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U.S. Citizenship Law and the Means for Becoming a Citizen

by Katherine Leahy

In this election year, perhaps more than any other in recent memory, immigration issues have been at the forefront of the policy debate. However, the very last matter on the minds of Americans who rank immigration as an important political issue are the rather obscure legal doctrines of derived and acquired citizenship. These concepts provided an interesting (albeit tangential) footnote to the presidential race, as both Arizona Senator John McCain and one of his opponents for the Republican nomination, former Massachusetts Governor Mitt Romney, can point to the operation of the law of acquired citizenship in their recent family histories.

Article II of the U.S. Constitution requires that the President of the United States be a "natural born citizen," which led some to question whether McCain, who was born in the Panama Canal Zone while his father was stationed there as a Naval officer, was even eligible to be president.¹ U.S. Const. art. II, § 1, cl. 4. That is a matter for constitutional scholars to sort out; but, as we will see, there is little dispute that McCain has been a citizen of the United States since birth. Nevertheless, the case of McCain's citizenship serves as a timely example of the complexities of U.S. citizenship law. This article will explore U.S. citizenship law, focusing on the means by which individuals become U.S. citizens. As a general matter, there are three main legal doctrines in this area: birthright citizenship, acquisition, and derivation.² This article will look at these doctrines, with a particular emphasis on issues related to out-of-wedlock birth.

Birthright Citizenship

Perhaps the best-known dictate of U.S. immigration law is that of "birthright citizenship," the legal doctrine that automatically confers U.S. citizenship upon individuals born in the territorial United States, which is derived from the Citizenship Clause of the Fourteenth Amendment

to the U.S. Constitution.³ See U.S. Const. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”). Case law dictates that persons born in territories “incorporated into” the United States are U.S. citizens at birth. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135 (1892). This interpretation has insured that individuals born in U.S. territories that were later granted statehood or permanent territorial status are considered citizens of the United States at birth—a principle most famously illustrated by the last Arizona Republican to receive a presidential nomination, Barry Goldwater, who was born in the Arizona territory in 1909 before Arizona achieved statehood.

The matter of what exactly constitutes “the United States” for purposes of birthright citizenship has been more heavily litigated than one might expect. This is particularly true in regard to individuals born in foreign territories that were, for a period of time, territories of the United States but were never incorporated into the United States. The Philippines is the most notable of these. See, e.g., *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999) (holding that a person born and residing in the Philippines when it was a possession of the United States is not born in the United States for purposes of citizenship). Most important for our purposes, however, is the legal impact that the contours of birthright citizenship have on acquired citizenship.

Acquired Citizenship

The petitioner in *Friend* was not asking the Ninth Circuit to find that he was a U.S. citizen by birthright, but rather that he had acquired U.S. citizenship from his father. The court found in *Friend* that the petitioner’s father, though a U.S. citizen, had not resided in the United States for a sufficient period of time to allow the petitioner to acquire citizenship. Individuals born in foreign territories not incorporated into the United States to one or two citizen parents may “acquire” citizenship at birth. Sections 301(c)-(e), (g)-(h) of the Immigration and Nationality Act, 8 U.S.C § 1401(c)-(e), (g)-(h). A child born abroad to two U.S.-citizen parents (regardless of marital status) before January 13, 1941, acquires citizenship if at least one parent “resided in the United States.” Former section 301(h) of the Act. On the other hand, for children born after January 13, 1941, citizenship is acquired so long as one parent resided in the United States *or* one of its

possessions. Section 301(c) of the Act; former sections 201(c), 301(a)(3) of the Act.

Where a child is born abroad to one citizen parent and one alien parent, however, several factors govern acquisition of citizenship, including the marital status of an individual’s parents at the time of his or her birth, the citizenship status of each parent, whether it is the mother or the father who is a U.S. citizen, and the date (and even time) of the individual’s birth. Under the law currently in force, an individual born abroad to one U.S. citizen and one alien parent who are married at the time of that individual’s birth may acquire citizenship provided that the U.S.-citizen parent was physically present in the United States or a possession for at least 5 years prior to the child’s birth, and 2 of those years in the United States were after the citizen parent’s 14th birthday. Section 301(g) of the Act. The current law also provides for inclusion of time spent in honorable service to the U.S. military, in employment with the U.S. Government or certain other intergovernmental organizations, or as a dependent in the household of a parent in such service or employment. The current law also contains no “retention requirements,” statutory provisions dictating that individuals who have acquired citizenship reside and maintain continuous physical presence in the United States for certain periods of time in order to retain their citizenship.

It should be noted, however, that the current law applies only to individuals born on or after November 14, 1986. Acquisition of citizenship is governed by the law in place at the time of an individual’s birth, and the current law differs in many respects from previous versions. For people born between December 24, 1952, and November 13, 1986, the law required that the citizen parent have been present in the United States or a possession for at least 10 years, and that 5 of these years have followed the parent’s 14th birthday. Citizens by acquisition born between January 13, 1941, and December 23, 1952, are subject to complex transmission and retention requirements, most related to parental military service. Transmission and retention requirements imposed on individuals born between May 24, 1934, and January 12, 1941, are somewhat less complex.⁴ Individuals born before noon, Eastern Standard Time, on May 24, 1934, however, face the lowest hurdle: so long as the citizen mother resided in the United States at any time before the birth of the individual in question, that individual is a U.S. citizen. Section 301(h) of the Act.⁵

The matter becomes somewhat more complicated where the individual claiming acquired citizenship was born out of wedlock. A child born out of wedlock after December 23, 1952 to a mother who is a U.S. citizen and a father who is not, can acquire citizenship if the mother is physically present in the United States or a possession for a continuous period of at least 1 year at any time prior to the individual's birth. Section 309(c) of the Act, 8 U.S.C. § 1409(c).⁶ Notably, children born out of wedlock to a mother who is a U.S. citizen have never under any iteration of the Act been subject to any statutory retention requirement. See Kurzban, *supra* note 4, app. B, at 1342.

On the other hand, children born out of wedlock to a father who is a U.S. citizen and a mother who is not face a tangled web of legal requirements and restrictions that govern acquisition of citizenship. Under the current law, the father must have been physically present in the United States for at least 5 consecutive years before the child's birth (2 of which must have been after the father's 14th birthday). Section 301(g) of the Act. In addition, (1) a blood relationship must be established between the father and child; (2) the father (unless deceased) must agree to support the child until the child reaches 18 years of age; and (3), before the child turns 18, the child must be legitimated, the father must acknowledge paternity, or paternity must be established by court adjudication. Section 301(a) of the Act. Retention requirements previously in force have been eliminated.⁷

The statutory distinction between those persons born out of wedlock to citizen mothers and those born to citizen fathers has withstood constitutional scrutiny. In *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Supreme Court held that "Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth." *Id.* at 62. The Court went on to discuss two "important governmental objectives" served by the distinction. The first is "the importance of assuring that a biological parent-child relationship exists." *Id.* The second is the

determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law,

but one that consists of the real, everyday ties that provide a connection between child and citizen parents and, in turn, the United States.

Id. at 64-65.

Derivative Citizenship

Derivative citizenship is the avenue by which a child born outside the United States becomes a citizen upon the naturalization of a parent or parents, subject to certain other conditions. Under the current law at section 320(a) of the Act, 8 U.S.C. § 1431(a):

A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

- (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

As is the case with acquired citizenship, the conditions attendant to deriving citizenship were at one time significantly more onerous for individuals born out of wedlock or whose parents divorced before one of them naturalized. Former section 321(a) of the Act, 8 U.S.C. § 1432, which was in effect until February 26, 2001, stated:

A child born outside the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

- (1) The naturalization of both parents; or
- (2) The naturalization of the surviving parent if one of the parents is deceased; or
- (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by

legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The current law is the result of amendments to the Act by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631, which took effect on February 27, 2001. The Board of Immigration Appeals and all of the circuit courts that have considered the issue hold that the law's benefits are not retroactive. *Dave v. Ashcroft*, 363 F.3d 649, 654 (7th Cir. 2004); *Drakes v. Ashcroft*, 323 F.3d 189, 191 (2d Cir. 2003); *United States v. Arbelo*, 288 F.3d 1262, 1263 (11th Cir.), cert. denied, 537 U.S. 911 (2002); *Batista v. Ashcroft*, 270 F.3d 8, 15 n.7 (1st Cir. 2001); *Hughes v. Ashcroft*, 255 F.3d 752, 757-60 (9th Cir. 2001); *Nehme v. INS*, 252 F.3d 415, 430-33 (5th Cir. 2001); *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001) (en banc). The law applicable to any individual claim of derived citizenship, therefore, is the law "in effect when [the respondent] fulfilled the last requirement for derivative citizenship." *Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005).

Given that the Child Citizenship Act is not retroactive, an important ongoing issue is that of legitimation.⁸ As noted above, former section 321 of the Act, which was in effect until February 26, 2001, provided that "[a] child born outside the United States of alien parents . . . becomes a citizen of the United States upon [among other scenarios] . . . the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation."⁹ In several cases involving derivative citizenship under former section 321(a) of the Act, the Board and the circuit courts have looked at foreign law in determining whether an individual was legitimated. In *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006), the Board ruled that "legitimation occurs under Guyanese law only when the natural parents marry." *Id.* at 967; accord *Poole v. Mukasey*, 522 F.3d

259, 265 n.3 (2d Cir. 2008) ("As determined in 2006 by the BIA, under Guyanese law, a father legitimates his illegitimate child only if the father marries the child's mother."). Similarly, in *Matter of Hines*, 24 I&N Dec. 544, 548 (BIA 2008), the Board concluded that "we will hereafter deem a child born out of wedlock in Jamaica to be the 'legitimated' child of his biological father only upon proof that the petitioner was married to the child's biological mother at some point after the child's birth." However, note that in *Wedderburn v. INS*, 215 F.3d 795, 797 (7th Cir. 2000), the Seventh Circuit ruled that the Jamaican petitioner had been legitimated in a case where his parents never married, but the petitioner's father added the father's name to the petitioner's birth certificate.

Conclusion

This article has attempted to provide an overview of the means through which individuals gain citizenship. The issues explored in this article are particularly likely to arise in the detained setting, where a lawful permanent resident has committed a removable offense and is raising a claim of citizenship. In the case of both acquired and derivative citizenship, careful attention to relevant dates and close inspection of any relevant foreign law are essential. Recent decisions on this issue may portend an increase in attention to cases that involve derivative or acquired citizenship, so it is hoped that this discussion is of some value to adjudicators.

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1. David Montgomery, *Romney and McCain: Hispanic Candidates?* Wash. Post, Jan. 28, 2008, at C01. Of course, this discussion has focused on the constitutional question whether the "natural born citizen" clause of Article II, Section 1 of the Constitution narrows the class of citizens eligible for the presidency to only those who are citizens by virtue of their birth in the territorial United States—that is, those who are citizens by birthright.

2. A fourth "avenue" exists in the form of naturalization, the acquisition of citizenship by way of application.

3. The legislative history of the amendment bears out the congressional intent to institute a broad doctrine of jus soli. The author of the citizenship clause, Michigan Senator Jacob Merritt Howard, insisted that this amendment to the Fourteenth Amendment was simply "declaratory of what [he] regard[ed] as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). Howard went on to add that this clause would, naturally, exclude those "persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors, or foreign ministers accredited to the Government of the United States," exceptions which operate to this day to exclude from birthright citizenship children born, for instance, to foreign diplomats. *Id.* Notably, Senator James Doolittle of Wisconsin moved that

the clause also include specific language excluding “Indians not taxed,” for fear that huge numbers of Native Americans (at that point considered citizens of their tribes, which were regarded as quasi-foreign nations) would begin to demand the privileges of American citizenship. *Id.* Senator Edgar Cowan of Pennsylvania sought clarification from Senator Howard as to the scope of the clause, asking, “Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?” *Id.* The debate is transcribed over several additional pages of the Congressional Globe and, suffice it to say, contains some statements by members of the U.S. Senate that would make a contemporary American blush. In the end, however, the clause was enacted unaltered from Senator Howard’s original proposed language.

4. This summary is taken from Ira J. Kurzban, *Immigration Law Sourcebook* app. B, at 1339-41 (11th ed. 2008). Appendix B contains a complete list of requirements and the relevant law for acquiring citizenship for individuals born outside the United States to one citizen parent and one alien parent, from before May 24, 1934, to the present.

5. It is also important to note that Congress has on occasion passed narrowly directed acts conferring citizenship on individuals born in particular territories on or after certain dates. These include acts codified at sections 303 - 307 of the Act, 8 U.S.C. § 1403 - 1407, covering Alaska, Hawaii, Guam, the U.S. Virgin Islands and, importantly for the 2008 presidential election, the Panama Canal Zone. Senator John McCain’s birth in the Canal Zone in 1936 places him well within the effective period of section 303, which dictates that any individual born in the Canal Zone to one or two U.S. citizens on or after February 26, 1904, is a U.S. citizen.

6. Section 309(c) of the Act states that “a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth.” The Supreme Court has indicated that, in this context, “nationality” and “nationality status” refer to citizenship: “When the citizen parent of the child born abroad and out of wedlock is the child’s mother, the requirements for the transmittal of citizenship are described in [INA § 309(c)].” *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 59 (2001).

7. As with children born to married parents, the current law applies to children born on or after November 14, 1986. For a complete list of citizenship requirements for children born abroad out of wedlock to a U.S.-citizen father and an alien mother before that date, see Kurzban, *supra* note 4, app. B, at 1343-46.

8. Another ongoing issue concerning derivative citizenship relates to the definition of “legal custody.” For a recent decision on this subject, see *Pina v. Mukasey*, 542 F.3d 5 (1st Cir. 2008).

9. For purposes of adjudications by the Department of Homeland Security, United States Citizenship and Immigration Services (“USCIS”), unlegitimated alien children are still be eligible to obtain derivative citizenship through their mothers under section 320(a) of the Act. This question arose because section 320(a) deleted the provision in the former section 321(a) stating that unlegitimated alien children could obtain derivative citizenship through their mothers, and section 101(c)(1) can be read to exclude unlegitimated individuals from the definition of “child.” In a memorandum dated September 26, 2003, however, William Yates, then-Associate Director of the Department of Homeland Security, USCIS, stated that, for the purposes of USCIS’s adjudications, “[a]ssuming an alien child meets all other requirements of Section 320 and 322 [of the INA], an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen.” Memorandum from William R. Yates, Acting Assoc. Dir., BCIS, HQ 70/34.2-P (Sept. 26, 2003), <http://www.uscis.gov/files/pressrelease/PolMemo98pub.pdf>

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR OCTOBER 2008

by John Guendelsberger

The United States Courts of Appeals issued 296 decisions in October 2008 in cases appealed from the Board. The courts affirmed the Board in 277 cases and reversed or remanded in 19 for an overall reversal rate of 6.4% compared to last month’s 9.6%.

The chart below provides the results from each circuit for October 2008 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	9	9	0	0.0
2nd	111	105	6	5.4
3rd	28	25	3	10.7
4th	11	11	0	0.0
5th	13	13	0	0.0
6th	6	6	0	0.0
7th	9	9	0	0.0
8th	2	1	1	50.0
9th	85	76	9	10.6
10th	4	4	0	0.0
11th	18	18	0	0.0
All:	296	277	19	6.4

October was a slow month with fewer decisions than usual and only 19 total reversals or remands. There were no reversals or remands in seven of the circuits.

The Ninth Circuit reversed only one adverse credibility determination. Other Ninth Circuit reversals in asylum cases included two cases in which the Board overlooked an aspect of the harm in finding that cumulative harm did not amount to past persecution, and two cases involving flaws in the well-founded fear determination. The court also held that convictions under California statutory rape provisions were not categorically aggravated felony offenses under the “sexual abuse of a minor” ground and that application of the modified categorical approach was not warranted.

The Second Circuit found fault with two adverse credibility determinations and also reversed in two cases in which it found that cumulative harm amounted to past persecution such that the presumption of a well-founded fear should have been applied. The sole reversal from the Eighth Circuit also found a failure to apply the presumption of a well-founded fear of persecution in a case in which past persecution had been established.

Third Circuit reversals included a case in which the Board applied an incorrect standard in making the “exceptional and extremely unusual hardship” determination for cancellation of removal, a case limiting the time period for section 246 rescission of adjustment of status to the 5-year period set by statute, and a case in which the Board failed to address an issue raised in a motion to reopen.

The chart below shows the combined results for the first 10 months of 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
9th	1545	1269	276	17.9
7th	96	80	16	16.7
6th	78	68	10	12.8
2nd	955	838	117	12.2
11th	172	157	15	8.7
3rd	385	353	32	8.3
8th	64	59	5	7.8
10th	48	45	3	6.3
1st	85	81	4	4.7
5th	122	117	5	4.1
4th	125	122	3	2.4
All:	3675	3189	486	13.2

By way of comparison, at this point in calendar year 2007 there were 624 reversals or remands out of 4183 total decisions (14.9%). In calendar year 2006 there were 781 reversals or remands out of 4431 total decisions (17.6%).

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RECENT COURT DECISIONS

Second Circuit

Alsol v. Mukasey, __F.3d__, 2008 WL 4890162 (2d Cir. Nov. 14, 2008): The Second Circuit held that a repeat State court conviction for simple possession of a controlled substance will not be deemed a felony simply because it *could have* been prosecuted as one under the recidivist provision of the Controlled Substances Act. The court adopted the holding in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), requiring the alien’s status as a recidivist drug possessor to have been admitted or determined by a court or jury during the prosecution for the second drug offense.

Balachova v. Mukasey, __F.3d__, 2008 WL 4865970 (2d Cir. Nov. 12, 2008): The court granted the portion of the respondent’s petition challenging the Immigration Judge’s finding that he was barred from asylum as a persecutor of others. The court found that a review of the facts did not support the Immigration Judge’s conclusions that the respondent’s minimal role in a house search and his inaction during the subsequent rape of two youths taken from the house were sufficient to meet the legal standard.

Diallo v. U.S. Dep’t of Justice, __F.3d__, 2008 WL 4924065 (2d Cir. Nov. 19, 2008): The petitioner, a native and citizen of Guinea, sought review of the Board’s summary affirmance of an Immigration Judge’s decision denying asylum, withholding of removal, and relief under the CAT. The Immigration Judge found that his testimony was not credible. Before the Board, the petitioner argued that he was credible and emphasized that his testimony was consistent, responsive, and sufficiently detailed. In addition, he argued that the State Department Country Reports corroborated his claims, and that the Immigration Judge overemphasized small disparities between his testimony and differences included, or not included, in the Country Reports. The court found that the Immigration Judge erred in finding that the Country Reports contradicted the petitioner’s testimony, and this error undermined the ultimate decision that the petitioner was not credible. The court held that given the presence of some errors in the Board’s decision as to issues that were properly exhausted and the plausibility of other newly claimed errors, the case was remanded to the Board.

Sixth Circuit

Kaba v. Mukasey, __F.3d__, 2008 WL 4876838 (6th Cir. Nov. 13, 2008): The Sixth Circuit dismissed the respondent's petition challenging the Immigration Judge's adverse credibility finding. The court held that although an asylum applicant need not include every detail in his asylum application, the complete lack of specificity in the respondent's original I-589, as well as its amended version, provided sufficient support for the Immigration Judge's skepticism, as did one "blatant overstatement" of the dangers faced by his relatives.

Ninth Circuit

Ahmed v. Mukasey, __F.3d__, 2008 WL4925056 (9th Cir. Nov. 19, 2008): The Ninth Circuit sustained the respondent's appeal from the Immigration Judge's denial of her motion to reopen (which was affirmed by the Board). The respondent sought reopening to apply for adjustment of status based on a marriage entered into during the pendency of proceedings. She claimed ineffective assistance of counsel for the fact that her motion was untimely. The Immigration Judge found no prejudice resulting from the ineffective assistance, as the motion would nevertheless have been denied under *Matter of Velarde*, 19 I&N Dec. 377 (BIA 1986), due to the DHS opposition. The court held that while such opposition could be considered by the Immigration Judge, it could not form the sole basis for denial of the motion. The court found ineffective assistance and remanded for further proceedings.

Tenth Circuit

Xiu Mei Wei v. Mukasey, __F.3d__, 2008 WL 4822879 (10th Cir. Nov. 7, 2008): The Tenth Circuit denied the respondent's appeal from the Board's denial of her second motion to reopen. The respondent, a citizen of the People's Republic of China, had previously had her asylum application, based on her fear of forcible sterilization arising from her third pregnancy, denied as untimely. She subsequently sought reopening based on the "changed personal circumstance" of her fourth pregnancy and claimed that a letter to her mother indicating that she would face sterilization on return to China constituted evidence of changed country conditions. The court upheld the Board's denial of her motion and adopted the reasoning of *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), rejecting the theory that an applicant could bypass the timeliness requirements of section 240(c)(7)(C) of the Act by filing a "successive asylum application" under section 208(a)(2)(D) of the Act.

AG/BIA PRECEDENT DECISIONS

In *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008), and *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008), the Board addressed motions to reopen to rescind an in absentia order of removal based on a claim that notice sent by regular mail was not received. In *Matter of M-R-A-*, the Board first found that the strong presumption of delivery established by *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995), no longer applies when certified mail is not used for a Notice to Appear ("NTA") and Notice of Hearing ("NOH"). As noted by several circuit courts, a weaker presumption is appropriate.

Once it is established that the NTA and NOH were sent by regular mail properly addressed and mailed according to normal procedures, the Immigration Judge must then determine, on a case by case basis, whether the alien has presented sufficient evidence to overcome the weaker presumption of delivery. The Board concluded that all relevant evidence submitted to overcome the weaker presumption of delivery via regular mail must be considered, including but not limited to factors such as: (1) the respondent's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the respondent's actions upon learning of the in absentia order, and whether due diligence was exercised in seeking to redress the situation; (4) any prior affirmative application for relief, indicating that the respondent had an incentive to appear; (5) any prior application for relief filed with the Immigration Court or any prima facie evidence in the record or the respondent's motion of statutory eligibility for relief, indicating that the respondent had an incentive to appear; (6) the respondent's previous attendance at Immigration Court hearings, if applicable; and (7) any other circumstances or evidence indicating possible nonreceipt of notice. *M-R-A-*, 24 I&N Dec. at 674. In *Matter of C-R-C-*, the Board, applying the factors in *Matter of M-R-A-*, concluded that the alien overcame the weaker presumption of regular delivery of the Notice to Appear because, among other things, he submitted an affidavit stating he did not receive the Notice to Appear, he showed he had an incentive to appear because he affirmatively applied for asylum, and he exercised due diligence in promptly seeking to redress the situation.

In *Matter of F-P-R*, 24 I&N Dec. 681 (BIA 2008), the issue before the Board was whether an alien's last arrival for purposes of assessing an asylum applicant's timeliness under section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B), excludes a brief departure and reentry. In this case, the respondent had been living in the United States since 1989 when on June 17, 2005, he returned to Mexico to attend his stepfather's funeral. He returned on July 20, 2005, and was apprehended near the border. He filed for asylum on February 8, 2006. The Immigration Judge calculated the 1-year deadline from respondent's 1989 arrival instead of 2005, stating that applicants should not be able to reset the asylum clock by taking a short excursion abroad. The Immigration Judge found the alien barred from asylum, but granted withholding. The Board reversed, finding that the meaning of the term "last arrival" is clear and refers to an alien's most recent coming or crossing into the United States. While this construction could permit applicants to defeat the 1-year bar, in this case the respondent went to a funeral; thus there was no need to consider whether the regulation should be read to embody an implicit exception in a case where it is found that an alien's trip abroad was solely or principally intended to overcome the 1-year bar.

The Attorney General, in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), has determined that in deciding whether a conviction is for a "crime involving moral turpitude ("CIMT")" under a divisible state statute, Immigration Judges and the Board should look not only to the record of conviction, but also to reliable evidence outside the record of conviction, in order to ascertain the nature of the conviction. The Attorney General intended the decision to alter the long-standing rule that evidence outside the record of conviction will not be employed to determine if an offense is a CIMT. See, e.g., *Matter of Torres-Varela*, 23 I&N Dec. 78, 84 (BIA 2001), and cases cited within. The Attorney General's decision sets forth a uniform national standard to be accorded deference by the courts. See *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

The underlying issue in this case was whether the respondent's conviction in Texas for indecency with a child (TPC § 21.11(a)(1)) should be deemed a CIMT conviction. The Immigration Judge found the crime to be an aggravated felony for sexual abuse of a minor, and the respondent sought adjustment of status. The Immigration Judge found the respondent ineligible to adjust because he was convicted of a CIMT, and the

respondent appealed to the Board. The Board sustained the appeal upon concluding that not every crime potentially covered under TPC § 21.11(a)(1) involves conduct so depraved as to warrant classifying the whole statute as one involving moral turpitude. The Board remanded the record for consideration of the respondent's application for adjustment.

As stated above, the Attorney General formulated a uniform approach to be applied nationwide in CIMT cases. The first step is to employ the categorical approach, which looks at the statute of conviction rather than to the specific facts of an alien's case. This test requires a determination of whether there is a "realistic probability, not a theoretical possibility," that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude. *Silva-Trevino*, 24 I&N Dec. at 690 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Attorney General took guidance from *Gonzales v. Duenas-Alvarez*, employing a "realistic probability" test to determine whether a crime was an aggravated felony theft offense.

If the categorical approach does not resolve the CIMT issue, a modified categorical approach should be used. In doing so, the Immigration Judge should first examine the alien's record of conviction—including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript.

If the record of conviction fails to show whether the alien was convicted of a CIMT, an Immigration Judge is permitted to consider evidence beyond that record "if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions." In reaching this conclusion, the Attorney General considered the differences between immigration and criminal cases (e.g., *Taylor v. United States*, 495 U.S. 575 (1990)), and the Board's reasoning in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), although he stated that the latter case was not directly applicable because it involved an aggravated felony. The Attorney General emphasized that in going beyond the record of conviction, "[t]he sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Silva-Trevino*, 24 I&N Dec. at 703. Further, a "hierarchy of evidence" may be appropriate to limit the administrative burden of this inquiry.

The final part of the decision employs the above test to determine whether the respondent's conviction under TPC § 21.11(a)(1) is for a CIMT. The Attorney General explained that any intentional sexual conduct by an adult was a CIMT so long as the perpetrator knew or should have known that the victim was a minor. This would therefore include consideration of whether the statute includes a mistake-of-age defense. Regarding the statute at issue, it applied only to intentional sexual conduct. Further, it had, in fact, been applied to non-CIMT conduct (thereby satisfying the "realistic probability" test) and was therefore not categorically a CIMT. The next question was whether the modified categorical approach provided an answer, and, in this case, the Board found it did not. The record was remanded so that further inquiry could be made, beyond the record of conviction, as to whether the conviction was for a CIMT.

This decision also discusses the varying burdens of proof for a CIMT determination depending on whether the issue is inadmissibility under section 212(a) of the Act, 8 U.S.C. § 1182(a), or removability under section 237(a) of the Act, 8 U.S.C. § 1227. *See, e.g.*, n.4 (explaining that the application of above test will be relatively straightforward when, in a case such as the instant one, the alien bears the burden of proof to show he is not inadmissible). It is also reiterates that a CIMT under the Act requires that the perpetrator have committed a reprehensible act with some form of scienter. *See, e.g.*, n.5.

LEGISLATIVE UPDATE

The Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (Oct. 3, 2008) ("CSAA"), establishes a criminal offense and penalty for the recruitment or use of child soldiers. Section 2(a) of the CSAA (adding new section 18 U.S.C. § 2442). The offense applies to "whoever knowingly—(1) recruits, enlists, or conscripts a person to serve while such person is under 15 years of age in an armed force or group; or (2) uses a person under 15 years of age to participate actively in hostilities." 18 U.S.C. § 2442(a).

Additionally, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the Immigration and Nationality Act and a ground of deportability at section 237(a)(4)(F) of the Act. Sections 2(b) and (c) of the CSAA. These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child

soldiers in violation of section 2442 of title 18, United States Code," is inadmissible and is deportable. *Id.*

Finally, the CSAA states that for purposes of sections 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii) of the Act, 8 U.S.C §§ 208(b)(2)(A)(iii), 1231(b)(3)(B)(iii) (asylum and withholding of removal), an alien who is inadmissible or is deportable on these grounds "shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime." Section 2(d)(1) of the CSAA. Sections 241(b)(3)(B)(iii) and 208(b)(2)(A)(iii) of the Act state that aliens are ineligible for withholding of removal or asylum, respectively, where it is determined that "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." The CSAA requires the Attorney General and Secretary of Homeland Security, within 60 days of the CSAA's enactment, to promulgate final regulations implementing these bars for asylum and withholding of removal.

REGULATORY UPDATE

73 Fed. Reg 71,020 (2008)

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Extension of the Re-Registration Period and Automatic Extension of Employment Authorization Documentation for Honduran Temporary Protected Status Beneficiaries

ACTION: Notice.

SUMMARY: On October 1, 2008, the Department of Homeland Security (DHS) published a Notice in the Federal Register extending the designation of Honduras for Temporary Protected Status (TPS) through July 5, 2010. USCIS has decided to extend the reregistration period through December 30, 2008. Beneficiaries of TPS for Honduras are required to re-register and obtain new Employment Authorization Documents (EADs), when an EAD is requested by the beneficiary. Since USCIS will not be able to process and re-issue new EADs for all such beneficiaries by the January 5, 2009 expiration date, USCIS has decided to automatically extend the validity of EADs issued to Honduran nationals (or aliens having no nationality who last habitually resided in Honduras) until July 5, 2009. This Notice announces that extension and also explains how TPS beneficiaries and their employers

may determine which EADs are automatically extended.
DATES: This notice is effective November 24, 2008. The re-registration period will be extended through December 30, 2008. The automatic extension of EADs will begin on January 6, 2009, and will remain in effect until July 5, 2009.

73 Fed. Reg. 71,021

**DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services**

Extension of the Re-Registration Period and Automatic Extension of Employment Authorization Documentation for Nicaraguan Temporary Protected Status Beneficiaries

ACTION: Notice.

SUMMARY: On October 1, 2008, the Department of Homeland Security (DHS) published a Notice in the Federal Register extending the designation of Nicaragua for Temporary Protected Status (TPS) through July 5, 2010. USCIS has decided to extend the reregistration period through December 30, 2008. Beneficiaries of TPS for Nicaragua are required to re-register and obtain new Employment Authorization Documents (EADs), when an EAD is requested by the beneficiary. Since, USCIS will not be able to process and re-issue new EADs for all such beneficiaries by the January 5, 2009, expiration date, USCIS has decided to automatically extend the validity of EADs issued to Nicaraguan nationals (or aliens having no nationality who last habitually resided in Nicaragua) until July 5, 2009. This Notice announces that extension and also explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.
DATES: This notice is effective November 24, 2008. The re-registration period will be extended through December 30, 2008. The automatic extension of EADs will begin on January 6, 2009, and will remain in effect until July 5, 2009.

73 Fed. Reg. 72,276

**DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
8 CFR Parts 204, 214 and 299**

Special Immigrant and Nonimmigrant Religious Workers

ACTION: Final rule.

SUMMARY: This final rule amends U.S. Citizenship and

Immigration Services (USCIS) regulations to improve the Department of Homeland Security's (DHS's) ability to detect and deter fraud and other abuses in the religious worker program. This rule addresses concerns about the integrity of the religious worker program by requiring religious organizations seeking the admission to the United States of nonimmigrant religious workers to file formal petitions with USCIS on behalf of such workers. This rule also implements the Special Immigrant Nonminister Religious Worker Program Act requiring DHS to issue this final rule to eliminate or reduce fraud in regard to the granting of special immigrant status to nonminister religious workers. The rule emphasizes that USCIS will conduct inspections, evaluations, verifications, and compliance reviews of religious organizations to ensure the legitimacy of the petitioner and statements made in the petitions. This rule adds and amends definitions and evidentiary requirements for both religious organizations and religious workers. Finally, this rule amends how USCIS regulations reference the sunset date by which special immigrant religious workers, other than ministers, must immigrate or adjust status to permanent residence.
DATES: Effective date: This rule is effective November 26, 2008.

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