Immigration

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During the January 1, 2013 to December 31, 2013 survey period, courts in the Eleventh Circuit decided hundreds of cases affecting immigration law. The following is a discussion of some of those decisions that clarified important issues pertaining to immigration law in the Eleventh Circuit.

I. REVIEWING FACTUAL DETERMINATIONS IN ASYLUM CASES

The Immigration and Nationality Act (INA)[1] is clear: the Board of Immigration Appeals (BIA) may not apply a de novo standard of review when considering the findings of fact of an Immigration Judge (IJ).[2] One of the primary issues confronted by the United States Court of Appeals for the Eleventh Circuit was whether an IJ's determination of the likelihood of a future event is a determination of law that could be correctly reviewed de novo by the BIA.[3] The court clearly established that the BIA cannot review such a determination de novo without engaging in "factfinding in the course of deciding appeals"—an action expressly barred by the INA.[4]

Twice in as many months, the Eleventh Circuit held that the BIA's de novo review of the issue of whether a respondent seeking asylum has a

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1. 8 U.S.C. §§ 1101-1537 (2012).

2. 8 C.F.R. § 1003.1(d)(3)(i) (2013) ("The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").

3. *See, e.g.*, Zhou Hua Zhu v. U.S. Att'y Gen., 703 F.3d 1303 (11th Cir. 2013).

4. *Id.* at 1314 (quoting 8 C.F.R. § 1003.1(d)(3)(iv)).

well-founded fear of persecution was improper.[5] In both cases, the BIA erred in its determination that future persecution was a question of law and thus reviewable de novo on appeal.[6] In *Zhou Hua Zhu v. United States Attorney General*,[7] the court held that the finding of the IJ—that it was reasonably possible that a Chinese citizen returned to China would be forcibly sterilized—was a factual determination and therefore impermissibly reviewed de novo by the BIA.[8] Just over a month later, the court drove the point home even further, holding that the BIA had overstepped the statutorily set limitations on its review by overturning the IJ's factual determination regarding the likelihood of future persecution following a shooting in the Colombian respondent's home and several subsequent death threats.[9] Due to the limitations placed on the BIA's ability to overturn an IJ's determination that the respondent in an asylum case has a well-founded fear of future persecution, the importance of making compelling and persuasive arguments before the IJ is substantial.

II. DETERMINING WHAT IS AN AGGRAVATED FELONY

Under the INA, an alien who commits an aggravated felony is removable.[10] Though the definition of "aggravated felony" is absent from the common law, the INA lists numerous offenses that constitute an aggravated felony.[11] Thus, the issue is whether the offense committed by the individual rises to the level of an aggravated felony within the meaning of the statute.[12]

In February 2013, the Eleventh Circuit held that a shoplifting conviction under the Criminal Code of Georgia[13] did not categorically establish an aggravated felony, and because the record of conviction also did not establish that the petitioner committed an aggravated felony, his offense failed to warrant his removal on grounds that it was an

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5. *Id.* at 1308; Erazo v. U.S. Att'y Gen., 506 F. App'x 938, 942-43 (11th Cir. 2013). Both cases held that the BIA conducts de novo review of the legal findings of the IJ, but factual determinations are to be reviewed applying a clear-error standard. *Zhou Hua Zhu*, 703 F.3d at 1308; *Erazo*, 506 F. App'x at 944.

6. *Zhou Hua Zhu*, 703 F.3d at 1314; *Erazo*, 506 F. App'x at 943-44.

7. 703 F.3d 1303 (11th Cir. 2013).

8. *Id.* at 1314.

9. *Erazo*, 506 F. App'x at 942.

10. 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

11. 8 U.S.C. § 1101(a)(43).

12. *See generally* Ramos v. U.S. Att'y Gen., 709 F.3d 1066 (11th Cir. 2013); Jaggernauth v. U.S. Att'y Gen., 432 F.3d 1346 (11th Cir. 2005).

13. O.C.G.A. tit. 16 (2012).

aggravated felony.[14] In *Ramos v. United States Attorney General*,[15] the Eleventh Circuit overturned the BIA's holding that a Filipino national and lawful permanent resident of the United States was removable due to a shoplifting conviction, which the BIA held to be an aggravated felony and thus grounds for his removal under the INA.[16] Ramos successfully argued on appeal that the statutory definition of the Georgia theft offense, of which he was convicted, was divisible in that it punished some conduct that constituted theft under the federal statute but also punished conduct that did not qualify as theft.[17] The court held that "a conviction under the Georgia statute for shoplifting with intent to 'appropriat[e] merchandise to [one's] own use without paying for the same,'" went beyond the federal definition of theft and was rightly classified as divisible.[18]

The charging document is the next (and last) means by which the government can demonstrate that the offense committed is categorically theft.[19] A holding that the charging document categorically fits the INA's definition of theft would merit an aggravated felony classification; however, in Ramos's case, the charge merely restated the divisible Georgia statute, which the court had previously defined as falling short of a theft offense conviction.[20]

This same issue arose later in the year in *Donawa v. United States Attorney General*,[21] where a Florida man, who conceded he was subject to deportation, argued that he was not an aggravated felon under the INA.[22] Importantly, a conviction for an aggravated felony disqualifies the individual from discretionary relief under the INA, such as cancellation of removal.[23] The Eleventh Circuit applied its recently adopted test from *Ramos* and held that the appellant's conviction for cannabis possession with intent to sell, which included both misdemean-

14. *Ramos*, 709 F.3d at 1072.
15. 709 F.3d 1066 (11th Cir. 2013).
16. *Id.* at 1068, 1072.
17. *Id.* at 1069.
18. *Id.* at 1071 (alterations in original) (quoting O.C.G.A. § 16-8-14(a)).
19. *Id.* at 1072.
20. *Id.*
21. 735 F.3d 1275 (11th Cir. 2013).
22. *Id.* at 1279.
23. *Id.* "The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States" if the alien, among other requirements, has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(b)(1).

or offenses as well as felony offenses, was divisible and consequently not an aggravated felony under the INA.[24]

The successful argument put forward by the appellants in *Ramos* and *Donawa* will encourage other individuals facing deportation to seek equitable relief even though they may have committed what would previously have been classified as an aggravated felony that would bar them from equitable relief under the INA. It is yet to be seen, but anticipated that it may also drive the legislatures within the Eleventh Circuit to draft tighter criminal statutes to more cleanly mesh state and federal criminal law because of its import in this particular area of immigration law.

However, these decisions have not come without some pushback from the BIA and IJs. Both the BIA and each individual IJ is given discretionary authority to determine whether the offense of shoplifting is an offense of "moral turpitude"—disqualifying the individual from relief under the INA.[25] In *In re Rivas*,[26] the BIA used this rationale to deny eligibility for a respondent who argued that his shoplifting conviction did not rise to the level of an aggravated felony under the Eleventh Circuit's holding in *Ramos*.[27] It seems clear that IJs and the BIA will follow the Eleventh Circuit's approach to this issue. However, if intent is included in the charging document, it may be found that the respondent has committed a crime of moral turpitude, making the respondent ineligible for relief under the INA.[28]

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24. *Donawa*, 735 F.3d at 1278, 1280, 1281-82.

25. *See In re* Rivas, 2013 BIA LEXIS 13, *12-13 (2013).

> The issue in both *Ramos* and *Jaggernauth*, was whether the petitioners were removable for aggravated felony theft offenses, and neither decision addressed whether the petitioners were removable for crimes involving moral turpitude, which is the issue in the case before us. Furthermore, *Jaggernauth* was decided prior to the respondent's hearing before the Immigration Judge and therefore could have been raised at that time.

Id. at *13.

26. 2013 BIA LEXIS 13 (2013).

27. *Id.* at *12-13.

28. *See In re* Edmond, 2013 WL 4041239, at *1-2 (BIA July 29, 2013). The BIA applied the categorical approach in its evaluation of Edmond's offense and ultimately concluded that without an intent element the offense could not rise to the level of moral turpitude. *Id.*

III. MOTION TO REOPEN FILING DEADLINE SUBJECT TO EQUITABLE TOLLING

In *Avila-Santoyo v. United States Attorney General*,[29] the Eleventh Circuit, sitting en banc and overruling its prior precedent, held that the ninety-day deadline following a removal order to file for reopening could be equitably tolled.[30] The INA clearly states that the respondent has ninety days from the date of entry of a final administrative order of removal to file the motion to reopen, unless one of the statutory exceptions is met.[31] This seems clear enough, but in light of recent case law from the United States Supreme Court, the Eleventh Circuit was prompted to re-evaluate its once hard-line stance.[32] Importantly, the Eleventh Circuit held that the ninety-day deadline is not jurisdictional—this coincides with the INA.[33] Additionally, the court noted that because the ninety-day deadline is not "unusually generous," equitable tolling may (and likely will be) appropriate in some situations.[34] The Eleventh Circuit made note of the Supreme Court's interpretation that the inclusion of several stated exceptions to the INA's ninety-day filing rule does not mean that Congress intended to preempt all other equitable means of tolling.[35] The BIA has applied the holding in *Avila-Santoyo* to mean that an equitable tolling exception requires the following: first, a showing of a diligent pursuit of the individual's rights and, second, some extraordinary circumstance that prevented compliance with the ninety-day filing deadline.[36] However, it should be noted that the BIA has been wary of permitting a claim of ineffective assistance of counsel to suffice for the "exceptional circumstances" standard set in *Avila-Santoyo*.[37]

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29. 713 F.3d 1357 (11th Cir. 2013).

30. *Id.* at 1363-64.

31. 8 U.S.C. § 1229a(c)(7)(C)(i) ("Except as provided in this subparagraph, the motion to reopen shall be filed within [ninety] days of the date of entry of a final administrative order of removal.").

32. *See, e.g.*, Holland v. Florida, 560 U.S. 631 (2010) (holding that "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling").

33. *Avila-Santoyo*, 713 F.3d at 1362. "The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a) (2013).

34. *Avila-Santoyo*, 713 F.3d at 1363.

35. *Id.* at 1363-64.

36. *In re* Arroliga, 2013 WL 3899846, at *1 (BIA July 19, 2013).

37. *See, e.g., In re* Benjamin-Stubbs, 2013 WL 5872196, at *1 (BIA Oct. 17, 2013) (holding that the litigant failed to act in due diligence though she likely suffered from ineffective counsel).

Several months later, in *Ruiz-Turcios v. United States Attorney General*,[38] the Eleventh Circuit faced a nuanced issue raised by its prior decision in *Avila-Santoyo*—whether equitable tolling was permissible to appellants who filed a motion to reopen more than once, as the INA permited.[39] The appellant presented a seemingly reasonable issue of law for the court to decide; just as 8 U.S.C. § 1229a(c)(7)(C)(i) clearly sets out the ninety-day filing rule and its exceptions, 8 U.S.C. § 1229a(c)-(7)(A) clearly states that respondents may only file one motion to reopen following their removal order.[40] Nevertheless, the court held that the BIA failed to determine first whether the one-motion rule is a jurisdictional issue (the court of appeals first held in *Avila-Santoyo* that the ninety-day rule did not have jurisdictional implications).[41] It may seem that the court of appeals "passed the buck" in *Ruiz-Turcios*, but according to the court's own opinion that is not the case. The court stated, "Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."[42]

The BIA has looked to the decision in *Ruiz-Turcios* for guidance when evaluating whether it is appropriate to equitably toll the time limit for a motion to reopen. One of the common justifications brought to invoke equitable tolling is a claim of ineffective assistance of counsel. However, if all of the elements of an ineffective-assistance-of-counsel claim are not met, the BIA has not been willing to forgive noncompliance with the ninety-day filing rule.[43] The BIA has also been willing to accept the discretionary authority bestowed upon it by the *Ruiz-Turcios* decision—if an IJ desires to hear a motion to reopen, even though the ninety-day filing deadline has passed, the IJ has the discretionary authority to do so under *Ruiz-Turcios*.[44]

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38. 717 F.3d 847 (11th Cir. 2013).

39. *Id.* at 850.

40. 8 U.S.C. § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen . . . .").

41. *Avila-Santoyo*, 713 F.3d at 1361.

42. *Ruiz-Turcios*, 717 F.3d at 850 (quoting INS v. Orlando Ventura, 537 U.S. 12, 16 (2002)).

43. An ineffective-assistance-of-counsel claim is not valid unless all of the elements are met, including the following: (1) filing of an affidavit by the appellant's attorney attesting to the prior counsel's agreement to represent the client; (2) filing of a formal complaint with the appropriate state bar association; and (3) allowing the prior counsel a chance to respond. *See In re* Roberts, 2013 WL 3899814, at *1 (BIA July 9, 2013); *In re* Lozada, 1988 BIA LEXIS 19 (1988).

44. For example, subsequent to *Ruiz-Turcios*, the BIA held that the presence of new facts in a case warranted an equitable tolling of a motion to reopen the filing deadline. *In*

IV. BIA HOLDS, AND ELEVENTH CIRCUIT AFFIRMS, STATUTORY BAR DOES NOT EXEMPT SUPPORT GIVEN TO TERRORIST ORGANIZATION UNDER DURESS

The Eleventh Circuit affirmed the BIA's holding that the INA does not make an exception to the material-support bar for aiding a terrorist organization, even when the support was offered involuntarily or under duress.[45] Section 1182 of the INA[46] deals with the specific acts and conditions that disqualify individuals from receiving relief from negative immigration action. This section also states that an individual who knows or reasonably should have known such acts would render aid to a terrorist organization is barred from relief under the INA.[47] The court justified its hard-line stance applying the well-known canon of statutory interpretation known as *expressio unius est exclusio alterius*; the court noted that the INA lists specific exceptions for individuals who are barred on account of their affiliation with a totalitarian party.[48] In *Alturo v. United States Attorney General*,[49] the court took special care to note that every circuit that had addressed the issue has held that the INA does not contain an implied exception to the material-support bar for support provided involuntarily or under duress.[50]

In October 2013, the court restated its holding from *Alturo* and held that a Colombian national was ineligible for withholding of removal because he rendered aid to a terrorist organization under the meaning of the INA when he provided members of the Revolutionary Armed

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re Tiwari, 2013 WL 4041257, at *1 (BIA July 31, 2013).

45. Alturo v. U.S. Att'y Gen., 716 F.3d 1310, 1314 (11th Cir. 2013).

46. 8 U.S.C. § 1182.

47. 8 U.S.C. § 1182(a)(3)(B)(i)(I), (a)(3)(B)(iv)(VI). Section 1182(a)(3)(B)(iv)(VI) of the INA states that an alien is ineligible for asylum and withholding of removal if

> the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training . . . to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization . . . .

8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

48. *Alturo*, 716 F.3d at 1314 (contrasting the language of 8 § 1182(a)(3)(D)(ii), which expressly states an exception for involuntary support of a totalitarian regime, with 8 U.S.C. § 1182(a)(3)(B)(i), which states the exceptions from the material-support bar but does not include involuntary support). *See also* BLACK'S LAW DICTIONARY 661-62 (9th ed. 2009) (defining *expressio unius est exclusio alterius* as a "canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative").

49. 716 F.3d 1310 (11th Cir. 2013).

50. *Id.* at 1314.

Forces of Colombia (FARC) air transportation, even though he did so under duress.[51] It is clear that rendering aid to a terrorist organization, as set out in the INA, is a disqualifying act with no implied exception.[52] The Eleventh Circuit has repeatedly stated that should Congress intend to afford an exemption for this particular subsection, it could enact a specific exception, as it has for other actions making individuals inadmissible under the INA.[53]

V. ADVANCE PAROLE EXIT DOES NOT QUALIFY AS "DEPARTURE"

The Eleventh Circuit also affirmed a key BIA holding, clarifying that an individual who leaves the country after having received advance parole is not disqualified from adjusting his status because advance parole does not meet the statutory definition of "departure" under the INA.[54] The court of appeals affirmed the BIA's "common sense" reasoning that individuals who had obtained advance parole to travel temporarily outside the country should not be disqualified from the opportunity to adjust their status.[55]

This is one area of the law that was logically explained by the BIA and coincides with realistic policy application. It never made sense to grant individuals permission to leave the country after they had gone through the proper channels to receive that permission, and then to punish them later when they seek further relief that they may be entitled to under the INA. This is an important clarification first adopted by the BIA and justly endorsed by the Eleventh Circuit.

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51. Bravo Benitez v. U.S. Att'y Gen., 2013 WL 5750618, at *1, *2 (11th Cir. Oct. 24, 2013). In *Bravo Benitez,* the court stated, "Bravo's argument that his support was de minimis rather than material is also without merit. The plain language of the material support bar lists 'transportation' as an example of material support, and Bravo provided the FARC with air transportation." *Id.* at *2 (citing 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

52. *See supra* note 47.

53. *E.g., Alturo,* 716 F.3d at 1314 ("While the result might reasonably be viewed as harsh, we are constrained by the language Congress chose to use and the BIA's reasonable construction of that language. It is up to Congress, not the courts, to correct any perceived inequity.").

54. Ortiz-Bouchet v. U.S. Att'y Gen., 714 F.3d 1353, 1357 (11th Cir. 2013).

> In *[In re] Arrabally*, which was decided while this appeal was pending before this Court, the BIA held "that an alien who has left and returned to the United States under a grant of advance parole has not made a 'departure . . . from the United States' within the meaning of [§ 1182(a)(9)(B)(i)(II)]."

Id. at 1357 (second and third alterations in original) (quoting *In re* Arrabally, 2012 BIA LEXIS 12, at *17 (2012)).

55. *Id.* The BIA clarified this point after *Arrabally* had already been set for appeal. *Id.* The court held that the respondent was eligible for relief under 8 U.S.C. § 1182(a)(9)(B)(i)(II) because she had left the United States after receiving advance parole. *Id.*

There are, of course, many other opinions and decisions that deserve mention in a survey article. These chosen individual cases show a trend in what some would call a "liberalization" of the Eleventh Circuit in its immigration decisions, and virtually all of them are welcomed by the attorneys of the private immigration bar and their clients.

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