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Brand X: Deference Should Be More Than a Matter of "Who's On First"

By William N. Frank

The Paradox

One of the paradoxes in the application of judicial deference to an administrative agency's decisions is the discrepancy between the special deference *due* Board of Immigration Appeals ("Board") adjudications involving immigration law, and what is sometimes actually *afforded* such decisions. The Immigration and Nationality Act ("Act") vested the Attorney General with the administration and enforcement of the Act. The Attorney General then delegated this power to the Board. Based on that delegation, the Supreme Court held that the Board should be accorded *Chevron* deference when it "gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 416 (1990). The Court was referring to *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which set forth the doctrine that when Congress has *delegated* authority to an agency, courts should not "substitute [their] own construction of a statutory provision for a reasonable interpretation made by the... agency." *Id* at 844.

In fact, the Court later recognized in *INS v. Abudu*, 485 U.S. 94 (1988), that the reasons for "giving [judicial] deference" to the Executive Branch in the immigration context "apply with even greater force" because officials "exercise especially sensitive political functions that implicate questions of foreign relations." *Id* at 110. However, an apparent inconsistency at the Circuit Court level has arisen where affording *Chevron* deference to a Board decision would conflict with the court's own rulings made before the Board decision. The result is that Board adjudications have not always benefitted from one of the goals of the *Chevron* doctrine: ensuring that one homogeneous statutory construction will apply throughout an agency's national jurisdiction.

The Court stepped into the breach in a different administrative forum to resolve the conflict between congressional delegation, the timing of an agency decision, and circuit *stare decisis*, in its landmark 2005 decision *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005) (“Brand X”). In brief, the Court held that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Id.* at 982. The Court also broke new ground on agency interpretative changes by rejecting arguments that an agency “interpretation... inconsistent with its past practice” necessarily precluded the applicability of *Chevron*, and by limiting the method of finding statutory ambiguity to the statute’s plain terms, and not to extrinsic sources of congressional intent. *Id.* at 981, 986.

This article will discuss the background of judicial deference, the holding of *Brand X*, and some of the issues that have emerged from *Brand X* in scholarly circles.

A Short Summary of the Long History of Deference

Courts have long recognized the principle first advanced in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803) that it is “the province and duty of the judicial department to say what the law is.” *Id.* at 177. However, reaching back to at least 1827 in *Edward’s Lessee v. Darby*, 25 U.S. (1 Wheat.) 206, 210 (1827), the Supreme Court has found that the *Marbury* principle must learn to exist side by side with the reality that Congress frequently delegates broad authority to administrative agencies. The *Edward’s Lessee* Court accordingly found that constructions of “doubtful and ambiguous law” by “those who [are] . . . appointed to carry its provisions into effect, are entitled to very great respect.” *Id.* at 210.

In a series of landmark decisions beginning with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court brought into sharper focus the caselaw governing judicial deference. Taken together, *Skidmore*, 1984’s *Chevron v. Natural Resources Defense Council*, *supra*, and 2001’s *United States v. Mead Corp.*, *infra*, provided a nearly, but not quite complete, framework for courts to employ when determining *when* an agency decision commands deference, and *how much* deference should then be afforded.

First, in *Skidmore*, the Court examined the deference due to an administrator’s interpretations where the administrator had no delegated lawmaking authority, but did conduct investigations and issue guidelines, all under the authority of a statute. The *Skidmore* Court tasked courts to assess multiple factors to decide, on a case-by-case basis, how much deference, if any, should be accorded an agency decision: “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140. This last clause is noteworthy in that it appeared to foreclose the possibility that an agency construction would be *mandated* to take precedent over a reviewing court’s construction. Thus, while an agency decision would never have the “power to control” the court’s decision, the interpretation should have “weight” depending upon the multi-factor analysis.

Next, in the Court’s 1984 decision in *Chevron v. Natural Resources Defense Council*, the Court updated its scope of deference based on two rationales. The Court bowed to the greatly magnified role that agencies began to play in the second half of the twentieth century by recognizing that (1) Congress indeed wants agencies to exercise primary authority over their organic statutes; and (2) agencies, and not courts, possess the technical expertise, and political accountability that yield interpretive ability and legitimacy. First, the reviewing court must determine whether the statute is unambiguous: “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. The Court explained that “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 943 n.9. However, if the court determines that the statute is “silent or ambiguous,” it then proceeds to the second *Chevron* step. *Id.* at 843. It does not impose its own construction of the statute, but rather it decides “whether the agency’s answer is based on a permissible construction of the statute.” *Id.*

Finally, along came *United States v. Mead Corp.*, 533 U.S. 218 (2001), which to some extent revived a moribund *Skidmore*. *Skidmore* had long been abandoned, or, at least, rarely invoked as a measure of deference. *Mead* served as a

“traffic cop” case, clarifying that *Chevron* deference applies to agency interpretations that arose under an explicit or implicit delegation from Congress to make rules that carry the “force of law.”¹ Other agency interpretations, where the “regulatory scheme is highly detailed, and the [agency] can bring the benefit of specialized experience to bear,” are reviewed under the lesser, but still somewhat deferential, *Skidmore* treatment. *Id.* at 226-27, 234-35.

A loose end remaining after *Chevron* and *Mead* concerned instances where (1) the agency releases a decision not eligible for *Chevron* deference, which is (2) reversed by a circuit court decision which does not find the statute to be unambiguous, after which (3) the agency, in a *Chevron*-eligible decision, contradicts the circuit court. In these instances, is the circuit required to disregard its own precedent, by showing *Chevron* deference to the agency’s second decision?

Brand X

Arising in the Ninth Circuit, the question in *Brand X* was whether companies that provide broadband Internet service are telecommunications carriers or information-service providers for jurisdictional purposes of the Communications Act of 1934. In reaching its decision to reverse the Ninth Circuit’s invalidation of a Federal Communications Commission (“FCC”) ruling that broadband sellers are not providing telecommunications services, the Supreme Court enunciated the following specific rule: “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.” *Brand X*, 545 U.S. at 982-83. The Court reasoned that to allow otherwise would make the fortuitous order of agency and circuit decisions the dispositive issue on which body interprets a statute, and not “whether Congress has delegated to an agency the authority to interpret a statute.” *Id.* at 983.

Justice Scalia dissented, stating that this decision makes “judicial decisions subject to reversal by Executive officers.” *Id.* at 1016. The *Brand X* majority countered that the more appropriate view is that of the diversity model, where a federal court decides a question of state law. In this context, a prior circuit precedent has not been “reversed” by the agency, any more than a federal court’s interpretation of a state law is considered “reversed” by

a state court that adopts a conflicting, but ultimately authoritative interpretation of state law. *Id.* at 983-84.

In reaching its result in *Brand X*, the Court also incidentally addressed the effect of a policy reversal by an agency. First, in rejecting the respondents’ arguments that the FCC interpretation was undeserving of a *Chevron* deference because the FCC interpretation was “inconsistent with [the agency’s] past practice,” the Court stated that “if the agency adequately explains the reasons for a reversal of policy,” such change is the “whole point of *Chevron*... to leave the discretion provided by the ambiguities of a statute with the implementing agency.” *Id.* at 981 (quoting *Smiley v Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). The Court found that there is nothing inherently arbitrary about an agency providing “a fresh analysis” of a problem; the relevant inquiry is restricted to whether a reasonable decision-maker could have responded to those facts as the agency did. *Id.* at 972. Thus, the deference due an inconsistent agency interpretation and the precedential value of the new position turns on the extent that the agency has proffered an adequate explanation.

A Survey of the Potential Effects of Brand X

The scholarly community has predicted consequences large and small following in the wake of *Brand X*. One such position is that in holding that the later agency construct “trumps” the earlier judicial precedent to the extent it purports to resolve a statutory ambiguity, the main effect of *Brand X* is to limit the *Marbury* principle. This camp believes that *Brand X* represents a radical “re-adjusting” of the effect of *stare decisis* of circuit decisions on later-agency interpretations of law.²

Another camp asserts that *Brand X* will operate to permit agencies the needed flexibility to change interpretations over time akin to a change of common law when applying statutes and regulations, while still engendering *Chevron* deference for those adjustments.³

Another interesting discussion concerns whether *Brand X*’s true long-term impact will be in resolving the tension between “textualism” versus “intentionalism,” by favoring plain language statutory interpretations over determinations of congressional intent that resort to extrinsic sources when evaluating statutory delegations to agencies.⁴ Originally, the *Chevron* decision spoke in terms

of congressional intent and used the language of the “traditional tools of statutory construction” to determine the first step in the *Chevron* analysis, “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. The answer to this question sets the boundaries of how much leeway the agency has in construing a statute. If the statute is found unambiguous, the agency is not entitled to *Chevron* deference. In theory, under this approach, known as “intentionalism,” the interpretation of a statute was “restricted” to what Congress intended.⁵ In practice, intentionalism is thought to expand the possibilities of finding a statute ambiguous, thus leading to a greater number of agency decisions entitled to *Chevron* deference. However, under the holding in *Brand X*, *Chevron*’s step-one analysis is limited to “the statute’s plain terms.” *Brand X*, 545 U.S. at 986. Courts may not look to congressional intent in determining whether “Congress has directly spoken.” Textualists⁶ argue that the result will be that courts will find more instances in which a plain language reading of the organic statute limits is appropriate, resulting in more agency interpretations ending at *Chevron*’s step one, and therefore not meriting a *Chevron* deference.

An Indication from the Ninth Circuit: *Gonzales v. DHS*

Brand X is just now beginning to be felt at the circuit level. In *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the first circuit decision to fully apply *Brand X* in analyzing a Board decision, the Court applied *Brand X* to uphold a later and conflicting Board construct in the face of a prior Ninth Circuit precedent. *Gonzales v. DHS* involved a DHS policy of denying I-212 applications (for permission to reapply for admission into the United States after deportation or removal) where the applicant was inadmissible and fewer than ten years had elapsed since the date of the applicant’s last departure from the United States. A district court granted a preliminary injunction restraining enforcement of this policy, and DHS appealed to the Ninth Circuit. DHS argued that the Ninth Circuit should follow the Board’s decision in *Matter of Torres-Garcia*, 23 I&N Dec 866, which held that an alien’s prior-granted I-212 waiver did not insulate him from a charge of inadmissibility “arising from a subsequent unlawful entry.” *Id.* at 870. However, a prior Ninth Circuit decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), had held a successful I-212 waiver “cured” such an alien’s inadmissibility. *Id.* at 793.

Employing the *Brand X* analysis, the Ninth Circuit first found that its original decision was based on a finding that the statute was ambiguous,⁷ but that the agency decision it rejected was not *Chevron*-eligible as it was based on a guidance memorandum. The Court then found that the Board’s decision in *Matter of Torres-Garcia*, however, *was* entitled to *Chevron* deference, to the extent the Board’s decision examined the underlying statutes and their legislative histories to reach its decision. Again relying on *Brand X*, the Court further found that the *Perez-Gonzalez v. Ashcroft* Court’s reliance on a prior agency interpretation, here a regulation, did not preclude this court from affording deference to a later and contrary agency construct in *Matter of Torres-Garcia*.

While it is too early to tell what full effect that *Brand X* will have on circuit court reviews of Board decisions, at least in the Ninth Circuit’s *Gonzales v. DHS*, the disparity between the special deference that some argue is due Executive Branch adjudications involving immigration law, and what is afforded such decisions, has been narrowed.

William N. Frank is a Judicial Law Clerk at the Los Angeles Immigration Court.

1. An explicit delegation is where the agency has been directed by Congress to carry out a statute, and Congress has stated that the agency can do so by making rules carrying the force of law; an implicit delegation is where the agency has been entrusted to carry out a statute, and while Congress has not expressly stated that the agency has the power to make “force of law” rules, such rulemaking can be inferred as necessary to carry out the statute by other indicia of Congressional intent. Such indicia include but are not limited to “agency’s generally conferred authority and other statutory circumstances.” *Mead*, 533 U.S. at 219, 226-27.

2. See, e.g., Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L.R. 1235, 1305 (2007).

3. See, e.g., Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 Admin L. Rev. 783, 785 (2007).

4. See, e.g., Doug Geysler, *Courts Still “Say What The Law Is”: Explaining the Functions of the Judiciary and Agencies after Brand X*, 106 Colum. L. Rev. 2129, 2140 (2006).

5. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 367-68 (1994) (arguing that “the text alone will yield a fairly wide range of possible meanings,” but “admit legislative history and the range of possible meanings narrows.”)

6. Textualists argue that intentionalists create more “agency-liberating ambiguity” by “permit[ting] the apparent meaning of a statute to be impeached by the legislative history.” See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521 (1989).

7. The court in *Gonzales v. DHS*, found that in “falling back on the regulations” rather than in finding the inadmissibility provision or the statutory scheme unambiguous, the court had not foreclosed a later (and possibly conflicting) Broad construction in *Perez-Gonzalez*. See *Gonzales v. DHS*, 508 F.3d at 1239.

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR DECEMBER 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeals in cases reviewing Board decisions in December 2007 rose from last month’s 16.2% to 18.1%. The chart below provides the results from each circuit for December 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	3	3	-	0.0
2nd	60	45	15	25.0
3rd	40	35	5	12.5
4th	19	18	1	5.3
5th	16	13	3	18.8
6th	13	12	1	7.7
7th	2	2	0	0.0
8th	8	7	1	12.5
9th	222	181	41	18.5
10th	1	1	-	0.0
11th	13	8	5	38.5
All:	397	325	72	18.1

The Ninth Circuit accounted for well over half of the decisions this month and most of the reversals. As usual, Ninth Circuit reversals covered a wide range of issues, including 11 adverse credibility determinations in asylum cases, several motions to reopen based on ineffective assistance of counsel, several remands 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 a number of decisions involving divisibility and application of the modified categorical approach to criminal grounds for removal.

The Second Circuit reversed in a number of asylum cases, five involving credibility, one involving burden of proof and corroboration requirements, one involving pattern and practice of persecution, and one for individualized analysis of the Convention Against Torture claim.

The five reversals from the Eleventh Circuit all involved nexus or level of harm for past persecution in asylum claims by Colombian applicants who had been harmed or threatened by FARC or similar groups.

The chart below shows the final stats for all of calendar year 2007 arranged by circuit from highest to lowest rate of reversal. The reversal rates from 2006 are shown in brackets in the column on the right.

Circuit	Total	Affirmed	Reversed	%	[% in 2006]
7th	94	68	28	29.2	24.8
2nd	1189	975	214	18.0	22.6
9th	2312	1932	380	16.4	18.2
8th	88	74	14	15.9	11.3
6th	118	102	16	13.6	13.0
11th	226	237	29	10.9	8.6
3rd	339	305	34	10.0	15.8
5th	208	190	18	8.7	5.9
4th	180	167	13	7.2	5.2
10th	57	53	4	7.0	18.0
1st	79	76	3	3.8	7.1
All:	4932	4179	753	15.3	17.5

For the year 2007 the Ninth Circuit handed down the largest number of reversals (380), just over half of all reversals. The Second Circuit reversed 214 to account for another 28 % of reversals. Together, the Second and Ninth Circuit issued 71 % of all decisions and 79 % of all reversals. The Seventh Circuit, while rendering relatively few decisions had the highest rate of reversal at 29.2%.

By way of comparison, during calendar year 2006, the courts issued more decisions (5398), and more reversals (944), and had a higher overall rate of reversal (17.5%) than in 2007. The 2007 ordering of circuits by rate of reversal matches the 2006 results fairly closely with the Seventh, Second, and Ninth Circuits heading up the list both years. As in 2006, four circuits reversed at under 10% in 2007.

In addition, according to numbers released by the Administrative Office of U.S. Courts, petitions for review challenging Board decisions fell 23 percent from September 2006 to September 2007. The largest decreases were in the Fifth, Sixth, Ninth and Eleventh Circuits.

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

Getting Serious About Frivolousness: When Can the Ultimate Sanction Be Imposed?

by Edward R. Grant

Now that Board Member Gerald R. Hurwitz has retired, there is a touch less frivolity these days at the Board of Immigration Appeals. Days at the office are now, well, days at the office, not potential episodes of *Seinfeld* or *Curb Your Enthusiasm* in the making.

But in another example of how context can radically alter the meanings of words with similar entomology, we turn from “frivolity” to the subject of “frivolousness” in asylum adjudications – a subject quite serious indeed.

The gravity is underscored by the penalty. Whereas an adverse credibility determination in an asylum case bars no other form of relief – and aliens found not credible routinely receive a discretionary grant of voluntary departure – the consequences of knowingly filing a frivolous application for asylum are the most severe in the Immigration and Nationality Act: a permanent ban on eligibility for any benefits under the Act. *See* section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6). (As discussed below, this bar does not extend to withholding of removal or protection under the Convention Against Torture.)

Since the enactment of the frivolous application provisions in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (“IIRIRA”) experience shows that EOIR adjudicators have appreciated the seriousness of these consequences, and have not lightly rendered “frivolous” findings, even in the face of clear and unexplained discrepancies and/or the submission of documents found to be fraudulent. But they have rendered these decisions without much guidance. Prior to the Board’s recent precedent in *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), the only standards for doing so were those set forth in federal regulations. *See* 8 C.F.R. § 1208.20 (2007). Federal case law on frivolous applications also has been sparse: no more than a dozen or so reported decisions, about evenly split between cases affirming and cases overturning a finding of “frivolousness.”

This article proposes first to delineate what factors may, and may not, come into play in making a “frivolous” finding. It will then discuss the legal standards currently existing to guide Immigration Judges and the Board in making these determinations. Finally, it will consider the unsettled issue of the standard of proof required to show that an asylum application has, in the words of the implementing regulation, been “deliberately fabricated.”

Frivolousness: It’s Not Enough to be “About Nothing”

Seinfeld may have been the most “frivolous” hit in TV history because it was literally about – nothing. This dovetails with the commonly-accepted legal understanding of the term: “Frivolous is commonly understood to mean having no basis *in law* or fact.” *Rowe v. United States*, 583 F.Supp. 1516, 1520 (D.Del. 1984) (emphasis supplied) (rejecting claim that prohibition on filing a “frivolous” tax return was unconstitutionally vague.) The concept even extends to refugee law: domestic law permits the rejection of applicants who fail to state a “credible fear” of persecution, *see* section 235(b)(1)(B) of the Act, and international authorities have long treated as “manifestly unfounded” claims that, even if based on true facts, have no legal substance under the provisions of the Refugee Convention. *See Resolution on Manifestly Unfounded Applications for Asylum*, Member States of the European Communities, November 30-December 1, 1992.

“Frivolousness” in the context of section 208 of the Act, however, does not extend to factually-based applications that are “about nothing,” or at least nothing that can be linked to a ground of protection recognized in asylum law. The legislative history of IIRIRA is largely silent on what Congress intended in using the term; a lone reference in the House Judiciary Committee Report, H.R. Rep No. 104-469 at 82 (1996), refers to a frivolous application as “*including* an application that contains a willful misrepresentation of a material fact,” which suggests that factors other than such a misrepresentation could support a frivolous finding.

Any such ambiguity was laid to rest by the regulations implementing IIRIRA, published in March 1997 and effective April 1, 1997. *See* 62 Fed. Reg. 10311, 10344 (March 6, 1997). In its proposed rule form, the regulation classified as frivolous an application that “is fabricated *or brought for an improper purpose.*” *See* 62 Fed. Reg. 443, 468 (Jan. 3, 1997) (emphasis supplied). Without explanation, the final rule dropped

the “improper purpose” clause, but otherwise expanded the definition to include the fabrication of “any” material element. As further amended in 1999, the provision now reads as follows:

An asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

8 C.F.R. 208.20 (2007).¹

Given the “deliberate fabrication” standard, it is reasonable to ask why any asylum applicant who is caught in a deliberate falsehood is not subject to the frivolous application bar. As noted, even in the absence of judicial guidance on the point, Immigration Judges and the Board have succeeded in drawing this distinction. What factors are at play in that determination, and how are they reflected in the case law now emerging on the subject?

Fabrication: It’s Not Enough to be “Not Credible”

Matter of Y-L-, *supra*, followed a Second Circuit decision remanding the issue of an Immigration Judge’s finding of a frivolous application for further consideration, and “so that [the BIA] may, in the first instance, set down clear and explicit standards by which frivolousness decisions may be judged. In doing so, we encourage the BIA to consider not only the relevant statutes and regulations, but also the principles articulated by our sister circuits.” *Liu v. U.S. Dep’t of Justice*, 455 F.3d 106, 116 (2d Cir. 2006). The Board’s decision attempted to meet this mandate by setting forth a four-part test for assessing the sufficiency of a frivolousness finding.

(1) notice to the alien of the consequences of filing a frivolous application;

(2) a specific finding by the Immigration Judge or the Board that the alien knowingly filed a frivolous application;

(3) sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and

4) an indication that the alien has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

Matter of Y-L-, at 155.

Applying this standard, the Board vacated its earlier decision which had upheld the Immigration Judge’s frivolousness finding; the Board found that proper notice was given, and that the frivolous finding was both specific and supported by sufficient evidence, but concluded that the respondent had not been given adequate opportunity to address the bases for the finding, primarily because the Immigration Judge had given no indication, prior to her decision, that such a finding was contemplated. *Supra* at 159-160.

The first and fourth requirements in *Matter of Y-L-* are essentially procedural in nature and thus do not require extensive discussion. Suffice to say that, in light of the consequences of a frivolousness finding, a level of scrupulosity should be observed in that both the warnings (point 1) and the opportunity to rebut (point 4) are fully explained in terms understandable by the alien (even if the alien is represented by counsel, as it is the alien who will directly suffer those consequences.) As emphasized in *Matter of Y-L-*, it is usually “good practice” for an Immigration Judge to state that a frivolous finding is being contemplated; however, there may be situations where the deliberate fabrication of a material element of a claim is so clear on the record – such as an alien’s explicit admission of stating a falsehood – that “a formal request for an explanation would be a needless exercise.” *Matter of Y-L* at 159-160 and n. 3. Even in such cases, it makes matters more clear if the opportunity is provided. See *Lazar v. Gonzales*, 500 F.3d 469, 478-479 (6th Cir. 2007) (Immigration Judge, after noting blatant discrepancies between two submitted asylum applications, continued proceedings and gave applicant opportunity to explain the discrepancies).

The second and third requirements in *Matter of Y-L-*, on the other hand, do merit further discussion. The circuits have generally endorsed the conceptual approach in *Matter of Y-L-*, and despite some disagreements that

will be discussed below, have followed earlier rulings that a frivolous finding requires more than just a determination that an alien lacks credibility. See *Muhanna v. Gonzales*, 399 F.3d 582, 588-589; *Scheerer v. U.S. Att’y Gen’l*, 445 F.3d 1311, 1317-1318 (11th Cir. 2006) (adverse credibility finding not sufficient; “I must make specific findings as to which material elements of the asylum application were deliberately fabricated.”); see also *Luciana v. Att’y Gen’l*, 502 F.3d 273, 279-280 (3d Cir. 2007) (discrepancy relied upon not material to alien’s claim for asylum); *Yang v. Gonzales*, 496 F.3d 268, 277 (2d Cir. 2007) (Immigration Judge, while separately addressing the frivolousness determination, erred by incorporating findings he made in context of adverse credibility determination, and failing to address whether fabrications were “deliberate” or “material”).

Since lack of credibility is *not* sufficient, what is? To answer this question, it is worth considering, briefly, the factors that may lead to a supportable adverse credibility determination. These chiefly include unresolved discrepancies between an applicant’s earlier statements (chiefly in an asylum application) and the testimony at the hearing. Also relevant are discrepancies between the application or testimony and evidence offered in corroboration, whether it be documents, or the statements or testimony of witnesses. While not often described in these terms, the obligation to provide *credible* testimony is part of an asylum applicant’s overall burden of proof, a point clarified by the REAL ID Act’s amendments to section 208 of the Act. See section 208 (b)(1)(B).

By contrast, an applicant has no initial burden to prove that his or her application is not frivolous. That issue only comes into play when, generally speaking, a discrepancy or inconsistency leads to a conclusion that the respondent has engaged in a deliberate falsehood. It is at this point that frivolousness becomes an issue, and a determination separate and apart from the issue of burden of proof and credibility must be made.

For example, in *Matter of Y-L-*, the respondent first claimed that his wife gave birth to a second child, and later claimed that their second child was illegally adopted after the wife’s second pregnancy was forcibly aborted. Recently, in *Ceraj v. Mukasey*, ___ F.3d ___, 2007 WL 4547727 (6th Cir., Dec. 28, 2007), the Court affirmed a frivolousness determination based on the applicant’s inclusion in a supplemental asylum application of an incident that was not included in his 1991 application for refugee status, nor in his original 1997 asylum application. Since the incident was “essential” to the asylum claim, the Sixth

Circuit found adequate support for the conclusion that it was both material, and deliberately fabricated. *Id.*, at *5. The Sixth Circuit reached a similar conclusion in *Lazar v. Gonzales*, *Supra*, finding that the submission of two applications contradictory on the issue of the respondent’s country of residence during the periods relevant to his claim supported the frivolousness determination. See also *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002) (unrefuted dental records contradicted applicant’s statements of his age); *Ignatova v. Gonzales*, 430 F.3d 1209 (8th Cir. 2005) (alien’s submission of fraudulent hospital record); *Selami v. Gonzales*, 423 F.3d 621 (6th Cir. 2005) (newspaper article submitted by alien proven fraudulent when authentic copy of the original publication was provided from National Library of Albania); *Barreto-Claro v. U.S. Att’y Gen’l*, 275 F.3d 1334 (11th Cir. 2001) (alien’s second asylum application admitted lies in first application).

In its remand to the Board in *Liu*, the Second Circuit effectively endorsed the frivolousness rulings in *Efe*, *Ignatova*, *Selami*, and *Barreto-Claro*, describing them as “connected to tangible evidence of fabrication that could not reasonably be disputed.” See *Liu*, 455 F.3d at 115. However, it stated that there was an insufficient body of case law to conclude “how much beyond the ‘garden-variety’ inconsistencies that are the routine basis of adverse credibility decisions is required to support a finding of frivolousness.” *Id.* It suggested that a heightened standard of “concrete and conclusive evidence” of fabrication might be required, but declined to impose such a standard without an initial ruling from the Board. *Id.* at 114.

The Board considered, and rejected, the Second Circuit’s invitation to impose this heightened standard, concluding that both circumstantial and direct evidence could support a frivolousness determination. In setting forth the standards for the third prong of its test in *Y-L-*, the Board stated: “After taking into account the respondent’s explanations for discrepancies or implausible aspects of the claim, however, the Immigration Judge must provide *cogent and convincing reasons* for finding *by a preponderance of the evidence* that an asylum applicant knowingly and deliberately fabricated material elements of the claim.” *Matter of Y-L-*, at 158 (emphasis supplied).

Too little time has passed to determine how *Y-L-* will be accepted in the circuit courts. However, given prior case law, and the requirements of the regulations, it seems unlikely that the *requirements* of notice, specific findings, and an opportunity to rebut and explain will prove at all controversial. (Whether those requirements have been met in a particular case will be another matter.)

Deliberations are likely to focus, therefore, on the third prong: the level of proof required to sustain a frivolous determination. Indications already are present that this will be a matter of some dispute. These issues and others are discussed below.

Proving Fabrication: Is a “Preponderance” Sufficient?

In two post-*Y-L*- decisions, the Sixth Circuit has endorsed the Board’s evidentiary standard, specifying in *Ceraj* that the Immigration Judge’s determination on frivolousness was supported by a preponderance of the evidence. *Ceraj, Supra*, at *5; *see also Lazar*, 500 F.3d at 474. However, the Second Circuit, writing in *Yang v. Gonzales*, seems less persuaded. *Yang* noted without comment that the Board had rejected the “concrete and conclusive evidence” standard suggested by the circuit’s decision in *Liu*. *See Yang*, 496 F. 3d at 275. The Court then declined to apply *Matter of Y-L*- to the consolidated cases before it, remanding them to the Board for *further* consideration of, *inter alia*, the following: the extent to which an Immigration Judge must set out the factual findings supporting a frivolous determination; the extent to which findings made in support of an adverse credibility determination may be incorporated; and, significantly, the extent to which “the IJ is required to explicitly find that the fabrications were ‘deliberate’ or ‘material.’” *Id.* at 279.

The inclusion of this final requirement may signal discomfort with the “preponderance” standard. In *Matter of Y-L*-, the Board required that a frivolousness determination be “specific,” “cogent,” and “convincing,” descriptors that would seem adequate to describe how “explicit” a decision must be. Reasonable minds might disagree whether a particular decision meets these requirements – particularly on the key issues of whether a particular fabrication was “deliberate” or “material.” But failing any basis in statute or case law for imposing an *evidentiary* standard higher than preponderance of the evidence, the Court seems poised to focus on the explicitness and sufficiency of each finding that is required to support a frivolous finding.

Yang also signaled other areas of concern with *Y-L*, leading the Court to remand the cases before it with “additional instructions,” rather than either to apply *Y-L*- itself, or to issue a simple remand for the Board to do the same. “We do not opine on the reasonableness of the [BIA’s] interpretations of the frivolousness statute,” the Court wrote – even though it was quite familiar with the facts in *Matter of Y-L*-. *Yang*, 496 F. 3d at 278, n.8 It

noted “ambiguities” in the Board’s requirements of separate findings to support a frivolousness determination, and also invited the Board to consider whether a “general warning given at the beginning of a hearing” is sufficient to meet the requirement of the warning of the consequences of a frivolous application. *Id.* at 279, n. 9. This latter point is potentially significant: the statute and regulation would both seem to require such an “upfront” notification; does the Court’s decision indicate a need for repeated notifications at other junctures in the case?

Yang is not alone in suggesting discomfort with *Matter of Y-L*-; the Second Circuit’s view is shared by the Third Circuit, in dicta, in *Luciana v. Att’y Gen’l*. The dispositive issue in *Luciana* was straightforward: whether a single misrepresentation made in an untimely asylum application was “material” to that application. The Court held it was not. Due to the untimeliness of the application, the falsehood was not material because “[it lacked] the capability of influencing the decision of the Asylum Officer, the IJ, or the BIA.” *See Luciana*, 502 F. 3d at 280. An *untimely* asylum application, therefore, cannot be a *frivolous* asylum application. The results were quite consequential: freed from the frivolousness bar, the Petitioner in *Luciana* was now eligible to apply for adjustment of status based on an approved spousal visa petition.

Simple enough – but the circuit did not leave things there. After an extensive discussion of both *Matter of Y-L*- and *Yang* – and a tentative conclusion that the frivolousness finding before it would not stand under the former – the Court concluded that “many of the precise contours of frivolousness remain unsettled.” *Id.* at 282, n. 11. The Court then went further, providing a clear indication of the philosophy it would bring to future consideration of frivolousness issues. The “jurisprudence of conceptions (*Begriffsjurisprudenz*),” it wrote, has been superseded by a “jurisprudence of results (*Wirklichkeitsjurisprudenz*),” and thus, the first question before a court should be, “how will a rule or a decision operate in practice?” *Id.* at 283, 284.

In the case at bar, the IJ found Petitioner to have committed a serious wrong: she ratified a false statement contained in her asylum application. This is a wrong we cannot condone. Immigration proceedings, like almost all legal proceedings, depend on the ability of decision-makers to find the truth. Lies undercut immigration proceedings just as

they do proceedings in state and federal courts. Without the truth, the judicial edifice turns to a house of cards.

But Petitioner's misdeed will not go unpunished. Her asylum application has been denied. The IJ's order for her removal – issued, ultimately, because she voluntarily came forward to apply for asylum – stands. Any possibility she has of ever living permanently with her family in the United States now hangs on the willingness of the Attorney General to grant her a [fraud] waiver. Such waivers are far from a certainty. . .

By additionally issuing a frivolousness finding, the IJ brought down on Petitioner a lifetime ban on all means of legally entering the United States. This punishment falls not only on her, but on her husband and child as well. Because modern jurisprudence recognizes the importance of results, it would seem that the various IJs and the Board should at least consider the consequences of the draconian penalty attached to a finding that the application for asylum is frivolous, particularly where, as here, the finding may cause the family structure of the applicant to be permanently ruptured.

see Luciana, 502 F. 3d at 284.

How future legal standards may develop is uncertain; we *can* be certain, however, that we will see this passage quoted frequently. There are probably as many avenues for comment on the passage as there are readers of this bulletin, so I will leave you to it.

Our dear friend Jerry Hurwitz probably knows a thing or two about *Begriffsjurisprudenz* and *Wirklichkeitsjurisprudenz*, and now has the leisure to contemplate them at greater depth. For us who remain, we must be about the serious business of determining, in the face of a skeptical federal judiciary, when an asylum application is, indeed, “frivolous.”

Edward R. Grant is a Member since 1998 of the Board of Immigration Appeals. He is honored to have served with

Jerry Hurwitz, and more recently, with the also-just-retired M. Christopher Grant. Best wishes and godspeed to both.

1. The final sentence was added as part of the 1999 regulations implementing the Convention Against Torture. While the regulatory notice did not discuss this amendment, it was apparently intended to ensure that the frivolous application bar not impair treaty obligations under the 1967 Protocol Relating to the Status of Refugees, incorporating the *non-refoulement* obligation in Article 33 of the 1951 Refugee Convention. *See* 64 Fed. Reg. 8478, 8481 (Feb. 19, 1999) (Wherever possible, subsequent acts of Congress must be construed as consistent with treaty obligations. *See, e.g., Cook v. United States*, 288 U.S.102, 120 (1933) (“[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.”)).

RECENT COURT DECISIONS

Supreme Court

Ali v. Achim, __S. Ct. __, 2007 WL 4532177 (Dec. 27, 2007): In a memorandum decision, the writ of certiorari was dismissed.

Circuit Courts

First Circuit

Tobon-Marin v. Mukasey, __F. 3d__, 2008 WL 73400 (1st Cir. Jan. 8, 2008): The First Circuit dismissed the appeal from the denial of petitioners' asylum claim due to their failure to establish a nexus between their fear of FARC and their political opinion. The Court held that substantial evidence supported the Immigration Judge's findings that FARC's conscription efforts were not motivated by the petitioners' political opinions; that the petitioners had failed to establish past persecution; and that the petitioners had failed to establish a well-founded fear of future persecution, particularly where petitioners' family (including their brother, who is of conscription age) have remained in the family residence in Colombia without suffering reprisals or any further contact with FARC.

Second Circuit

Picca v. Mukasey, __F. 3d __, 2008 WL 80402 (2^d Cir. Jan. 9, 2008): The Second Circuit remanded, finding that the Immigration Judge's failure to inform the respondent of his right to be represented or of the existence of free legal services, as required by 8 C.F.R. § 1240.10, constituted reversible error. The petitioner appeared before an immigration judge on five occasions. At the first hearing, the petitioner was granted an adjournment to obtain counsel. The petitioner was then represented by

counsel at three subsequent cursory hearings. Counsel withdrew at the last of these, and the Immigration Judge granted the petitioner a final adjournment to obtain counsel. When the petitioner appeared *pro se* at the fifth hearing, the Immigration Judge proceeded with the merits hearing, resulting in the denial of all relief and an order of removal. The Court held that the inclusion of a list of free legal services attached to the Notice to Appear served on the petitioner would not satisfy the notice requirement, as the regulation specifically requires the Immigration Judge to provide such information.

Third Circuit

Yu v. U.S. Attorney General, ___F. 3d ___, 2008 WL 126632 (3rd Cir. Jan. 15, 2008): The Third Circuit upheld the Board's determination that a couple from China had failed to show that their fear of sterilization was reasonable based upon their having a second child in the U.S. Noting that the record in this case was identical to the record before the Board in *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), the Court analyzed that decision, and found that the Board's conclusion that the State Department reports were more reliable than the affidavit of a retired demographer, Dr. John Aird, was well reasoned and supported by substantial evidence.

Seventh Circuit

Eke v. Mukasey, ___ F. 3d ___, 2008 WL 60178 (7th Cir. Jan. 7, 2008): The Court dismissed the appeal of a petitioner from Nigeria who had been denied withholding of removal by the Immigration Judge. After determining that it had jurisdiction to review such matter, the Court found that the petitioner's convictions for identity theft and conspiracy to commit financial crimes constituted aggravated felonies pursuant to section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(43)(M)(i), as the offense involved fraud or deceit and the loss to the victim(s) exceeded \$10,000. The Court also upheld the Immigration Judge's denial of the petitioner's withholding claim based upon his purported homosexuality. The Court would not disturb the Immigration Judge's negative credibility finding, and found that the Immigration Judge did not err in requiring the applicant to present corroborating evidence and to establish he would be singled out for persecution, as he had failed to establish his inclusion in the persecuted group of homosexuals. Lastly, the Court held that petitioner's due process rights were not violated by the government's conducting the hearing by video.

Ninth Circuit

Arteaga v. Mukasey, ___ F. 3d ___, 2007 WL 4531961 (9th Cir. Dec. 27, 2007): The Court dismissed the appeal of a member of a violent street gang seeking asylum as a member of a particular social group. The Court found that the claimed group's "shared past experience" included violent criminal activity, which the court found was "not fundamental to gang members' individual identities or consciences". The Court stated that to find otherwise would be "to pervert the humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws." The Court upheld the Board's determination that the respondent's California conviction for car theft constituted an aggravated felony, and also held that the respondent had failed to establish eligibility for Convention Against Torture protection, as he did not demonstrate that any feared torture would be at the hands of the Salvadoran government.

Cerezo v. Mukasey, ___F. 3d ___, 2008 WL 115184 (9th Cir. Jan. 14, 2008): The Ninth Circuit granted the petition, holding that a violation of California Vehicle Code §20001(a), for leaving the scene of an accident resulting in bodily injury or death, is not a crime involving moral turpitude. Reading the California statute literally, the Court concluded that a driver in an accident who inadvertently fails to provide his vehicle registration number along with his other information has violated the statute, and that such hypothetical action would not be "base, vile or depraved." Furthermore, the Court found that state case law "stopped short of providing a binding interpretation of the statute that would preclude a conviction...for mere negligence in failing to provide one type of identifying information required by the statute."

Eleventh Circuit

Chen v. U.S. Attorney General, ___F. 3d ___, 2008 WL 150205 (11th Cir. Jan. 17, 2008): The Court denied the appeal of a former family planning office employee whom the Board had found to be ineligible for asylum as one who assisted in the persecution of others. Holding that the standard for such determination "is a particularized, fact specific inquiry into whether the applicant's conduct was merely indirect...or was active, direct and integral to the underlying persecution," the Court found that the applicant's actions of guarding pregnant women slated for forced abortions "was essential to the ultimate persecutory goal" and thus "certainly rises to the level of culpability that qualifies as assistance in persecution." The Court

also held that the applicant's "single redemptive deed" of releasing a pregnant detainee would not alter the analysis, as it occurred only after two months spent supervising other women at the facility.

Hernandez v. U.S. Attorney General, ___F. 3d___, 2008 WL 160265 (11th Cir. Jan. 18, 2008): The Court upheld an Immigration Judge's decision (affirmed by the Board) finding the petitioner removable as an aggravated felon on the basis of a Georgia conviction for simple battery. The Court concluded that such crime was a "crime of violence" after determining that the Georgia courts have interpreted the statute as requiring actual physical contact that inflicts pain or injury, and that the prong of the statute under which the petitioner was convicted "required intentionally causing *physical harm* to the victim through physical contact."

BIA PRECEDENT DECISIONS

In *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008), the Board held that if an Immigration Judge grants withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), the decision must contain an order of removal. This applies when asylum has not been granted. The Board reasoned that this construction is consistent with the regulatory scheme and is suggested by the title of the statute, "Detention and Removal of Aliens Ordered Removed." Furthermore, without a removal order, the Department of Homeland Security has no authority to remove the alien to another country, which is permitted under the Act. In the case before the Board, the aliens were granted withholding of removal to Indonesia, but because the Immigration Judge did not enter a removal order, the proceedings are unresolved and incomplete. The case was remanded for entry of a removal order.

In *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008), the Board considered whether the respondent's welfare fraud conviction is a "theft offense." The respondent argued that the portion of the law under which she was convicted, "by fraudulent device obtains... public assistance...to which he or she is not entitled" is not a theft offense, but is a separate aggravated felony - an offense that involves fraud or deceit under section 101(a)(43)(M)(i). Section 40-6-15 of the General Laws of Rhode Island. The Board agreed, and clarified its holding

in *Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000), which defined a theft offense as the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. The Board relied on *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005), which found that fraud is a separate and distinct offense, and that the two offenses are meant to be treated differently. *Soliman* defined fraud as the taking or acquisition of property with consent that has been unlawfully obtained. The critical distinction is consent, and the Board refined the definition of theft in *Matter of V-Z-S* to specify that the "taking" of property must be "without consent." As the respondent was charged with an aggravated felony theft offense, and the Rhode Island statute does not include these elements, the Board terminated proceedings.

LEGISLATIVE COMMENTARY

Immigration Legislation Possibilities after the Demise of Comprehensive Immigration Reform

by S. Kathleen Pepper

Did comprehensive immigration reform die with the Senate's failure this past June to move forward with "The Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007" (S. 1639)? No, but it is likely to be on an extended hiatus. According to some observers, since 2008 is an election year and 2009 will be a first year of a new presidency, comprehensive immigration reform is unlikely to be revived, renewed, or reinvigorated until late 2009 or early 2010. However, the importance of some type of immigration reform will likely continue to be debated and discussed in various public fora.

While comprehensive immigration legislation is unlikely to be on the agenda for at least a couple of years, smaller scale immigration bills continue to be introduced. Some of these bills may be enacted either as small stand-alone bill, or as a part of larger non-immigration specific bills. Many of these bills will focus on a single topic, such as H-2B returning workers,¹ or one aspect of immigration, such as enforcement.² Most such legislation will be referred to a committee where little action seems likely to happen.

Immigration legislation will also be found in appropriations bills or in amendments to appropriations bills. For example, exceptions to the material support bar to asylum for certain enumerated groups were included in the Department of State's FY2008 appropriations bill which was passed in December as part of the Omnibus Appropriations bill.³ It is also likely that any Department of Homeland Security appropriations bill will contain immigration provisions affecting the Executive Office for Immigration Review. For example, increased funding for detention space will result in larger numbers of detained aliens which will increase bond hearings before Immigration Judges. Increased funding for the Border Patrol in designated areas will result in more apprehensions of aliens in those areas which in turn will increase the number of removal hearings before Immigration Judges.

Bipartisan support is key for enactment of an immigration provision or bill. However, it is not a guarantee of success as evidenced by the demise of the "The Development, Relief, and Education for Alien Minors Act" or DREAM Act. This bill, which would grant lawful permanent resident status to aliens who came to the United States as children and who seek to attend college or join the United States uniformed services,⁴ was initially offered as an amendment to the Defense Department Appropriations bill (S. 2919). It was rejected as a stand-alone bill (S. 2205) by the Senate on October 24, 2007, on a procedural vote.

Small-scale bills with bipartisan support and non-controversial issues have the best chance of being enacted. One such bill, "The Child Soldiers Accountability Act of 2007" (S. 2135), was passed by unanimous consent by the Senate on December 19, 2007, and then referred to the House Judiciary Committee. This bill creates criminal liability for persons who recruit, enlist, or conscript a person under the age of 15 years into an armed group or force or who knowingly use such children in combat hostilities or who attempt or conspire to do the foregoing. This bill also makes aliens who recruit or use child soldiers inadmissible to, and removable from the United States and ineligible for asylum and withholding of removal.

The next 2 to 2 ½ years should see immigration legislation continue to be introduced but not in a comprehensive reform package. The time and effort needed to enact comprehensive immigration reform must

wait until after a new President takes office. Until then, smaller scale immigration provisions and bills have the best chance of enactment.

S. Kathleen Pepper is an attorney-advisor with the Board of Immigration Appeals. She was detailed in 2007 to the Senate Judiciary Committee to work on comprehensive immigration reform and other immigration legislative matters. The views expressed in this article are solely those of the author and do not reflect the views of the Executive Office for Immigration Review, the Board, or the Senate Judiciary Committee, its subcommittees, or members.

1. The Save Our Small and Seasonal Business Act of 2007 (S. 988/H.R. 1843) was introduced March 29, 2007, in both the Senate and the House, respectively. This bill would extend the termination date exemption for returning workers from the H-2B temporary worker numerical limitations.
2. The Immigration Enforcement and Border Security Act of 2007 (S. 1984) was introduced in the Senate on August 2, 2007. This bill deals exclusively with interior enforcement and border security issues, many of which are also found in S. 1639.
3. Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844, Section 691(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008, Title VI, § 691(b) (Dec. 26, 2007).
4. The DREAM Act would allow aliens who entered the United States prior to the age of 16 years the opportunity to attend college or other institution of higher education, including occupational training, or to join the uniformed services, which includes the United States armed forces as well as the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.

REGULATORY UPDATE

UNITED STATES SENTENCING COMMISSION
Sentencing Guidelines for United States Courts
Federal Register: January 28, 2008 (Volume 73, No 18)

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also provides multiple issues for comment, some of which are contained within proposed amendments.

Presidential Determination on FY 2008 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status

Presidential Determination No. 2008-1

Memorandum for the Secretary of State

Subject: Presidential Determination on FY 2008 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended In accordance with section 207 of the Immigration and Nationality Act (the "Act")(8 U.S.C. 1157), as amended, and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions:

The admission of up to 80,000 refugees to the United States during FY 2008 is justified by humanitarian concerns or is otherwise in the national interest; provided, however, that this number shall be understood as including persons admitted to the United States during FY 2008 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below. The ceiling shall be construed as a maximum not to be exceeded and not a minimum to be achieved. The 80,000 admissions numbers shall be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations; provided, however, that the number of admissions allocated to the East Asia region shall include persons admitted to the United States during FY 2008 with Federal refugee resettlement assistance under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, as contained in section 101(e) of Public Law 100-202 (Amerasian immigrants and their family members):

- Africa 16,000
- East Asia 20,000
- Europe and Central Asia . . 3,000
- Latin America/Caribbean . . 3,000
- Near East/South Asia 28,000
- Unallocated Reserve 10,000

The 10,000 unallocated refugee numbers shall be allocated to regional ceilings as needed. Upon providing notification to the Judiciary Committees of the Congress, you are hereby authorized to use unallocated admissions in regions where the need for additional admissions arises. Additionally, upon notification to the Judiciary Committees of the Congress, you are further authorized to transfer unused admissions allocated to a particular region to one or more other regions, if there is a need for greater admissions for the region or regions to which the admissions are being transferred. Consistent with section 2(b)(2) of the Migration and Refugee Assistance Act of 1962, as amended, I hereby determine that assistance to or on behalf of persons applying for admission to the United States as part of the overseas refugee admissions program will contribute to the foreign policy interests of the United States and designate such persons for this purpose. Consistent with section 101(a)(42) of the Act (8 U.S.C. 1101(a)(42)), and after appropriate consultation with the Congress, I also specify that, for FY 2008, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:

ation to the Judiciary Committees of the Congress, you are hereby authorized to use unallocated admissions in regions where the need for additional admissions arises. Additionally, upon notification to the Judiciary Committees of the Congress, you are further authorized to transfer unused admissions allocated to a particular region to one or more other regions, if there is a need for greater admissions for the region or regions to which the admissions are being transferred. Consistent with section 2(b)(2) of the Migration and Refugee Assistance Act of 1962, as amended, I hereby determine that assistance to or on behalf of persons applying for admission to the United States as part of the overseas refugee admissions program will contribute to the foreign policy interests of the United States and designate such persons for this purpose. Consistent with section 101(a)(42) of the Act (8 U.S.C. 1101(a)(42)), and after appropriate consultation with the Congress, I also specify that, for FY 2008, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:

- a. Persons in Vietnam
- b. Persons in Cuba
- c. Persons in the former Soviet Union
- d. In exceptional circumstances, persons identified by a United States Embassy in any location

You are authorized and directed to report this determination to the Congress immediately and to publish it in the Federal Register.

EOIR Immigration Law Advisor

Juan P. Osuna, Acting Chairman
Board of Immigration Appeals

David L. Neal, Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Editor
(703) 605-1102
EOIR Law Library

Jean King, Senior Legal Advisor
(703)605-1744
Board of Immigration Appeals

Anne Greer, Assistant Chief Immigration Judge
(703) 305-1247
Office of the Chief Immigration Judge

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