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LITIGATION HIGHLIGHTS

Inside

Probability of Torture Is a Question of Fact Subject to Clearly Erroneous Review by the BIA

In ***Kaplun v. Attorney General of U.S.***, __ F.3d __, 2010 WL 1409019 (3d Cir. April 9, 2010) (*Ambro*, Smith, Michel), the Third Circuit reversed *Matter of V-K*, 24 I&N Dec. 500 (BIA 2008), a precedent decision where the BIA had interpreted its standard of review regulation to allow *de novo* review of an IJ's determination of the likelihood of torture.

The petitioner, a citizen of Ukraine, was admitted to the United States in 1977 as a seven-year-old refugee. He later became a legal permanent resident. In 1997 and 1998 he was charged and convicted in two federal criminal proceedings based on his participation in fraudulent stock schemes. Petitioner pled guilty to an information alleging securities fraud with losses of nearly $900,000 as a result of his 1998 offense. In the pre-sentence investigation report (PSR), the total loss for the 1998 offense was described as "at least $700,000 and less than $1,000,000." Petitioner was sentenced to 56 months' imprisonment for the 1998 conviction, but a fine was waived because of his inability to pay.

In 2001 DHS commenced removal proceedings against the petitioner based on the 1997 and 1998 convictions. Petitioner denied removability and later submitted an application for asylum. The government produced the judgment of conviction, the PSR, and the information to establish the 1998 conviction and its surrounding facts.

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When VWP Entrants Are Eligible To Apply For Adjustment Of Status: Harmonizing INA §§ 245(c)(4) and 217(b)(2)

Congress enacted the Visa Waiver Pilot Program ("VWPP") as part of the 1986 Immigration Reform and Control Act, codified at INA § 217. Section 201 of the Immigration Act of 1990 revised the VWPP and extended the program until September 30, 1994. Subsequent amendments to section 201 of the Immigration Act of 1990 have extended the program and made the program permanent (hereinafter "VWP"). Under this program, alien visitors may enter the United States from designated countries for a period not to exceed 90 days without obtaining a nonimmigrant visa.

Congress established the VWP in an effort "to determine if a visa waiver provision could facilitate international travel and promote the more effective use of the resources of affected government agencies while not posing a threat to the welfare, health, safety, or security of the United States." 53 *Fed. Reg.* 24898 (1988). In furtherance of this aim, it promulgated implementing regulations. *Id.* These regulations were designed to "facilitate travel, streamline or reduce the work of affected agencies, and ensure that vital national interests are protected." *Id.* "'[T]he linchpin of the

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Probability of torture is a question of fact

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In his application for asylum, petitioner claimed that, as a Jewish refugee, he would be subjected to persecution and torture if he were removed to the Ukraine. In support of his claims, he procured an expert witness to give testimony on anti-Semitism in the Ukraine. This expert gave detailed testimony on the situation and voiced disagreement with various government reports on the extent of anti-Semitism in that country. He also testified that petitioner would be unable to gain citizenship, get a job, rent an apartment, or even buy a train ticket. It was his expert opinion that petitioner would be living on the street, destitute, and would be targeted for extortion and torture.

In an April 2004 ruling, the IJ found petitioner removable based on his prior convictions, but granted withholding of removal and CAT protection crediting the testimony of petitioner's expert. Petitioner appealed the part of the ruling that found him removable and the government cross-appealed the grant of withholding.

In November 2004, the BIA held that the IJ erred in his removal findings by inadvertently relying on the wrong record of conviction, and it vacated the IJ decision and remanded for a determination of whether petitioner was indeed removable as charged under either the 1997 or the 1998 conviction. On remand, the IJ concluded that the sole sustainable removal charge was the 1998 fraud conviction. When the case returned to the BIA, the BIA concluded that petitioner was removable on the basis of the 1998 conviction, that it was a "particularly serious crime" (thereby declining to address the alternative argument), and that the IJ erred in granting CAT protection. Accordingly, it ordered petitioner removed to the Ukraine.

Petitioner then sought judicial review and while his petition was pending he filed a motion with the BIA to reopen his case based on *Alaka v. Attorney General*, 456 F.3d 88, 108 (3d Cir. 2006). The BIA denied the motion to reopen because concluding that *Alaka* was factually distinguishable. Petitioner then filed a petition for review and this time the government asked the case to be remanded. In September 2007, the court remanded the case and asked the BIA to determine whether it had authority to reverse the IJ's determination

that "there [was] a preponderance of evidence in the record leading to a justification for a clear probability finding that this particular respondent . . . is likely to be targeted [for mistreatment,] at least in part, by both governmental and nongovernmental entities within the Ukraine should he be removed to that country . . . [and that such mistreatment will rise to the level of torture.]"

Insofar as the BIA interpreted 8 C.F.R. § 1003.1(d)(3) to hold that "an IJ's assessment of the probability of future torture is not a finding of fact because the events have not yet occurred, we conclude its interpretation plainly errs."

On remand, the BIA held in a precedential decision, that it had the authority to review the IJ's determination de novo. *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008). The BIA explained that while it reviewed the IJ's factual rulings for clear error, *"[it] d[id] not consider a prediction of the probability of future torture to be a ruling of 'fact.' Although predictions of future events may in part be derived from 'facts,' they are not the sort of "[f]acts determined by the Immigration Judge' that can only be reviewed for clear error."*

Petitioner then filed another petition for review. The Third Circuit, applying *Nijhawan v. Holder*, 557 U.S.__, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009), where the Court determined that the provision in question "calls for a 'circumstance-specific,' not a 'categorical,' interpretation," held that petitioner's 1998 conviction was shown to be an aggravated felony by clear and convincing evidence. In particular, the court found that two uncontroverted items of evidence, namely the criminal information and the PSR, established the amount clearly and convincingly.

The court also found that the BIA had not committed a legal error when it determined that petitioner's aggravated felony was a "particularly serious crime." The court held that it lacked jurisdiction to review the Attorney General's discretionary determination that a crime was particularly serious.

Finally, the court agreed with petitioner's argument that the BIA erred in reviewing the probability of future torture de novo and not under a "clearly erroneous" standard. The court explained that prior to 2002, the BIA reviewed all aspects of an IJ's decision de novo. However, the regulations were amended in 2002 to provide that the BIA "will not engage in de novo review of findings of fact determined by an immigration judge." *See* 8 C.F.R § 1003.1(d)(3)(i)-(ii). The court then held that insofar as the BIA interpreted 8 C.F.R. § 1003.1(d)(3) to hold that "an IJ's assessment of the probability of future torture is not a finding of fact because the events have not yet occurred, we conclude its interpretation plainly errs."

In the case of the likelihood of torture, explained the court, there are two distinct parts to the mixed question: (1) what is likely to happen to the petitioner if removed; and (2) does what is likely to happen amount to the legal definition of torture? The court said that the two parts should be examined separately, because the first question is factual but the second question is a legal question. "Gluing the two ques-

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VWP Entrants Eligibility For Adjustment

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program is the waiver, which assures that a person who comes here with a VWP visa will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays.'" *Lang v. Napolitano*, 596 F.3d 426, 428 (8th Cir. 2010) (*quoting Handa v. Clark*, 401 F.3d 1129, 1135 (9th Cir. 2005)).

It is, however, this linchpin of the VWP that appears, at first glance, to conflict with the adjustment of status statute, 8 U.S.C. § 1255(c)(4). The confusion arises because section 1255(c)(4) indicates that a VWP entrant may apply for adjustment of status if he qualifies as "an immediate relative," but 8 U.S.C. § 1187(b) states that an alien cannot be included in the VWP,

> *unless the alien has waived any right (1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.*

These sections, however, can be reconciled. Section 1255(c)(4) is completely silent as to when the VWP entrant may apply and to how the entrant's eligibility to apply for adjustment of status is affected by the VWP alien's removability once he remains in the country beyond his authorized 90 days (or otherwise violates his/her VWP visitor's status). Because of the silence in this regard, an assistant United States attorney was able to convince the Tenth Circuit to find, in *Schmitt v. Maurer*, 451 F.3d 1092, 1097 (10th Cir. 2006), that if a VWP entrant wants to apply for adjustment of status, then he must apply before his authorized 90-day visit expires because, after that period, he "may not challenge an Order of Removal . . . on any grounds other than asylum."

This position has been adopted by every Circuit that has addressed it. *See Lang v. Napolitano*, 596 F.3d 426, 428 (8th Cir. 2010) (recognizing, in dicta, that the alien was required to file for adjustment of status within 90 days of entering through the VWP); *Bayo v. Napolitano*, 593 F.3d 495, 507 (7th Cir. 2010) ("After the visitor overstays her 90-day visit . . . the effect of the VWP kicks in, preventing any objection to removal (except for asylum), including one based on adjustment of status."); *McCarthy v. Mukasey*, 555 F.3d 459, 462 (5th Cir. 2009) ("once McCarthy violated the terms of the VWP . . . she was no longer entitled to contest her removal"); *Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008) ("to allow an adjustment of status petition after the 90 days has expired would create an avoidable conflict between the adjustment of status statute and the no contest statute"); *Lacey v. Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007) ("an alien who overstays his authorized time under the VWP and files for an adjustment of status after he has overstayed, but before the issuance of a removal order, has waived his right to contest a subsequent removal order") (internal citations omitted).

OIL attorneys have argued that denials of applications for adjustment of status filed by VWP entrants prior to the expiration of their 90-day visit are reviewable only in the federal circuit courts of appeals.

This position gives meaning, without contradiction, to 8 U.S.C. § 1255(c)(4) and 8 U.S.C. § 1187(b)(2). The language of section 1255(c)(4) is honored by allowing VWP aliens to apply for adjustment of status up until the day their authorized visit expires (after which time the alien could face a charge of removability at any time) and the language of section 1187(b)(2) is honored by enforcing the waiver to contest, other than on the basis of an application for asylum, any action for removal of the alien.

Lastly, OIL attorneys have argued that denials of applications for adjustment of status filed by VWP entrants **prior** to the expiration of their 90-day visit are reviewable only in the federal circuit courts of appeals, not the district courts. This position is supported by 8 U.S.C. § 1252(a)(5), which states that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal." Additionally, this position will limit the possibility of duplicate litigation.

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BIA review of probability of torture

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tions together, however, does not entitle the BIA to review the first question, the factual one, de novo. It must break down the inquiry into its parts and apply the correct standard of review to the respective components," said the court. Here the court found that the BIA had disagreed with the IJ crediting "the [expert] witness's statements regarding what would happen in [petitioner's] specific situation" if he were removed, dismissing it as "speculative." This, concluded the court, "appears to have been reversal of a factual finding under a de novo standard, an impermissible BIA action." Accordingly, the case was again remanded to the BIA.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Second or Subsequent State Controlled Substance Conviction

The Supreme Court heard argument in ***Carachuri-Rosendo v. Holder*** (Sup.Ct. No. 09-60) on March 31, 2010. In the government's response to the petition for writ of certiorari, the Solicitor General agreed that certiorari is appropriate in view of an inter-circuit split regarding the circumstances under which an alien's state conviction for illegal possession of a controlled substance qualifies as an "aggravated felony." Defending the judgment below (570 F.3d 263 (5th Cir. 2009)), the Solicitor General argued, contrary to the interpretation of the Board of Immigration Appeals (***Matter of Carachuri-Rosendo***, 24 I&N Dec. 382 (BIA 2007) (*en banc*)), that such a conviction constitutes an aggravated felony if the conduct occurred after a prior illegal drug conviction has become final, regardless of whether the recidivist nature of the crime was established in the prosecution.

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Aggravated Felony — Term of Imprisonment

On January 7, 2010, the government filed a petition for rehearing en banc in ***Shaya v. Holder***, 586 F.3d 401 (6th Cir. 2009), challenging the court's holding that Shaya's conviction was not an aggravated felony crime of violence, which requires that the term of imprisonment be at least one year. The court held that the language of 8 U.S.C. § 1101(a)(43)(F) is ambiguous and that its application to an indeterminate sentence was primarily a function of state law. The government argues that the panel ignored the federal statutory definition of "term of imprisonment" contained in 8 U.S.C. § 1101(a)(48)(B), and failed to defer to the Board's reasonable interpretation of the immigration statute.

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Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction. The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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VWP — Waiver, Due Process Particularly Serious Crimes

In June 2009, the government filed a petition for panel rehearing and opposed petitioner's petition for rehearing and rehearing en banc in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the Board determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

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Withholding — Particularly Serious Crime

The Tenth Circuit has ordered a response to petitioner's request for rehearing en banc of ***N-A-M- v. Holder,*** 587 F.3d 1052 (10th Cir. 2009). The questions raised by the petitions are: May a non-aggravated felony be counted as a particularly serious crime for purposes of the bar to withholding of removal? Is a separate dangerousness assessment necessary for an offense to be a particularly serious crime?

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Jurisdiction — Criminal Alien

In ***Turcios v. Holder***, 582 F.3d 1075 (9th Cir. 2009), the government has filed its opposition to *en banc* rehearing. The question presented is whether the court properly dismissed a criminal alien's petition seeking review of BIA's denial of the motion to reconsider the dismissal of his untimely appeal on the grounds that the BIA's denial was an exercise of routine discretion.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Rejects Asylum Claim Based on Childhood Harm from Street Gang and Neighbor

In *Mejilla-Romero v. Holder*, __ F.3d __, 2010 WL 1293818 (1st Cir. April 6, 2010) (*Lynch*, Selya; Stahl, dissenting), the First Circuit, held that substantial evidence supported the agency's determination that the mistreatment the petitioner suffered as a child in Honduras from a neighbor and a street gang did not rise to the level of persecution.

"Reviewing courts, in immigration cases, do not have the luxury of choosing at will which facts to emphasize or which inferences to draw. These are functions for the agency"

The petitioner, who was eleven years old when he illegally entered the United States, lived with his grandfather is a small Honduran town. Growing up in Honduras, petitioner had a series of bad encounters with a neighbor who harassed the petitioner and his grandparents. Petitioner also had difficulty with a gang of young males from a nearby town who would attempt to steal his money. Petitioner believed that the gang members wanted to recruit him into their gang.

Petitioner was placed in removal proceedings the day after he entered the United States. An IJ in a comprehensive written opinion, denied petitioner's asylum claim finding that he had not established either past persecution or that his mistreatment was based on a protected ground. The IJ also found no objectively reasonable fear of future persecution. On appeal, the BIA agreed with the IJ's determination that petitioner had failed to meet his burden of establishing persecution on a protected ground.

The First Circuit held that the IJ's and BIA's determination that petitioner did not suffer past persecution was supported by case law. In addition, the court ruled that petitioner failed to establish that the mistreatment he suffered was motivated on account of one of the five statutorily-protected grounds. In particular, there was no clear evidence of the neighbor's motive, the gang's motive was to steal money, and refusal to join a gang was not political opinion and did not make a particular social group. "Even if petitioner had shown that the gang's attack were motivated by petitioner's resistance to gang recruitment", said the court, "that would not help his case. Refusal to join a gang does not constitute political opinion." The court specifically rejected petitioner's contention that the BIA had erred in applying the "social visibility analysis." The court noted that it had "explicitly affirmed the relevance of the social visibility inquiry to social group analysis." Moreover, the court also agreed with the BIA's finding that petitioner had not shown that the Honduran government was unable and unwilling to help him.

Finally, the court also determined that the IJ's and the BIA's conclusions that petitioner lacked a well-founded fear of future persecution and could safely relocate were supported by substantial evidence.

In a concurring opinion, Judge Selya noted that that "it is easy to paint a heart wrenching picture of petitioner's case," referring to the dissenting opinion of Judge Stahl. However, said Judge Selya, "there is a rub: reviewing courts, in immigration cases, do not have the luxury of choosing at will which facts to emphasize or which inferences to draw. These are functions for the agency, and the appropriate standard of review requires a high degree of deference to the agency's choices."

Judge Stahl in his dissent, would have held that petitioner had shown that he had suffered past persecution on account of an imputed political opinion attributed to him because of his family's long-standing land activism.

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SECOND CIRCUIT

Second Circuit Holds that It Has Jurisdiction to Review Questions of Law Challenging Good Moral Character Determination Made Under "Catchall" Provision

In *Sumbundu v. Holder*, __ F.3d __, 2010 WL 1337221 (2d Cir. April 7, 2010) (*Calabresi*, Livingston, Restani), the Second Circuit held, on an issue of first impression, that the court has jurisdiction to review the BIA's good moral character determination made pursuant to the "catchall" provision of INA § 101(f), 8 U.S.C. § 1101(f) in the "relatively rare instance[]" where an alien raises "plausible" questions of law or constitutional claims.

The petitioners, husband and wife, and citizens of Gambia, entered the United States on tourist visas in 1992 but failed to depart after their authorized stay expired. They subsequently had five children, all of whom are U.S. citizens. The IJ determined that petitioners, while taking advantage of taxpayer subsidized housing, had misreported and possibly filed fraudulent tax returns since 1992. Accordingly, the IJ determined that petitioner lacked good moral character under INA § 101(f) and therefore were ineligible for cancellation. The BIA affirmed the IJ's ruling.

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Preliminarily, the court determined that it had jurisdiction, at least to consider petitioners' question because it raised "plausible question of law," namely whether the BIA had applied the proper legal standard in determining that they lacked good moral character. The court then rejected petitioners' contention that the correct good moral character test was whether filing inaccurate tax returns was intentional and the inaccuracy was a substantial sum. The court found that whatever intent requirement may apply, it was present here given petitioners' decade-long pattern of gross under-reporting of income. The court also found that while "a substantial sum" may be a factor in determining moral character, there is no such requirement under the statute.

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■ **Alien Who Fraudulently Seeks Admission Under Visa Waiver Program Is Bound by the Program's Terms**

In ***Shabaj v. Holder***, __ F.3d __, 2010 WL 1427511 (2d Cir. April 12, 2010) (*Jacobs*, Sack, Hall), the Second Circuit held that an alien who uses a fraudulent document to seek admission under the Visa Waiver Program and is from a country whose citizens are not eligible for the VWP is bound by the circumscribed removal process afforded to VWP applicants.

The petitioner, a citizen of Albania, arrived to the United States in November 2000, and sought to enter under the VWP by using a false Italian passport. When detained upon his arrival, petitioner sought asylum and was referred to an IJ for an asylum-only proceeding. His claim was denied on October 3, 2001, and the BIA denial his appeal on February 25, 2003. Subsequently, the BIA also denied his motions to reopen on December 21, 2004, and March 10, 2005.

Within four months of the March 10, BIA order, petitioner married a United States citizen, and twice applied for adjustment of status and waivers of inadmissibility. The applications were denied. Upon the denial of the second application on January 26, 2009, a final order of removal was issued pursuant to 8 C.F.R. § 217.4(b).

Before the Second Circuit, petitioner argued that he was not an applicant under the VWP because Albanians are ineligible for it, and the order directing his removal pursuant to the VWP statute (permitting asylum-only removal proceedings) was "invalid and unlawful." The court held that petitioner was bound by the terms of the program notwithstanding that he used a fraudulent passport to obtain the benefit of expedited entry for which his waiver was given quid pro quo. The court also noted that the regulation implementing the statute, 8 C.F.R. § 217.4(a)(1), treats someone who applies under the VWP using fraudulent papers as bound by its provisions.

The confidentiality provision of INA § 245A(c)(5) does not apply to an application for employment authorization submitted by the child of a Legal Immigration Family Equity ("LIFE") Act adjustment-of-status applicant.

The court also upheld the DHS' determinations – to the extent the determinations were necessary to consider the alien to be a VWP applicant – that he presented the fake passport to authorities and that he properly waived any right to broader removal proceedings.

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THIRD CIRCUIT

■ **Confidentiality Provision Added By LIFE Act Does Not Cover Employment Authorization Application**

In ***Patel v. Attorney General of the United States***, 599 F.3d 295 (3d Cir. 2010) (Fuentes, Roth, Van Antwerpen)(*per curiam*), the Third Circuit held, as a matter of first impression, that the confidentiality provision of INA § 245A(c)(5) does not apply to an application for employment authorization submitted by the child of a Legal Immigration Family Equity ("LIFE") Act adjustment-of-status applicant.

The petitioner, a citizen of India, entered the United States in 1988 without inspection. Petitioner's father later submitted an application under LIFE Act § 1104 for an adjustment to lawful permanent resident status. While that application was pending, petitioner filed an application for work authorization under § 1504 of the LIFE Act Amendments family unity provisions. Her application was denied and, based on her admissions in the application, removal proceedings were initiated against her.

At her removal hearing, petitioner admitted that she was ineligible for adjustment of status under section 1104(b), but sought to terminate the proceedings arguing that the confidentiality provisions prevented DHS from using her section 1504(b) employment application for the purpose of removal proceedings. The IJ order her removed and the BIA affirmed.

The court held, applying *Chevron*, that "the plain language of section 1104(c)(5) makes clear that the confidentiality provisions apply only to a filing submitted by an alien described in LIFE Act § 1104(b), and only insofar as the filing is an application for adjustment of residency status." "There is no room for us to conclude that Congress intended to extend the protection of INA § 254A (c)(5) to any filing other than an application by an alien for adjustment of

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residency status," concluded the court.

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FOURTH CIRCUIT

■ **Fourth Circuit Denies Asylum Claim Based on Past Economic Persecution, No Well-Founded Fear of Future Persecution**

In ***Mirisawo v. Holder***, __ F.3d __, 2009 WL 963200 (4th Cir. March 17, 2010) (*Niemeyer, Davis, Gregory*), the Fourth Circuit, upheld the BIA's decision denying asylum and withholding of removal. Zimbabwe's Operation Restore Order partially destroyed a slum house the alien had purchased for family members. The alien never resided there and did not rely on the property for rental income. The court ruled the alien did not suffer harm amounting to "economic persecution," and that the lack of recent persecution of any of her close family members suggested she would not be subjected to persecution.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds that 8 C.F.R. § 1003.23(b)(1) Does Not Limit the Application of the Departure Bar to Aliens Who Leave the Country Before a Removal Order Is Issued**

In ***Toora v. Holder,*** __ F.3d __, 2010 WL 1385113 (5th Cir. April 8, 2010) (*Davis*, Wiener, Southwick), the Fifth Circuit, held that the departure bar under 8 C.F.R. § 1003.23(b)(1), applied to aliens who leave the country once removal proceedings have begun, but whose removal order is yet to be issued.

The petitioner, a citizen of India, illegally entered the United States in February 1995. He was detained and a day later he was placed in removal proceedings. On March 13, 1995, an NTA was sent to petitioner at the detention facility notifying him that a deportation hearing had been scheduled for April 3, 1995. However, on March 13, petitioner posted bond and was released from custody. Petitioner reported that he was moving to New York but instead he left the United States on March 23 and returned to India. On April 3, 1995, an IJ held petitioner's deportation hearing and because he was not in attendance he was ordered removed in absentia. On August 27, 1995, petitioner reentered the United States under a different name. He did not disclose his prior contacts with the former INS. Petitioner then filed an affirmative asylum application and was granted asylum.

The Fifth Circuit held that the departure bar divested the IJ from considering the alien's motion to reopen.

In March 2007, DHS notified petitioner that it intended to rescind the 1995 grant of asylum on the basis that the INS Asylum Office lacked jurisdiction to grant asylum because of petitioner's earlier deportation proceedings and therefore the grant was void *ab initio.* Petitioner did not challenge the notice but, instead, filed a motion to reopen to rescind the 1995 order arguing that he had never received the NTA for April I3, 1995, hearing. The IJ denied the motion finding that petitioner had received the written notice and that under the regulatory departure bar, the IJ lacked jurisdiction. Alternatively, the IJ determined that petitioner's motion was time-barred. On appeal, the BIA concluded that the IJ had jurisdiction because the departure bar was inapplicable but that, nonetheless, the motion was time barred.

The Fifth Circuit disagreed with the BIA' interpretation that the IJ had jurisdiction over petitioner's motion to reopen. The court declined to defer to the BIA's analysis of the departure bar regulation in *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008), finding that, since in this case the BIA did not offer any authority, analysis, or explanation for its interpretation of the departure bar regulation and because its interpretation did not rationally flow from the "plain language of the regulation," the departure bar divested the IJ from considering the alien's motion to reopen.

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■ **Fifth Circuit Dismisses Challenge to Removability Determination Because Alien Failed to Exhaust.**

In ***Claudio v. Holder***, 601 F.3d 316 (5th Cir. 2010) (*Garza*, DeMoss, Clement), the Fifth Circuit, held that it lacked jurisdiction to review an alien's challenge to removability where the alien had failed to raise the issue in his brief before the BIA. The court rejected the reasoning of *Hoxha v. Holder*, 559 F.3d 157 (3d Cir. 2009), and held that when an alien chooses to file a brief before the Board, only those issues argued in the brief are exhausted, and the Board may deem abandoned any issues raised only in the administrative notice of appeal but not raised in the brief.

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SIXTH CIRCUIT

■ **Sixth Circuit Determines That Alien Was Not Persecuted On Account of Political Opinion in Mexico**

In ***Pablo-Sanchez v. Holder***, 600 F.3d 592 (6th Cir. 2010) (Gibbons, *Sutton*, White), the Sixth Circuit upheld the denial of petitioner's withholding of removal claim.

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The petitioner, his wife and four children, are all citizens of Mexico. In 1994, petitioner, a well-to-do artist and business owner, campaigned as the Green Party candidate for a seat in Mexico's Congress. His campaign encountered stiff opposition from the then-incumbent PRI party. Petitioner claimed that hecklers threatened him at his campaign rallies, and he received phone messages demanding that he "stop participating with this party or things w[ill] not go well for [your] family." Petitioner lost the election and soon left the Green Party due to the harassment. Petitioner also claimed that in March 1996, while leaving a bank carrying a large amount of cash, muggers covered his face and assaulted and robbed him. Later in November of that year he was mugged and beaten a second time. The IJ and later the BIA denied withholding.

The court ruled that substantial evidence supported the BIA's denial of relief where the sole link between petitioner's political activity, the muggings, and threatening phone calls he experienced was that petitioner thought he recognized the assailant's voice from a campaign rally 18 months earlier when petitioner was a candidate for Mexico's Congress. Moreover, both muggings had occurred when the petitioner left a bank after withdrawing cash.

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■ **Sixth Circuit Affirms that the REAL ID Act Precludes District Court Jurisdiction over Constitutional Challenges to Final Orders of Removal**

In ***Elgharib v. Napolitano,*** 600 F.3d 597 (6th Cir. 2010) (Merritt, *Moore*, Gibbons), the Sixth Circuit, affirmed the Southern District of Ohio's decision dismissing the alien's habeas petition for lack of subject-matter jurisdiction. The court held that Congress acted within its constitutional powers to limit judicial review of INA, as amended by the REAL ID Act, and that 8 U.S.C. § 1252(a)(5) and (g) both preclude district court jurisdiction over constitutional challenges to final orders of removal. The court further concluded that the alien may not obtain judicial review by captioning her constitutional challenge to her removal order as an "original action" under the All Writs Act, and that the Constitution qualifies as "any other provision of law (statutory or non-statutory)" under all sections of 8 U.S.C. § 1252. Finally, the court also held that 8 U.S.C. § 1252(g) applies to actions by the Department of Homeland Security.

An alien may not obtain judicial review by captioning her constitutional challenge to her removal order as an "original action" under the All Writs Act.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that the BIA Need Not Address Good Moral Character When the Alien Is Otherwise Statutorily Ineligible**

In ***Benaouicha v. Holder,*** __ F.3d __, 2010 WL 1292718 (7th Cir. On April 6, 2010) (Easterbrook, *Hamilton*, Springmann), the Seventh Circuit, held that the BIA did not err by failing to address whether petitioner was of good moral character for purposes of cancellation of removal when his conviction for a crime involving moral turpitude rendered him statutorily ineligible.

The petitioner, an Algerian citizen, was admitted into the United States to attend an airline training academy in Texas. He never enrolled. On October 1, 2001, he was convicted for falsely applying for a social Security card and served a six-month sentence. Upon his release, DHS placed him in removal proceedings charging him with failure to comply with non-immigrant statutes and for a CIMT conviction. Petitioner conceded the charges but sought adjustment based on a marriage to a USC. While the removal proceedings were pending, petitioner pled guilty to battery. He then sought a continuance of his hearing because his marriage had dissolved – the victim of his battery was his wife – and had filed an I-360, a petition to classify him as battered spouse of a USC. That petition was eventually denied. The IJ, following several continuances, determined that petitioner was ineligible under the abused spouse provision. The BIA affirmed.

The court rejected petitioner's contention that he should have been given the opportunity to demonstrate his good moral character notwithstanding his convictions for fraud and battery. The court held that petitioner had already conceded that he had been convicted of a CIMT and therefore could not meet the good moral character requirement. The court further concluded that it lacked jurisdiction to review the denial of the alien's I-360 visa petition because "that decision did not occur within the context of the removal proceedings before the immigration judge."

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that the Board Abused Its Discretion in Denying a Motion to Reopen by Relying Solely on a Lack of Jurisdiction over the Underlying Application for Relief.**

In ***Clifton v. Holder***, __ F.3d __, 2010 WL 1006436 (8th Cir. March 22, 2010) (Wollman, *Hansen*, Shepherd) the Eighth Circuit, held that the when the BIA denies a motion to reopen by an arriving alien seeking to have proceedings reopened and continued while U.S. Citizenship and Immi-

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gration Services adjudicates his application for adjustment of status, the BIA must do more than simply note its lack of jurisdiction over the underlying application. Instead, the BIA must provide an articulated basis for why the alien did not merit a favorable exercise of discretion.

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■ **Eighth Circuit Holds that BIA Did Not Engage in Improper Fact-Finding**

In ***Chak Yiu Lui v. Holder,*** 600 F.3d 980 (8th Cir. 2010) (*Bye*, Smith, Colloton), the Eighth Circuit upheld the BIA's denial of the petitioners' application for adjustment of status. Mr. Lui's sister, a U.S. citizen, filed a Petition for Alien Relative benefitting Mr. Lui and listing his wife as a derivative beneficiary. The petition was approved on August 28, 1987. The petitioners were informed by the consulate in Hong Kong that visa numbers were not immediately available for their use and they would be contacted when their petitions could be actively processed. Subsequently, in 1992, the petitioners entered the United States as non-immigrants with an L visa. Their visas expired on July 10, 1994. Mr. Lui's sister then filed another petition on behalf of the couple on September 30, 1998.

On May 15, 2003, the Luis applied for adjustment of status based on the 1987 petition, for which there were visa numbers available. USCIS denied the application because the 1987 case had been terminated for non-response in May of 1999, and the originating petition was destroyed on May 17, 2000, after petitioners failed to respond to letters mailed by the consulate to their address of record in Hong Kong. USCIS determined that visa numbers were not yet available for the petition filed in 1998. In addition, the agency found the willful failure to file a sales tax return, of which Mr. Lui had been convicted of two counts, qualified as a crime involving moral turpitude and separately made Mr. Lui ineligible for adjustment of status.

Subsequently, an IJ found the petitioners ineligible for adjustment of status because there were no visas immediately available for their use and ordered them removed as overstays. The IJ also denied both requests for voluntary departure. She found Mr. Lui had committed a crime involving moral turpitude, and that neither had shown eligibility for voluntary departure. The BIA affirmed the IJ's decision.

The court held that it was improper for the BIA to determine that petitioner had no qualifying relative for a waiver of inadmissibility when the IJ had not reached that issue.

Before the Eight Circuit, petitioners argued, *inter alia*, that the documents on which the BIA based its decision, namely criminal records, were not properly admitted into the record and therefore could not form support for the decision. The court found that petitioners were clearly on notice the IJ was in possession of the documents and had based her decision on them. "There is no reason they could not have raised the issue before the BIA," said the court.

Petitioners also argued that the BIA had engaged in impermissible fact-finding when it held that that Mr. Lui was statutorily ineligible for adjustment of status as a person convicted of a crime involving moral turpitude. The court rejected that contention, explaining that "the determination that Mr. Lui was statutorily ineligible for adjustment was a legal finding, based on the IJ's factual finding that Mr. Lui had been convicted of two counts of willful failure to file a tax return." The court added that under its regulations at 8 C.F.R. § 1003.1(d)(3)(ii), "[t]he BIA reviews legal questions de novo and is entitled to reach its own legal conclusions based on the underlying facts." The court nonetheless held that it was improper for the BIA to determine that petitioner had no qualifying relative for a waiver of inadmissibility when the IJ had not reached that issue.

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■ **Eighth Circuit Holds in Light of *Kucana* that It Has Jurisdiction to Review IJ's Denial of a Continuance**

In ***Thimran v. Holder***, 599 F.3d 841 (8th Cir. 2010) (Loken, *Arnold*, Benton), the Eighth Circuit held that the Supreme Court's recent decision in *Kucana v. Holder*, __U.S. __, 130 S. Ct. 827 (2010) "effectively overruled" its decision in *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004), that held that 8 U.S.C. § 1252 (a)(2)(B) deprived the court of jurisdiction to review an IJ discretionary denial of a continuance. The court concluded that the IJ did not abuse her discretion in denying the alien's request for an indefinite continuance to await the adjudication of the appeal of the denial of the second I-130 petition filed on his behalf by his wife because the IJ had already continued the case for over two years to await the adjudication of the second I-130 petition, and once the second I-130 petition was denied the likelihood of the alien obtaining an immediate-relative visa decreased significantly.

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■ **Eighth Circuit Upholds Adverse Credibility Finding Based On Submission of Suspect Documents**

In ***Nadeem v. Holder,*** 599 F.3d 869 (8th Cir. 2010) (Loken, *Benton*, Viken), the Eighth Circuit held that substantial evidence supported an adverse credibility determination based

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on petitioner's submission of a Pakistani police report and arrest warrant that a State Department investigation revealed contradicted Pakistani records. The court rejected petitioner's claim that he would be tortured by the Pakistani government as a result of the State Department investigation because there was no evidence that investigators disclosed any information about the alien to Pakistani officials.

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NINTH CIRCUIT

■ Ninth Circuit Holds That Asylum Applicant From Kenya Was Credible And That Record Did Not Establish Changed Country Conditions

In ***Mutuku v. Holder***, __ F.3d__, 2010 WL 1407852 (9th Cir. April 9, 2010) (Fletcher B., *Pregerson*, Graber), the Ninth Circuit remanded the case for a determination whether petitioner had suffered past persecution. Petitioner, a citizen of Kenya, worked for Lutheran World Relief and was an organizer and supported of the Democratic Party, the leading opposition Party in Kenya. Petitioner entered the United States in 1992 on a B-2 visitor's visa. When she was placed in removal proceedings in 1998 as an overstay, she sought asylum, withholding and CAT protection. Petitioner claimed that in 1992, armed men came looking for petitioner at her house, burned down her home, beat her sister and harassed her mother. They also told her mother that they would kill petitioner if she did not stop her political activities. The IJ denied asylum because the application was untimely filed, she was not credible, and she had not established fear of future persecution. The IJ denied withholding based on the adverse credibility finding and changed country conditions. CAT was denied because the Democratic Party was now in power in Kenya. The BIA affirmed.

The court first upheld the BIA's denial of petitioner's asylum application on the untimeliness ground. However, as to petitioner's withholding claim, the court held that the IJ's adverse credibility determination was not supported by the record because the inconsistency he relied upon did not exist. The IJ had found that petitioner was not credible because she had omitted in her asylum application the fact that she had almost been run over by a truck driven by political activists. The court pointed out that petitioner had stated in the asylum application that she had been "almost run down by a vehicle." Additionally, the court held that the IJ had improperly found that conditions in Kenya had improved for members of the Democratic Party to such an extent that petitioner no longer had a well-founded fear of future persecution. The court found that the 2002 State Department Country Report indicated that abuses like those suffered by petitioner were still common in Kenya. Accordingly, the court remanded the proceedings solely for the agency to consider whether petitioner had established past persecution.

The court held that a prior Circuit decision applying *Brand X* deference to the BIA interpretation of a statute applies to all cases currently on direct review.

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■ Ninth Circuit Holds That Alien Subject to Reinstatement Must Challenge Agency's Denial of Adjustment Application Through Petition for Review

In ***Morales-Izquierdo v. Holder,*** __ F.3d __, 2010 WL 1254137 (9th Cir. On April 2, 2010), (Beezer, *Gould*, Tallman, JJ.) the Ninth Circuit held that the district court lacked jurisdiction to review the agency's denial of adjustment of status because the denial was part of a reinstatement order constituting an "order of removal" and appealable only in the courts of appeals. The court further held that a prior Circuit decision applying *Brand X* deference to the BIA interpretation of a statute applies to all cases currently on direct review.

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■ Ninth Circuit Holds that Abstract of Judgment May be Relied Upon in the Modified Categorical Approach

In ***Ramirez-Villalpando v. Holder***, __ F.3d __, 2010 WL 1407959 (9th Cir. April 9, 2010) (Wallace, Hug, *Clifton*), the Ninth Circuit held that the abstract of judgment, when corroborated by the felony complaint, could be considered under the modified categorical approach. The court did not reach the question of whether *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008), permits the court to rely on the abstract of judgment without additional corroboration. The court also held that its review was not limited to the evidence that the BIA expressly identified, and that the Board was not required to "expressly parse or refute on the record" every piece of evidence. Finally, the court held that the alien's conviction was not subject to collateral attack.

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■ Ninth Circuit Finds Jurisdiction to Review Asylum Untimeliness Based on Ineffective Assistance, Upholds Denial of Withholding of Removal and CAT

In ***Tamang v. Holder***, __ F.3d __, 2010 WL 917202 (9th Cir. March 16, 2010) (Gould, Tallman, *Benitez*) the Ninth Circuit held that it had jurisdiction to consider petitioner's claim that ineffective assistance of counsel was

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an exceptional circumstance that could toll the asylum filing date. The court characterized the petitioner's claim that he was not subject to the *Lozada* requirements as a mixed question of fact and law, but dismissed the asylum application as untimely.

The court further denied withholding of removal because alien did not suffer any "personal persecution" when his brother was persecuted by Maoists in Nepal, and that, even assuming past persecution, changed circumstances in Nepal would preclude a finding of a clear probability of persecution. The court also held that petitioner did not establish an independent clear probability of future persecution based on "vague threats" to his family in Nepal.

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■ **Use of a Firearm Is Not Required for a Drug Trafficking Crime**

In ***Lopez-Jacuinde v. Holder***, 600 F.3d 1215 (9th Cir. 2010) (*B. Fletcher*, Clifton, Bea), the Ninth Circuit held that a state conviction for possession of pseudoephedrine with intent to manufacture methamphetamine, in violation of California Health and Safety Code § 11383(c), was a drug trafficking crime which constitutes an aggravated felony under federal law. The court further held that a state conviction could be a drug trafficking crime even without the use of a firearm element. The court also rejected petitioner's argument that the federal drug offense requires a minimum amount of pseudoephedrine, which would have rendered the state statute broader than the federal crime. Accordingly, the petitioner, a Mexican citizen, was found statutorily ineligible for cancellation of removal.

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■ **Ninth Circuit Holds that "Returning Mexicans from the United States" Is Too Broad to be a Cognizable Social Group**

In ***Delgado-Ortiz v. Holder***, 600 F.3d 1148 (9th. 2010) (Canby, Gould, Tallman) (*per curiam*), the Ninth Circuit, held that petitioners' proposed social group of "Mexicans returning home from the United States who are targeted as victims of violent crime as a result" was too broad to be considered a cognizable social group.

"The key to establishing a particular social group is ensuring that the group is narrowly defined."

The petitioners, husband and wife, entered the United States in February 1993 and January 1992, respectively, without admission or parole after inspection by an immigration officer. When placed in proceedings, they conceded removability at the initial removal hearing, withdrew their previously-filed applications for asylum, withholding of removal, and CAT protection, but applied for cancellation of removal. The IJ denied cancellation because they failed to show that their removal would result in exceptional and extremely unusual hardship. The BIA affirmed but they were granted voluntary departure.

Petitioners did not depart. Instead they filed a timely motion to reopen seeking to introduce new hardship evidence and to reapply for protection under the CAT. The BIA denied that motion. Petitioners then filed a second motion to reopen on February 4, 2009, based on allegedly new country conditions-seeking to reapply for asylum, withholding of removal, and protection under the CAT. They asserted that they belonged to a particular social group: "Mexicans returning home from the United States who are targeted as victims of violent crime as a result." The BIA denied the motion as untimely, number-barred, and on the merits.

The Ninth Circuit upheld the denial of the motion for failure to demonstrate prima facie eligibility for the relief requested. The court noted that "asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground . . . the key to establishing a particular social group is ensuring that the group is narrowly defined." Further, when seeking to define such a group, "[v]arious factors, such as immutability, cohesiveness, homogeneity, and visibility, are helpful in various contexts," but we should also follow the 'traditional common law approach, looking at hypothetical cases and commonalities in cases that go one way or the other.'" The court noted that petitioners' proposed group was akin to other groups the court has rejected as being too broad, such as business owners who had rejected demands by narcotics traffickers, the Roma and young men in El Salvador who resisted gang violence.

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■ **Ninth Circuit Holds that Alien Is Not Removable as an Aggravated Felon for His 1988 Conviction for Sexual Abuse of a Minor**

In ***Ledezma-Galicia v. Holder***, 599 F.3d 1055 (9th Cir. 2010) (Reinhardt, *Berzon*, Bybee) the Ninth Circuit, refused to grant *Chevron* deference and held that the alien, who was convicted of sexual abuse of a minor in September 1988, may not be removed because the 1988 law that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988, and neither Congress's over-

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haul of the grounds for deportation in 1990 nor its rewrite of the definition of aggravated felony in 1996 under IIRIRA, erased that temporary limitation.

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■ **Ninth Circuit Overturns Adverse Credibility Determination Held to Be Based on Conjecture and Speculation**

In ***Chawla v. Holder***, __ F.3d __, 2010 WL 1135766 (9th Cir. March 26, 2010) (O'Scannlain, *Trott*, Paez), the Ninth Circuit held that the agency's adverse credibility determination was not supported by the record. The court parsed each of the seven factors articulated by the agency, and held that the adverse credibility determination was based largely on conjecture and speculation. For instance, the court held that two newspaper articles with differing accounts of a rally "[were] not wholly inconsistent;" the alien provided a reasonable explanation for the differing accounts, and neither the Immigration Judge nor the BIA specifically addressed the alien's explanation. The court also held that certain corroborating evidence that the agency requested was not "easily available."

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■ **Ninth Circuit Holds That California Marijuana Conviction Is Categorically an Offense Relating to a Controlled Substance.**

In ***Guerrero-Silva v. Holder***, 599 F.3d 1090 (9th Cir. 2010) (Hug, *Bybee*, Gwin), the Ninth Circuit, dismissed the petition for review after concluding that petitioner's conviction for violating California Health and Safety Code § 11361(b) (furnishing, administering, or giving, or offering to furnish, administer, or give marijuana to a minor older than fourteen) is categorically an offense relating to a controlled substance which rendered the alien removable under 8 U.S.C. § 1227(a)(2)(B)(I). The court distinguished Circuit law holding that some solicitation offenses are not removable offenses under the INA on the ground that those cases involved either generic solicitation statutes or the aggravated felony ground of removal.

Under the new U visa regulations, aliens who are denied U visas may appeal only to the USCIS Administrative Appeals Office rather than the immigration court.

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■ **Ninth Circuit Holds that IJ Does Not Have Jurisdiction over Alien's Request for U Visa Interim Relief**

In ***Lee v. Holder,*** 599 F.3d 973 (9th Cir. 2010) (Kozinski, Thompson, McKeown) (*per curiam*) the Ninth Circuit held that the IJ did not have authority to make a determination on the petitioner's application for U visa interim relief. The court concluded that petitioner's appeal of the IJ's denial of interim relief failed because the decision whether to grant such relief was committed to USCIS.

The court further held that, even under the new U visa regulations, aliens who are denied U visas may appeal only to the USCIS Administrative Appeals Office rather than the immigration court. Finally, the court determined that it lacked jurisdiction over the alien's unexhausted argument that U visa regulations failed to set a guideline regarding the application of the "likely to be helpful" criterion.

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DISTRICT COURTS

■ **Western District of Virginia Grants Government's Motion for Summary Judgment, Concluding Plaintiff Is No Citizen by Birth Where Notice of Her Father's Termination as Diplomat Occurred After Her Birth**

In ***Raya v. Clinton, et al***, __ F.2d. __, 2010 WL 1424294 No. 09-cv-169 (W.D. Va. April 9, 2010) (*Conrad, J.*), the district court rejected the government's argument that the court lacked jurisdiction over the plaintiff's claims under 8 U.S.C. § 1503(a)(1), but granted the government's alternative motion for summary judgment finding that plaintiff was not a U.S. citizen.

The plaintiff was born on October 9, 1981, at Walter Reed Army Medical Center in Washington, D.C. to Mohamed Aly Mohamed Raya (the plaintiff's father) and Nabila Salama (the plaintiff's mother). At the time of the plaintiff's birth, his father was a citizen of the Arab Republic of Egypt. Approximately two years before the plaintiff was born, the plaintiff's father was appointed by the Egyptian government to a diplomatic position with the Egyptian Embassy in Washington, D.C.

The plaintiff alleged that her father's diplomatic visa expired five months prior to her birth, and that his duties as an attaché to the Egyptian Embassy expired four months before she was born. The plaintiff further alleged that her father resided in Egypt on the date of her birth, where he was serving in the Egyptian armed forces, and that her mother was an Egyptian national illegally present in the United States on an expired diplomatic visa.

The court found that the State Department's determination that plaintiff was not a United States citizen by birth was based on a reason-

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able application of the Vienna Convention on Diplomatic Relations because notification of her father's termination as a diplomat occurred after her birth.

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■ **District Court Dismisses Challenge to USCIS's Decision Not to Parole Removed Alien**

In *Veliz-Payes v. Napolitan.,* No. 09-cv-3060 (*Motz*, J.) (D. MD March 30, 2010), the district court granted the government's motion to dismiss the action. In this case, the alien left the United States after an immigration judge concluded that he was removable for having overstayed his nonimmigrant visa. Later, the alien illegally reentered the country. After he reentered, the alien moved to reopen his removal proceedings, but the Government removed him again pursuant to a reinstated removal order. In his complaint to the court, the alien claimed that the government had a duty to parole him into the United States so he could pursue his motion to reopen. In their motion to dismiss, defendants argued that the court lacked jurisdiction over the case because parole decisions are entirely discretionary, and the Immigration and Nationality Act deprives district courts of jurisdiction over discretionary decisions.

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■ **District Court for District of New Jersey Dismisses Challenge to Agency's Revocation of Approved Immigrant Visa Petition**

In *Trans American Trucking Service v. Holder*, No. 09-cv-6116 (D. N.J. April 5, 2010) (*Linares, J.*), the district court dismissed a complaint filed by an employer under the Administrative Procedure Act challenging the legal validity of USCIS revocation of an employment-based immigrant visa petition filed on behalf of plaintiff employee. Plaintiffs alleged that the agency erroneously revoked the petition based on the employee's prior attempt to enter into a sham marriage for immigration purposes. The court held that it lacked subject matter jurisdiction under the INA to review the agency's decision, because the revocation statute authorizes USCIS to revoke the approval of immigration visa petitions as a matter of unfettered discretion.

The court held that it lacked subject matter jurisdiction because the revocation statute authorizes USCIS to revoke the approval of immigration visa petitions as a matter of unfettered discretion.

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■ **Northern District of California Grants Government's Motion for Summary Judgment in Class Action Challenge to U.S. Citizenship and Immigration Services' Biometric Fees, Saving Government $100 Million**

In *Bautista-Perez v. Holder*, No. 07-cv-4192 (N.D. Cal. April 6, 2010) (*Henderson*, J.), the district court granted the government's motion for summary judgment in a class action challenging the U.S. Citizenship and Immigration Services' (USCIS) practice of charging biometric services fees, over and above the statutory $50 registration fee, for aliens seeking Temporary Protection Status (TPS). The complaint alleges that the Immigration and Nationality Act, which includes a $50 cap on fees "as a condition of registering" for TPS, bars USCIS from imposing an additional fee for biometric services. The court had certified a nationwide class of approximately 400,000 individuals who each sought a refund of roughly $250 each.

The government argued that the cap did not relate to the biometric services fees, but the court twice rejected that argument. Based on the October 28, 2009, enactment of the Department of Homeland Security Appropriations Act of 2010 (DHS Appropriations Act), the court granted the government's motion.

The court held that the DHS Appropriations Act expressly allows the collection of a biometric services fee in addition to the registration fee and provides for its application as of 1998. Following the court's dismissal of the claim that charging a biometric services fee in addition to the $50 registration fee violates the Immigration and Nationality Act, the only remaining issue is the legality of DHS's practice of charging a biometric services fee when the collection of biometrics is not required.

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■ **Court Revokes Naturalization of Defendant Whose Green Card Was Obtained Fraudulently from Corrupt INS Official**

In *United States v. Young Kwon Son*, No. 08-cv-11025 (*Stearns*) (D. Mass. April 13, 2010), Judge Stearns granted the government's motion for summary judgment. The court found that defendant Son's naturalization should be revoked because it was obtained fraudulently. In particular, the court found that Son's father fraudulently obtained Son's lawful permanent residence from Leland Sustaire, a former INS official convicted of conspiracy to bribe a public official. An order cancelling Son's certification of naturalization is forthcoming.

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INSIDE OIL

OIL welcomes back ***Margot Nadel***. In mid-2006, Margot left OIL to work for Northrop Grumman. In late 2007, she joined the United States Department of State, and served an overseas tour at the U.S. Embassy in Kabul, Afghanistan.

INSIDE EOIR

EOIR is on a trajectory to dramatically increase the number of immigration judges by later this year, which will help mitigate the increasing caseload.

EOIR has hired more than 60 immigration judges since the beginning of fiscal year 2006.

EOIR is currently in the midst of a hiring initiative for 47 immigration judges. These 47 positions include 28 immigration judge positions newly allocated for FY 2010. The new allocations bring the total number of authorized positions from 252 to 280.

TRAINING CALENDAR

■OIL's 14th Annual Immigration Litigation Conference will be held at the National Advocacy Center in Columbia, South Carolina on September 27— October 1, 2010. This is an advanced immigration law conference intended for experienced attorneys who are litigating in the federal courts or advising their client agencies on immigration matters that may lead to litigation.

■OIL's 16th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC on November 15-19, 2010. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

For additional information about these training programs contact Francesco Isgro at Francesco.Isgro@usdoj.gov.

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The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

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