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The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.

In this issue...

Gang Violence and Asylum: The Problem of Defining a Particular Social Group

By Katherine A. Smith

Fleeing the strife of civil war in El Salvador, a group of immigrants in Los Angeles in the 1980s formed the Mara Salvatrucha, or MS-13, gang. Initially, these immigrants created MS-13 to protect themselves from already established L.A. gangs. MS-13, however, has now come to be considered one of the most violent and dangerous criminal gangs in the world.

MS-13 now has a presence in many parts of the United States. In addition, because many gang members were removed to Central America in recent years, the influence of MS-13 is now widespread in the region. The State Department notes that:

> [O]ver the past decade, criminal gang organizations have emerged as a serious and pervasive socio-economic challenge to the security, stability and welfare of El Salvador and other nations of Central America. This problem ... has evolved into a transnational phenomenon impacting regional law enforcement and security concerns for Mexico, the United States and other countries.

United States Dep't of State, *Issue Paper: Youth Gang Organizations in El Salvador* (June 2007) (Virtual Law Library at: http://eoirweb/library/country/el_salvador.htm).

This transnational development of gang membership has led to an influx in asylum claims involving former gang members and other individuals who fear gang recruitment or violence. The Immigration Courts and the Board of Immigration Appeals have wrestled with the following question: What protection, if any, does asylum law in the United States offer to these individuals?

Gang cases present a variety of issues. Is gang violence "persecution" or merely criminal activity? If the former, who is the "persecutor"? If it is persecution, is it on account of any particular reason? How realistic is

internal relocation for victims of gang violence? Can governments be considered unwilling or unable to offer protection from gang violence? While these are all worthwhile questions, this article will focus on one issue in particular: are there any particular social groups related to gang violence that are cognizable under asylum law? This issue has emerged as an important one. The Third Circuit recently remanded a case to the Board directing it to address whether Honduran men who have been actively recruited by gangs and who have refused to join the gangs belong to a particular social group. *Valdiviezo-Galdamez v. U.S. Atty. Gen.*, 502 F.3d 285 (3d Cir. 2007).

Defining Particular Social Group

Very few published decisions from any court directly address social groups relating to gangs. Therefore, a review of the legal framework related to social group may help supply some analytical tools in addressing these issues.

Section 101(a)(42) of the Immigration and Nationality Act, 8 USC 1101(a)(42), states that for purposes of asylum, persecution must be on account of "race, religion, nationality, membership in a particular social group, or political opinion." The Board clarified "persecution on account of membership in a particular social group" in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), stating that it intended to "preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." *Acosta*, 19 I&N Dec. at 233-34. Thus, the individual must be a member of a group of persons all of whom share a common, immutable characteristic. *Id*. at 233. This can be an innate characteristic or a shared past experience, and must be something that cannot be changed or should not be required to be changed because it is fundamental to the members' individual identities or consciences. *Id.*

In *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), the Board took another look at its definition of "particular social group" and discussed the ways in which the circuits have diverged in their approaches. It explained that the First, Third, Sixth, and Seventh Circuits adopted the Board's formulation in *Matter of Acosta. C-A-*, 23 I&N Dec. at 955-56. The Ninth Circuit, however, has identified two types of social groups: (1) groups with a "voluntary associational relationship" among their members, described as a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest" (*Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)); and (2) groups whose members share immutable characteristics such as a familial relationship or sexual identity (*Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)). The Second Circuit follows the Ninth Circuit's "voluntary associational relationship" standard, but also requires that the attributes of a particular social group be recognizable and discrete. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). After examining these approaches, the Board held in *Matter of C-A-* that it would adhere to the formulation in *Matter of Acosta*, and that one factor that ought to be considered in this analysis is the extent to which members of a society perceive those with the characteristic in question as members of a group. *C-A-*, 23 I&N Dec. at 956. The adjudicator is not, however, required to find a voluntary associational relationship or an element of cohesiveness. *Id*. at 956-57.

Several circuits have addressed *Matter of C-A-*, and all have found it to be a reasonable interpretation. The Eleventh Circuit reviewed *Matter of C-A-* itself and gave it deference as a reasonable interpretation of the Act. *Castillo-Arias v. U.S. Atty. Gen.*, 446 F. 3d 1190 (11th Cir. 2006). *Accord, Ucelo-Gomez v. Mukasey*, __F.3d __, 2007 WL 4139343 (2d Cir. Nov. 21, 2007) (affirming *Matter of A-M-E- & J-G-U-,* 24 I&N Dec. 69, 76 (BIA 2007)); *Pavlyk v. Gonzales*, 469 F.3d 1082 (7th Cir. 2006).

Recently, the Board held that, in addition to social visibility, a factor to be considered in determining whether a particular social group exists is whether the group can be defined with sufficient particularity to delimit its membership. *Matter of A-M-E- & J-G-U-,* 24 I&N Dec. 69, 76 (BIA 2007) (finding that the terms "wealthy" and "affluent" standing alone are too amorphous to provide an adequate benchmark for determining group membership). As noted above, this case was affirmed by the Second Circuit. *Ucelo-Gomez v. Mukasey*, *supra*. The very nature of the term "social group" implies that there must be more than one person who fits into the subsection of the population being described. However, when defining the group, there is also a potential pitfall in creating too large of a group. *See Castillo-Arias* at 1199 (holding that informants working against a Colombian drug cartel are not a social group because their defining attribute is persecution and they are too numerous and inchoate). Note, though, that in *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005), the Tenth Circuit signaled a willingness to accept larger groups in finding female members of the Tukulor Fulani tribe in Senegal to be a particular social group. The Court acknowledged the reluctance by some

courts "to use gender as a group-defining characteristic for fear of permitting half of a nations' population to qualify for asylum," but stated that the courts' focus should be not on the size of the social group, but rather "on whether the members of that group are sufficiently likely to be persecuted" on account of their group membership. *Id*. at 1199-1200. *See also Gao v. Gonzales,* 440 F.3d 62 (2d Cir. 2006) (finding women who have been sold into marriage, whether or not that marriage has yet taken place, and who live in a part of China where forced marriages are considered valid and enforceable to be a social group); *cert. granted, judgment vacated, Keisler v. Gao*, 128 S. Ct. 345 (Oct. 1, 2007); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (finding "Somali females" to constitute a particular social group). The social visibility requirement may assist in striking the balance between over-inclusiveness and drawing too narrow of a group.

Some circuits have held that a social group must be defined by more than the fact that individuals in the group all suffer persecution or face a common danger. *See, e.g., Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005) (finding that a class of young Albanian women who are forced into prostitution is not a social group, partly because "a social group may not be circularly defined by the fact that it suffers persecution"); *see also Sanchez-Trujillo*, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding that a class of young, urban, working-class males of military age who had maintained political neutrality is not a social group); *but see Lukwago v. Ashcroft*, 329 F.3d 157, 170-73 (3d Cir. 2003) (holding that children from Northern Uganda who are abducted and enslaved by a guerilla organization are not a social group for purposes of finding past persecution but do have a social group claim for future persecution).

Application to Gang Cases

As noted above, the Third Circuit has remanded a case to the Board directing it to address whether "Honduran men who have been actively recruited by gangs and who have refused to join the gangs" belong to a particular social group. *Valdiviezo-Galdamez v. Attorney General* at 290-91[1]. In that case, the petitioner was not only opposed to the gang MS-13, but also claimed to have been kidnapped, beaten, and threatened solely because of his resistance to gang recruitment. *Id*. at 287, 290-91. The Third Circuit noted that the group in which the petitioner claimed membership shared the characteristics of other groups that the Board has found to constitute particular social groups. *Id*. at 291. However, in making this observation, the Court cited to a 1993 Third Circuit case that quoted *Matter of Acosta* and *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), without noting the more recent Board cases of *Matter of C-A-* or *Matter of A-M-E- & J-G-U*. *See id.* The Court had no trouble finding nexus, stating that "[n]o reasonable factfinder could conclude that Galdamez was attacked for any reason other than his status as a young Honduran man who had been recruited to join the gang and refused to join." *Id.* at 291.

Two principal scenarios seem to be emerging with regard to the gang cases coming before the Immigration Courts: (1) the asylum seeker is a former gang member, or (2) the asylum seeker was not a member but has resisted recruitment or for some other reason fears persecution by a gang.

For the first scenario, one view is that a group consisting of former gang members meets the immutable characteristic test because former membership is a characteristic of the past that cannot be changed. This view has parallels to other social group configurations which have been addressed by the courts. For example, in *Sepulveda v. Gonzales*, 464 F. 3d 770 (7th Cir. 2006), the Seventh Circuit found that former employees of the Colombian Attorney General's office belonged to a particular social group. The Court reasoned that the group shared an immutable characteristic required for particular social group classification under *Acosta*: "A social group has to have sufficient homogeneity to be a target for persecution. But under *Acosta* this is not a demanding requirement, and is easily satisfied by a group of former employees of a particular institution." The Court found that the status of being a former employee distinguished the case from the claimed social group of uncorrupt prosecutors who were subjected to persecution for exposing government corruption in *Pavlyk v. Gonzales*, 469 F. 3d 1082 (7th Cir. 2006). Former gang members are also a clearly defined discrete group of people. This group of people may not be cohesive in the sense that they continue to formally associate with one another, but neither are other recognized social groups such as homosexual men or women who have undergone female genital mutilation.

This formulation was rejected by the Ninth Circuit, however, in finding that the unique characteristic of being a former and current gang member "is materially at war with those we have concluded are innate for purposes of membership in a social group." *Arteaga v. Mukasey,* _F.3d_ 2007 WL 4531961 (9th Cir. Dec. 27, 2007) at *4. The Court found,

> [W]e cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft. Following in the analytical footsteps of President Lincoln, calling a street gang a "social group" as meant by our humane and accommodating law does not make it so. In fact, the outlaw group to which the petitioner belongs is best described as an "antisocial group," the definition of antisocial being, "tending to interrupt or destroy social intercourse; hostile to the well-being of society; characterized by markedly deviating behavior; averse to the society of others or to social intercourse; misanthropic." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 96 (2002). To do as Arteaga requests would be to pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws. Accordingly, we hold that participation in such activity is not fundamental to gang members' individual identities or consciences, and they are therefore ineligible for protection as members of a social group.

Id.

A tricky question arises when considering social visibility. The issue is whether members of society perceive those with the characteristic in question as members of a group. Factors in this analysis may include whether there are additional identifying characteristics such as tattoos or a wide-spread reputation. Does the former gang member have a choice as to whether he or she continues to look like a gang member with characteristics such as clothing style or manner of speech? A decision along these lines is likely to be very fact-specific, and the social group definition set forth by applicable circuit and Board law will be determinative. For instance, in *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003), a petitioner with multiple gang tattoos on his face and body argued that he would be persecuted in Honduras because he was a "tattooed youth." *Castellano-Chacon*, 341 F.3d at 538, 539, 549. The Sixth Circuit determined that "tattooed youth" are not members of a social group because the only shared past experience is that they received a tattoo. *Id.* In *Aretega*, the Ninth Circuit relied on the Sixth Circuit decision as well as *Matter of A- M- E-*, *supra*, to dismiss the claimed social group a of "tattooed gang members".

Analyzing social groups for asylum seekers who have never joined gangs but allege persecution by gangs is likewise complex. Anybody who is not in a gang could claim to fall into this broad category. In a number of unpublished opinions, the Ninth Circuit rejected this claim as too broad. *Ayala-Euceda v. Gonzales*, 229 F.App'x. 445 (9th Cir. April 20, 2007); *Santos-Pineda v. Gonzales*, 205 F.App'x. 532 (9th Cir. Nov. 9, 2006); *Arqueta v. Gonzales*, 202 F.App'x. 222 (9th Cir. Sept. 9, 2006). In the latter two cases, the Court relied upon *Ochoa v. Gonzales*, 406 F.3d 1166, 1169 (9th Cir. 2005), finding that "business owners in Colombia who rejected demands from narco-traffickers to participate in illegal activity" was too broad a group to be a particularized social group. Applicants often present related claims which narrow the group to one that is particularly vulnerable to gang violence, such as street children, young women, or small business owners, as in the above decision. Courts have held that facing a common danger is not enough to constitute a social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (holding that homeless street children in Honduras are not a social group, as the elements that define the group, "poverty, homelessness and youth," are "far too vague and all encompassing" to set perimeters for a particular social group). There must be an additional factor that singles the group out for persecution and that is immutable (or based on a voluntary association for the circuits that use that analysis). Family membership is considered a social group in many circuits (*see, e.g., Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004)) and may be applicable in gang related cases. In contrast, simply owning a small business is generally not fundamental to one's identity or immutable. Similarly, in forced gang recruitment cases, parties still need to identify a social group to which the person being recruited belongs.

Given these emerging issues, we can anticipate further development in this area. In the meanwhile, adjudicators can take guidance from cases addressing the particular social group definition, and apply this law as appropriate to the particulars of each claim, such as the specific events recounted by the applicant, and the quality of his or her evidence.

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[1]The Third Circuit declined to address whether "Honduran men who have been actively recruited by gangs and who have refused to join the gangs" belong to a particular social group", stating they could not "decide this question in the first instance" *Valdiviezo-Galdamez v. Attorney General* at 290-91. *See Gonzales v. Thomas,* 547 U.S. 183, 126 S.Ct. 1613, (2006) (holding that court of appeals erred by holding in the first instance that members of a family are a "particular social group" without prior resolution of this issue by the BIA).

For additional information on the MS-13, contact the Law Library to request loan of the DVD "**World's Most Dangerous Gang**," a National Geographic Production.

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR NOVEMBER 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeals in cases reviewing Board decisions in November 2007 rose from last month's 11.8 % to 16.2 %. The chart below provides the results from each circuit for November 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	7	7	-	0.0
2nd	81	62	19	23.5
3rd	14	14	-	0.0
4th	9	9	-	0.0
5th	20	19	1	5.0
6th	6	5	1	16.7
7th	3	2	1	33.3
8th	7	7	-	0.0
9th	189	157	32	16.9
10th	1	1	-	0.0
11th	15	12	3	20.0
All:	**352**	**295**	57	**16.2**

The Ninth Circuit accounted for over half of all the decisions this month and well over half of the reversals. As usual, Ninth Circuit reversals covered a wide range of issues. The Court reversed several adverse credibility determinations in asylum cases, disagreed with the analysis regarding level of harm for past persecution in two cases and with the finding of no nexus in another. Two cases were remanded for further consideration of evidence in regard to well-founded fear. Other issues involved a stipulated remand in a case involving allegations of Immigration Judge bias, a remand to permit further evidence after finding that the Immigration Judge improperly limited testimony, a remand where an unrepresented respondent was forced to proceed without counsel, and remands to consider reasonable cause for late filing of appeals to the Board. The Court remanded several Board denials of motions to reopen or reconsider, two based on ineffective assistance of counsel, one for failure to address all of the issues raised, and another for further consideration of new evidence in a cancellation case regarding hardship related to the health of a child. Six of the remands were for further consideration of whether return at the border broke physical presence under *Ibarra-Flores v. Gonzales,* 439 F.3d 614 (9th Cir. 2006) and *Tapia v. Gonzales,* 430 F.3d 997 (9th Cir. 2005). One of the few reversals involving criminal grounds held that a conviction under an Arizona statute for attempted public sexual indecency with a minor was not "sexual abuse of a minor" under the aggravated felony provision because the statute did not require that the minor be touched or even aware of the conduct involved and the record of conviction was did not clarify what occurred. Resilas v. Keisler, _F.3d_, 2007 WL 3225603 (9th Cir. Nov. 2, 2007)

The Second Circuit reversed in a number of asylum cases, six involving credibility, two involving burden of proof and corroboration requirements, two involving level of harm for past persecution, and two involving nexus analysis. The one aggravated felony reversal involved calculation of the requisite monetary amount for the aggravated felony fraud provision. In another case, the Second Circuit joined the Fifth and Ninth Circuits in ruling that the Board lacks jurisdiction to enter an order of removal in the first instance.

A common thread in most of the Second and Ninth Circuit reversals this month was that the Courts found that the Board did not address all the relevant facts in the record or did not adequately address arguments or issues raised on appeal or in a motion to reopen or remand. Consequently, most of the adverse decisions referenced here were remands to permit the Board or the Immigration Judge to further develop the record by more fully addressing the relevant issues rather than outright reversals for error of law or under the substantial evidence test.

The chart below shows numbers of decisions for January through November 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	94	66	28	29.8
2nd	1129	930	199	17.6
8th	80	67	13	16.3
9th	2090	1751	339	16.2
6th	105	90	15	14.3
3rd	299	270	29	9.7
11th	253	229	24	9.5
5th	192	177	15	7.8
4th	161	149	12	7.5
10th	56	52	4	7.1
1st	76	73	3	3.9
All:	**4535**	**3854**	**681**	**15.0**

Last year at this point (January through November 2006) we had a total of 4838 decisions with 864 reversals for a 17.9 % overall reversal rate.

John Guendelsberger is Senior Counsel to the Board Chairman, and is serving as a Temporary Board Member.

RECENT COURT DECISIONS

Second Circuit

Xiu Fen Xia v. Mukasey, __ F. 3d __, 2007 WL 4270805 (2d Cir. Dec. 7, 2007): The Court dismissed the appeal of a female asylum seeker who had secretly aborted her pregnancy in China to avoid the harsh consequences of such pregnancy being discovered at a mandatory checkup. Following the Board precedent decision *Matter of* T-Z-, 24 I&N Dec. 163 (BIA 2007), the Court agreed with the Board that an abortion is not "forced" under the refugee definition unless the threatened harm for refusal would be sufficiently severe to amount to persecution. The Court held that because no government official was aware of the respondent's pregnancy, she had not sufficiently established a threatened harm.

Fifth Circuit

Burke v. Mukasey, __ F. 3d __, 2007 WL 4295386 (5th Cir. Dec. 10, 2007): The Court dismissed the respondent's appeal challenging whether his N.Y. State conviction for possession of stolen property in the third degree was an aggravated felony. The Court found the elements of such crime to fall under the generic definition of a "theft offense", and to thus meet the definition of aggravated felony under 8 U.S.C. §1101(a)(43)(G).

Sixth Circuit

Zhang v. Mukasey, __ F. 3d __, 2007 WL 4191756 (6th Cir. Nov. 29, 2007): The Court reversed a decision of the Immigration Judge (affirmed by the Board) that respondent was removable under section §237(a)(2)(A)(i) of the Immigration and Nationality Act where he committed a crime involving moral turpitude more than five years after entering the U.S., but less than five years after adjusting his status to that of a lawful permanent resident. The Court rejected the Immigration Judge's conclusion that an adjustment of status can also be considered an admission, holding that "there is only one 'first lawful admission,' and it is based on physical, legal entry into the United States, and not on the attainment of a particular status."

Eighth Circuit

Zacarias v. Mukasey, __ F. 3d __, 2007 WL 4233167 (8th Cir. Dec. 4, 2007): The Court upheld an Immigration Judge's decision, affirmed by the Board, denying asylum to a respondent who claimed four instances in which he and his family suffered harm from the guerrillas and other groups in Guatemala. The Court acknowledged that the Immigration Judge found the respondent's testimony to be "very vague" and found that he left Guatemala to escape general levels of violence. The Immigration Judge also found that the respondent did not engage in any activities that would cause him to be targeted at either the time he left or the present, and considered the impact of the 1996 peace accords. The Court also rejected the respondent's challenge to the competency of the telephonic interpreter, who had difficulty at times hearing the respondent, where the interpreter told the Immigration Judge when she did not understand, and the questions and answers were then repeated. The Court also rejected respondent's claim that the Immigration Judge's active questioning caused prejudice, finding no impropriety where such questioning solicited pertinent information regarding the application.

Ninth Circuit

Chaly-Garcia v. U.S., __ F. 3d __, 2007 WL 4198175 (9th Cir. Nov. 29, 2007): The Court reversed the decision of a U.S. District Court finding that the respondent was not an ABC class member under the class action settlement in *American Baptist Churches v. Thornburgh* because his 1991 asylum application did not include a written statement indicating his desire to opt-in to the ABC settlement. The Court held that the text of the ABC Agreement requires a class member to request *the benefits of* the Agreement, but does not state that an individual must refer to the Agreement itself, nor must an applicant submit the specific registration card included in the Agreement.

Toufighi v. Mukasey, __ F. 3d __, 2007 WL 4336189 (9th Cir. Dec. 13, 2007): The Court dismissed the appeal of a respondent from Iran who was denied asylum by an Immigration Judge in 1998, and whose appeal was dismissed by the Board in 2002, but who later moved to reopen proceedings to (1) adjust status based upon his marriage to a U.S. citizen, and (2) to file a new asylum claim based upon changed conditions in Iran. The Court found that the respondent's motion based upon his adjustment application was untimely. Furthermore, the respondent failed to present *prima facie* evidence that the alleged "changed conditions" (which the respondent claimed was increased persecution in Iran of proponents of liberal, pro-Western or pro-American ideologies), would directly affect him. The Court expressed skepticism about the social group of pro-Western Iranians.

Gonzales v. Dept. of Homeland Security, __ F.3d __, 2007 WL 4209273 (9th Cir. Nov. 30, 2007), the Court applied *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*), to conclude that the Court must apply *Chevron* deference to the Broad's interpretation of a statute regardless of the Court's contrary precedent, provided that the Court's earlier precedent was an interpretation of a statutory ambiguity. The underlying issue was whether the Board's decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) (holding that an alien who reenters the United States without admission after having been previously removed is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and that the alien is statutory ineligible for a corresponding waiver of inadmissibility unless more than 10 years have elapsed since the date of the alien's last departure from the U.S.), took precedence over a prior contrary Ninth Circuit decision. *See Perez-Gonzales v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). The Ninth Circuit found that under *Brand X*, it was bound by the Board's resolution of the underlying issue as *Perez-Gonzales* was based on a finding of statutory ambiguity; the Board's decision in *Torres-Garcia* interpreted the applicable statutes (e.g., section 212(a)(9) of the Act); and the Board's interpretation in *Torres-Garcia* was reasonable (and therefore entitled to *Chevron* deference).

Petrosyan v. Mukasey, __ F.3d __, 2007 WL 4168985 (9th Cir. Nov 27, 2007). The Court remanded the appeal of a respondent from Armenia who applied for asylum, withholding of removal and CAT protection. The Immigration Judge excluded documents purportedly from the Armenian government. The Court held that a respondent may resort to any recognized procedure for authentication of documents in general, including the procedures permitted under Federal Rule of Evidence 901, and thus a petitioner's failure to obtain government certification of a foreign public document's authenticity is not necessarily a bar to admission of the document. 8 C.F.R. § 287.6(c) is not the exclusive means, and an alien's testimony may be used.

BIA PRECEDENT DECISIONS

In a pair of cases, *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), and *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007), the Board addressed the issue of whether and when a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony drug trafficking crime under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). In *Matter of Carachuri-Rosendo*, the respondent, a lawful permanent resident, had a 2004 Texas conviction for possession of marijuana, and a 2005 Texas conviction for possession of a controlled substance. Both were misdemeanors, and the second conviction contained no reference to the first. The majority first found that decisional authority from the Supreme Court and the controlling Federal circuit court of appeals is determinative. The Board reasoned that its interpretation of criminal law is not entitled to deference. In this case, the precedent from the Fifth Circuit, which predated the Supreme Court's decision in *Lopez v. Gonzalez*, 127 S.Ct. 625 (2006), is controlling, which in this case results in a finding that the respondent's second conviction is an aggravated felony. Six other circuits have released precedents on this issue (1st, 2d, 3d, 6th, 7th, 9th).

The Board then addressed circuits where there is no controlling authority, and found that a State conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism unless the alien's status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for that simple possession offense. The Board noted that interpretation of recidivist possession is ambiguous because it is not a discrete offense under Federal law, and is not defined in relation to elements. In *Lopez v. Gonzalez,* the Supreme Court's focus was to ensure that section 101(a)(43)(B) be applied to actual drug trafficking, and that a State offense can be an aggravated felony drug trafficking crime only if it proscribes conduct punishable as a felony under Federal law. In light of this, the Board

held that the State offense should correspond in some meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism. Federal recidivist felony treatment hinges not simply on potential punishment; it requires the actual invocation by a Federal prosecutor of the recidivist enhancement features of Federal law. The Board found that State recidivism prosecutions must correspond to the Federal law's treatment by providing the defendant with notice and opportunity to be heard on whether recidivist punishment is proper.

Matter of Thomas, *supra*, arose in the Eleventh Circuit, a circuit without controlling authority on the issue. In this case, the respondent had a 2002 cocaine possession conviction and a 2003 marijuana possession conviction. The respondent first argued that the 2002 conviction was not a valid prior conviction for a recidivist conviction, because it was expunged for rehabilitative purposes. The Board found that, while the Eleventh Circuit has no precedent on point, every other circuit to decide the issue has found that an expunged conviction remains a valid prior conviction for Federal recidivism provisions. In any event, the Board held that because the record does not reflect that the 2003 conviction arose from a State proceeding in which the respondent's status as a recidivist drug offender was admitted or determined by a judge or jury, the 2003 conviction is not an aggravated felony. The respondent remains deportable, but is not ineligible for cancellation of removal.

In *Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007), the Board considered whether an alien with a State conviction for possession of marijuana, less than two ounces, in a drug free zone was eligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). This required resolution of whether the fact of the location of the offense, which was a sentence enhancement, is treated as an element of the underlying offense which would take it out of the 212(h) simple possession exception. The Board first held that any fact, including one contained in a sentence enhancement, that serves to increase the maximum penalty for a crime and that is required by the law of the convicting jurisdiction to be found beyond a reasonable doubt by a jury, if not admitted by the defendant, is to be treated as an element of the underlying offense. The Board found that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt), required the Board to reach this conclusion and superseded its prior precedent, *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992). The Board cautioned that not all sentencing factors, if not admitted, are required to be found beyond a reasonable doubt (such as enhancements under the United States Sentencing Guidelines), and in those cases, *Matter of Rodriguez-Cortes* still controls. In this case, the "drug free zone" factor under Texas law requires a jury finding beyond a reasonable doubt if not admitted by respondent. Therefore, the enhancement is treated as an element of the offense, and the respondent is not eligible for a waiver.

REGULATORY UPDATE

DEPARTMENT OF STATE
22 CFR Part 41
Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act
ACTION: Final rule.
SUMMARY: This rule amends 22 CFR Part 41 in order to reflect increased security measures requiring fingerprinting and name checks of all visa applicants, with certain narrow exceptions, and to be consistent with an amendment to the Schedule of Fees for Consular Services including the cost of such checks in fees for non-immigrant and immigrant visas and border crossing cards.
DATES: This final rule becomes effective January 1, 2008.

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