IMMIGRATION LAW: 2010-2011 FIFTH CIRCUIT CASE LAW UPDATE

David N. Strange[*] *and Arslan S. Umarov*[**]

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* David N. Strange teaches immigration law at the Texas Tech University School of Law and is also a partner at Whittenburg, Whittenburg, Stein & Strange, P.C.

** Arslan Umarov is a graduate of the Texas Tech University School of Law.

I. INTRODUCTION

The Fifth Circuit Court of Appeals ruled on 343 cases involving immigration law during the July 1, 2010 to June 30, 2011 survey period.[1] The circuit courts of appeal are the first level of Article III-court review of administrative decisions relating to immigration matters,[2] and most rulings are mere confirmations of the decisions by administrative bodies.[3] The Fifth Circuit, however, did decide on a few notable issues that are discussed in this Survey. For convenience, references to the Immigration and Nationality Act are abbreviated "INA" and references to the Board of Immigration Appeals are abbreviated "BIA."

Part A of this Survey discusses a contested and somewhat complicated case involving reimbursements for H–2B workers. Part B discusses two important cases affecting asylum and withholding of removal. Part C discusses the continuing impact of the U.S. Supreme Court's holding in *Carachuri-Rosendo*. Finally, Part D discusses a case involving jurisdiction after an alien's departure from the United States while a habeas petition is pending.

II. SUMMARY OF NOTABLE FIFTH CIRCUIT IMMIGRATION CASES

A. H–2B Workers and Reimbursement

1. Background

In 2008, the Department of Homeland Security and the Department of Labor issued new regulations on the issue of H–2B workers and reimbursement.[4] Before the new regulations took effect, H–2B nonimmigrant temporary workers had to invest into upfront costs such as travel, visa, and recruitment expenses before coming to the United States for work.[5] The following case deals with employment prior to the issuance of the new regulations.

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1. Our research into the number of cases was conducted manually on Westlaw using keywords and Boolean logic.

2. 8 U.S.C. § 1252(b)(2); 28 U.S.C. § 2342; *see also, e.g.*, Elia v. Gonzales, 431 F.3d 268, 272-73 (6th Cir. 2005) (discussing the circuit court's direct review of deportation orders).

3. *See, e.g.*, Nolos v. Holder, 611 F.3d 279, 286 (5th Cir. July 2010).

4. *See, e.g.*, 73 Fed. Reg. 78,052 (Dec. 19, 2008) (issuing changes to 20 C.F.R. § 655.22(g)(2) on December 19, 2008, with new rules going into effect on January 18, 2009).

5. Castellanos-Contreras v. Decatur Hotels, L.L.C., 622 F.3d 393, 400 (5th Cir. Oct. 2010) (en banc).

2. Castellanos-Contreras v. Decatur Hotels, L.L.C.[6]

a. Facts

A group of H–2B hotel workers sued its employer alleging violations of the Fair Labor Standards Act (FLSA).[7] Specifically, the workers alleged that the federal law required the employer "to reimburse them for their travel expenses, visa fees, and recruitment payments during their first week of work, failing which, such sums must be deducted from the first week's wage before calculating whether a minimum wage, under the FLSA, was paid."[8] The workers argued that these deductions took their pay below the minimum wage.[9] The employer argued that it was not required "to reimburse the travel, visa, and recruitment expenses in question."[10] The case arrived to the Fifth Circuit on an interlocutory appeal, but the court decided the case on its merits.[11]

b. Decision

Other than questions of jurisdiction, at issue was whether the employer had to reimburse inbound travel expenses, visa expenses, and recruitment costs.[12] Unusually, the case was heard en banc before fourteen circuit court judges.[13] The court held, in an 8–6 decision, that the employer was not required to reimburse the workers any fees at issue.[14] The court reasoned that there was no statute or regulation expressly stating "that inbound travel expenses must be advanced or reimbursed by an employer of an H–2B worker."[15] Similarly, the court reasoned that no law or regulation required, at the time in question, the employer to bear the cost of a worker's expenses, such as the visa application fee.[16] Additionally, the court refused to accept the workers' argument that inbound travel and visa expenses are "specifically

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6. *Id.* at 396.
7. *Id.* at 396-97.
8. *Id.*
9. *Id.* at 397.
10. *Id.*
11. *Id.* at 396.
12. *Id.* at 400.
13. *Id.* at 396.
14. *Id.* at 404.
15. *Id.* at 400. *But see* 20 C.F.R. § 655.22(g)(2) (promulgated after the time in question) (requiring employers to contractually forbid "any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2B workers to seek or receive payments from prospective employees"); 8 C.F.R. § 214.2(h)(6)(i)(B) (promulgated after the time in question) ("As a condition of approval of an H–2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H–2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H–2B employment . . . .").
16. *Decatur Hotels, L.L.C.*, 622 F.3d at 400, 401 n.9 (referring to 8 C.F.R. § 214.2(h)(6)(i)(B) and 20 C.F.R. § 655.22(g)(2): "We express no opinion as to how our decision today affects those new regulations.").

required for performance of the employer's particular work," and hence that these expenses constitute "tools of the trade" pursuant to FLSA.[17] Thus, the workers unsuccessfully argued "that their payment of these expenses are 'de facto deductions' from their wages."[18] Additionally, the majority distinguished its decision from the Eleventh Circuit's holding in *Arriaga*.[19] The court explained that in *Arriaga*, the matter dealt with H–2A workers, not H–2B workers.[20] Finally, the recruitment costs did not have to be reimbursed because the court concluded these costs had been apportioned to each party appropriately.[21]

3. Analysis

Arguably, the holding in this case is very much pro-employer because with this decision, employers are not required to reimburse the inbound travel, visa, and recruitment expenses for their H–2B workers.[22] Consequently, the holding is also pro-immigrant labor because with lower labor costs, the demand for immigrant labor remains high. On the other hand, the dissent would have increased labor costs for H–2B workers and arguably would have lowered the demand for immigrant labor.[23] So, although this particular group of immigrant laborers lost its case for reimbursement,[24] immigrant laborers as a whole arguably won greater job opportunity. In the end, however, the new regulations gut much of the importance of the court's holding in *Castellanos-Contreras*, but it is still a notable decision as potentially persuasive authority for pending litigation in other circuits.[25]

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17. *Id.* at 400 (quoting 29 C.F.R. § 531.35).

18. *Id.*

19. *See id.* at 402-03 (citing Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002)).

20. *Id.* at 403. *But see, e.g.*, *id.* at 405 (8–6 decision) (Dennis, J., dissenting) ("In its erroneous ruling, the majority opinion creates a split between us and the Eleventh Circuit and establishes a circuit precedent that permits employers to shift their costs in recruiting foreign labor to their temporary foreign worker recruits; this allows those employers to effectively reduce temporary foreign workers' wages below the nationally established minimum wage floor and creates a competitive disadvantage for other employers who pay legitimate wages at or above that floor."); Salazar-Martinez v. Fowler Bros., Inc., 781 F. Supp. 2d 183, 195 (W.D.N.Y. 2011) (citing *Arriaga*, 305 F.3d 1228) ("This Court also finds that the reasoning in the Eleventh Circuit's decision in *Arriaga* and the Dissent in the Fifth Circuit's decision in *Decatur Hotels* are persuasive on this issue.").

21. *Decatur Hotels, L.L.C.*, 622 F.3d at 404.

22. *See* 73 Fed. Reg. 78,052 (Dec. 19. 2008) (issuing changes to 20 C.F.R. § 655.22(g)(2) on December 19, 2008, with new rules going into effect on January 18, 2009).

23. *See Decatur Hotels, L.L.C.*, 622 F.3d at 404-07 (Dennis, J., dissenting).

24. *Id.* at 404 (majority opinion).

25. *Cf. id.* at 393; *Salazar-Martinez*, 781 F. Supp. 2d at 195 (citing *Arriaga*, 305 F.3d 1228) ("This Court also finds that the reasoning in the Eleventh Circuit's decision in *Arriaga* and the Dissent in the Fifth Circuit's decision in *Decatur Hotels* are persuasive on this issue.").

B. Asylum and Withholding of Removal: Statutory Interpretation

1. Background

Both asylum and withholding of removal are forms of relief that protect an alien from forcible return to a country where persecution of the alien has occurred or may occur.[26] The scope of relief available under withholding of removal is somewhat limited compared to the relief offered by the asylum provisions. Asylum is broader in impact and affords the alien the opportunity to include his spouse and minor children in the asylum process and to seek employment authorization; it also includes a possibility to adjust the alien's status to lawful permanent residency.[27] Withholding of removal, on the other hand, as a more limited form of relief, does not allow for inclusion of the alien's family members and does not lead to lawful permanent residency.[28]

2. Hakim v. Holder

a. Facts

In 1988, Azmi Hakim, a citizen of Israel, was admitted into the United States as an immigrant.[29] In 2000, Hakim was convicted of various offenses, and then in 2003, Hakim was convicted of tax fraud and money laundering.[30]

In July 2006, the Department of Homeland Security initiated removal proceedings because of the money laundering conviction.[31] At a hearing in May 2007, the immigration judge (IJ) held that Hakim was removable because of his previous convictions.[32] Hakim then sought relief under withholding of removal and the Convention Against Torture (CAT).[33] "[I]n October 2007, Hakim, a Greek Orthodox Christian, alleged that Muslims persecuted him and members of his family in Israel."[34] The IJ rejected the CAT claim because "Hakim did not show that the government of Israel had acquiesced to [the] torture of [Christians] by Muslims in Israel."[35] Hakim timely appealed the Fifth Circuit's denial of relief under CAT after the BIA affirmed the IJ's decision.[36]

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26. *See* 8 U.S.C. §§ 1158, 1231(b)(3). The term "alien" is defined in the INA at § 101(a)(3) and "means any person not a citizen or national of the United States." INA § 101(a)(3); 8 U.S.C. § 1101(a)(3).

27. 8 U.S.C. §§ 1158, 1159; 8 C.F.R. § 1209.2.

28. *See*, *e.g.*, 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16; Arif v. Mukasey, 509 F.3d 677, 680-82 (5th Cir. 2007) (wife of withholding applicant does not obtain a derivative status); STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 893 (5th ed. 2009).

29. Hakim v. Holder, 628 F.3d 151, 152 (5th Cir. Dec. 2010).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

b. Decision

At issue was whether the BIA applied the correct legal standard to determine if Hakim was eligible for relief under CAT.[37] The court held that the standard articulated by the BIA in *Matter of S-V-* is inadequate because it "does not include the willful blindness required for CAT protection."[38] The court explained that "[t]o obtain protection under the CAT, an alien must demonstrate that, if removed to a country, it is more likely than not he would be tortured by, or with the acquiescence of, government officials acting under the color of law."[39] Further, the court reasoned that it already held that "'acquiescence' is satisfied by a [foreign] government's willful blindness of torturous activity."[40] Therefore, the court clarified for the BIA that the standard in *Matter of S-V-* is inadequate by itself to determine whether a foreign government has acquiesced to acts of torture.[41] The case was then remanded to the BIA to apply the proper standard.[42]

3. Demiraj v. Holder

a. Facts

In October 2000, Rudina Demiraj and her son entered the United States without inspection.[43] On September 28, 2001, shortly before the statutory one-year deadline to file, Demiraj filed an application for asylum, withholding of removal, and protection under CAT.[44] To support her application, Demiraj showed that she was the wife of a material witness in a criminal investigation against a known human smuggler from Albania.[45] When her husband returned to Albania, the smuggler kidnapped, beat, and shot the husband.[46] Demiraj argued that she was a member of a particular social group.[47] At her removal proceeding, an IJ denied all forms of relief to Demiraj.[48] After numerous appeals and refilings, the BIA finally denied appellate relief in October 2008.[49]

37. *Id.* at 155.
38. *See id.* at 156-57 (citing Matter of S-V-, 22 I. & N. Dec. 1306, 1312 (BIA 2000)).
39. *Id.* at 155 (citing 8 C.F.R. § 208.16(c)(2)).
40. *Id.* (citing Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354 (5th Cir. 2002)).
41. *Id.* at 156-57.
42. *Id.* at 157.
43. Demiraj v. Holder, 631 F.3d 194, 196 (5th Cir. Jan. 2011).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 198.
48. *Id.* at 196.
49. *Id.* at 197.

b. Decision

The court upheld the BIA.[50] The court reasoned that Demiraj was not entitled to either asylum or withholding of removal because Demiraj had failed to demonstrate that any persecution she "might suffer in Albania was 'on account of' [her] membership in the Demiraj family within the meaning of the statute and regulation."[51] Further, the court explained that any future persecution that Demiraj might suffer would be because of her husband and not because of membership in a particular social group, to wit, her family membership.[52] In other words, hurting her would hurt her husband.[53] The court categorized such persecution as "a quintessentially personal motivation, not one based on a prohibited reason under the INA."[54]

Importantly, the court distinguished the facts of this case from the Seventh Circuit's holding in *Torres v. Mukasey*.[55] In *Torres*, the Seventh Circuit held that the "petitioner had successfully demonstrated persecution on account of membership in his family."[56] The Fifth Circuit, however, held that the Albanian smuggler "was motivated by personal revenge"—"not because he has a generalized desire to hurt the Demiraj family as such."[57] The holding drew a somewhat lengthy dissent from Circuit Judge Dennis.[58] In his dissent, Judge Dennis stated that "[f]amily membership is a characteristic that a person either cannot change (if he or she is related by blood) or should not be required to change (if he or she is related by marriage)."[59] Judge Dennis would have reversed the BIA and remanded the finding that Demiraj's marriage put her into a particular social group.[60]

4. Analysis

The Fifth Circuit deviated from the Seventh Circuit's decision in *Torres*.[61] In *Torres*, the alien claimed that he was persecuted as a soldier "in the Honduran army because of his membership in a social group—namely, his family, which included four older brothers, three of whom were military deserters."[62] The court distinguished that the persecutors resented the entire family collectively in *Torres*, whereas in the present matter, the persecutor was

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50. *Id.* at 201.
51. *Id.* at 198.
52. *Id.* at 199.
53. *See id.*
54. *Id.*
55. Torres v. Mukasey, 551 F.3d 616, 622 (7th Cir. 2008).
56. *Demiraj*, 631 F.3d at 199 n.6 (citing *Torres*, 551 F.3d at 622).
57. *Id.*
58. *See id.* at 201-03 (Dennis, J., dissenting).
59. *Id.* at 203.
60. *Id.*
61. *See supra* notes 55-57 and accompanying text.
62. Torres v. Mukasey, 551 F.3d 616, 621 (7th Cir. 2008).

motivated by personal revenge and only sought to harm Demiraj as a way to get at her husband.[63] This may be a subtle distinction, but the court felt it enough to reject a claim based on a social group.[64]

C. Continuing Impact of Carachuri-Rosendo v. Holder

1. Background

The U.S. Supreme Court revisited the INA's definition of "aggravated felony" in *Carachuri-Rosendo v. Holder*.[65] In *Carachuri-Rosendo*, a lawful resident alien faced removal after he committed two misdemeanor drug possession offenses.[66] The Government initiated removal proceedings after the second misdemeanor offense.[67] At issue was whether the second simple drug possession was an aggravated felony when committed after another simple drug possession offense.[68] The U.S. Supreme Court reversed the Fifth Circuit decision and held that "Carachuri-Rosendo, and others in his position, may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal."[69]

2. Section 212(c) Relief After Carachuri-Rosendo*:* Enriquez-Gutierrez v. Holder

a. Facts

Enriquez, a citizen of Mexico, became a lawful permanent resident of the United States in 1976.[70] In 1980, Enriquez was convicted of an alien smuggling-related offense.[71] Next, he was convicted in 1990 for felony delivery of marijuana, which led to deportation proceedings in 1991.[72]

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63. *See Demiraj*, 631 F.3d at 199 n.6.

64. *See id*.

65. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010).

66. *Id.* at 2580 ("[F]irst, possession of less than two ounces of marijuana . . . . For the second, possession without a prescription of one tablet of a common antianxiety medication . . . .").

67. *Id.*

68. *See id.*

69. *Id.* at 2589.

70. Enriquez-Gutierrez v. Holder, 612 F.3d 400, 402 (5th Cir. July 2010). This is a petition for the review of the BIA in its decision ordering deportation. *Id.*

71. *Id.*

72. *Id.* It is also important to note that before 1996, an alien previously admitted or who had previously made an entry was placed into deportation proceedings. LEGOMSKY & RODRIGUEZ, *supra* note 28, at 420. After 1996, the terminology changed; now an alien previously admitted is placed into removal proceedings (but charged with deportability under INA § 237). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

While his marijuana conviction resulted in deportation proceedings, Enriquez sought a waiver of deportation under former INA § 212(c).[73] After an IJ refused to grant Enriquez's waiver in May 1991, and the dismissal of an appeal of that decision in July 1994, Enriquez filed a motion seeking reconsideration and reopening of his case, but the motion sat pending until February 2002.[74] The BIA agreed to reopen Enriquez's deportation proceedings and remanded the case to an IJ, granting Enriquez an opportunity to establish that he merited § 212(c) relief despite the fact that it had been a decade since the original deportation proceeding.[75]

Complicating the case, in 1996, Congress restricted grants of § 212(c) relief and then repealed the provision altogether.[76] Despite its repeal in 1996, § 212(c) continues to be applied in certain removal proceedings.[77] Moreover, during the time that Enriquez's case was pending, Enriquez was convicted of two additional crimes.[78] In November 2005, the IJ rejected new argument and ordered that Enriquez be removed to Mexico.[79]

b. Decision

Enriquez had four challenges to the BIA's decision on which the court ruled. First, the court held that the 2001 cocaine conviction, although occurring after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), did not render Enriquez ineligible for a § 212(c) waiver in his 2004 deportation proceedings.[80] The court cited to the Second Circuit's decision in *Garcia-Padron*, which found that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRIRA

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73. *Enriquez-Gutierrez*, 612 F.3d at 402. Under former § 212(c), the Attorney General retained the discretion to permit aliens subject to deportation to remain in this country, as long as they "had maintained 'a lawful unrelinquished domicile of seven consecutive years' in the United States, had not been convicted of 'one or more aggravated felonies,' and had not 'served for such felony or felonies a term of imprisonment of at least 5 years.'" *Id.*; *see* 8 U.S.C. § 1182(c) (1994).

74. *Enriquez-Gutierrez*, 612 F.3d at 403.

75. *Id.*

76. *Id.* The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) placed new restrictions on the eligibility of certain aliens for waivers of deportation under § 212(c). *See* Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277. Shortly after the passage of AEDPA, Congress passed IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546. IIRIRA repealed § 212(c) and replaced it with INA § 240A, a more restrictive provision that only allows the Attorney General to "cancel" the removal of aliens if they have not been convicted of an aggravated felony. *See* 8 U.S.C. § 1182(c) (former INA § 212(c)); § 1229b (new INA § 240A); IIRIRA § 304(a)-(b), 110 Stat. at 3009-594-97; *Enriquez-Gutierrez*, 612 F.3d at 403.

77. *Enriquez-Gutierrez*, 612 F.3d at 403. The Supreme Court ruled in *INS v. St. Cyr* that IIRIRA's repeal of § 212(c) could not be retroactively applied to aliens who pled guilty before the passage of IIRIRA when those guilty pleas to deportable offenses may have been entered with the expectation of eligibility for a discretionary waiver of deportation. *Id.* (citing INS v. St. Cyr, 533 U.S. 289 (2001)).

78. *Id.* (explaining that Enriquez was convicted for possession of a firearm in violation of state law and possession of less than a gram of cocaine in 2001).

79. *Id.* at 405.

80. *Id.* at 408 (stating that Enriquez made his argument despite the fact that his conviction occurred after the passage of AEDPA and IIRIRA); *see supra* note 76.

did not restrict the availability of § 212(c) relief for an alien in deportation proceedings that began before the effective date of both statutes.[81] Importantly, following the reasoning of *Carachuri-Rosendo*, the court noted that Enriquez's 2001 cocaine conviction was not an aggravated felony, even though it was his second drug possession offense, because "he was not charged for recidivism on the basis of his earlier 1990 marijuana conviction."[82]

Second, the court held that the BIA went beyond its authority in reviewing the transcript of his April 2004 deportation hearing.[83] The court explained that "[t]he BIA is prohibited from engaging 'in factfinding in the course of deciding appeals'"; however, the BIA "may take 'administrative notice of commonly known facts such as current events or the contents of official documents' pursuant to 8 C.F.R. § 1003.1(d)(3)(iv)."[84]

Third, the court held that the BIA erred in determining that Enriquez stipulated that the § 212(c) waiver granted in his 2004 deportation proceedings would not cover his 2001 cocaine conviction.[85] The court found that the April 2004 transcript of Enriquez's deportation hearing unambiguously demonstrated that he did not stipulate to exclude his 2001 cocaine conviction from his § 212(c) waiver.[86]

Finally, Enriquez argued that, as a matter of law, the 2001 cocaine conviction was included within the IJ's 2004 decision to grant the waiver because Enriquez disclosed the conviction in his application for § 212(c) relief, pursuant to 8 C.F.R. § 1212.3(d).[87] The BIA did not rule on this issue because it erroneously concluded that Enriquez had stipulated that his 2001 cocaine conviction would not be covered by the § 212(c) waiver.[88] Accordingly, the court remanded the matter back to the BIA.[89]

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81. *Enriquez-Gutierrez*, 612 F.3d at 408; *see* Garcia-Padron v. Holder, 558 F.3d 196, 202-04 (2d Cir. 2009); *supra* note 76.

82. *Enriquez-Gutierrez*, 612 F.3d at 406 n.4 (citing Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580 (2010)) ("In *Carachuri-Rosendo*, the Supreme Court held that 'second or subsequent simple possession offenses are not aggravated felonies . . . when . . . the state conviction is not based on the fact of a prior conviction.'" (omissions in original)).

83. *Id.* at 410. Enriquez argued that the transcript was not made part of the record before the IJ in his later removal proceedings and was therefore not reviewable by the BIA. *Id.*

84. *Id.* at 409-10.

85. *Id.* at 411.

86. *Id.*

87. *Id.* at 413.

88. *Id.* (counseling that the Supreme Court cautioned appellate courts that when the BIA has not yet considered an issue, "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." (citing INS v. Orlando Ventura, 537 U.S. 12, 16 (2002))) ("[W]e will defer to the BIA's interpretation of immigration regulations if the interpretation is reasonable." (citing Lopez-Gomez v. Ashcroft, 263 F.3d 422, 444 (5th Cir. 2001))).

89. *Id.* at 406, 413.

3. LPR Cancellation of Removal After Carachuri-Rosendo*:* Espinal v. Holder

a. Facts

Nicolas Antonio Espinal, a native and citizen of the Dominican Republic, was formerly a lawful permanent resident of the United States.[90]

In the original proceeding, "[t]he [IJ] held that Espinal was subject to removal following his 2007 misdemeanor conviction for possession of crack cocaine under New York law, and that he was statutorily ineligible for cancellation of removal."[91] On appeal of that order, the BIA dismissed the appeal on February 5, 2008 (February Order).[92]

Espinal filed a motion to reconsider with the BIA, and he filed a petition for review with the Fifth Circuit.[93] "Espinal argued [that the BIA] erred by finding him ineligible for cancellation of removal" because "none of his New York drug convictions qualified as an aggravated felony."[94] After the BIA denied Espinal's motion for reconsideration, it sua sponte reconsidered the February Order in a subsequent order on March 28, 2008 (March Order), specifically affirming the dismissal of Espinal's appeal, with a modification leaving the holding relying solely upon Espinal's 2007 drug conviction and a previous 2003 drug conviction.[95]

b. Decision

Because the BIA sua sponte reconsidered and revised its previous decision after Espinal filed a petition for review, and because Espinal did not file a subsequent petition for review, the court first addressed whether it had appellate jurisdiction over Espinal's appeal.[96]

The Government argued that the BIA effectively vacated the February Order and rendered it non-final for purposes of judicial review.[97] The court, however, held that for purposes of judicial review, filing a motion for

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90. Espinal v. Holder, 636 F.3d 703, 704 (5th Cir. Mar. 2011). This is a petition for review of a BIA decision dismissing his appeal of an IJ's removal order. *Id.*

91. *Id.* The IJ based the finding of ineligibility on Espinal's two previous drug convictions in 2003 and 2005 under the same New York statute. *Id.* at 705.

92. *Id.*

93. *Id.*

94. *Id.*; *see* 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is . . . deportable from the United States if the alien . . . has not been convicted of any aggravated felony."); 8 U.S.C. § 1101(a)(43) (defining "aggravated felony").

95. *Espinal*, 636 F.3d at 705. "Espinal did not file a new petition for judicial review of the March Order." *Id.*

96. *Id.*

97. *Id.* The Government argued that by reconsidering its February Order, "granting" reconsideration, and issuing the March Order, there was not a final decision for the court to review. *Id.*

reconsideration does not make the initial order of removal non-final,[98] nor does a "*denial* of a motion to reconsider 'affect federal court jurisdiction over the underlying removal order.'"[99]

The court reasoned that most circuits have concluded that the grant of a motion for reconsideration and the BIA issuance of a subsequent order do not automatically render the initial removal order non-final or moot.[100] The court adopted this case-by-case approach and held that it "retains jurisdiction over a petition for review so long as the BIA's grant of reconsideration does not materially change, or effectively vacate, the order under review."[101] As the March Order did not vacate or materially change the February Order, the court retained appellate jurisdiction.[102]

As to the merits of the case, Espinal argued "that the BIA erred by determining that his 2007 drug conviction constituted an 'aggravated felony' that rendered him ineligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a)."[103]

According to the INA, "a lawful permanent resident subject to removal from the United States may apply for discretionary cancellation of removal if, *inter alia*, he 'has not been convicted of any aggravated felony.'"[104] The Controlled Substances Act (CSA) conveys that a simple possession conviction after "a prior conviction for any drug . . . offense chargeable under the law of any State" becomes final may be punished as a felony; therefore, a second state conviction for simple possession may qualify as an "aggravated felony."[105] The court stated:

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98. *Id.*; *see, e.g.*, Stone v. INS, 514 U.S. 386, 395 (1995); Thomas v. Att'y Gen., 625 F.3d 134, 139 (3d Cir. 2010).

99. *See Espinal*, 636 F.3d at 705 (quoting Plasencia-Ayala v. Mukasey, 516 F.3d 738, 745 (9th Cir. 2008), *overruled by* Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009)) ("[T]he more difficult question arises where the BIA decides to reconsider and modifies its order while judicial review is pending.").

100. *See id.*; *Plasencia-Ayala*, 516 F.3d at 745-46; *see also* Khouzam v. Ashcroft, 361 F.3d 161, 167 (2d Cir. 2004) (upholding jurisdiction where BIA denied motion for reconsideration yet also clarified the reasoning of its initial order).

101. *Espinal*, 636 F.3d at 706 (following the circuits that hold that unless the BIA's new order vacates or materially changes its original order, the reviewing court continues to have jurisdiction over the petition).

102. *Id.* After it grants reconsideration, the BIA may affirm, modify, or reverse its original order. *See* 8 C.F.R. § 1003.2(i). Here, "the BIA expressly affirmed the February Order and retained nearly all of its reasoning [and] simply abandoned its reliance on Espinal's 2005 drug conviction to find him ineligible for cancellation of removal relief." *Espinal*, 636 F.3d at 706. As the March Order included the earlier order's general legal analysis of Espinal's remaining convictions and the BIA's ruling on Espinal's due process claim, the court saw no reason to require Espinal "to raise the identical issue again in a petition to review" the March Order, particularly where the order "expressly affirms the BIA's prior decision and its analysis does not significantly differ" from the prior order. *Id.*

103. *Espinal*, 636 F.3d at 707.

104. *Id.* (internal citations omitted) (quoting Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580-81 (2010)) (citing 8 U.S.C. § 1229b(a)(3)). For immigration purposes, an aggravated felony includes a "'drug trafficking crime' [pertinently defined] as 'any felony punishable under the Controlled Substances Act.'" *Id.*; *see* 18 U.S.C. § 924(c)(2); 8 U.S.C. § 1101(a)(43)(B).

105. *Espinal*, 636 F.3d at 707; *see* 21 U.S.C. § 844(a); *Carachuri-Rosendo*, 130 S. Ct. at 2581.

> The Supreme Court recently clarified . . . that for a state conviction to qualify as an "aggravated felony" under the INA, the conduct prohibited by state law must not only be punishable as a felony under federal law, but "the defendant must *also* have been *actually convicted* of a crime that is itself punishable as a felony under federal law."[106]

The court in this case was bound by the *Carachuri-Rosendo* decision and held that none of Espinal's state drug convictions were enhanced based upon the fact of a prior conviction and that Espinal had not been convicted of a felony punishable under the CSA.[107] Thus, the BIA erred in determining that Espinal was ineligible for cancellation of removal based on aggravated felony grounds.[108] Accordingly, the court granted Espinal's petition for review, vacated the BIA order, and remanded the case to allow Espinal to pursue cancellation of removal.[109]

4. Analysis

The Fifth Circuit has expanded *Carachuri-Rosendo* to allow previously ineligible aliens to seek discretionary relief. More aliens can now seek relief from removal because the *Carachuri-Rosendo* decision has narrowed the definition of an aggravated felony under the INA.[110]

D. BIA Jurisdiction After Alien's Departure While Habeas Petition Pending

1. Background

Generally, the BIA does not have jurisdiction to hear an immigrant's appeal if the immigrant has left the United States.[111] A departure from the United States ordinarily constitutes a withdrawal of the appeal.[112]

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106. *Espinal*, 636 F.3d at 707; *see* 21 U.S.C. § 844(a); *Carachuri-Rosendo*, 130 S. Ct. at 2589. The "[s]econd or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43) when . . . the state conviction is not based on the fact of a prior conviction." *Carachuri-Rosendo*, 130 S. Ct. at 2580.

107. *See Espinal*, 636 F.3d at 707.

108. *See id.*; *see also Carachuri-Rosendo*, 130 S. Ct. at 2589 ("[W]hen a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' . . . of a 'felony punishable' as such 'under the Controlled Substances Act.'" (quoting 18 U.S.C. § 924(c)(2))).

109. *See Espinal*, 636 F.3d at 707-08.

110. *See Carachuri-Rosendo*, 130 S. Ct. at 2580.

111. *See* 8 C.F.R §§ 1003.2(d), 1003.4.

112. *See* sources cited *supra* note 111. There is an exception for arriving aliens as defined in INA § 1001(q).

2. Rodriguez-Barajas v. Holder

a. Facts

"Rodriguez-Barajas was admitted into the United States [in 1990] as a lawful permanent resident. In 1998, he was convicted in state court of possession of marihuana and sentenced to four years of deferred adjudication."[113] In 2001, he was found ineligible for admission as a returning resident alien because of his conviction.[114] Rodriguez-Barajas conceded to the allegations against him, and the IJ ruled that he was ineligible for cancellation of removal because of his aggravated felony conviction.[115]

Rodriguez-Barajas filed an appeal to the BIA, but that appeal was dismissed for failure to file a brief.[116] He then "filed a habeas petition in federal district court challenging the denial of his application for cancellation of removal."[117] The habeas petition was then transferred to the Fifth Circuit, which eventually remanded the matter back to the BIA.[118] "On remand, the government submitted documents showing that, during the pendency of his habeas petition, Rodriguez-Barajas had voluntarily removed himself to Mexico."[119] The BIA then dismissed the appeal for lack of jurisdiction.[120]

b. Decision

The issue in this case was whether an alien subject to removal proceedings, who voluntarily departed the United States after the BIA issued a decision on his appeal, but while his habeas petition was still pending, is deemed to have withdrawn his appeal to the BIA.[121] The court concluded that the regulation at 8 C.F.R. § 1003.4 does not apply to departures occurring after a BIA decision on appeal and while a habeas petition is pending.[122] The court then ruled that the BIA has jurisdiction to review Rodriguez-Barajas's appeal.[123]

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113. Rodriguez-Barajas v. Holder, 624 F.3d 678, 679 (5th Cir. Oct. 2010). This is a petition for review of a BIA decision arguing that the BIA erred in holding that it lacked jurisdiction to hear Rodriguez-Barajas's appeal due to his voluntarily leaving the country while his habeas corpus petition was pending in federal court. *Id.*

114. *Id.*

115. *Id.* The BIA subsequently dismissed his appeal for failure to file a brief. *Id.*

116. *Id.*

117. *Id.* ("[The] petition was transferred to this court, which, in 2007, granted the Attorney General's motion to remand to the BIA in light of *Lopez v. Gonzales*, [549 U.S. 47 (2006)].").

118. *Id.*

119. *Id.*

120. *Id.* (stating the BIA's contention that, "pursuant to 8 C.F.R. § 1003.4, Rodriguez-Barajas's voluntary departure constituted a withdrawal of his appeal. Rodriguez-Barajas filed the instant petition for review in this court.").

121. *See id.* (pursuant to 8 C.F.R. § 1003.4).

122. *See id.* at 681.

123. *Id.*

As a rule, the court grants the BIA's interpretation of its own regulation "considerable legal leeway."[124] Rodriguez-Barajas argued that 8 C.F.R. § 1003.4, the regulation at issue, was not applicable "because his departure after the BIA's decision on appeal, but while his habeas petition was pending, was not 'subsequent to the taking of an appeal, but prior to a decision thereon.'"[125]

The court reasoned that "[n]o court appears to have addressed whether the language 'subsequent to the taking of an appeal, but prior to a decision thereon' covers departures occurring after a decision by the BIA but while a habeas petition is pending."[126] Without precedent on point, the court looked to the plain language of 8 C.F.R. § 1003.4.[127] The court then concluded that the BIA's decision on appeal is "a decision" under the regulation despite being subject to habeas review.[128]

Comparing 8 C.F.R. § 1003.4 to a similar provision, 8 C.F.R. § 1003.2(d), also provided guidance.[129] The court reasoned that the presence of the limiting language in 8 C.F.R. § 1003.4, but not in 8 C.F.R. § 1003.2(d), implied that the former regulation should not be construed to mirror the latter.[130]

Further, "[w]ithout BIA jurisdiction on remand, consideration of a removed alien's habeas petition would be pointless, because the sole remedy available under habeas review in the case of a removed alien is to vacate the removal order."[131] The court found that "§ 1003.4 unambiguously does not bar

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124. *Id.* at 680. The court "must defer to an agency's interpretation of its own regulation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Id.* at 679-80 (internal quotation marks omitted). The regulation states in pertinent part: "Departure from the United States of a person who is the subject of deportation or removal proceedings . . . subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken." 8 C.F.R. § 1003.4.

125. *Rodriguez-Barajas*, 624 F.3d at 680.

126. *Id.* (internal quotation marks omitted). "The government argues that this case is controlled by *Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005)." *Id.* However, "the issue in *Long* was whether § 1003.4 covered involuntary as well as voluntary departures," which tells nothing about whether a petitioner does so if his departure follows the BIA's decision. *Id.*

127. *Id.*

128. *Id.* (stating "that if an alien departs 'subsequent to the taking of an appeal, but prior to a decision thereon . . . the initial decision in the case shall be final to the same extent as though no appeal had been taken.'" (omission in original)).

129. *Id.* at 681 (advising that "[u]nder § 1003.2(d), any departure from the United States after filing a motion to reopen or reconsider by a person subject to removal proceedings precludes BIA jurisdiction to consider the motion").

130. *Id.* "[T]here is a critical difference between the two provisions: Section 1003.2(d) says that '[a]ny departure from the United States . . . occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such a motion.'" *Id.* (omission and second alteration in original). Contrast this language against the language in 8 C.F.R. § 1003.4, which says "a departure constitutes a withdrawal of an appeal only if it occurs 'prior to a decision thereon.'" *Id.*

131. *Id.*; *see* Nken v. Holder, 129 S. Ct. 1749, 1761 (2009). "The government admits that 'there is a tension between this [c]ourt's jurisdiction over petitions for review and the regulation that controls the [BIA's] jurisdiction' and concedes that an alien removed while his habeas petition is pending 'could nonetheless pursue his appeal before the [BIA]' on remand." *Rodriguez-Barajas*, 624 F.3d at 681 (alterations in original).

the BIA's jurisdiction over the appeal of an alien who departs, whether voluntarily or involuntarily, after the BIA has decided his appeal but while his habeas petition is pending."[132]

The petition for review was granted, the BIA's decision vacated, and the matter remanded.[133]

3. Analysis

An alien's voluntary departure, while a habeas petition is pending, does not strip the BIA of jurisdiction.[134]

III. CONCLUSION

The cases from the 2010–2011 survey period did not include any groundbreaking decisions. Importantly, however, there was an expansion of the Supreme Court's decision in *Carachuri-Rosendo* into the § 212(c) and Cancellation of Removal contexts, evidencing a continuing impact of that decision.[135] Perhaps the reach of the aggravated felony provisions of the INA, and the consequential impact on potential relief, had expanded too far. Following the Supreme Court's lead in *Carachuri-Rosendo*, the Fifth Circuit has pulled back the reins a little more on the reach of the aggravated felony provisions, and in a rare instance, fewer aliens are affected negatively rather than more aliens negatively affected.[136] It will surely be interesting to see how the continuing legacy of *Carachuri-Rosendo* develops in the Fifth Circuit and in the other circuit courts of appeal.

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132. *Rodriguez-Barajas*, 624 F.3d at 681. "Therefore, the government's interpretation of the regulation is not entitled to deference." *Id.* at 681-82 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).

133. *Id.* at 682.

134. *See id.* at 680-82.

135. *See supra* Part II.C.

136. *See supra* Part II.C-D.