



AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
CHICAGO, ILLINOIS 60610

THE INTERNATIONAL LAWYER



THE INTERNATIONAL LAWYER

A QUARTERLY PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

SPRING 2010 • VOLUME 44 • NUMBER 1

INTERNATIONAL LEGAL DEVELOPMENTS IN REVIEW: 2009

Introduction. William B.T. Mock, Jr.
Mark E. Wojcik

Business Regulation

Customs Law
Export Controls and Economic Sanctions
International Anti-Trust
International M&A and Joint Ventures
International Trade

Disputes

International Commercial Dispute Resolution
International Courts
International Criminal Law
International Family Law
International Litigation

Corporate

Corporate Social Responsibility
International Commercial Transactions
International Intellectual Property Law
International Procurement

Finance

International Financial Products and Services
International Investment and Development
International Secured Transactions and Insolvency
International Securities and Capital Markets
Islamic Finance

Industries

Aerospace and Defense Industries
Information Services, Technology and Data
Protection
International Energy and Natural Resources
International Transportation

Constituent Division

International NGO and NPO
Women's Interest Network

Tax, Estate and Individuals

Employment Law
Immigration and Nationality Law

Public International Law

Anti-Corruption
Human Rights
International Art and Cultural
Heritage
International Environmental Law
International Law of the Sea
National Security
Sexual Orientation and Gender
Identity

Legal Practice

Transnational Legal Practice

Regional and Comparative

Africa
Asia/Pacific
Canada
China
Europe
India
Latin America and Caribbean
Mexico
Middle East
Russia

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

Immigration and Nationality Law

COMMITTEE EDITOR: JOHANNA K.P. DENNIS*

QIANG BJORNBAK, JOSH D. FRIEDMAN, SANDRA GROSSMAN, SARAH J. HAWK, MARIA MAÑÓN, JORENE SOTO, & JUDITH L. WOOD*

Introduction

The year 2009 involved a substantial number of significant cases at all levels and several legislative proposals, but as in 2008, there were few significant statutory enactments. Similar to 2008, enacted legislation addressed appropriations for 2010 and non-controversial programs, such as those for religious workers, physician waivers of the home foreign residency requirement, and the Visa Waiver Program. This article focuses primarily on case law and administrative developments in immigration law during 2009. Specifically, this article covers significant case law developments; worksite enforcement, I-9 audits and E-verify programs; Federal First Offender Act eligibility under *Lujan-Armendariz*; and issues related to asylum, including asylum for foreign domestic violence victims.

I. Worksite Enforcement, Increased Audits/Investigations, E-Verify Push for 2010

A. I-9 DOCUMENT COMPLIANCE

The U.S. Department of Homeland Security released a new I-9 form to increase the security of the employment authorization verification process.¹ Under the Immigration

* Johanna K.P. Dennis served as the committee editor for the Immigration is an Associate Professor of Law at Vermont Law School.

* Qiang Bjornbak is the principal of the Law Offices of Qiang Bjornbak and Vice Chair of the ABA-SIL Immigration and Naturalization Committee. Josh D. Friedman is the vice-chair of the ABA-SIL International Investment and Development Committee and serves as the editor-in-chief for that committee's newsletter and for the Subcommittee on International Refugee Law's newsletter. Sandra Grossman is the founder and owner of Grossman Law, LLC. Sarah J. Hawk is a partner at and chairs the Global Immigration Practice of Fisher & Phillips LLP. María Mañón is an associate at Grossman Law, LLC. Jorene Soto is an attorney advisor at the U.S. Department of Justice, Executive Office for Immigration Review. Judith L. Wood is the principal of the Law Office of Judith L. Wood.

1. Press Release, Dep't of Homeland Security (DHS)-U.S. Citizenship and Immigration Services (USCIS), Questions and Answers: USCIS Revises Employment Eligibility Verification Form (Feb. 11, 2009), available at http://www.uscis.gov/files/article/I9_qa_12dec08.pdf.

and Reform Act, Form I-9 is required for all employees hired after November 6, 1986 to confirm identity and work eligibility. This requirement is set forth in section 274A(a)(1)(B) of the Immigration and Nationality Act.

In February 2009, a new I-9 form was released with a more restricted list of acceptable documents. A revised I-9 form was released on August 7, 2009² and the M-274 Handbook for Employers was also updated.³ The new I-9 form streamlined the list of acceptable documents and no longer allows expired identity documents such as an expired driver's license or an expired U.S. Passport. The failure to complete and retain I-9 forms can result in criminal and civil penalties for the employer. I-9 compliance for technical errors can result in \$110 to \$1,100 fines per I-9 form, and substantive violations can result in fines from \$375 to \$16,000.⁴

In April 2009, the Department of Homeland Security (DHS) announced a renewed focus of its resources in worksite enforcement, targeting employers who knowingly hire illegal workers as well as continued efforts for the arrest and removal of criminal aliens.⁵ In 2008, out of 6,000 detentions, only 135 employers were arrested. This represented a shift from Immigration and Customs Enforcement (ICE) raids toward the distribution of Notices of Inspection to hundreds of employers. The strategy states:

Enforcement efforts focused on employers better target the root causes of illegal immigration. An effective strategy must do all of the following: 1) penalize employers who knowingly hire illegal workers; 2) deter employers who are tempted to hire illegal workers; and 3) encourage all employers to take advantage of well-crafted compliance tools. To accomplish these goals, ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of the illegal workforce.⁶

B. I-9 AUDIT INCREASE

The year 2009 brought in a new wave of compliance audits and investigations, ranging from administrative fines to criminal arrests for companies from ICE, the agency created in 2004 under the DHS and charged with the role of conducting investigations into companies' hiring records and I-9 policies. Since the new ICE enforcement strategy initiated in April 2009, ICE has issued 142 Notices of Intent to Fine, totaling \$15,865,181. By

2. DHS-USCIS, Form I-9, available at <http://www.uscis.gov/files/form/i-9.pdf> (last visited Aug. 7, 2009).

3. DHS-USCIS, Handbook for Employers, available at <http://www.uscis.gov/files/natedocuments/m-274.pdf> (last visited July 31, 2009).

4. Inflation Adjustment for Civil Monetary Penalties Under Sections 274A, 274B, and 274C of the Immigration and Nationality Act, 73 Fed. Reg. 10,130 (Feb. 26, 2008) (to be codified at 8 C.F.R. pts. 270, 274a, 280, 1274a, and at 28 C.F.R. pt. 68).

5. Press Release, DHS-Immigration and Customs Enforcement (ICE), Worksite Enforcement Strategy (Apr. 30, 2009), available at http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf.

6. Memorandum on Worksite Enforcement Strategy from DHS Office of Investigations to Directors and Agents in charge at ICE (Apr. 30, 2009), available at http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf.

comparison, in 2008, ICE issued only thirty-two Notices of Intent to Fine, totaling \$2,355,330.⁷

In July 2009, Krispy Kreme Doughnut Corporation was fined \$40,000 for I-9 violations for a store location in Ohio. ICE audited Krispy Kreme's I-9 forms after receiving reports of illegal workers at its factory in Ohio. The company also agreed to provide a revised immigration compliance program and implement procedures to ensure immigration compliance.⁸

C. FORM I-9 AUDITS

A Notice of Inspection (NOI) issued to a company requires surrender of I-9 forms within three business days, absent an extension in certain circumstances for large employers.

On July 1, 2009, DHS issued 652 notices to companies nationwide, and notices continue to be served. ICE sent notices to specific industries, including hospitality, construction, meatpacking, and restaurants. On November 19, 2009, ICE announced that another 1,000 NOIs were being sent to companies. By comparison, ICE sent out only 503 similar notices in 2008. John Morton, DHS Assistant Secretary for ICE stated, "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the law."⁹ Mr. Morton referred to the auditing of the I-9 forms as "only the first step in ICE's long-term strategy to address and deter illegal employment."¹⁰ These audits reflect a shift toward focusing on employers instead of the undocumented employees. ICE will continue to investigate employers using I-9 form audits to ensure that they are in compliance with all immigration laws.

D. UNANNOUNCED SITE AUDITS FOR EMPLOYERS

In 2010, H-1B employers should be prepared for unannounced site visits from U.S. Citizenship and Immigration Services (USCIS) to confirm the information submitted in H-1B filings. After a 2008 internal study revealed that as many as twenty-one percent of H-1B petitions were defective in some way, USCIS modified the H-1B I-129 form instructions to authorize the release of company information related to the visa petition.¹¹

As part of an effort to prevent visa fraud, the USCIS Office of Fraud Detection and National Security (FDNS) commenced an audit of the H-1B program.¹² As a part of the audit program, investigators are visiting H-1B employers to verify the accuracy of the information in the H-1B petition. FDNS does not need a subpoena to investigate H-1B

7. Press Release, DHS-ICE, ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for their Hiring Practices (Nov. 19, 2009), available at <http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>.

8. Press Release, DHS-ICE, Krispy Kreme Fined After I-9 Audit (July 7, 2009), available at <http://www.ice.gov/pi/nr/0907/090707cincinnati.htm>.

9. ICE Assistant Secretary John Morton, *supra* note 7.

10. *Id.*

11. DHS-USCIS, Form I-129, available at <http://www.uscis.gov/files/form/I-129.pdf>.

12. American Immigration Lawyers Association, Types of USCIS Site Visits, AILA InfoNet Doc. No. 09112060 (Nov. 20, 2009), <http://www.aila.org/content/default.aspx?docid=30610>.

employers. Cooperation by the company is voluntary. Legal counsel is allowed if time permits because a site visit is not usually able to be rescheduled.

During these unannounced site visits, the investigators may request to speak with the company representative who signed the H-1B petition to confirm information contained in the H-1B petition, including the employee's job title, salary, work location, education background, employer's business, and revenue. The investigator may also speak with the H-1B employee and the H-1B employee's supervisor. The investigator may also request to take photographs of the employer's facility.

Employers should review H-1B petitions submitted for employees and ensure the accuracy of the information contained in the petition and confirm that the terms and conditions of the employee's employment have not changed. Also, employers must pay the prevailing wage for the position according to the work location stated on the Labor Condition Application (LCA). LCA violations can result in fines from \$1,000 (including \$5,000 for willful violations and up to \$35,000 if a U.S. worker is displaced). A site visit can also open up a company to other violations and scrutiny from other government agencies, including the IRS, DOL, and OSHA.

Legislation has been proposed to overhaul the H-1B and L-1 visa programs and increase restrictions, but this remains in congressional committee.¹³

E. E-VERIFY PROGRAM EXPANSION

E-Verify has gained momentum and support by DHS. In late October, Congress passed H.R. 2892, the Department of Homeland Security 2010 Appropriations bill, which allocated \$42.8 billion to DHS. This included a three-year extension of E-Verify and \$137 million in funding designed to improve the accuracy of E-Verify operations.¹⁴

In September, the Federal Acquisition Regulation was implemented which requires certain federal contractors to use E-Verify, based on FAR federal contracts of \$100,000 and at least 120 days in duration, and subcontracts flowing from the principal contract for services of at least \$3,000.¹⁵

In November, DHS launched an ad campaign, encouraging all employers to voluntarily sign up for its online employment verification system that uses data from DHS and the Social Security Administration (SSA) to confirm identity and work eligibility for new hires.¹⁶ The campaign, called "I E-Verify," will use public service television ads to tout the 170,000 companies that currently use the system.

Companies using database systems such as E-Verify, the Social Security Number Verification System offered by the SSA, electronic I-9 form systems, and background checks, should become familiar with the systems in order to avoid verification discrimination.

13. See Govtrack.us, S.887: H-1B and L-1 Visa Reform Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-887> (last visited Nov. 26, 2009).

14. See Department of Homeland Security 2010 Appropriations, Pub. L. No. 111-83 Stat. 2142 (2009) (formerly H.R. 2892).

15. See generally Federal Acquisition Regulation, <https://www.acquisition.gov/far/> (last visited Jan. 31, 2010).

16. Press Release, Global Immigration Counsel, USCIS Announces Increased Enforcement and Compliance Initiatives, Including Issuance of 1,000 Additional Notices of Inspection (Nov. 19, 2009), available at <http://www.globalimmigrationcounsel.com/2009/11/articles/us-immigration/uscis-announces-increased-enforcement-and-compliance-initiatives-including-issuance-of-1000-additional-notices-of-inspection/>.

Verification-related discrimination can result when misuse occurs, such as illegal pre-screening and premature termination.¹⁷ Employers can face civil penalties for refusing to hire an individual based on their nationality or immigration status.

II. Case Law Developments

A. SIGNIFICANT BIA AND SUPREME COURT CASES

1. Adjustment Of Status

In *Matter of Silitonga*,¹⁸ the Board of Immigration Appeals (the Board, or BIA) held that an Immigration Judge (IJ) does not have jurisdiction to adjudicate an application for adjustment of status filed by an arriving alien, unless the alien has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole in order to pursue a previously-filed application. Thus, in most cases, "the USCIS has exclusive jurisdiction to adjudicate an arriving alien's application for adjustment of status under 8 C.F.R. § 245.2(a)(1)," and "it retains jurisdiction to adjudicate the application even where an unexecuted administratively final order of removal remains outstanding."¹⁹

2. Cancellation of Removal

In *Matter of A-M*,²⁰ the Board held that notwithstanding the heading of section 240A(b) of the Immigration and Nationality Act (INA), which refers only to nonpermanent residents, a lawful permanent resident who qualifies as a battered spouse may be eligible to apply for cancellation of removal under section 240A(b)(2). It further held that, given the nature and purpose of the relief of cancellation of removal for battered spouses under section 240A(b)(2), such factors as an alien's divorce from an abusive spouse, remarriage, and previous self-petition for relief based on the abusive marriage are relevant in determining whether an application for that relief should be granted in the exercise of discretion.²¹

3. Criminal Convictions

In *Nijhawan v. Holder*,²² the Supreme Court held that for purposes of defining crimes involving fraud or deceit as aggravated felonies under the INA, the \$10,000 loss threshold amount refers to the specific circumstances in which the defendant committed a fraud or deceit crime, rather than to the generic definitions of the fraud or deceit crime.

In *Matter of Zorilla-Vidal*,²³ the Board held that outside the jurisdiction of the Ninth Circuit, a conviction for criminal solicitation under a State's general purpose solicitation statute is a conviction for a violation of a law "relating to a controlled substance" under

17. See 8 U.S.C. § 1324b (2008) (prohibiting national origin discrimination during the employment process).

18. 25 I. & N. Dec. 89 (BIA 2009).

19. *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009).

20. *Matter of A-M*, 25 I. & N. Dec. 66 (BIA 2009).

21. *Id.*

22. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

23. *Matter of Zorilla-Vidal*, 24 I. & N. Dec. 768 (BIA 2009).

section 237(a)(2)(B)(i) of the INA where the record of conviction reflects that the crime solicited is an offense relating to a controlled substance.

In *Matter of Caredenas Abreau*,²⁴ the Board held that a pending late-reinstated appeal of a criminal conviction does not undermine the finality of the conviction for purposes of the immigration laws.

4. Definition Of "Child" And "Parent"

In *Matter of Guzman-Gomez*,²⁵ the Board held that the terms "child" and "parent" defined at section 101(c) of the Act do not encompass stepchildren and stepparents, and that a person born outside of the United States cannot derive U.S. citizenship under section 320(a) of the Act, 8 U.S.C. § 1431(a) (2006), by virtue of his or her relationship to a non-adoptive stepparent.

5. Detention

In *Matter of M-A-S-*, the Board held that an IJ may order an alien detained until departure as a condition of a grant of voluntary departure.²⁶

6. Due Process

In *Matter of Compean, Bangaly & J-E-C-*,²⁷ the Attorney General vacated the earlier decision in *Matter of Compean, Bangaly & J-E-C-*,²⁸ and pending the outcome of a rulemaking process, directed the Board and the IJs to continue to apply the previously established standards for reviewing motions to reopen based on claims of ineffective assistance of counsel.

7. Motions

In *In re Hashmi*,²⁹ the Board held that "[a]n alien's unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition should generally be granted if approval of the visa petition would render him prima facie eligible for adjustment of status."

In *In re Lamus*,³⁰ the Board held that a "motion to reopen to apply for adjustment [of status] based on a marriage entered into after the commencement of removal proceedings may not be denied under the fifth factor enumerated in *Matter of Velarde*," based on the mere fact that the DHS "has filed an opposition to the motion, without regard to the merit of that opposition."

24. *Matter of Caredenas Abreau*, 24 I. & N. Dec. 795 (BIA 2009).

25. *Matter of Guzman-Gomez*, 24 I. & N. Dec. 824 (BIA 2009).

26. *Matter of M-A-S-*, 24 I. & N. Dec. 762 (BIA 2009).

27. *Matter of Compean, Bangaly & J-E-C-*, 25 I. & N. Dec. 1 (A.G. 2009).

28. *Matter of Compean, Bangaly & J-E-C-*, 24 I. & N. Dec. 710 (A.G. 2009).

29. *In re Hashmi*, 24 I. & N. Dec. 785 (BIA 2009).

30. *Matter of Lamus-Pava*, 25 I. & N. Dec. 61 (BIA 2009) (citing *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (BIA 2002)).

8. Removability/Inadmissibility

In *Matter of Barcenas-Barrera*,³¹ the Board held that "[a]n alien who willfully and knowingly makes a false representation of birth in the United States on a passport application is inadmissible under section 212(a)(6)(C)(ii) of the INA," and that an individual "convicted of violating 18 U.S.C. § 1542 for falsely representing that she was born in the United States on an application for a passport, is removable under section 237(a)(1)(A) of the Act" based on being "inadmissible at the time of her adjustment [of status] under section 212(a)(6)(C)(ii)."

In *Matter of Espinoza*, the Board held that "[a]n alien may be rendered inadmissible under section 212(a)(2)(A)(i)(II) of the INA on the basis of a conviction for possession or use of drug paraphernalia," and that such an alien "may qualify for a waiver of inadmissibility under section 212(h) of the Act if that offense relates to a single offense of simple possession of 30 grams or less of marijuana."³²

9. Stay Of Removal

In *Nken v. Holder*,³³ the U.S. Supreme Court held that traditional stay factors governed a court of appeals' authority to stay an alien's removal pending judicial review, as opposed to the more demanding standard of the INA.

10. Waivers Of Inadmissibility

In *Matter of Moreno-Escobosa*,³⁴ the Board held that "[t]he date of an alien's plea agreement . . . is controlling in determining" an alien's eligibility for a section 212(c) waiver, and that the Ninth Circuit's holding in *Abebe v. Mukasey*,³⁵ "does not invalidate 8 C.F.R. § 1212.3 (2009), so as to preclude an alien who seeks to waive a deportation ground from establishing eligibility for section 212(c) relief."

B. FEDERAL FIRST OFFENDER ACT ELIGIBILITY UNDER LUJAN-ARMENDARIZ

In *Lujan-Armendariz v. INS*, the Ninth Circuit held that an expungement of a first-time conviction for simple drug possession under a state law that is analogous to the Federal First Offender Act (FFOA)³⁶ eliminates the effect of the conviction for immigration purposes.³⁷ In three new cases issued this year, the Ninth Circuit continued to flesh out its holding in *Lujan-Armendariz* by concluding, either directly or obliquely, that: (1) a con-

31. *Matter of Barcenas-Barrera*, 25 I. & N. Dec. 40 (BIA 2009).

32. *Matter of Espinoza*, 25 I. & N. Dec. 118 (BIA 2009).

33. *Nken v. Holder*, 129 S. Ct. 1749 (2009).

34. *Matter of Moreno-Escobosa*, 25 I. & N. Dec. 114 (BIA 2009) (citing *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009)).

35. *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009).

36. Federal First Offender Act, 18 U.S.C.S. § 3607 (LexisNexis 2006) [hereinafter FFOA]. The FFOA is a federal rehabilitative statute that entitles persons who have never previously violated narcotics laws, and who are found guilty under federal or state law of first-time simple drug possession, to have the charges dismissed without entry of a conviction and avoid having their offenses used against them for any purpose. *Id.* § 3607(b) (providing that a case disposed of under the FFOA "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose").

37. *Lujan-Armendariz v. INS*, 222 F.3d 728, 735 (9th Cir. 2000).

viction for possession of drug paraphernalia that is merely incidental to drug use does not preclude a non-citizen from invoking the FFOA's protection; (2) FFOA relief is categorically unavailable to a non-citizen who has violated a condition of probation; (3) serving a probationary jail term likely does not disqualify a non-citizen from FFOA eligibility; and (4) a guilty plea to a first-time offense of simple drug possession cannot serve as an admission of a controlled-substance offense for immigration purposes as long as the offense is expunged and the expungement applies retroactively to a date preceding the issuance of a final administrative order.³⁸

11. Possession of Drug Paraphernalia

The express terms of the FFOA make post-conviction relief available only to individuals who have received a conviction for possession of a "controlled substance," as described 21 U.S.C. § 844.³⁹ Although possession of drug paraphernalia is not an offense described in Section 844, the Ninth Circuit held in *Ramirez-Altamirano v. Holder* that a finding of guilt for the lesser or equivalent offense of possession of paraphernalia also qualifies for FFOA treatment.⁴⁰ In that case, a non-citizen initially charged with both felony drug possession and misdemeanor possession of drug paraphernalia later pleaded guilty only to the lesser drug-paraphernalia charge.⁴¹ The court observed that if the non-citizen had instead pled guilty to the more serious drug possession charge, his conviction would have qualified him for relief under the FFOA: "[t]he structure of his plea agreement obviously was intended to minimize his culpability by allowing him to avoid facing the more serious drug possession charge, and reflects the state's view as to the seriousness of the offense."⁴²

The court reasoned that "there is no rational basis for treating individuals found guilty of possessing drug paraphernalia more harshly than those found guilty of possessing the actual drugs themselves."⁴³ Therefore, the court held that "persons convicted for possession of drug paraphernalia . . . are eligible for the same immigration treatment as those convicted of drug possession under the FFOA."⁴⁴ Under this holding, a non-citizen invoking the FFOA in order to avoid the immigration consequences of a conviction must demonstrate that, among other things, the conviction was for possession of a controlled substance, or for an equivalent or lesser charge.⁴⁵

Importantly, the court distinguished the less serious offense of possession of the instruments used for delivering or administering an illicit drug to the body from the more serious offense of possession of the machinery, supplies, or ingredients used for manufacturing a controlled substance.⁴⁶ The court suggested that, given the differing gravity of the offenses, the policy rationale of equal protection that supports the

38. See *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 803, 808-09 (9th Cir. 2009); *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009); see also *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009).

39. 18 U.S.C. § 3607(a).

40. *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 808-09 (9th Cir. 2009); accord *Cardenas-Urriarte v. INS*, 227 F.3d 1132, 1137 (9th Cir. 2000).

41. See *Ramirez-Altamirano*, 563 F.3d at 808.

42. *Id.*

43. *Id.*

44. *Id.* at 809.

45. *Id.* at 812 (citing *Cardenas-Urriarte*, 227 F.3d at 1137-38).

46. *Id.* at 808-09 (citing *Cardenas-Urriarte*, 227 F.3d at 1137 n.6).

equivalent treatment of drug possession and possession of drug-delivery paraphernalia does not apply to possession of drug-manufacturing paraphernalia.⁴⁷ Nevertheless, as long as the paraphernalia at issue is merely "incidental to drug ingestion," a conviction for possession of such drug paraphernalia will not preclude a non-citizen from invoking the FFOA's protection.⁴⁸

12. Violations of Probation

Another core eligibility requirement for FFOA relief is compliance with all conditions of probation imposed as a result of a conviction for simple drug possession or an equivalent or lesser charge.⁴⁹ In March 2009, the Ninth Circuit held in *Estrada v. Holder*, that a non-citizen who has violated his probation may not benefit from the FFOA's protections.⁵⁰ In that case, a non-citizen sought to qualify for a waiver of separate grounds for removal by invoking the FFOA on account of the expungement of his conviction for possession of drug paraphernalia.⁵¹ The petitioner had been convicted for possession of drug paraphernalia in violation of a California law and was placed on probation for three years.⁵² Although the petitioner eventually succeeded in setting aside and vacating his guilty plea, the state court had twice found that the petitioner had violated the terms and conditions of his probation.⁵³

The *Estrada* court observed that the FFOA did not provide for dismissal or expungement of a conviction for an offender who violated the terms of his or her probation.⁵⁴ Accordingly, the court declined to grant the petitioner FFOA relief, reasoning that "because Estrada would not have been entitled to FFOA relief as a federal defendant, his California expungement does not negate his conviction for immigration purposes."⁵⁵

13. Imprisonment

The Ninth Circuit has not yet resolved whether serving jail time in connection with a conviction for simple drug possession precludes a non-citizen from taking advantage of the FFOA's protection. Although the question arose in *Ramirez-Altamirano*, where the non-citizen served jail time for his guilty plea to misdemeanor possession of drug para-

47. See *id.*

48. *Id.* at 809.

49. 18 U.S.C. § 3607(a) (stating, with respect to qualifying convictions, that, "At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation").

50. *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009); accord *Sanchez-Morfin v. INS*, 85 F.3d 637, 1996 WL 157512, at *2 (9th Cir. 1996) (concluding that a petitioner had "placed himself beyond" the statute's protection by violating the terms of his probation before completing an Arizona expungement program because the FFOA "does not seem to help probation violators").

51. *Estrada*, 560 F.3d at 1041.

52. *Id.* at 1041.

53. *Id.*

54. *Id.* at 1042.

55. *Id.* at 1041 (citing *Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 983-84 (9th Cir. 2006); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 812 (9th Cir. 1994)).

phernalia,⁵⁶ the court expressly declined to decide whether "his five-day jail sentence would have precluded him from qualifying for expungement under the FFOA."⁵⁷

Nevertheless, the Ninth Circuit has intimated that serving jail time would not likely disqualify a non-citizen from eligibility for FFOA treatment.⁵⁸ This result makes sense from the perspective that disqualifying a non-citizen from FFOA eligibility based on jail time associated with an expunged conviction for first-time drug possession would violate the equal-protection guarantee advanced in *Lujan-Armendariz*.⁵⁹ But if jail time were treated as a bar to FFOA treatment, then a first-time drug-possession offender who expunges his conviction by first serving his sentence and thereafter obtains a vacatur might face various negative immigration consequences, whereas any other substantively similarly situated offender in a state utilizing an alternative procedure would not face such consequences. Imposing consequences on an offender merely on account of a procedural variation would nearly eviscerate the FFOA's legislative purpose of ensuring "that the various harsh consequences that normally flow from a criminal conviction would not affect individuals found guilty of a first-time simple drug possession offense."⁶⁰

14. Guilty Pleas

A non-citizen may be considered as having a "conviction" of a controlled-substance offense for immigration purposes if he or she was "convicted of," "admits to having committed," or "admits committing acts which constitute the essential elements" of the offense.⁶¹ This year, the Ninth Circuit determined in *Romero v. Holder* that a non-citizen's "guilty plea in connection with his expunged, first-time simple possession offense [cannot] serve as an 'admission' of a controlled substance offense once that offense [is] expunged."⁶²

This case dealt with an IJ's decision finding a non-citizen statutorily barred from demonstrating the good moral character required for non-resident cancellation of removal on account of his guilty plea to a first-time offense of simple drug possession, despite a subsequent expungement of the plea under a state rehabilitative statute.⁶³ The court reasoned that to allow the use of Romero's "guilty plea which preceded the expungement of the offense to constitute an 'admission' of a controlled substance offense would attach a legal consequence to the expunged offense,"⁶⁴ which result would contravene *Lujan-Armendariz*'s holding that "the [FFOA's] ameliorative provisions apply for all purposes."⁶⁵

56. *Ramirez-Altamirano*, 563 F.3d at 803.

57. *Id.* at 812 (emphasis added) (observing that the BIA had failed to address this question in its decision).

58. See *Lujan-Armendariz v. INS*, 222 F.3d at 734 n.11, 738 n.18 (though not holding directly on the issue, explaining that an "expungement" sufficient for FFOA treatment includes "vacatur" or "set-asides," in which "a formal judgment of conviction is entered after a finding of guilt, but then is erased after the defendant has served a period of probation or imprisonment and his conviction is ordered dismissed by the judge").

59. See *id.* at 736-37 (citing H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess., at 224 (1996)) (holding that equal protection requires substantively similar but procedurally different expungements to be treated similarly for the purposes of the FFOA and observing that Congress sought to ensure uniform treatment of expungements received "under substantively similar but procedurally different state statutes").

60. *Id.* at 736.

61. 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2006).

62. *Romero v. Holder*, 568 F.3d 1054, 1061 (9th Cir. 2009).

63. *Id.* at 1056.

64. *Id.* at 1060.

65. *Id.* at 1060 (quoting *Lujan-Armendariz*, 222 F.3d at 735).

Therefore, the court concluded that Romero was not statutorily barred from proving good moral character because of his subsequently expunged guilty plea to a first-time simple drug-possession offense under state law.⁶⁶

Notably, the timing of the expungement of Romero's plea played a significant role in the ultimate disposition of the case. Indeed, in February 2003, after the BIA had already dismissed Romero's appeal from the IJ's decision, Romero filed a motion to reopen based on new evidence showing that, after he had successfully completed the drug-rehabilitation program, the state court set aside his guilty plea and dismissed the charge against him in an order *nunc pro tunc* retroactive effect to October 7, 1999.⁶⁷ In view of these facts, the Ninth Circuit held that Romero's expungement entitled him to FFOA treatment.⁶⁸

Presumably, a contrary result would have occurred in *Romero* had a final administrative decision been entered with respect to Romero's cancellation application before the effective date of the expungement. Indeed in two earlier cases, the Ninth Circuit held that a non-citizen who may be eligible in the future to receive expungement of a conviction for first-time simple drug possession under a state rehabilitative program cannot benefit from FFOA treatment if he or she has not yet received such relief by the time that immigration consequences have been imposed as a result of the conviction.⁶⁹

Reading the Ninth Circuit's recent decision in *Romero* in light of these earlier cases suggests at the very least that a guilty plea to a first-time offense of simple drug possession cannot serve as an admission of a controlled-substance offense for immigration purposes as long as the offense is expunged and the expungement is given retroactive effect predating the final conclusion of the administrative proceedings, as was the *nunc pro tunc* order in *Romero*. Whether a plea that is expunged before the issuance of a final administrative order is also eligible for FFOA treatment in the absence of retroactive application is a question that the *Romero* case leaves open to future adjudication.

IV. Asylum Developments

U.S. asylum law is dynamic, and this year, the decisions relating to the refusal to recognize gang recruitment as a "particular social group," the interpretation of the statutory language relating to the so-called "persecutor bar," and the much-awaited asylum for "foreign victims of domestic violence" have been seminal and innovative.

A. "PARTICULAR SOCIAL GROUP"

In 2008, both the BIA and the Ninth Circuit had refused to recognize a particular social group of "persons resistant to gang recruitment."⁷⁰ An interesting development, however, has been made towards the definition of disfavored groups. Following its application of the disfavored group analysis to the asylum claim of a member of Indonesia's Chinese

66. *Id.* at 1062.

67. *Id.* at 1058.

68. *Id.* at 1062.

69. See *Padilla-Medel v. Gonzales*, 197 F. App'x 617, 619 (9th Cir. 2006); *Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1290 (9th Cir. 2004).

70. See *Santos-Lemus v. Mukasey*, 542, F.3d 738, 745-46 (9th Cir. 2008); *In re S-E-G*, 24 I. & N. Dec. 579 (BIA 2008); *In re E-A-G*, 24 I. & N. Dec. 591 (BIA 2008).

Christian minority in *Sael v. Ashcroft*,⁷¹ the Ninth Circuit applied the same analysis to the withholding of removal claim of a member of Indonesia's Chinese Christian community in *Wakkary v. Holder*.⁷² This analysis helps to "lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting that an applicant must adduce to meet the ultimate standard under the regulations, 'individually singled out' rubric."⁷³ Furthermore, an applicant does not need to show that he or she is "individually singled out for persecution," if he or she can prove a "pattern of practice of persecution of a group of persons similarly situated to the applicant on enumerated grounds."⁷⁴ The Ninth Circuit has also found that there is a pattern of persecution of homosexual men in Jamaica.⁷⁵

B. "PERSECUTOR BAR", PAST PERSECUTION, AND "CENTRAL REASON"

In *Negusie v. Holder*,⁷⁶ the U.S. Supreme Court held that the persecutor bar provision in the Immigration and Nationality Act was ambiguous as to whether coercion or distress was relevant in determining if an alien had participated in persecution. It further held that the Board's construction of the persecutor bar as not requiring any motivation or intent on an alien's part was not entitled to *Chevron*⁷⁷ deference because it was based on legal error. The Court remanded for further proceedings. *Negusie* indicates that the "intent" to persecute should exist independent of coercion, and being coerced to persecute should not be judged by the same standard as independent, intentional persecution.

In *Matter of A-T*,⁷⁸ the Board held that requests for asylum premised on past persecution related to female genital mutilation (FGM) must be adjudicated within the framework set out by the Attorney General,⁷⁹ and that once past persecution on account of an enumerated ground is shown, a presumption is triggered that there would be future harm on the basis of the same statutory ground.

Also, in *Parussimova v. Mukasey*, the Ninth Circuit determined that "a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist," or if "standing alone," the motive "would have led the persecutor to harm the applicant."⁸⁰ The court clarified that "persecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant," as long as the applicant can "demonstrate that a protected ground was 'at least one central reason.'"⁸¹ In addition, internal relocation will be presumed impossible if the asylum applicant proves that he or she was subjected to government-sponsored persecution, unless the government can rebut with a preponderance of evidence establishing the contrary.⁸²

71. *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004).

72. *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009).

73. *Id.* at 1064.

74. 8 C.F.R. § 208.13 (b)(2)(iii); 8 C.F.R. § 1208.13 (b)(2)(iii).

75. *Bromfield v. Holder*, 543 F.3d 1071 (9th Cir. 2009).

76. *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

77. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

78. *In re A-T*, 24 I. & N. Dec. 617 (A.G. 2008).

79. See *Matter of A-T*, 24 I. & N. Dec. 617 (A.G. 2008).

80. *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009).

81. *Id.*; see also *Sinha v. Holder*, 564 F.3d 1015, 1021 (9th Cir. 2009).

82. *Brezilien v. Holder*, 569 F.3d 403, 414 (9th Cir. 2009).

C. CHANGE OF COURSE: ASYLUM VICTORIES A REAL POSSIBILITY FOR VICTIMS OF DOMESTIC VIOLENCE

For immigrant victims of domestic violence and their advocates, 2009 will be remembered as the year that DHS finally acceded to granting asylum to Rody Alvarado Peña, a Guatemalan woman who endured decades of horrific physical and mental abuse at the hands of her husband. The decision by DHS, a well-deserved victory for Ms. Alvarado, marks an important change in the government's stance towards domestic violence-based asylum claims and opens the door a bit wider to other victims of abuse seeking refuge in the United States. Ms. Alvarado's protracted legal battle, spanning more than thirteen years and three administrations, came to symbolize the plight of abused women seeking asylum in the United States, who traditionally experience disfavored treatment by the U.S. government.

1. The Social Group Formulation in Asylum Claims

All foreign nationals face a formidable task when applying for asylum in the United States. Applicants must establish they are "refugees" within the meaning of the INA.⁸³ A "refugee" must show he or she is "unable or unwilling to return to, and is unable and unwilling to avail himself or herself of the protection of [their country of nationality]. . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁸⁴ It is possible to establish eligibility for asylum based upon past persecution or a well-founded fear of future persecution if the persecution is on account of one of five enumerated grounds.⁸⁵

Persecution on account of membership in a social group is one of these grounds.⁸⁶ In *Matter of Acosta*, the BIA interpreted the phrase "persecution on account of membership in a particular social group" to mean:

Persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis. However, whatever the common characteristic that defined the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.⁸⁷

83. See Immigration and Nationality Act §208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(i) (2009).

84. *Id.* §101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2009).

85. *In re Chen*, 20 I. & N. Dec. 16 (BIA 1989).

86. See DHS Supplemental Brief at 7, *Matter of L-R*, (Board of Immigration Appeals Apr. 13, 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>; see also *Karouni v. Gonzales*, 399 F.3d 1163, 1171-72 (9th Cir. 2005) (finding that all alien homosexuals are part of a particular social group); *Vumi v. Gonzales*, 502 F.3d 150, 154-55 (2d Cir. 2007) (recognizing membership in a nuclear family as a social group).

87. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). See also, e.g., *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (defining social group with immutable characteristics such as gender, youth, member-

To obtain asylum based on this ground, an applicant must: (1) specify the particular social group; (2) show that he or she is a member of that group; and (3) show that he or she has a well-founded fear of persecution based on his or her membership in that group.⁸⁸ Traditionally, victims of domestic violence seeking asylum, such as Ms. Alvarado, attempt to formulate their claims upon persecuted social group grounds.

2. *A Painful Past*

On October 28, 2009, in a one-paragraph supplemental filing in Ms. Alvarado's case, DHS stated that Ms. Alvarado was "eligible for asylum" and that she "merits a grant of asylum as a matter of discretion," thereby ending more than a decade of litigation in her case.⁸⁹ In 1996, an IJ found Ms. Alvarado credible and granted her asylum based on persecution she feared because of her "membership in a particular social group of 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.'"⁹⁰ Nevertheless, three years later, the BIA reversed the IJ's decision, finding that Ms. Alvarado's social group formulation failed because, although Ms. Alvarado was clearly a member of that group, she did not demonstrate how the group's characteristics were understood by members of her society nor had she proven that "male oppressors see their victimized companions as part of this group."⁹¹ In a telling statement, the BIA declared that "[t]he solution to [Ms. Alvarado's] plight does not lie in our asylum laws as they are currently formulated" and instead recommended that she seek relief from removal under a separate section of law.⁹²

On January 19, 2001, Attorney General Reno vacated the BIA's decision and directed the Board on remand to stay reconsideration until after the publication of proposed regulations that sought to clarify the definitions of persecution and membership in a particular social group.⁹³ On February 21, 2003, Attorney General Ashcroft certified the Board's decision for review, but remanded the case on January 19, 2005, again directing the Board to reconsider its decision "in light of the final rule."⁹⁴ The proposed rules never materialized, and Ms. Alvarado's asylum claim and those of countless other victims of domestic violence were placed on hold pending a decision in Ms. Alvarado's case. It was not until September 25, 2008, that the presiding Attorney General lifted the stay imposed on the BIA and remanded the case for reconsideration of the issues presented by asylum claims based on domestic violence.⁹⁵

ship in a particular tribe, and opposition to female genital mutilation); *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006) (stating that "a past experience is by its very nature, immutable, as it has already occurred, and cannot be undone").

88. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

89. See DHS Response to the Respondent's Supplemental Filing of Aug. 18, 2009 at 1; *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008).

90. *Matter of R-A-*, 22 I. & N. Dec. 906, 911 (BIA 1999) (citing Immigration Judge Decision of Sept. 20, 1996).

91. *Id.* at 918.

92. *Id.* at 928.

93. *Matter of R-A-*, 22 I. & N. Dec. 906 (A.G. 2001).

94. *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).

95. *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008).

3. *Time for Change*

In an April 2009 supplemental brief, submitted to the BIA in a separate asylum case involving an abused woman from Mexico, the DHS laid the groundwork for its decision in Ms. Alvarado's case.⁹⁶ The government offered for the first time "alternative formulations of 'particular social group' that *could*, in appropriate cases, qualify aliens for asylum or withholding of removal."⁹⁷ The formulations serve as guidelines for practitioners and advocates seeking to define their client's social group.

According to DHS, a particular social group is "best defined in light of the evidence about how the respondent's abuser and her society perceive her role within the domestic relationship."⁹⁸ The key is to identify: (1) the characteristics the persecutor targeted in choosing his victim;⁹⁹ (2) the immutability of the applicant's status within the domestic relationship or the constraints that made it impossible for the victim to leave the relationship;¹⁰⁰ and (3) the social perceptions in that particular country regarding domestic violence.¹⁰¹ In other words, applicants must establish that their persecutors viewed them as subordinates and that this behavior was socially acceptable.¹⁰² The brief warns against social group formulations that are "impermissibly circular" or those that "are centrally defined by the existence of the abuse they fear."¹⁰³ Ultimately, the brief marks an important change in the government's traditional stance towards social group asylum claims and proposes that victims of domestic violence may form part of a cognizable social group. In any case, DHS's position is a welcomed development for abused foreign nationals seeking safe haven in the United States.

96. See DHS Supplemental Brief, *supra* note 86.

97. *Id.* at 5 (emphasis added).

98. *Id.* at 14.

99. *Id.* at 15.

100. *Id.* at 16.

101. *Id.* at 14.

102. *Id.* at 15.

103. *Id.* at 6 (noting that "[t]o allow such circularity in defining a particular social group - individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution-would not be true to the refugee definition in U.S. Law and the treaties on which it is based . . .").