to the court, disparate treatment would exist if section 212(c) eligibility were based on whether an alien had traveled outside the United States following conviction. Therefore, a failure to afford section 212(c) eligibility to such aliens who had remained in the United States would deprive these aliens of the equal protection of the laws.

The Second Circuit in *Francis* did not strike down the statute as unconstitutional but expanded its reach by making relief under section 212(c) of the Act available to aliens who would have been eligible but for their failure to depart the country. The Board agreed with *Francis* in *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), finding that a waiver of inadmissibility under section 212(c) is available to a lawful permanent resident ("LPR") in deportation proceedings regardless of whether the LPR "departs the United States following the act or acts which render him deportable." *Id*. at 30. The Board further concluded that "permanent resident aliens similarly situated shall be treated equally with respect to their applications for discretionary relief under section 212(c) of the Act." *Id*. After the Second Circuit had identified the equal protection dilemma and the Board had spoken on it, the next question involved implementation—"[h]ow to decide whether a deportee was 'similarly situated' to an excludee?" *Blake v. Carbone*, 489 F.3d 88, 95 (2d Cir. 2007). The answer was the statutory counterpart test.

The Statutory Counterpart Test

The statutory counterpart test, first adopted by the Board in *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979), examines whether a charged "ground of deportation is also a ground of inadmissibility." *Id*. at 728; *see also Matter of Wadud*, 19 I&N Dec. 182, 185 (BIA 1984) (finding the alien was ineligible for section 212(c) relief where he "was charged with deportability under section 241(a)(5) of the Act which has no comparable ground of excludability among those specified in section 212(c)"). In *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), in which the Board reaffirmed the statutory counterpart test, the Board explained that "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses." *Id*. at 728. The Board further stated that "[t]he coverage of the offenses . . . need not be a perfect match in order to be 'statutory counterparts' . . . so long as the ground of inadmissibility addresses essentially the same category of offenses under which the removal charge is based." *Id*. at 729. In critiquing the statutory counterpart test, the Second Circuit has noted that "[c]omplications" can arise "when an aggravated felony conviction [is] the basis for deportation," because "no ground of exclusion speaks in terms of 'aggravated felonies.'" *Blake*, 489 F.3d at 95-96. Other "difficult" cases are those involving "grounds of deportation [that] can arise only in deportation proceedings," such as entering the United States without inspection. *Id*. at 96.

Congressional actions beginning in the 1990s played a significant role in developing the statutory counterpart test as the majority approach. Prior to1990, an alien convicted of an aggravated felony could apply for relief under section 212(c). However, effective November 29, 1990, Congress enacted section 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052, which amended section 212(c) to provide that a waiver was unavailable to an alien "who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years."[2] *See Matter of Meza*, 20 I&N Dec. 257 (BIA 1991). Subsequently, Congress enacted section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277. This section, which took effect April 24, 1996, provided that a number of criminal offenses, including all aggravated felonies without regard to term of imprisonment, would automatically render an alien statutorily ineligible for section 212(c) relief. *See Matter of Fortiz*, 21 I&N Dec. 1199, 1201 n.3 (BIA 1998); *Matter of Soriano*, 21 I&N Dec. 516, 518 (BIA 1996; A.G. 1997). Effective April 1, 1997, section 212(c) was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-597.

However, following the repeal of section 212(c), the Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that a waiver would remain available to those aliens who pled guilty to an offense pursuant to a plea agreement and who would have been eligible for relief under section 212(c) when they pled guilty. The Court reasoned that such aliens could have entered into the plea agreements with the expectation they would be eligible for such relief. *Id*. at 321-26.

In 2004, the Department of Justice published a regulation at 8 C.F.R. § 1212.3 that implemented *St. Cyr* by providing that aliens could apply for relief under section 212(c) of the Act with respect to convictions obtained by guilty pleas before section 212(c) was repealed. *See* 8 C.F.R. § 1212.3(h). Moreover, the regulation codified the statutory counterpart test, stating that section 212(c) relief is unavailable if "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. § 1212.3(f)(5).

The Offense-Specific Approach

In *Blake v. Carbone*, the Second Circuit articulated an alternative to the statutory counterpart test: the offense-specific approach. There, the Second Circuit was ruling on an appeal from the Board's decision in *Matter of Blake*. The Board had held that the respondent was ineligible for relief under section 212(c) of the Act because there was no statutory counterpart to the aggravated felony offense of sexual abuse of a minor. *Matter of Blake*, 23 I&N Dec. at 729. In reversing the Board's decision, the Second Circuit outlined a different approach, holding that the determination of an alien's section 212(c) statutory eligibility "must turn on [his or her] particular criminal offenses." *Blake*, 489 F.3d at 103. In the court's words, "If the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation." *Id*. Hence, the court's approach is offense-specific. According to the court, "What makes one alien similarly situated to another is his or her act or offense," and not "the language Congress used to classify his or her status." *Id*. at 104.

The Law After *Matter of Blake*

The Circuit Courts

In the wake of *Matter of Blake* and *Blake v. Carbone*, nine courts of appeals have considered the statutory counterpart test.[3] None of the courts has joined the Second Circuit in adopting the offense-specific approach. Nearly all of the decisions involve petitioners who are removable as a result of committing an aggravated felony, often a "crime of violence" pursuant to section 101(a)(43)(F) of the Act.[4] The most recent decision came in *De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009), where the Eleventh Circuit, in adhering to the statutory counterpart test, stated, "We recognize that clarity in this area has proven an elusive goal, given the complexity created by overlapping administrative decisions, judicial opinions and Congressional actions." *Id*. at 1337.

Several factors have influenced the courts in adopting the statutory counterpart test. Some courts have noted that the statutory counterpart test has long been established in case law, though they have disagreed as to when, exactly, this test became law. In this regard, the Fifth Circuit noted that the Board "has long required comparable grounds of inadmissibility in § 212(c) applications," citing to the Board's decisions in *Matter of Wadud* and *Matter of Granados*, issued in 1984 and 1979, respectively. *Vo v. Gonzales*, 482 F.3d 363, 370 (5th Cir. 2007). Similarly, the Seventh Circuit stated that "[t]he 'statutory counterpart' rule for deportees seeking to invoke § 212(c) appears in case law as far back as the late 1970s." *Valere v. Gonzales*, 473 F.3d 757, 761 (7th Cir. 2007). The Third Circuit agreed that the statutory counterpart test has long been in effect but cited to a later date, stating that "[t]he principle that § 212(c) is available in removal proceedings only where the ground for removal has a 'statutory counterpart' ground for exclusion has been firmly in place and consistently applied since at least 1991." *Caroleo v. Gonzales*, 476 F.3d 158, 163 (3d Cir. 2007).

Another important factor further influencing the courts was, and continues to be, deference. In *De la Rosa*, the Eleventh Circuit stated, "[O]ur review of the BIA's interpretation of the statutes it administers 'is informed by the principle of deference'" set forth in

continued on page 11

CIRCUIT COURT DECISIONS FOR OCTOBER 2009

by John Guendelsberger

The United States courts of appeals issued 320 decisions in October 2009 in cases appealed from the Board. The courts affirmed the Board in 284 cases and reversed or remanded in 36, for an overall reversal rate of 11.3% compared to last month's 14.8%. There were no reversals from the First, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below provides the results from each circuit for October 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total cases	Affirmed	Reversed	% reversed
First	1	1	0	0.0
Second	84	77	7	8.3
Third	35	31	4	11.4
Fourth	16	15	1	6.3
Fifth	24	23	1	4.2
Sixth	7	7	0	0.0
Seventh	2	2	0	0.0
Eighth	7	7	0	0.0
Ninth	123	102	21	17.1
Tenth	6	6	0	0.0
Eleventh	15	13	2	13.3
All circuits:	320	284	36	11.3

The 21 reversals in the Ninth Circuit involved a variety of issues, including disagreement with the adverse credibility determination in 5 cases. The court remanded several cases to address issues that were overlooked or not fully discussed. These included three Indonesian asylum claims, two of which overlooked the disfavored group issue and another that did not specifically address the claims made by the minor children. Other remands for issues not fully addressed included a claim to humanitarian asylum based on severity of the past persecution, a denial of a continuance, and a procedural due process challenge. Five cases addressing motions to reopen were reversed for insufficient reasons to support denial. Two of the reversals involved the smuggling and crime of violence aggravated felony grounds for removal.

The seven reversals in the Second Circuit involved two adverse credibility determinations, as well as a mixed motive nexus issue, the persecutor bar, the national security bar, the denial of a continuance for adjustment of status based on labor certification, and a frivolousness determination.

The four reversals from the Third Circuit involved adverse credibility in an asylum claim, abuse of discretion in the denial of a motion to reopen, and two cases addressing crimes involving moral turpitude, one in which the court rejected the framework established in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

The Eleventh Circuit's two reversals and the Fourth Circuit's sole reversal addressed Board denials of motions to reopen for changed country conditions based on the population control policy in China.

The chart below shows the combined numbers for the first 10 months of 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total cases	Affirmed	Reversed	% reversed
Ninth	1573	1288	285	18.1
Third	257	214	43	16.7
Seventh	67	57	10	14.9
Eighth	61	55	6	9.8
Sixth	141	129	12	8.5
Eleventh	254	235	19	7.5
Second	1202	1132	70	5.8
First	62	59	3	4.8
Fifth	200	192	8	4.0
Tenth	41	40	1	2.4
Fourth	151	148	3	2.0
All circuits:	4009	3549	460	11.5

Last year at this point there were 3675 total decisions and 486 reversals for a 13.2% overall reversal rate.

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How Much Deference Is Owed to Non-Precedent Decisions of the Board? The Case of *Joseph v. Holder*

by Edward R. Grant

If you are like me, you read a court of appeals immigration opinion by skipping ahead to "the juicy bits": was the applicant credible, or did the harm she suffered rise to the level of persecution, or does the circuit conclude that country conditions in Fredonia ("the land of the brave and the free") have, under the wise leadership of President Rufus T. Firefly, substantially changed for the better? In so doing, we usually skip discussions of the standard of review, whether an issue is a question of law or fact, and other such pleasantries.

In most cases, we have lost nothing in the exchange. We get swiftly to the point, and the parts we skip are genuinely boilerplate, charting no new path for us to follow or ponder. But occasionally, and perhaps increasingly, the "boring bits" in a case have a good deal to say about the unique business of immigration adjudication, helping to define the elements of *our* various tasks, and not merely the contours of the court's own jurisdiction.

Just such a case was issued in August by the Seventh Circuit, holding that the Board adopted an overly narrow interpretation of 8 C.F.R. § 1003.2(c)(3), which permits asylum applicants to file a late motion to reopen based on changed circumstances arising in the country of origin. *Joseph v. Holder*, 579 F.3d 827 (7th Cir. 2009). The threshold question was the degree of deference to be given the Board's interpretation, especially where it was issued in a single-member, unpublished decision. Since thousands of such decisions are issued each year—many of them adopting and affirming the rationale of Immigration Judges—the Seventh Circuit's tour d'horizon on judicial deference to Board decisions is worth a closer look. (Since the case is on remand, our discussion will not concern the merits of the case.)

The facts are thus: the alien in *Joseph* is a Pakistani Christian who married an American against the wishes of her parents. She has since divorced and claims to face the choice, if returned to Pakistan, of a forced marriage arranged by her father, or familial abandonment and severe societal discrimination. Originally a derivative on her mother's (denied) application for asylum, she filed her own motion to reopen, claiming exemption from the time limitation on such motions based on the "changed circumstance" of the forced marriage threat.

That motion was denied by the Board, a decision reversed by the Seventh Circuit in an unpublished 2007 opinion. On remand, the Board again denied the motion, in a single-member decision, finding that the marriage threat was a change that was entirely personal to her, and thus not a "changed circumstance" within the meaning of the regulation. The Board's decision also indicated, quoting from a DHS brief, that "changed circumstances" involve a "'dramatic change in political, religious, or social situation.'" *Joseph*, 579 F.3d at 831 (quoting the Board's decision). The issue, then, is whether the Board got it right on the meaning of "changed circumstance"—a question that the Seventh Circuit concluded must first turn on of what level of deference the decision of a single Board Member should be given.

As the court noted, the circuits are split on the level of deference to accord single-member decisions. Most hold that full deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), is not warranted. The Ninth Circuit, for example, withheld *Chevron* deference from a single-member non-precedential decision that concluded that time spent in the "Family Unity Program" could not count toward the continuous residence requirement for cancellation of removal under section 240A(a) of the Act. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006). The scope of *Chevron*, the Ninth Circuit noted, was circumscribed by the Supreme Court's later decision in *United States v. Mead Corp.,* 533 U.S. 218 (2001), which holds that *Chevron* only applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id*. at 226-27. The "'essential factor'" in determining whether an agency has acted to promulgate rules "carrying the force of law" is whether the decision has precedential value; since the Board's decision in *Garcia-Quintero* did not, *Chevron* deference could not be applied. *Garcia-Quintero*, 455 F.3d at 1012-13 (quoting *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006).

The Second and Eleventh Circuits reached the same conclusion, for similar reasons. *See Quinchia v. U.S. Att'y Gen.*, 537 F.3d 1312, 1314-15 (11th Cir. 2008) (declining to give *Chevron* deference to a single-member non-precedential decision that "does not rely on existing

BIA or federal court precedent"), *superseded on rehearing*, 552 F.3d 1255 (11th Cir. 2008); *Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007). Complicating matters somewhat is the question of *Skidmore* deference—a lower level accorded to non-precedential agency decisions, in light of the agency's experience in handling such matters, but requiring that the decision be assessed by its "power to persuade." S*kidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In *Garcia-Quintero*, the Ninth Circuit found *Skidmore* to be the appropriate level of deference for unpublished Board decisions, and at least one other circuit—which passed on the question of *Chevron* deference—has agreed. *Garcia Quintero*, 455 F.3d at 1014-15; *see also Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850-51 (8th Cir. 2008) (reserving the question of *Chevron* deference; employing *Skidmore* deference). Other courts, however, have not explicitly gone the *Skidmore* route, choosing instead to remand cases to the Board for further consideration and publication of a precedential opinion. *See Quinchia*, 537 F.3d at 1315; *Rotimi*, 473 F.3d at 58. (The Board's subsequent decision in *Matter of Rotimi*, 24 I&N Dec. 567 (2008), was a "two-fer," complying with the Second Circuit's request for a published adjudication, and leading the Eleventh Circuit to vacate its initial decision in *Quinchia*.)

The Seventh Circuit, at least until *Joseph*, stood in contrast. *Gutnik v. Gonzales*, 469 F.3d 683 (7th Cir. 2006), held that unpublished, single-member Board decisions *could* be accorded *Chevron* deference provided reasons are given for the statutory interpretation. *Cf. Smriko v. Ashcroft*, 387 F.3d 279, 289 n.6 (3d Cir. 2004) (holding that deference was not warranted when the Board issued an affirmance without opinion of an Immigration Judge's decision that offered no analysis or precedent to which the court could defer). And *Gutnik* had a worthy pedigree—the Supreme Court in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999), unanimously and unambiguously held that the Ninth Circuit should have accorded *Chevron* deference to the unpublished decision of the Board that concluded that the respondent was barred from asylum for having committed a serious nonpolitical crime.

Joseph walked back—at least a half-step—from the level of *Chevron* deference established in both *Gutnik* and *Aguirre-Aguirre*. First, it noted that the Board, in determining that the threat of forced marriage was not a "changed circumstance" arising in Pakistan, was addressing a *regulation* as opposed to a provision of the Act. Thus, the court asserted, the question of deference was controlled not by *Chevron*, but rather, by *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is controlling "'unless plainly erroneous or inconsistent with [the] regulation'" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))). Second, the court determined that because of the single-member nature of the Board's decision in *Joseph*, the case was comparable to *Mead Corp.*, 533 U.S. 218. That decision held that *Chevron* deference was not owed to a tariff classification letter, a document that may be issued by any of the 46 port-of-entry Customs Offices, and that the Supreme Court concluded was never intended by Congress to have the force of law. *Id.* at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."). *Mead Corp.* did hold, however, that such tariff letters were entitled to *Skidmore* deference. *Id.* at 234-39.

The Seventh Circuit synthesized the strands of case law thusly:

> Just as varying degrees of deference are appropriate for regulations or other forms of guidance issued by agencies, so too are different levels of deference appropriate for interpretations of regulations offered by agencies. When the agency speaks formally, *Auer* holds that the agency's interpretation is controlling unless it is plainly erroneous or inconsistent with the regulation. An off-the-cuff response to an interpretive question from the first person who answers the telephone would be quite a different matter. Here, we have a decision by a single Board member, which puts us in a middle ground between the two poles we have just described. Just like the ruling letters in *Mead*, it is unpublished and non-precedential.

Joseph, 579 F.3d at 832. In the end, applying the *Auer* standard, the court concluded that the Board's interpretation of the regulation was inconsistent with its plain language, which does not "restrict the concept of 'changed circumstances' to some kind of broad social or political change in the country, such as a new governing party, as opposed to a more personal or local change." *Id.* at 834. The key factors, the court concluded, were

whether the factual claims were manufactured, which they were not, and whether they arose in Pakistan, which they did. That being the case, the Board's interpretation was in error.

Multiple questions arise from the Seventh Circuit's analysis. This is in part the nature of the beast—as the Supreme Court noted in *Mead Corp.*, the delegation of rule-making and interpretative authority under a congressional statute may be shown in a variety of ways, and since the issuance of *Chevron* in 1984, had resulted (by 2001) in more than two dozen high Court decisions determining when *Chevron* does and does not apply. *Mead Corp.*, 533 U.S. at 230 nn.11–12. But other questions, unique to immigration law and even to the specific provisions at issue in *Joseph*, are worth exploring.

First is the nature of the regulation itself. *Joseph* plants its flag firmly on the concept that the Board was interpreting a regulation, not the Act itself. However, the time and number limitations on motions to reopen, including the exception for "changed circumstances," are statutory as well as regulatory—and in this case, unlike most circumstances, the regulation *preceded* the statute, although both were enacted in the same year. *See* section 240(c)(7) of the Act (formerly section 240(c)(6), as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); *see also* 8 C.F.R. §§ 1003.2(c)(2)–(3), 1003.23(b)(4). Considering that the text of the statute and regulation are virtually identical, it is unclear why a different standard of deference would apply to the Board's interpretation of the regulatory, as opposed to the statutory, provision. *Joseph* does not mention section 240(c)(7) of the Act—perhaps because it was not referenced in the decision of the Board.

Second on the block is the Seventh Circuit's treatment of single-member Board decisions. Analogizing such rulings to tariff classification letters at issue in *Mead Corp.* appears questionable. The Board, unlike the individual Customs Offices, is an appellate body with delegated responsibility to exercise the Attorney General's adjudicative authority in immigration matters, including the interpretation of laws and regulations. It is unclear why the single-member decision granted *Chevron* deference in *Gutnik*—whether an alien previously adjusted under section 209 of the Act retains his "refugee" status when placed in proceedings because of a subsequent criminal conviction—is worthy of less deference than a decision holding that "changed circumstances" must be something evident in the country as a whole. According such heightened deference, of course, does not mean that the interpretation is consonant with the plain language of the Act or the regulations. Based on the court's rather quick dismissal of the Board's interpretation, that may have been the result even if full *Chevron* deference had been applied. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987) (applying *Chevron* deference, but rejecting the Board's interpretation as unsustainable).

A third question—which may be the key to understanding *Joseph*, if not other rulings that give diminished deference to unpublished Board decisions—is whether a different standard should apply to rulings on procedural matters, such as motions to reopen, as opposed to more substantive matters of statutory interpretation. *Aguirre-Aguirre* calls for heightened deference to legal interpretations by the Board that implicate immigration *policy*:

> [W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu*, 485 U.S. 94, 110 (1988). A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.

Aguirre-Aguirre, 526 U.S. at 425. However, it is unclear whether the same degree of deference is due when the question involves interpretation of a *procedural* aspect of the Act or regulations.

Further insight on this question may come in a case also arising in the Seventh Circuit. The issue before the Supreme Court this term in *Kucana v. Holder*, 129 S. Ct. 2075 (2009) (Mem.), involves Federal court *jurisdiction* over Board decisions on motions to reopen, as opposed to the degree of deference owed to the Board

once that jurisdiction is asserted. *See Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008); *see also* Immigration Law Advisor, Vol. 3, No. 10 (Oct. 2009). Those clearly are separate questions. However, at the November 10 oral argument in *Kucana*, the Court closely focused on the *discretionary* aspect of decisions on motions to reopen and questioned why the Act, which shields many discretionary determinations from judicial review, should be interpreted to allow judicial review of *this* form of discretionary decision.

Oral argument is at best an imperfect predictor of Supreme Court rulings. And even if the Court curtails review of discretionary determinations on motions to reopen, the type of question involved in *Joseph* might still be viewed as *legal* in nature. The Seventh Circuit in particular has drawn these types of lines in defining its own jurisdiction over motions, *see* Immigration Law Advisor, Vol. 1, No. 10 (Oct. 2007); it will be interesting to see if that circuit's heretofore sui generis approach to these questions now receives fuller backing from a higher authority.

Edward R. Grant was appointed to the Board of Immigration Appeals in January 1998.

RECENT COURT OPINIONS

First Circuit:

Gourdet v. Holder, __F.3d__, 2009 WL 3630990 (1st Cir. Nov. 4, 2009): The First Circuit denied a Haitian alien's petition for review of a Board decision dismissing his appeal from an Immigration Judge's denial of his application for protection under the Convention Against Torture. The alien was convicted of a controlled substance violation. He claimed that if returned to Haiti, he would be detained as a criminal deportee under "horrible" conditions and may be further subjected to police mistreatment. The court relied on *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), in concluding that the substandard prison conditions cited do not constitute torture. The court further affirmed the Immigration Judge's determination that the alien's fear of being struck by police officers and/or other detainees was not so severe as to rise to the level of torture.

Jia Duan Dong v. Holder, __F.3d__, 2009 WL 3682652 (1st Cir. Nov. 6, 2009): The First Circuit denied a petition for review after the Board affirmed the denial of a coercive family planning asylum claim from China. The alien initially based his application on the forcible sterilization of his wife, but this claim was subsequently foreclosed by the Attorney General's decision in *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008). The court rejected the alien's argument that the Board improperly failed to consider whether his departure from China 4 years after his wife's sterilization constituted "other resistance" to China's coercive population control policies. The court found no error by the Board in failing to consider that argument, which was never raised before the Board and was therefore deemed waived. The court additionally found that the Board did not abuse its discretion in refusing to remand the matter for further fact-finding where the alien had failed to explain to the Board what additional facts he intended to present, and the record did not contain any obvious signs of resistance to be explored further.

Sugiarto v. Holder, __F.3d__, 2009 WL 3738792 (1st Cir. Nov. 10, 2009): The court denied an Indonesian alien's petition for review of a Board decision affirming an Immigration Judge's denial of her asylum claim. The court found no nexus to a protected ground in the two incidents that the alien suffered in Indonesia (namely, a robbery attempt and a bomb scare at a shopping mall), because the identity and motive of their perpetrators was a matter of conjecture unsupported by objective evidence. As to future fear, the court found no "pattern or practice" of persecution against Christians in Indonesia. The court chose not to consider whether the Ninth Circuit's "sliding scale" or "disfavored group" approach is consistent with First Circuit precedent, because the application of such an approach would not change the outcome in the absence of any evidence that either the alien or a member of her family has been individually targeted because of their religion.

Fourth Circuit:

Nken v. Holder, __F.3d__, 2009 WL 3490877 (4th Cir. Oct. 30, 2009): On remand from the Supreme Court (*See* Immigration Law Advisor, Vol. 3, No. 4, at 12-13 (Apr. 2009)), the Fourth Circuit granted the alien's petition for review and remanded to the Board for further proceedings. The alien's asylum application was denied in 2005 because of an adverse credibility finding. The Board dismissed the alien's appeal and denied his three subsequent motions to reopen. In the third motion, the Board rejected the alien's claim of changed country conditions (which he based in part on a 2008 letter from his brother), finding that he had not presented sufficient facts or evidence to support such a conclusion. The Board also noted his failure to submit his own statement or asylum application articulating his

new claim based on recent events in Cameroon, which the Board found significant in light of the prior adverse credibility finding. The court found it unclear that the Board had addressed the crux of the alien's arguments. It remanded for the Board to explain why the brother's letter was insufficient to support reopening, noting that although the Board mentioned the Immigration Judge's 2005 credibility finding, it did not tie that determination to the brother's letter.

Sixth Circuit:
Al-Ghorbani v. Holder, __F.3d__, 2009 WL 3718297 (6th Cir. Nov. 9, 2009): The Sixth Circuit granted the petition for review filed by the Yemeni petitioners after the denial of their applications for withholding of removal. The petitioners are brothers. One of the brothers had secretly married the daughter of a powerful general, who vehemently rejected the marriage proposal because of the inferior social status of the brothers' family. After the general learned of the union and the couple went into hiding, the second brother was detained, interrogated about their whereabouts, and tortured. All three managed to escape to the U.S. and the two brothers filed untimely asylum applications. Although the Immigration Judge found them credible, he denied their withholding claims based on their failure to establish a nexus to a protected ground. The court found that it lacked jurisdiction to review the pretermission of the asylum applications based on their timeliness. However, it ordered that the withholding claims should be granted, finding a nexus to two particular social groups: their family (whose perceived lower social status triggered the general's ire); and their membership in a group opposing the repressive and discriminatory Yemeni customs governing marriage. The court also held, contrary to the Board's finding, that the record established that the aliens could not reasonably expect the assistance of the Yemeni Government in controlling the general's actions.

Eighth Circuit:
Yohannes v. Holder, __F.3d__, 2009 WL 3644301 (8th Cir. Nov. 5, 2009): The Eighth Circuit denied an alien's petition for review of the Board's decision denying him a waiver under section 216(c)(4) of the Act of the spousal joint-filing requirement for removal of the condition on his lawful permanent resident status. The court held that it lacked jurisdiction to review the discretionary denial of the waiver. The court further found no legal error in the Board's determination that the alien failed to establish that his marriage was entered into in good faith. According to the court, the alien's claim that the Immigration Judge erred in precluding him from applying for a waiver based both on good faith and extreme hardship was not supported by the record. It further found no merit to his due process claim that the Immigration Judge demonstrated bias in favor of the DHS.

Ninth Circuit:
Bermudez v. Holder, __F.3d__, 2009 WL 3739255 (9th Cir. Nov. 10, 2009): The Ninth Circuit denied an alien's petition for review of a decision of the Board denying both his request to terminate proceedings and his application for cancellation of removal. The court held that the alien's State court conviction for possession of drug paraphernalia (namely, "a pipe and/or packets" used for and with the drug methamphetamine) constitutes a conviction relating to a controlled substance under section 237(a)(2)(B)(i) of the Act. The court further found that it lacked jurisdiction to review the denial of relief, which involved a discretionary determination.

BIA PRECEDENT DECISIONS

In *Matter of Moreno-Escobosa*, 25 I&N Dec. 114 (BIA 2009), the Board addressed questions regarding the respondent's eligibility for a waiver under former section 212(c) of the Act, 8 U.S.C. § 1182(c). The Board first considered whether the date of the alien's plea or the date of sentencing controls in determining whether section 212(c) relief remains available. In this case, the respondent pled guilty to a controlled substance possession offense before the 1996 repeal of section 212(c), but he was not sentenced until well after the statute was repealed. The Board reasoned that under *INS v. St. Cyr*, 533 U.S. 289 (2001), section 212(c) relief remains available for those who pled guilty in reliance on the availability of the waiver, so the date of the plea is controlling. The Board next considered whether the recent decision of the United States Court of Appeals for the Ninth Circuit in *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc), foreclosed waiver eligibility for aliens charged with a ground of deportability rather than a ground of inadmissibility. In that decision, the court overruled its long-standing ruling in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), that there was no rational basis for providing section 212(c) relief from inadmissibility, but not deportation. However, the court indicated that its decision did not cast doubt on the regulation at 8 C.F.R. § 1212.3 (2009), which authorizes aliens to apply for section 212(c) relief regardless of whether they

are charged as deportable or as inadmissible or excludable, i.e., whether they are seeking admission at the border or are inside the country. *Abebe*, 554 F.3d at 1207. The parties agreed, as did the Board, that the decision in *Abebe* did not invalidate the regulation. The Board clarified that nothing in its opinion was intended to cast doubt on its prior decisions articulating the statutory counterpart rule that an alien seeking to waive a deportation ground must establish that there is a comparable ground of inadmissibility in section 212(a) of the Act. The case was remanded for a new decision on the respondent's section 212(c) application.

In *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the Board first found that the respondent's Minnesota conviction for possessing drug paraphernalia (a marijuana pipe) makes him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(II), as an alien convicted of violating a law "relating to" a controlled substance. The respondent was found removable under section 212(a)(6)(A)(i) of the Act, but sought adjustment of status. The Board reasoned that the language "relating to" has a broad meaning and was applicable in this case where the statute required that the paraphernalia be intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance. The decision also noted that under the Ninth Circuit's decision in *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000), and the Board's decision in *Matter of Martinez-Gomez*, 14 I&N Dec. 104 (BIA 1972), offenses involving general drug-related activity (as opposed to possession or sale of particular substances) do not need to be tied solely to federally controlled substances in order to support a finding of inadmissibility. Finally, the Board concluded that an offense need not have a Federal analogue for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act to be found.

Second, the Board concluded that the respondent's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act related to a single offense of simple possession of 30 grams or less of marijuana, so as to permit him to seek a section 212(h) waiver. The reference in section 212(h) to inadmissibility that "relates to a single offense of simple possession of 30 grams or less of marijuana," is broad and invites a circumstance-specific inquiry into the conduct that caused the alien to become inadmissible, rather than a generic inquiry into the elements of a predicate offense. The Board cautioned that offenses that are inherently more serious than simple possession (i.e., possession in prison or near a school) do not "relate to" a single offense of simple *possession* of 30 grams or less of marijuana. If the fact of conviction is sufficient to show that an alien committed actions in addition to (or more culpable than) simple possession of a small amount of marijuana, the inquiry is at an end, and section 212(h) relief is unavailable. The Board concluded that the record should be remanded to give the respondent a chance to prove to the Immigration Judge that his particular offense involved conduct that related to a single offense of simple possession of 30 grams or less of marijuana.

In *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009), the Board set forth the standards for granting continuances to afford the Department of Homeland Security ("DHS") the opportunity to adjudicate an alien's employment-based visa petition (Form I-140) or to give the Department of Labor ("DOL") the opportunity to adjudicate a labor certification. In this case, the respondent was admitted to the United States as a visitor on December 13, 1994. In 2003 he was placed in proceedings for overstaying his visa. After a number of continuances over 13 months, the Immigration Judge denied the respondent's request for a continuance based on his pending labor certification. The Board affirmed, but the Second Circuit granted the respondent's petition for review, directing the Board to set forth standards for determining whether an alien has shown good cause for a continuance to apply for adjustment of status based on a pending labor certification or employment-based visa petition.

The Board found that in determining whether good cause exists for a continuance, the Immigration Judge should first determine the respondent's place in the employment-based adjustment of status process. The decision outlines this process and considers the special case of aliens subject to adjustment under section 245(i) of the Act, 8 U.S.C. § 1255(i), noting that Immigration Judges should acknowledge and consider an alien's eligibility for section 245(i) treatment. The Board then held that Immigration Judges should balance the factors articulated in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), if applicable, and any other relevant considerations. While all these factors may be pertinent in a given case, the focus of the inquiry is the ultimate, apparent likelihood of success on the adjustment application. The Board further held that the pendency of a labor certification before the DOL generally will not be sufficient to grant a continuance in the absence of additional persuasive factors, such as the demonstrated likelihood of its imminent adjudication

or DHS support for the motion. In this case, at the time of the hearing before the Immigration Judge, the respondent's labor certification was pending. The respondent presented additional evidence that the labor certification was subsequently approved but then expired. The respondent argued that he was eligible for 245(i) treatment, and that an employer would soon file another labor certification. The Board found that the respondent did not currently have a pending labor certification, and he had therefore not established prima facie eligibility for adjustment of status.

Bond proceedings were the subject of *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009). In this case, the Immigration Judge determined that the respondent presented a "potential" danger to the community based upon his criminal history but ordered him released from custody upon the posting of a $15,000 bond. The Board found that Immigration Judges must make a precise finding whether the respondent has demonstrated that he would not pose a danger to persons or property. If such a finding is made, then the respondent must remain in custody without bond. If an Immigration Judge determines that a respondent would not pose a danger to persons or property, then it is appropriate for an Immigration Judge to consider the other factors in the case relevant to determining the amount of bond necessary to ensure the respondent's presence at further proceedings. Consideration of the respondent's criminal record was found to be appropriate because it related to his likelihood to appear. The case was remanded for clarification of the Immigration Judge's decision that the respondent presented a "potential" danger.

In *Matter of Velasco*, 25 I&N Dec. 143 (2009), the Board addressed the retroactivity provisions of the voluntary departure regulations at 8 C.F.R. § 1240.26(c)(4), Nt. (2009), which took effect January 20, 2009. The Immigration Judge granted the respondent voluntary departure in January 2008. The respondent timely appealed but failed to pay the bond, and in February 2009, the Board dismissed the respondent's appeal but reinstated voluntary departure. The parties filed a joint motion to reconsider, requesting that the Board clarify the respondent's status in light of the regulations. At the time the Immigration Judge granted the respondent voluntary departure, the Board's decision in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006), was controlling law. Applying the version of 8 C.F.R. § 1240.26(c)(3) (2006) then in effect, the Board held in *Matter of Diaz-Ruacho* that an alien who failed to post the voluntary departure bond within the required 5-day period was not subject to the penalties imposed by section 240B(d)(1) of the Act, 8 U.S.C. § 1229c(d)(1), for failure to depart, but the alternate order of removal took effect. The new rule, which explicitly overruled *Matter of Diaz-Ruacho*, provides that "failure to post the required voluntary departure bond within the time required does not terminate the alien's obligation to depart within the period allowed or exempt the alien from the consequences for failure to depart voluntarily during the period allowed." 8 C.F.R. § 1240.26(c)(4), Nt. The rule made clear that it was not to be applied retroactively, which the Board interpreted to mean that it will not be applied to grants of voluntary departure made by an Immigration Judge before January 20, 2009. Since the respondent was granted voluntary departure before the rule's effective date and did not post the voluntary departure bond, the Board applied *Matter of Diaz-Ruacho*, vacated its order reinstating voluntary departure, and held that the Immigration Judge's alternate order of removal took effect.

The Current Status *continued*

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *De la Rosa*, 579 F.3d at 1335 (quoting *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1195 (11th Cir. 2006)). The *De la Rosa* court went on to state that, in affirming *Matter of Blake*'s statutory counterpart test, the court was "[a]ffording due deference to the BIA's interpretation of the INA." *Id.* at 1340. Similarly, in its unpublished decision in *Rubio v. U.S. Att'y Gen.*, 182 Fed. Appx. 925, 929 (11th Cir. 2006), the Eleventh Circuit adopted the statutory counterpart test, citing to the general principle that the court is "obliged to defer to the BIA's reasonable interpretation of the INA." In *Thap v. Mukasey*, 544 F.3d 674 (6th Cir. 2008), the Sixth Circuit approached the issue of deference from a slightly different angle but similarly noted that it wished to avoid overstepping its authority. There, quoting the Ninth Circuit, the Sixth Circuit stated that adopting the offense-specific approach would constitute "'judicial legislating [that] would vastly overstep our limited scope of judicial inquiry into immigration legislation . . . and would interfere with the broad enforcement powers Congress has delegated to the Attorney General.'" *Id.* at

679 (quoting *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994)). In a somewhat similar vein, the Seventh Circuit stated in *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 692 (7th Cir. 2008), that "if courts were to look beyond the charged grounds of deportation to the underlying criminal offense to determine whether the criminal offense *could* have been treated as a crime of moral turpitude, that would greatly expand the role Congress has assigned to the judiciary in immigration cases."

Abebe v. Holder

The Ninth Circuit threw a wrinkle into section 212(c) case law with its decision in the procedurally complex case of *Abebe v. Holder*, 554 F.3d 1203. There, Abebe was charged as removable for the aggravated felony offense of sexual abuse of a minor. The Immigration Judge and the Board found him ineligible for relief under section 212(c) because his ground of deportability, conviction for an aggravated felony, had no counterpart ground of inadmissibility. The Ninth Circuit published a decision, *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007), in which the court affirmed the statutory counterpart test and ruled that Abebe was ineligible for relief under section 212(c).[5] The court subsequently reheard the case en banc and published another decision, *Abebe v. Mukasey*, 548 F.3d 787 (9th Cir. 2008), which was then withdrawn and replaced with a third decision, *Abebe v. Holder*.[6]

In this third decision (as well as in the second decision), the Ninth Circuit repudiated the long-standing rule, originally stated by the Second Circuit in *Francis*, that "there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation." *Abebe*, 554 F.3d at 1207. In so doing, the Ninth Circuit overruled its own decision in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981). The Ninth Circuit in *Abebe* articulated a rational basis that Congress could have had in granting eligibility for section 212(c) relief to aliens who left the United States after their convictions, but not to aliens who remained in the country. Specifically, "Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to create an incentive for deportable aliens to leave the country." *Id*. at 1206. Thus, in *Abebe*, the Ninth Circuit indicated that an alien who did not leave the United States after his or her offense is no longer constitutionally entitled to apply for section 212(c) relief.[7]

Importantly, however, the Ninth Circuit explicitly did not invalidate 8 C.F.R. § 1212.3, which extends eligibility for relief under section 212(c) of the Act to certain aliens who did not leave the U.S. after their convictions. Indeed, the court stated that "nothing we say today casts any doubt on the regulation." *Id*. at 1207. In *Matter of Moreno-Escobosa*, 25 I&N Dec. 114 (BIA 2009), the Board affirmed that section 212(c) relief would remain available in the Ninth Circuit to otherwise eligible aliens who remained in the United States after their convictions. There, citing to the Ninth Circuit's statement quoted above, the Board "agree[d]" with the parties "that *Abebe* does not foreclose a section 212(c) waiver simply because an alien is charged with a ground of deportability rather than a ground of inadmissibility." *Id*. at 116. The Board further made clear that the statutory counterpart test would remain valid in the Ninth Circuit (and in all other circuits except the Second), stating that "nothing in this decision is intended to cast doubt on our prior holdings where we articulated the 'statutory counterpart' rule that an alien seeking to waive a deportation ground must establish that there is a comparable ground of inadmissibility in section 212(a) of the Act." *Id*. at 117.

Conclusion

With *Abebe*, the Ninth Circuit arguably created a three-way split between the circuits. In the first camp are the Board and the all the circuits to have addressed the issue other than the Second and the Ninth. The Board and these courts have adopted the *Francis* rule that aliens who did not leave the United States following their convictions and are otherwise eligible for relief under section 212(c) of the Act are constitutionally entitled to apply for this relief. Further, the Board and these courts have adopted the statutory counterpart test for determining whether an alien charged as deportable will be deemed eligible for section 212(c) relief. In the second camp is the Second Circuit, which continues to follow the *Francis* rule but applies the offense-specific approach instead of the statutory counterpart test. As a result of *Abebe*, the Ninth Circuit now stands alone in the third camp in holding that deportable aliens are not constitutionally entitled to apply for section 212(c) relief. It nevertheless declined to invalidate the regulation providing for this relief, and the Board has decided to continue to apply the statutory counterpart test set forth in the regulation. The development of the law reveals that even Congress's repeal of section 212(c) will not get rid of the "(c)" of confusion.

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1. *See* Sarah Koteen Barr, Notes and Comments, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 Lewis & Clark L. Rev. 725 (2008).

2. Prior to November 29, 1990, aliens convicted of an aggravated felony were not statutorily barred from applying for section 212(c) relief. However, as noted above, aliens charged as deportable for an aggravated felony conviction generally have difficulty establishing eligibility for section 212(c) relief, because there is no easily identifiable counterpart ground of inadmissibility. *See also infra* note 4.

3. *See De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009); *Thap v. Mukasey*, 544 F.3d 674 (6th Cir. 2008); *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62 (1st Cir. 2008); *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007) (*withdrawn*, *Abebe v. Holder*, 554 F.3d 1203); *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006); *Alvarez v. Mukasey*, 282 Fed. Appx. 718 (10th Cir. 2008). Only the Fourth Circuit has not ruled on the statutory counterpart test following *Matter of Blake*.

4. In general, courts have ruled that aggravated felons cannot obtain relief under section 212(c) of the Act because there is no counterpart ground of inadmissibility to deportability for an aggravated felony. In so ruling, the courts have affirmed the Board's holding in *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005), that inadmissibility for a crime involving moral turpitude is not such a counterpart. *See, e.g.*, *Dalombo Fontes v. Gonzales*, 483 F.3d 115, 122-23 (1st Cir. 2007).

5. Judge Berzon issued a concurrence in which she stated she would follow the Second Circuit's offense-specific approach were the court not bound by the Ninth Circuit's decision in *Komarenko*, 35 F.3d 432, where it adopted the statutory counterpart test. *Abebe*, 493 F.3d at 1106. As one argument in favor of the offense-specific approach, she noted that the Supreme Court stated in *St. Cyr* that "'[t]he extension of § 212(c) relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly.'" *Id*. at 1109-10 (quoting *St. Cyr*, 533 U.S. at 295). However, she remarked that deportation for an aggravated felony can almost never be waived under the statutory counterpart test because there is typically no counterpart ground of inadmissibility.

6. The third decision is identical to the second decision except that the third decision includes a rebuttal of the dissenters' arguments. The rebuttal contains the important statement, discussed below, that the Ninth Circuit is not invalidating 8 C.F.R. § 1212.3, which provides that certain deportable aliens are eligible for section 212(c) relief.

7. The Ninth Circuit's decision included a dissent by Judge Thomas, joined by Judge Pregerson. In part, the dissent attacked the majority's assertion that encouraging "self-deportation" is a rational basis for making inadmissible aliens, but not deportable aliens, eligible for section 212(c) relief. First, the dissenters argued that a regime of "self-deportation" would not necessarily conserve governmental resources. That is, "When an LPR leaves and attempts to reenter the country and is deemed excludable yet potentially eligible for a section 212(c) waiver, the LPR is generally allowed to enter and to apply for the waiver from within the country. If the alien is ultimately denied the waiver, the government must remove him. No fewer government resources are exerted than if the alien applied for a § 212(c) waiver during a deportation proceeding." *Abebe*, 554 F.3d at 1215. Moreover, the dissenters argued, barring deportable aliens from applying for waivers under section 212(c) could "increase the number of removal proceedings," if aliens left the United States and attempted to reenter to apply for section 212(c) waivers of inadmissibility. *Id*. at 1215-16. Second, the dissenters noted that "implicit in the majority's argument that a rational Congress would want to encourage aliens who are excludable but eligible for [a] section 212(c) waiver to place themselves in exclusion proceedings is the assumption that a rational Congress would want these persons to leave the country." *Id*. at 1216. However, the dissenters asserted, "[t]his is inconsistent with the fact that, by creating section 212(c) waiver[s], Congress explicitly identified this group of aliens as desirable for reentry to the country, subject to the Attorney General's discretion." *Id*.