

BIA Pro Bono Project Update

July, 2007 | Catholic Legal Immigration Network, Inc.

BIA Grants Asylum

Congratulations to **Susan E. Hill** of **Hill, Piibe & Villegas** and her students **Charles Forster**, **Kelly Perigoe**, **Jill Ryther** and **Maya Smith** at the **UCLA School of Law El Centro Asylum Clinic**. This legal team won an appeal at the BIA that allowed a victim of sexual abuse and torture to remain in the United States. Ms. Hill and her students represented Mr. N, a 24 year old asylee from Liberia, who had been victimized since he was a child. Mr. N was eight years old when rebels dragged him from his family's car, beat him, and took him to a military camp. Both of Mr. N's parents were killed due to their political opinions; Mr. N witnessed his mother's killers hauling her body away after she had been shot. Rebels placed Mr. N into involuntary servitude, where they drugged and sexually abused him. Mr. N fled to the Ivory Coast at the age of ten and lived there until his business was attacked and burnt to the ground.

The Immigration Judge (IJ) found Mr. N credible and that he had demonstrated past persecution in Liberia. The IJ also found, however, that the government had established changed country conditions due to the end of the Liberian civil war.

The IJ therefore denied asylum, withholding of removal, and protection under the CAT, concluding that Mr. N would not face future persecution in Liberia.

On appeal, the BIA agreed that Mr. N had demonstrated past persecution, but that the government had rebutted Mr. N's presumption of future persecution due to the fundamental change of circumstances in Liberia. However, Mr. N's legal team convinced the BIA that the persecution he suffered in Liberia as a child was so atrocious and severe that it would be inhumane for the United States to repatriate Mr. N to Liberia. The BIA granted Mr. N asylum for humanitarian reasons. Under this special humanitarian provision, an applicant may still be granted asylum in a favorable exercise of discretion if the past persecution he or she suffered was of such an unconscionable nature that the applicant should not be repatriated, even if it is shown that future persecution is unlikely.

"I am so grateful that Mr. N was able to get help through the BIA Pro Bono Project. The Immigration Judge's decision denying him relief was a travesty by many standards, especially considering the horrific events Mr. N suffered as a small child. In fact, I admit it's the first time I've ever cried while writing a brief."

- Susan E. Hill

Immigration Judge (IJ) Grants Asylum Upon Remand by the BIA

Congratulations to **Lori Nessel**, fellow **Jenny-Brooke Condon**, and students **Jessica Hargis** and **Biju Koshy** of the **Immigration & Human Rights Law Clinic at Seton Hall University School of Law** for their work on Mr. T's asylum case.

Mr. T fled the Ivory Coast in 2005 after being targeted for ethnic violence by Ivory Coast government forces. Mr. T applied for asylum, withholding and relief under the CAT before the Immigration Judge. The IJ found Mr. T to be credible, but that he failed to establish a nexus between his fear of persecution and one of the protected grounds for asylum. The IJ concluded that Mr. T only feared general conditions of civil strife within Ivory Coast. The IJ also denied CAT relief without further analysis.

Mr. T appealed the denial of asylum, withholding and CAT relief. The Seton Hall advocates argued that the IJ failed to conduct an independent analysis of Mr. T's CAT claim. They argued that the IJ based her denial of Mr. T's CAT claim on the conclusion that Mr. T had failed to sustain his burden of proof for asylum, which requires a lesser evidentiary standard than CAT. The BIA dismissed the asylum and withholding of removal appeals, but sustained Mr. T's appeal of withholding under CAT. The BIA remanded the case to the IJ for further proceedings regarding Mr. T's CAT claim. Under the supervision of Ms. Nessel and Ms. Condon, law students **Craig Scrogam** and **Colleen Ayers** represented Mr. T before the IJ. Thanks to additional evidence submitted in support of Mr. T's asylum claim based on ethnic violence due to tribal membership, the IJ granted asylum to Mr. T.

The BIA Pro Bono Project is a collaborative effort of four non-governmental agencies and the Executive Office for Immigration Review. It is coordinated by the Catholic Legal Immigration Network, Inc. (CLINIC) and supported by the American Immigration Law Foundation (AILF), American Immigration Lawyers Association (AILA), the National Immigration Project of the National Lawyers Guild (NIPNLG) and the Capital Area Immigrants' Rights (CAIR) Coalition.

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CAT Protection Granted to National of El Salvador

Congratulations to **Estelle McKee** of Cornell Law School; **Robert T. Greig**, **Joseph Landau**, **Anil Kalhan**, **Rupa Mitra**, and **Tanisha Massie** of **Cleary, Gottlieb, Steen & Hamilton LLP**; **Carter C. White** of the **Civil Rights Clinic**, **University of California School of Law, Davis**; and **Ryan Lindsey** and **Yuri Mikulka** of **Howrey LLP** for their work to obtain relief under the CAT for Mr. R, a Salvadoran asylum-seeker.

Mr. R fled to the United States as a teenager, motivated by fear of persecution due to the fact that he was a homosexual male with a female sexual identity. He applied for asylum, withholding of removal, and CAT relief before the IJ. The IJ denied Mr. R's asylum claim as untimely filed. The IJ denied Mr. R's withholding and CAT relief claims because, according to the IJ, he had failed to establish past persecution for purposes of withholding of removal and he had also failed to state that anyone in the government or acting on behalf of the government tortured him. With assistance from Cornell Law School, Mr. R appealed to the BIA and filed a motion to remand with new evidence. The BIA summarily affirmed the IJ's decision denying all relief and denied Mr. R's motion to remand. Cleary Gottlieb and Mr. White filed a petition for review at the Ninth Circuit. The Ninth Circuit found that the IJ had applied the incorrect standard for establishing a CAT claim because the IJ required Mr. R to show that he would suffer torture "by or at the instigation of" the government, which goes further than the legal standard requires. The correct standard allows for torture to occur "by or at the instigation of or with the consent or acquiescence of the government." Further, the Ninth Circuit found that the IJ failed to inquire properly into the likelihood of future persecution for purposes of withholding of removal. Represented by Howrey attorneys on remand to the IJ, Mr. R was granted relief under CAT.

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BIA Upholds IJ's Grant of CAT Relief

Bob Freitas, **Matthew Poppe**, **Ulysses Hui**, and **Vincent Law of Orrick, Herrington & Sutcliffe, LLP** and summer associate **Sherry Long** successfully represented Mr. Y, a refugee from the former U.S.S.R., before the BIA. As a result of a criminal conviction, Mr. Y was placed in removal proceedings. The Immigration Judge not only denied all relief, but also failed to advise Mr. Y of his rights under the CAT. Mr. Y filed a pro se Notice of Appeal to the BIA,

which remanded the case to the Immigration Judge for consideration of relief under the CAT. The IJ granted deferral of removal under CAT and DHS appealed. Arguing that it was more likely than not that Mr. Y would be tortured upon his return to Uzbekistan, the legal team from Orrick convinced the BIA to uphold the IJ's grant of deferral of removal.

Congratulations to George Mason University law student, **David C. Drake**, who under the supervision of **Thomas Hutchins** at the **Immigrant and Refugee Appellate Center**, represented Mr. H, an Algerian national, through the

BIA Project. The IJ granted Mr. H deferral of removal, finding that though he was barred from asylum and withholding based on a criminal conviction, he was entitled to protection under the CAT. The IJ found that Mr. H was known to Algerian authorities and considered a member of an outlawed political movement, as well as an ethnic Berber. The IJ further found that Mr. H had suffered persecution in the past, and that highly corroborative documentary evidence indicated that it was more likely than not that Mr. H would be detained and tortured if returned to Algeria.

DHS appealed the grant of deferral to the BIA, contending that Mr. H was not credible due to what it characterized as the implausibility of his escape from Algerian authorities, in addition to DHS's assertion that Berbers were no longer being tortured in Algeria. DHS also argued that Mr. H's return would not be noticed by Algerian authorities and even if it was, the incidents of torture Mr. H suffered in the past were simply isolated incidents unlikely to be repeated. The BIA disagreed with DHS arguments, finding that under

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the applicable standard of review the IJ's decision should be upheld. The BIA specifically found that Mr. H's history with Algerian authorities and the nature of his return as a criminal deportee would more likely than not subject Mr. H to further acts of torture at the hands of Algerian authorities. The BIA accordingly found Mr. H entitled to deferral of removal under the CAT and upheld the IJ's decision.

BIA Reverses Removal Order and Terminates Proceedings

David Klein of **Heller Ehrman LLP** and **David Lubitz** of **Bingham McCutchen LLP** represented Mr. O, a lawful permanent resident from the Dominican Republic, on appeal before the BIA and on Petition for Review before the Second Circuit Court of Appeals. The IJ found that Mr. O was removable on two grounds, both related to criminal activity. However, due to an IJ misinterpretation, Mr. O was found to be removable on one of the grounds based on a crime for which Mr. O was charged but never convicted. The IJ determined that Mr. O was statutorily ineligible for cancellation of removal.

The IJ certified his opinion to the BIA. Counsel for Mr. O successfully argued that Mr. O was not convicted of the crime underlying one of the charges of removability. The BIA agreed that the IJ had erred and reversed the IJ's finding that Mr. O was removable on that particular ground. Nevertheless, the BIA affirmed that Mr. O was removable on another ground. The BIA also upheld the IJ's finding that Mr. O was ineligible for cancellation of removal due to the stop-time rule, believing that he had committed a crime that had halted the accrual of continuous presence needed to qualify for relief. Mr. O filed a Petition for Review and Motion for Stay of Removal with the Second Circuit. Government counsel conceded that it could not meet its legal burden of proving that Mr. O was removable on either of the grounds charged, and agreed to have the Petition for Review granted. The case was remanded to the BIA with instructions to terminate removal proceedings against Mr. O.

BIA Upholds Cancellation of Removal Grant

Richard O'Connell of **Yost & O'Connell** represented Mr. M, a lawful permanent resident from Mexico, before the BIA. DHS charged Mr. M with a crime involving moral turpitude based on a misdemeanor conviction, and placed Mr. M in removal proceedings. The IJ sustained the charge of removal, but found Mr. M eligible for cancellation of removal. The IJ noted that Mr. M had many positive equities in his favor, including his successful completion of probation, attendance in counseling sessions, a positive employment record and two sons in the United States. After weighing the positive and negative factors in Mr. M's case, the IJ concluded that Mr. M merited a favorable exercise of discretion. On appeal, Mr. O'Connell was able to overcome DHS's argument that Mr. M did not deserve a favorable exercise of discretion and the BIA upheld Mr. M's grant of cancellation of removal.

BIA Reverses IJ and Grants Cancellation

Congratulations to **Ray Bolourtchi** of **Cofman & Bolourtchi LLC** for winning cancellation of removal for Mr. V, an LPR from Mexico. The IJ had originally denied Mr. V's request for cancellation of removal as a matter of discretion because Mr. V failed to reveal an old arrest for which he was not convicted during the immigration court proceedings. Mr. V subsequently filed a pro se Notice of Appeal to the BIA. Mr. Bolourtchi represented Mr. V on appeal and convinced the BIA that the favorable equities in Mr. V's case, including Mr. V's lawful permanent residency of 30 years, his two teenage U.S. citizen children, and his steady work experience outweighed the adverse factors. Although Mr. V did fail to mention a 1997 arrest, he was not convicted of that offense and understood that his record was "clean." The BIA therefore determined that Mr. V merited a grant of cancellation of removal as a matter of discretion.

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BIA Upholds IJ Decisions Terminating Proceedings

Vikram Badrinath of the **Law Office of Vikram Badrinath, PC** represented Mr. V, an LPR from Bulgaria, before the BIA. Mr. V entered the United States in 1995 on a visitor's visa and adjusted his status to permanent residence in 2000. As the result of a criminal conviction, DHS placed Mr. V in removal proceedings. The IJ found Mr. V to be removable as an alien convicted of a crime involving moral turpitude within five years of his admission, but granted him cancellation of removal. DHS appealed to the BIA.

On appeal, Mr. Badrinath argued that Ninth Circuit case law established that a crime involving moral turpitude committed within five years of an alien's adjustment to lawful permanent resident status did not constitute a basis of removability where the alien was admitted to the United States as a nonimmigrant more than five years prior to the commission of the crime. The BIA concluded that because Mr. V's admission to the United States actually occurred nine years prior to the date of his criminal conviction, he was not removable as charged. The IJ dismissed DHS's appeal, vacated the IJ decision, and terminated removal proceedings against Mr. V.

Ulises Pin of **Bingham McCutchen LLP** represented Mr. P, an LPR from Mexico, before the BIA. Mr. P was convicted of a misdemeanor offense and charged with removability for conviction of a crime of violence. The IJ terminated proceedings because DHS could not establish that Mr. P was convicted of a removable offense. On appeal, Mr. Pin argued that the offense for which Mr. P was convicted did not contain the use of physical force as "an element," which is required under Fifth Circuit law for an offense to qualify as a crime of violence. The BIA agreed that DHS failed to establish, by clear and convincing evidence, that Mr. P was removable as charged and dismissed the government's appeal.

Congratulations to **Marc Harrold** of the **University of Mississippi School of Law** for successfully representing an LPR from Mexico who had been living lawfully in the United States since 1983. Mr. C pleaded guilty to a criminal offense and was sentenced to 360 days of confinement. DHS initiated removal proceedings against Mr. C, charging him with a crime of domestic violence. The Immigration Judge terminated removal proceedings, finding that Mr. C's

misdemeanor conviction was not a crime of domestic violence because it was not a 'crime of violence,' as defined by law. On appeal, Marc argued that the IJ's analysis was correct and should be upheld. The BIA dismissed DHS's appeal and terminated removal proceedings against Mr. C.



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