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Immigration Litigation Bulletin

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Inside

David M. McConnell New OIL Director

Assistant Attorney General Tony West has announced that David McConnell has been selected as the new Director for OIL Appellate. In making the announcement, AAG West said, "Dave is a dedicated public servant who has done outstanding work for OIL over the past twenty years in various capacities, including as Deputy Director for twelve years, and most recently as Acting Director. He is an invaluable member of the Civil Division team. I've come to rely on Dave's good judgment and I know that he will do a superb job."

McConnell joined OIL in 1990 as a Trial Attorney. He became an Assistant Director in June 1996, and was appointed Deputy Director for

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David M. McConnell

Supreme Court To Decide Availability of § 212(c) Issue

Congress repealed waiver in 1996, but litigation continues unabated

In 1996 Congress first restricted, and the repealed section 212(c) of the INA, a provision that since 1952 had provided the sole avenue of relief to lawful permanent residents who had been convicted of certain crimes.

Originally, § 212(c) waived, in the discretion of the Attorney General, the criminal grounds of exclusion for LPRs who were returning to a lawful unrelinquished domicile of seven consecutive years. But, through administrative and court decisions, the relief was expanded to include LPRs who had not left the United Sates and thus were subject to deportable offenses. The BIA however, limited the waiver of deportable offenses to those offenses that had a statutory counterpart in the grounds of exclusion. *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005).

Although § 212(c) was a frequently litigated provision in the INA, often creating federal circuit conflicts, the Supreme Court never intervened to bring national uniformity. In 2001, however, the Court decided *INS v. St. Cyr*, 533 U.S. 289 (2001), where it held, based on principles of non-retroactivity, that the restriction and repeal of § 212(c) did not apply to LPRs who pled guilty before the effective dates of the

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INA § 212(c) issue to be heard by Supreme Court

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1996 amendments. The decision precipitated a new round of litigation regarding the scope and availability of § 212(c) relief to LPRs who had been convicted of crimes before 1996.

The Supreme Court has decided to intervene in another § 212(c) case. On April 18, 2011, it granted certiorari in ***Judulang v. Holder***, 2011 WL 1457529 (April 18, 2011), to consider whether the former § 212(c) is available to an LPR who plead guilty to an offense that renders him deportable and excludable under differently phrased statutory subsections.

Judulang was born in the Philippines in 1966 and entered the United States in 1974. In 1989, he was convicted of voluntary manslaughter in California state court, for which he received a suspended sentence of six years of imprisonment and four years of probation, conditioned on his spending 684 days in county jail. In 2003, he was convicted of grand theft of property valued at more than $400. Based on the latter conviction, Judulang was placed in removal proceedings in 2005, though additional charges of removability were later lodged, based on his 1989 conviction and for having committed two or more crimes involving moral turpitude.

In the initial proceedings, petitioner admitted that he was not a citizen of the United States. On September 28, 2005, an IJ ruled that petitioner was subject to removal on three grounds: under 8 U.S.C. §1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "a theft offense," as defined at 8 U.S.C. §1101(a)(43)(G)); as an alien convicted of an aggravated felony (specifically, a "crime of violence," as defined at 8 U.S.C. § 1101(a)(43)(F)); and under 8 U.S.C. §1227(a)(2)(A)(ii) as an alien convicted of "two or more crimes involving moral turpitude." The IJ found that Judulang was "not eligible for any forms of relief," including former § 212(c), and ordered him removed to the Philippines.

On February 3, 2006, the BIA dismissed Judulang's appeal. The BIA denied his claim, that he had obtained derivative United States citizenship through his parents. It also determined that Judulang's conviction for voluntary manslaughter rendered him removable and ineligible for 212(c) relief because "the 'crime of violence' aggravated felony category has no statutory counterpart in the grounds of inadmissibility under § 212(a) of the Act." The BIA found it unnecessary to determine "whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability."

Judulang then unsuccessfully sought review by the Ninth Circuit. That court determined that Judulang had "failed to create a genuine issue of material fact regarding his claim of citizenship," and that his challenge to the BIA's holding that he was ineligible for relief under the "statutory counterpart" theory was foreclosed by the panel decision in *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007), which the court found to be "controlling." The panel decision in *Abebe* was later superseded by an en banc decision that rested on somewhat different grounds. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010).

Subsequently, Judulang's petition for rehearing and rehearing en banc was denied, but Justice Anthony Kennedy stayed the judgment of the Ninth Circuit pending the filing of a petition for certiorari. The government opposed the granting of certiorari, noting on non-substantive grounds, that the question raised "concerns an alien's eligibility for a form of discretionary relief under a statute that was repealed almost 14 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments."

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Supreme Court to Consider Passport Issue Case

The question raised ***M.B.Z. v. Clinton***, __WL __, Docket No. 10-699 (U.S.), is whether the "political question doctrine" deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad "CRBA" and on a passport.

The petitioner, a USC, was born in West Jerusalem. When mother applied for a passport and Consular Report of Birth Abroad ("CRBA") for him she requested that the place of birth on both documents be designated as "Israel." Her requests were denied. Petitioner's passport and his CRBA list only "Jerusalem" as his place of birth and do not include any country of birth. However, a statutory provision directs the Secretary of State to endorse U.S. passports and CRBA of American citizens born in Jerusalem with "Israel" as the place of birth upon their request.

The District Court dismissed the complaint as "non-justiciable" on the ground that the case required the court to determine a "political question." *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007). A divided panel of the court of appeals affirmed the dismissal on jurisdictional grounds. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009)).

Defining "Admission": Inconsistent Interpretations of "Unambiguous Text"

In *Matter of Alyazji*, 25 I. & N. Dec. 397 (BIA 2011), the Board of Immigration Appeals addressed the often discussed, but less frequently agreed upon, issue concerning whether adjustment of status constitutes an "admission" as defined by the Immigration and Nationality Act ("INA"). Although the Board has consistently held that post-entry adjustment of status pursuant to 8 U.S.C. § 1255 should be treated as an "admission" for purposes of other provisions in the INA, the circuit courts vary regarding whether they deem post-entry adjustment as "admission," and if so, in what contexts.

The Board and circuit courts agree that post-entry adjustment of status is not included in the statutory definition of "admission," which is defined in 8 U.S.C. § 1101(a)(13) as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See, e.g.*, *Matter of Rosas-Ramirez*, 22 I. & N. Dec. 616 (BIA 1999); *Aremu v. Dept. of Homeland Security*, 450 F.3d 578, 581 (4th Cir. 2006); *Zhang v. Mukasey*, 509 F.3d 313, 316 (6th Cir. 2007); *Abdelqadar v. Gonzales*, 413 F.3d 668, 674 (7th Cir. 2005); *Shivaraman v. Ashcroft,* 360 F.3d 1142, 1146 (9th Cir. 2004). However, disagreement exists in determining whether the 8 U.S.C. § 1101(a)(13) definition is the sole and exclusive definition of admission or, if in the context of other INA provisions, adjustment of status may also qualify as an "admission." The Board has consistently held that it does, finding that other provisions in the INA support its determination that adjustment of status qualifies as "admission," and also recognizing that "if adjustment of status were not considered an admission, many lawful permanent residents would be considered inadmissible, despite their lawful status, based on their presence in the United States without having been admitted." *Matter of Alyazji*, 25 I. & N. Dec. at 399; *see also Matter of Rosas*, 22 I. & N. Dec. at 618-19 (relying in part on 8 U.S.C. § 1101(a)(20), which defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed"); *see also Matter of Koljenovic*, 25 I. & N. Dec. 219, 221 (BIA 2010) (stating that "adjustment of status is essentially a proxy for inspection and permission to enter at the border").

Most circuit courts agree with, with, the Board's rationale that adjustment of status must constitute an "admission" in order to avoid absurd results when applied to other INA provisions.

Most circuit courts that have addressed the issue of whether post-entry adjustment can constitute "admission" either agree with, or at least have not expressly disagreed with, the Board's rationale that adjustment of status must constitute an "admission" in order to avoid absurd results when applied to other INA provisions. For example, there are several grounds of removability at 8 U.S.C. § 1227 that are dependent upon convictions that occur "at any time after admission." *See* 8 U.S.C. §§ 1227(a)(2)(A)(ii), (iii), (B)(i), (C), (E)(i)-(ii). Several courts, including the Fourth, Sixth, Seventh, and Ninth Circuits, agree with, or at least do not explicitly disagree with, the Board's seminal decision in *Matter of Rosas* that a post-entry adjustment qualifies as an "admission" for purposes of determining whether the convictions occurred "after admission." *Matter of Rosas*, 22 I. & N. Dec. at 618-19; *see e.g.*, *Aremu*, 450 F.3d 578, 583 (noting that treating post-entry adjustment as an admission may be justified in some circumstances to avoid absurd results); *Zhang*, 509 F.3d at 316 (distinguishing *Matter of Rosas*, and noting that the alien in *Rosas* entered the United States illegally, and therefore that her "adjustment of status signified the first point at which she was *lawfully* in the United States"); *Abdelqadar*, 413 F.3d at 674 (noting that an agency is afforded latitude to "repair" statutes that do not work universally, but expressing doubt in this circumstance); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) (concluding that adjustment of status is properly considered an admission when the alien sought to be removed has never been admitted within the meaning of 8 U.S.C. § 1101(a)(13)).

By expanding the definition of admission to include post-entry adjustment of status, however, the use of the term "admission" or "admitted" in other provisions in the INA can require further interpretation, which has led to inconsistent results. Although some circuit courts may recognize that construing adjustment of status has its place when removal grounds require that a crime be committed after "admission," the courts have been more hesitant to construe post-entry adjustment of status as an "admission" for cases arising under 8 U.S.C. § 1227(a)(2)(A)(i), which authorizes the removal of any alien who "is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission" if the offense is punishable by a sentence of imprisonment of one year or longer. *See Aremu*, 450 F.3d at 581-82 (refusing to comment on whether post-entry adjustment can constitute admission if the alien had never been admitted under 8 U.S.C. § 1101(a)(13), and holding that "the date of admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(i) occurred when Aremu was admitted as a non-

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Defining "admission"

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immigrant visitor and not when he subsequently adjusted status); *Abdelqadar*, 413 F.3d at 674 (distinguishing 8 U.S.C. §§ 1227(a)(2)(A)(iii) from 1227(a)(2)(A)(i), holding that the latter removal provision requires that the five year "clock runs from physical entry, not from a change in legal status after arrival"); *Shivaraman,* 360 F.3d at 1146 (holding that for purposes of 8 U.S.C. § 1227(a)(2)(A)(i), adjustment is not "the date of admission" for determining removability within five years of admission if the alien had been previously admitted upon entry, pursuant to 8 U.S.C. § 1101(a)(13)).

In *Matter of Alyazji*, the Board specifically addressed the circuit courts' inconsistent approach to post-entry adjustment as an admission for purposes of 8 U.S.C. § 1227 (a)(2)(A)(i). 25 I. & N. Dec. at 401-02. The Board held that the relevant "date of admission" was the date "by virtue of which the alien was then in the United States." *Id.* at 398, 404-08. For example, if the alien was admitted to the United States as a nonimmigrant, and later adjusted status, the date of his admission as a nonimmigrant would qualify as "the date of admission," and the adjustment of status would be treated as merely an extension of the alien's already existing presence. *Id.*

However, if the alien adjusted status after entering the United States without inspection, and therefore was not present in the United States pursuant to an "admission" as defined by 8 U.S.C. § 1101(a)(13), the date the alien adjusted status would qualify as the "date of admission." *Id.* By way of this holding, the Board overruled its decision in *Matter of Shanu*, 23 I. & N. Dec. 754 (BIA 2005), which held that an alien is removable under 8 U.S.C. § 1227(a)(2)(A)(i) if the crime was committed within five years of *any* admission, including within five years of adjusting status, even if the alien had been previously admitted upon entry in accordance with 8 U.S.C. § 1101(a)(13).

While the Board clarified "date of admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(i), it also recognized that a post-entry adjustment of status must constitute an "admission" to avoid absurd results when it comes to waivers of inadmissibility under 8 U.S.C. §§ 1182(h) and (i). *Matter of Alyazji*, 25 I. & N. Dec. at 403; *see also Matter of Koljenovic*, 25 I. & N. Dec. at 219. Inconsistent approaches to treating adjustment as admission in this context by circuit courts still exist.

In *Matter of Alyazji*, the Board held that the relevant "date of admission" was the date "by virtue of which the alien was then in the United States."

One day after the Board issued *Matter of Alyazji*, the Eleventh Circuit issued its decision in *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1365 (11th Cir. 2011), holding that because there is no ambiguity in the definition of "admission" in 8 U.S.C. § 1101(a)(13), and because adjustment of status clearly does not fall within the purview of such definition, adjustment of status does not constitute admission for purposes of barring an alien for a waiver of inadmissibility under 8 U.S.C. § 1182(h). This statute provides in relevant part that "no waiver may be granted in the case of an alien who has been previously admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of admission the alien has been convicted of an aggravated felony." 8 U.S.C. § 1182(h).

The Eleventh Circuit relied on the Fifth Circuit's decision in *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008), which held that 8 U.S.C. § 1182(h) "only denies waivers of eligibility to aliens who have 'previously been *admitted* [§ 1101(a)(13)] to the United States as an *alien lawfully admitted for permanent residence* [§ 1101(a)(20)].'" *Lanier*, 631 F.3d at 1367. The Eleventh Circuit therefore held that aliens who adjust status post-entry are not barred from seeking a waiver under 1182, even if they have never been admitted pursuant to 8 U.S.C. § 1101(a)(13). In *Matter of Koljenovic*, however, the Board noted that because the alien in *Martinez* had been previously admitted as a nonimmigrant, the Fifth Circuit never considered whether the same rule would apply if the alien had not been previously admitted. *Matter of Koljenovic*, 25 I. & N. Dec. at 223; *Martinez*, 519 F.3d 532.

Indeed, in a unpublished decision, the Fifth Circuit declined to follow its holding in *Martinez*, distinguishing the facts of *Martinez*, in which the alien had been previously admitted, from the case at hand in which the alien was not previously admitted, but was granted post-entry adjustment of status. *Molina-Ramirez*, 362 Fed. Appx. 387, 392-93 (5th Cir. 2010) (unpublished).

The Eleventh Circuit in *Lanier* cited fidelity to the "unambiguous text" of 8 U.S.C. § 1101(a)(13) to support its conclusion that adjustment of status does not constitute "admission," even when an alien has not been previously admitted. Other circuit courts have stated the same, including in the cases that grappled with the definition of "admission" for purposes of 8 U.S.C. § 1227(a)(2)(A)(i). *See Aremu*, 450 F.3d at 581-82; *Zhang*, 509 F.3d at 316; *Abdelqadar*, 413 F.3d at 673; *Shivaraman,* 360 F.3d at 1146. The Board's decision in *Matter of Alyazji* may have clarified whether and when post-entry adjustment can be construed as the "date of admission" for purposes of 8 U.S.C.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court heard arguments in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court is considering the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 U.S.C. § 1326. The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit en banc heard oral arguments 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 BIA 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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Convictions - State Expungements

On December 16, 2010, the Ninth Circuit en banc heard arguments in ***Nunez-Reyes v. Holder***, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel had applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of congressionally-created immigration law.

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Asylum - Corroboration

On December 15, 2010, the Ninth Circuit en banc heard oral argument in ***Nirmal Singh v. Holder*** (08-70434) to address whether 8 U.S.C. § 1158(b)(1)(B)(ii) requires an immigration judge to take the following steps sequentially: (1) determine whether an asylum applicant has met his burden of proof; (2) notify the applicant that specific elements of his case require corroboration; and (3) provide the applicant an opportunity to explain why any evidence is unavailable. Although the issue was neither raised to the agency below, nor argued in the opening brief to the panel, in her dissent to the unpublished decision, Judge Berzon argued forcefully for such a process. The panel majority held that the plain language of the statute did not require a sequential process, and even if the statute had been ambiguous, the majority would defer to the agency's reasonable interpretation of the INA.

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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 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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Cancellation - Burden of Proof

On March 31, 2011, the government filed a petition for rehearing en banc in ***Rosas-Castaneda,*** 630 F.3d 881 (9th Cir. 2011). The issue raised in the petition is whether an alien can satisfy his burden of proving eligibility for cancellation by showing that his conviction was based on a divisible state offense, but refusing to provide the plea colloquy transcript so that the IJ could determine whether the conviction was an aggravated felony under the modified categorical approach. The Ninth Circuit has ordered petitioner to respond to the government's petition for rehearing.

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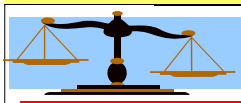

Summaries Of Recent Federal Court Decisions

THIRD CIRCUIT

■ Third Circuit Upholds Agency's Finding That Alien Failed to Show He Did Not Receive Notice of Deportation Hearing

In *Patel v. Att'y Gen. of the U.S.*, __ F.3d __, 2011 WL 652749 (3d Cir. April 25, 2011) (Barry, Hardiman, Stapleton), the Third Circuit granted the government's motion to publish a per curiam decision which had been originally issued on February 25, 2011. In the decision the court affirmed the BIA's refusal to reopen an in absentia removal order where petitioner's counsel of record was notified of the hearing, but was unable to contact petitioner because he had failed to keep himself apprised of his immigration proceedings and his whereabouts were unknown. The court rejected the petitioner's argument that actual notice had to have been effected on him in order for the in absentia order to be valid and reaffirmed that service by certified mail to an alien's attorney satisfies the notice requirement.

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■ Third Circuit Adopts "Harmless Error" Analysis, Denies Petition for Review

In *Li Hua Yuan v. Att'y Gen. of the U.S.*, __ F.3d __, 2011 WL 1519200 (3d Cir. April 22, 2011) (Fisher, *Jordan*, Cowen), the Third Circuit rejected petitioner's argument that the BIA erred when it assessed the sufficiency of the evidence supporting her claim for asylum and engaged in *de novo* review of the IJ's factual findings. The court held that substantial evidence supported the BIA's conclusion that petitioner "had not met her burden of showing that she was reasonably likely to be forcibly sterilized in China." The court also agreed with the First, Second, Fourth, Seventh, and Tenth Circuits that a "harmless error analysis" should apply in immigration cases, and affirmed that it would "view an error as harmless and not necessitating a remand to the [BIA] when it is highly probable that the error did not affect the outcome of the case." Applying that test, the court concluded that the BIA's erroneous de novo review of the IJ's factual findings was harmless and denied the petition for review.

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■ Third Circuit Remands Case to Reconsider Sua Sponte Reopening

In *Pllumi v. Att'y Gen. Of U.S.*, __ F.3d __, 2011 WL 1278741(*Jordan*, Greenaway, Jr., Stapleton) (3d Cir. April 6, 2011), the Third Circuit remanded the case to the BIA to determine whether the harm from Albania's inadequate healthcare system warranted the BIA's exercise of its authority to *sua sponte* reopen petitioner's untimely proceedings. The court adopted the Second Circuit's reasoning in *Mahmood v. Holder*, 570 F.3d 466 (2d Cir. 2009), and held that it may exercise jurisdiction over a denial of *sua sponte* reopening to the limited extent of recognizing when the BIA has relied on an incorrect legal premise.

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■ Third Circuit Affirms Denial of Untimely Reopening Request Where Alien Failed to Exercise Due Diligence in Pursuing His Ineffective Assistance of Counsel Claim

In ***Alzaarir v. Holder***, __F.3d__, 2011 WL 668119 (3d Cir. April 14, 2011) (Rendell, Jordan, Van Antwerpen) (*per curiam*), the Third Circuit published its previously non-precedential holding that the BIA did not abuse its discretion by denying the Palestinian applicant's untimely and number-barred motion to reopen alleging ineffective assistance of counsel. The court concluded that the petitioner had failed to demonstrate due diligence by not filing his motion while he waited for the government to respond to his request to join in a motion to reopen. It also ruled that while equitable tolling may be appropriate where the government has misled an alien, record evidence did not establish that the government ever agreed to joint reopening, much less misled the alien about its intent.

The court concluded that the petitioner had failed to demonstrate due diligence by not filing his motion while he waited for the government to respond to his request to join in a motion to reopen.

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FIFTH CIRCUIT

■ Fifth Circuit Determines that Voluntary Departure Under Threat of Deportation Proceedings Breaks Continuous Residence For Amnesty

In *Ramos-Torres v. Holder*, __ F.3d __, 2011 WL 1226963 (Davis, *Weiner*, Benevides) (5th Cir. April 4, 2011), the Fifth Circuit concluded that for purpose of determining an alien's eligibility for amnesty under IRCA, petitioner's decision to accept voluntary departure under threat of being placed in deportation proceedings constituted a break in his residency in the United States.

The petitioner, a Mexican citizen, was convicted in 1982 for illegal entry into the United States. He was sentenced to three years of unsupervised probation that was conditioned on his making no illegal return to the United States. Petitioner requested an administrative voluntary departure in lieu of depor-

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tation, which was granted, and he returned to Mexico. At some point during the next decade, he did illegally reenter the United States, and, in 1993, he applied for and was granted LPR status under IRCA's amnesty provision. In 2006, petitioner was convicted for illegally transporting aliens and was ordered removed from the United States. He then applied for cancellation of removal as an LPR. The IJ determined as a matter of law that petitioner had never been eligible for LPR status in the first place because of his 1982 voluntary departure, and thus he was ineligible for cancellation of removal. The BIA affirmed the IJ's decision.

> The court found that petitioner's "voluntary departure in lieu of deportation interrupted his alleged continuous residence as a matter of fact and as a matter of law."

The Fifth Circuit held that voluntary departure "with its attendant understanding that the alien will thereby cease his illegal presence" is inconsistent with continuous residence. Petitioner's absence, said the court, "was surely caused by the imminence of his deportation, even if deportation proceedings had not yet commenced against him. Consequently, "his voluntary departure in lieu of deportation interrupted his alleged continuous residence as a matter of fact and as a matter of law." Therefore petitioner was ineligible for LPR status under IRCA and consequently also ineligible for cancellation of removal.

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SEVENTH CIRCUIT

■ **Waiver of Inadmissibility Does Not Apply to Convictions for Possession of Drug Paraphernalia for Cancellation of Removal Purposes**

In ***Barma v. Holder***, __ F.3d __, 2011 WL 1237608 (6th Cir. April 5, 2011) (Easterbrook, Posner, *Rovner*), the Seventh Circuit held that a Canadian citizen's conviction for possession of drug paraphernalia rendered him ineligible for cancellation of removal because it was a conviction "relating to a controlled substance," falling under 8 U.S.C. § 1182(a)(2). Cancellation of removal requires, in relevant part, that an applicant not have been convicted of an offense under 8 U.S.C. § 1182 (a)(2). The court rejected petitioner's argument that an 8 U.S.C. § 1182(h) waiver for a single offense of simple possession of 30 grams or less of marijuana applied to his conviction under 8 U.S.C. § 1182 (a)(2), because the cancellation of removal statute referred only to 8 U.S.C. § 1182(a)(2), and did not incorporate the entirety of 8 U.S.C. § 1182, including 8 U.S.C. § 1182(h), as petitioner argued.

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EIGHTH CIRCUIT

■ **Eighth Circuit Upholds Agency's Finding that Detained Alien Was Personally Served with Notice of Hearing, Affirms Denial of Motion to Rescind Removal Order**

In ***Ashfaque v. Holder***, __ F.3d __, 2011 WL 1364474 (8th Cir. April 12, 2011) (Loken, *Arnold*, Bye), the Eighth Circuit agreed with the BIA's finding that a Bangladeshi alien who was ordered removed in absentia was personally served with notice of his removal hearing at a bond hearing, and so rejected the alien's argument that the agency erred by failing to personally serve him with notice even though personal service was practicable because he remained in government custody for several days after his bond hearing. Accordingly, the court held that the BIA properly denied the alien's untimely motion to reopen removal proceedings and rescind the removal order.

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■ **Eighth Circuit Upholds Agency's Decision Denying Pakistani Alien's Requests For Restriction On Removal And Protection Under The Convention Against Torture**

In ***Shaghil v. Holder***, __ F.3d __, 2011 WL 1405453 (8th Cir. April 14, 2011) (*Riley*, Murphy, Melloy), the Eighth Circuit upheld the BIA's decision denying the petitioner's requests for restriction on removal and protection under the CAT, concluding that substantial evidence supported the finding that the alien failed to demonstrate past persecution or a well-founded fear of future persecution on account of his Christian faith. The court also rejected the petitioner's due process claim, finding no prejudice where the BIA did not make audio recordings of the merits hearing available or allow petitioner to introduce evidence following an earlier remand. Finally, the court ruled that the BIA did not abuse its discretion by denying petitioner's motion to reopen to apply for adjustment of status on the ground that the alien's marriage was not bona fide.

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NINTH CIRCUIT

■ **Ninth Circuit Holds No Past Persecution or Well-Founded Fear of Future Persecution on Account of Homosexuality or HIV Status**

In ***Castro-Martinez v. Holder***, __ F.3d __, 2011 WL 1441859 (9th Cir. April 15, 2011) (McKeown, Fletcher, *Clifton*), the Ninth Circuit upheld the BIA's denial of asylum, restriction on removal, and protection under the CAT, concluding that substantial evi-

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dence supported the BIA's determination that the alien failed to demonstrate past persecution or a well-founded fear of future persecution on account of his homosexuality or HIV-positive status. The court concurred with the BIA that the sexual abuse the alien suffered as a child was not inflicted by or at the acquiescence of the Mexican government. The court also agreed that petitioner's explanation for why he did not report past sexual assaults to authorities was unpersuasive, and that the Mexican population as a whole suffers from lack of access to HIV medications.

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■ **Ninth Circuit Invalidates Departure Bar as to Aliens Who Move to Reopen After Removal**

In ***Reyes-Torres v. Holder***, __ F.3d __, 2011 WL 1312570 (9th Cir. April 7, 2011) (Wallace (dissenting), Thomas, Mills (C.D. Ill.)), the Ninth Circuit invalidated the departure bar under 8 C.F.R. § 1003.2(d) as to aliens who move for reopening subsequent to their removal.

The petitioner, a citizen of Mexico and an LPR since 1964, was convicted in 1984 of transporting aliens in violation of 8 U.S.C. § 1324(a)(2) and in 2007, for possession of a controlled substance. In 2008, DHS charged petitioner with being removable as an alien who had been convicted of an aggravated felony, and as an alien who had been convicted of a law relating to a controlled substance. Petitioner then sought cancellation of removal. The IJ found that petitioner's transportation conviction constituted an aggravated felony and he was therefore ineligible for cancellation of removal. In light of this finding, and in light of petitioner concession of removability on the controlled substance conviction, the IJ ordered him removed to Mexico. The BIA affirmed the IJ's decision on September 26, 2008. Reyes–Torres was removed from the United States on October 3, 2008.

On October 22, 2008, a California Superior Court judge granted petitioner's motion to withdraw his guilty plea to the controlled substance charge resulting in his 2007 controlled substance conviction. The judge granted the motion on the ground that petitioner was not adequately informed of the immigration consequences of the plea. On October 27, 2008, petitioner filed with the BIA a motion to reconsider and reopen proceedings based on the new evidence of the vacated conviction. On December 22, 2008, the BIA dismissed Reyes–Torres's motion to reopen and reconsider, concluding that it lacked jurisdiction under the "departure bar" at 8 C.F.R. § 1003.2(d) because petitioner had been removed from the United States prior to its filing.

The court reaffirmed that "the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen."

In reversing the BIA's decision, the Ninth Circuit concluded that this case was neither factually nor legally distinguishable from its opinion in *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). In *Coyt,* the court determined that "in passing IIRIRA, Congress anticipated that petitioners would be able to pursue relief after departing from the United States." Therefore Coyte, who had filed his motion prior to leaving the United States, was permitted to pursue his motion to reopen from abroad. Here, petitioner did not file his motion to reopen and reconsider until after he was removed. The court rejected the government's argument that the Attorney General had the power to reduce the time petitioner could have filed his motion to reopen from the statutorily mandated ninety days to seven days. "Because such a result would 'completely eviscerate the statutory right to reopen provided by Congress,' we reaffirm our holding in *Coyt* that 'the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen,'" said the court.

The court also held that its opinion in *Ledezma-Galicia v. Holder*, __ F.3d __, 2010 WL 5174979 (9th Cir. 2010), applies equally to applications for relief as it does to grounds of removability.

Writing in dissent, Judge Wallace stated that the departure bar is valid under *Chevron*, and that the temporal limitation contained in the Anti-Drug Abuse Act of 1988 that undergirds *Ledezma-Galcia* has no application in the relief context.

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■ **Ninth Circuit Finds Circumstances in India Had Changed "Substantially" so as to Trigger Exception to One-Year Asylum Filing Deadline for Asylum Claims**

In ***Vahora v. Holder***, __ F.3d __, 2011 WL 1238010 (Kozinski (dissenting), Reinhardt, *Timlin* (by designation)), the Ninth Circuit held that under the statute the exception to the one-year filing deadline based on "changed circumstances" means "a worsening of country conditions that substantially increases the chance that asylum will be granted." The court held that despite a subsequent grant of restriction on removal, the BIA erred by concluding that the alien necessarily would have had a plausible claim of eligibility for asylum during the one-year filing period, and that because the alien previously would have had such a plausible claim, he failed to show subsequent changed circumstances in

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India that "materially affected his eligibility for asylum."

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■ **Ninth Circuit Reconciles Precedent and Holds That Concession is Sufficient to Establish Criminal Grounds of Removability**

In ***Perez-Mejia v. Holder***, __F.3d __, 2011 WL 1496990 (9th Cir. April 21, 2011) (Tashima, Fisher, *Wolf* (by designation)), the Ninth Circuit reconciled its precedents and held that a Mexican citizen's concession of removability and admission that he was convicted of a particular criminal offense, as alleged in a Notice to Appear, were binding, just as judicial admissions are binding in a judicial proceeding.

An alien who admitted he was removable during the "pleading stage" of a removal proceeding could not argue "that the government's proof of his removability was insufficient" on appeal.

The petitioner, who is married to an United States citizen, was convicted in 1997 of possessing a narcotic for sale under California Health and Safety Code section 11351. Sometime later, he applied for adjustment of status to become an LPR. During his adjustment interview with the USCIS he disclosed his 1997 conviction. Despite the fact that his conviction should have rendered him ineligible, he was granted LPR status in 2003. In 2004, petitioner departed the United States. When he returned he applied for admission into the United States as a returning LPR at the Los Angeles International Airport. However, an immigration officer noted his 1997 conviction and served him with a notice to appear alleging inter alia removability based on the drug conviction. At the hearing before the IJ, petitioner's counsel conceded the grounds of removability. The IJ denied relief finding him statutorily ineligible for a § 212(h) waiver. On appeal, the BIA affirmed the IJ's decision, and also rejected a claim that DHS should have been estopped because petitioner had shown only that his adjustment application had been granted by mere negligence.

Before the Ninth Circuit petitioner argued that the government failed to meet its burden of proving that he was removable because the statute under which he was convicted, criminalizes possession for sale of a controlled substance, acetylfentanyl, that is not a substance that triggers removal. Therefore, he argued that his conviction required the application of the "modified categorical approach," a procedure that limits the information that can be considered to determine whether the conduct that led to an alien's conviction amounted to a removable offense.

The Ninth Circuit reaffirmed that an alien who admitted he was removable during the "pleading stage" of a removal proceeding could not argue "that the government's proof of his removability was insufficient" on appeal. "Admissions by an alien to facts alleged in an NTA, and concessions concerning matters of law, made in the 8 C.F.R. § 1240.10(c) 'pleading stage' of removal proceedings are binding, just as admissions made by a defendant in an answer to a civil complaint are binding in a judicial proceeding," said the court.

The court also held that a prior erroneous grant of lawful permanent resident status did not estop the government from using the alien's 1997 conviction as a basis for removal because the alien failed to show "affirmative misconduct" by the government or that he had "'lost . . . rights to which [he] was [otherwise] entitled.'"

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■ **Ninth Circuit Upholds Crime Of Child Abuse Finding**

In ***Jimenez-Juarez v. Holder***, 635 F.3d 1169 (9th Cir. 2011) (Graber, M.D. Smith, *Benitez*), the Ninth Circuit held that a conviction for third degree child molestation under Washington state law, which prohibits a person from having sexual contact with a minor who is 14 or 15 years of age when the perpetrator is at least forty-eight months older than the minor, is a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i). The court deferred to the BIA's interpretation in *Matter of Velazquez–Herrera*, 24 I&N Dec. 503 (BIA 2008), where it had held that a "crime of child abuse" is any offense that (1) involves an intentional, knowing, reckless, or criminally negligent act or omission that (2) constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation.

The court held that, at a minimum, the act of touching the sexual or other intimate parts of a 14- or 15-year-old victim constitutes maltreatment of a child and" impairs the child's mental well-being" and therefore falls within the BIA's definition of "child abuse" as set forth in *Matter of Velazquez–Herrera*.

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■ **Ninth Circuit Holds that "General Balancing Approach" Used to Evaluate Relevant Stay Factors Remains in Place**

In ***Leiva-Perez v. Holder***, __ F.3d __, 2011 WL 1204334 (9th Cir. April 1, 2011) (Wardlaw, Fisher, Berzon), the Ninth Circuit in a *per curiam* decision held that the Supreme Court's decision in *Nken v. Holder,* __U.S. __, 129 S. Ct. 1749 (2009), implicitly endorsed the practice of balancing the relevant equities of each of the four factors relevant to the consideration of stay requests, as articulated in *Abassi*

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v. INS, 143 F.3d 513 (9th Cir. 1998). In *Nken*, the Court noted that the four factors that have been considered when evaluating whether to issue a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lie. The Ninth Circuit found that *Nken*, "did not disturb the overall manner in which courts balance the various stay factors once they are established."

The court further held that, under *Nken*, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits in order to qualify for a stay. Finally, the court identified factors relevant to evaluating the possibility of irreparable harm absent a stay: physical danger, separation from family members, medical needs, and potential economic hardship. Applying these factors and balancing the relevant equities, the court granted the alien's motion for a stay of removal.

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■ **Parent's Physical Presence in The United States Is Not Imputable to Alien For Purposes of Satisfying Statutory Requirements for Cancellation of Removal**

In ***Saucedo-Arevalo v. Holder***, __ F.3d __, 2011 WL 1126039 (9th Cir. March 29, 2011) (*Graber*, Fisher, Marshall (by designation)), the Ninth Circuit affirmed the BIA's determination that an applicant for cancellation of removal cannot satisfy the statutory 10-year physical presence requirement through imputation of a parent's physical presence in the United States.

The petitioner had entered the country in 2002 and therefore could not satisfy the 10–year continuous physical presence requirement. Her mother entered the country in 1993, but the BIA held that her mother's physical presence cannot be imputed to petitioner for purposes of cancellation of removal.

The court rejected petitioner's argument that its ruling in *Barrios v. Holder,* 581 F.3d 849 (9th Cir. 2009) (prohibiting imputation of physical presence), is limited to special rule cancellation under NACARA, citing Congress's use of identical text in both statutes and their similar purposes. "The meaning of 'physical presence' is quite distinct from the requirements we have previously held to be imputable. Indeed, the difference in meaning is 'so great as to be dispositive,'" said the court.

"The meaning of 'physical presence' is quite distinct from the requirements we have previously held to be imputable. Indeed, the difference in meaning is 'so great as to be dispositive.'"

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■ **Ninth Circuit Holds that Aliens Who Are Inadmissible Under 8 U.S.C. § 1182(a)(9)(C)(i)(I) May Not Apply for Adjustment of Status Under 8 U.S.C. § 1255(i)**

In ***Garfias-Rodriguez v. Holder***, __ F.3d __, 2011 WL 1346960 (9th Cir. April 9, 2011) (Fisher, *Bybee*, Shea), the Ninth Circuit, deferring under *Nat'l Cable and Telecomm. Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005), and *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984), upheld the BIA's decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), that aliens who are inadmissible because of one year of unlawful presence (8 U.S.C. § 1182 (a)(9)(C)(i)(I)) may not apply for adjustment of status under INA § 245(i). The court also ruled that: *Briones* may be applied retroactively to his case; it lacked equitable authority to stay the alien's voluntary departure period regardless of 8 C.F.R. § 1240.26(i); and 8 U.S.C. § 1229c(e) unambiguously provides the Attorney General with authority to promulgate 8 C.F.R. § 1240.26(i), and the alien's grant of voluntary departure terminated upon his decision to file a petition for review.

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■ **Ninth Circuit Rejects Equal Protection Challenge of One -Year Bar for Asylum and Holds that Abuse in United States Cannot Constitute Persecution**

In ***Gonzalez-Medina v. Holder***, __ F.3d __, 2011 WL 1313026 (9th Cir. April 7, 2011) (*McKeown*, Fisher, and Gould), the Ninth Circuit upheld the decision of the BIA denying asylum and restriction on removal. Addressing issues of first impression, the court first concluded that the one-year filing deadline for asylum did not violate the Equal Protection Clause. It next determined that the regulation mandating that past persecution occur in the proposed country of removal was a permissible construction of the immigration statute and was entitled to deference. The court thereupon held that the Mexican alien's allegations of abuse in the United States could not constitute past persecution and that she otherwise failed to show that it was unreasonable for her to relocate within Mexico to avoid future harm.

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■ **Ninth Circuit Clarifies Procedural Requirements for Detention Hearings, Putting Burden on Government to Prove Flight Risk or Danger by Clear and Convincing Evidence**

In ***Singh v. Holder***, __ F.3d __, 2011 WL 1226379 (9th Cir. March

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31, 2011) (*Fisher*, Bybee, and Graber, JJ.), the Ninth Circuit held that "the substantial liberty interests at stake in [detention] hearings" required the government to prove by clear and convincing evidence that continued detention is justified.

The court held that, "given the substantial liberty interest at stake . . . the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a *Casas* hearing."

The petitioner, a native and citizen of Fiji, was admitted to the United States in 1979 on a visitor visa. He became a lawful permanent resident in 1981. He is married and has five children, all of whom are U.S. citizens. In April 2007, ICE issued petitioner an NTA charging that he was removable because he had been convicted of receiving stolen property in 2006 and petty theft with priors in 2005. Petitioner was taken into ICE custody without bond on April 10, 2007, and has remained in continuous custody from that time until the present.

In September 2007, the IJ concluded that petitioner was ineligible for cancellation of removal because he had committed an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(G). The BIA affirmed the removal order in March 2008. He then filed a petition for review in August 2008. The court then stayed the order of removal on August 13, 2008, pending the resolution of the petition.

In September 2008, Singh received his first bond hearing under *Casas–Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). In October 2008, the IJ issued a written decision denying petitioner bond. Petitioner appealed to the BIA and also moved to obtain a transcript of the *Casas* bond hearing to support his appeal, in which he raised various due process violations he contended occurred during the hearing. The BIA denied petitioner's motion, and ultimately dismissed his appeal, concluding that he was both a danger to the community "given his extensive criminal record," and a flight risk given that he was subject to a final administrative order of removal.

In July 2009, Singh filed a petition for a writ of habeas corpus alleging various procedural and substantive due process violations at his *Casas* bond hearing. The district court denied petitioner's petition in February 2010, concluding that it lacked authority to review the IJ's discretionary decision to deny bond and that his allegations of procedural and substantive due process violations were without merit. Petitioner then appealed to the Ninth Circuit.

The court held that, "given the substantial liberty interest at stake . . . the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a *Casas* hearing." The court also found that: (1) due process requires immigration courts to make a contemporaneous recording of the hearings, (2) a criminal record cannot serve as the sole basis for denial of bond, but must be considered along with the recency and seriousness of the offenses, and (3) the government need not prove special dangerousness to justify denying bond to the alien.

Finally, the court rejected the alien's argument that the district court, in examining the merits of his habeas petition, should have considered the fact that the alien raised a substantial argument that he was unremovable. "Because this portion of his habeas petition 'does nothing more than attack the IJ's removal order,' we lack jurisdiction to review it other than on a petition for review," said the court.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds that Aliens Already Deported or Merely Subject to a Deportation Order Do Not Meet the "In Custody" Habeas Requirement

In ***Arnold v. U.S. Att'y. Gen.***, 2011 WL 1304748 (11th Cir. April 6, 2011) (Carnes, Marcus, Fay) (unpublished), the Eleventh Circuit affirmed the district court's dismissal of the aliens' habeas petition. The aliens argued that they were "in custody" for habeas purposes at the time they filed their petition, because their temporary parole imposed a significant restraint on their liberty.

The court affirmed the district court's dismissal of the petition for lack of subject matter jurisdiction, noting that an alien who already has been deported by the time he files his petition does not satisfy the custody requirement because he is "subject to no greater restraint than any other non-citizen living outside American borders." Moreover, the mere possibility of future deportation is insufficient to establish custody, even when the alien is subject to a deportation order. Here, the aliens were not in the "custody" of immigration officials at the time of the filing, as one alien was already removed at the time the petition was filed, and the other three aliens failed to show that they were subject to any restraints on their liberty during their period of temporary parole.

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ASYLUM

■ *Zamanov v. Holder*, __ F.3d __, 2011 WL __ (9th Cir. Apr. 29, 2011) (holding that substantial evidence supported adverse credibility finding in pre-REAL ID case based on material omissions during AO interview going to the heart of alleged fear of political persecution in Azerbajian)

■ *Castro-Martinez v. Holder*, __ F.3d __, 2011 WL 1441859 (9th Cir. Apr. 15, 2011)(holding that asylum applicant from Mexico failed to show persecution on account of his homosexuality or HIV-positive status, where sexual abuse was not inflicted by government actors and applicant failed to show that government was unable or unwilling to control his attackers)

■ *Shaghil v. Holder*, __ F.3d __, 2011 WL 1405453 (8th Cir. Apr. 14, 2011)(holding that asylum applicant from Pakistan failed to show a clear probability of persecution as a result of his conversion from Islam to the Christian faith)

■ *Yuan v. Att'y Gen. of United States,* __ F.3d __, 2011 WL 1519200 (3d Cir. Apr. 22, 2011) (holding that substantial evidence supports BIA's determination that female Chinese applicant failed to prove reasonable likelihood of future forced sterilization due to birth of 2 children in U.S., where evidence on Chinese birth control policies was stale or did not pertain to proper locale, and evidence of forced sterilization was inapposite or unauthenticated; further holding that any BIA error in applying *de novo* review to IJ's factual findings was harmless, since it is highly probable this did not affect the outcome)

■ *Vahora v. Holder,* __ F. 3d __, 2011 WL 1238010 (9th Cir. Apr. 5, 2011) (interpreting in the first instance without prior construction by the agency that under CA9's *Fakhry* decision, the "changed circumstances" exception to one-year deadline for applying for asylum does not require an applicant who fears persecution to apply for asylum within one year of entry; the applicant may choose not to apply, wait until conditions get worse, and then claim worsened conditions are "changed circumstances" excusing the failure to apply within one year) (Judge Kozinski dissented)

■ *Gonzalez-Medina v. Holder,* __ F. 3d __, 2011 WL 1313026 (9th Cir. Apr. 7, 2011) (holding that the BIA's interpretation that the one-year deadline for asylum restarts if alien leaves the US for a legitimate reason and reenters, but does not restart for aliens who never left, does not violate equal protection; further, affirming that applicant failed to establish eligibility for withholding from Mexico based on past domestic violence in US, because past persecution must occur in the country of nationality, and applicant failed to show she could not reasonably relocate elsewhere in Mexico to avoid her abuser)

■ *Pllumi v. Att'y Gen. of United States,* __ F.3d __, 2011 WL 1278741 (3d Cir. Apr. 6, 2011) (holding that the BIA erred to the extent it considered petitioner's concerns about his future healthcare in Albania to be irrelevant to its decision on whether or not to *sua sponte* reopen petitioner's asylum proceedings; reasoning that "it is conceivable that, in extreme circumstances, harm resulting from the unavailability of necessary medical care could constitute 'other serious harm' under 8 C.F.R. § 1208.13(b)(1)(iii)(B)")

ADJUSTMENT

■ *Cruz-Miguel v. Holder*, __ F. 3d __, 2011 WL 1565847 (2d Cir. Apr. 27, 2011) (holding that the requirement that an alien be "paroled into the United States" in order to seek adjustment of status is not satisfied by the alien's release on "conditional parole" under 8 U.S.C. § 1226(a)(2)(B), and thus the BIA properly found petitioners statutorily ineligible for adjustment)

■ *Garfias-Rodriguez v. Holder,* __ F.3d __, 2011 WL 1346960 (9th Cir. Apr. 11, 2011) (applying *Brand X* deference and holding that aliens inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I) may not adjust their status under 8 U.S.C. § 1255(i), and that application of this rule to petitioner does not have an impermissibly retroactive effect; further upholding regulation which provides that a voluntary departure grant terminates upon an alien's decision to file a PFR, and noting that courts lack authority to equitably toll the voluntary departure period)

■ *Vemuri v. Napolitano*, __ F.Supp.2d __, 2011 WL 1031344 (D.D.C. Mar. 23, 2011) (dismissing an action challenging denial of an application for employment authorization, petition for immigrant worker, and application for adjustment of status, holding that alien's failure to comply with local rule warranted denial of his motion to file out of time opposition to defendants' motion to dismiss)

■ *Ramos-Torres v. Holder,* __ F.3d __, 2011 WL 1226963 (5th Cir. Apr. 4, 2011) (holding that an alien who, at the time of his adjustment of status, had been statutorily ineligible for adjustment due to a prior voluntary departure and illegal reentry was ineligible to seek cancellation of removal as a LPR)

ARREST, SEARCH, SEIZURE

■ *United States v. Cotterman*, __ F.3d __, 2011 WL 1137302 (9th Cir. Mar. 30, 2011) (reversing a district court holding that search of property seized at an international border and moved 170 miles from that border for further search cannot be justified by the border search doctrine, as a simple matter of time and space. The court of appeals found that the border search doctrine is not so rigid as to require the United States to

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equip every entry point—no matter how desolate or infrequently traveled—with inspectors and sophisticated forensic equipment capable of searching whatever property an individual may wish to bring within our borders or be otherwise precluded from exercising its right to protect our nation absent some heightened suspicion.)

■ *United States v. Perez-Partida*, __ F.Supp.2d __, 2011 WL 1126058 (D.N.M. Mar. 28, 2011) (granting a motion to suppress evidence (including identity evidence) obtained as a result of a policy of local police to inquire into the immigration status of every person arrested where the arrest itself had been unlawful)

CANCELLATION

■ *Saucedo-Arevalo v. Holder,* __ F. 3d __, 2011 WL 1126039 (9th Cir. Mar. 29, 2011) (holding that the period of physical presence of a parent is not imputed to a child to satisfy the requirement for cancellation because the physical presence requirement for cancellation is indistinguishable from the requirement under NACARA which the court previously held could not be imputed)

CRIMES

■ *Efagene v. Holder*, __ F.3d __, 2011 WL 1614299 (10th Cir. Apr. 29, 2011) (holding that the BIA erred in concluding that a conviction for failure to register as a sex offender under Colorado law categorically constitutes a crime involving moral turpitude where the crime was a regulatory offense and did not encompass conduct society deems inherently base, vile, or depraved)

■ *Matter of D-R-*, 25 I&N 445 (BIA Apr. 6, 2011) (holding that alien's deliberate omission from his refugee application that he was a special police officer during the Bosnian War could have affected or influenced the government's decision whether to grant him refugee status and was therefore a willful misrepresentation of a material fact; further holding that alien was removable under 8 U.S.C. § 1227(a)(4)(D) where the totality of the record supported the conclusion that he assisted in the extrajudicial killing of 200 Bosnian Muslims that his unit was involved in capturing, including evidence of his command responsibility, his presence, his platoon's active participation, and the finding that he must have been aware that many other Bosnian Muslims who were similarly situated had been executed nearby several days earlier).

■ *Matter of Ahortalejo-Guzman*, 25 I&N 465 (BIA Apr. 19, 2011) (applying *Matter of Silva-Trevino* and holding that evidence outside of the record of conviction may properly be considered in determining whether the alien has been convicted of a CIMT only where the conviction record itself does not conclusively demonstrate whether the alien was convicted of engaging in conduct that constitutes a CIMT)

CRIMINAL PROSECUTION

■ *United States v. Causevic,* __ F.3d __, 2011 WL 1517911 (8th Cir. Apr. 22, 2011) (holding that the admission of a Bosnian conviction document in a criminal prosecution for making a materially false statement violated the Confrontation Clause because the document was "testimonial" in nature, as it was used as evidence that the defendant lied when he stated at his adjustment interview he had not killed anyone) (Judge Shepherd issued a concurring opinion)

■ *Barma v. Holder,* __ F. 3d __, 2011 WL 1237608 (7th Cir. Apr. 5, 2011) (affirming BIA's determination that petitioner's conviction for possession of drug paraphernalia was a conviction related to a controlled substance offense under 8 U.S.C. § 1182 (a)(2), and that it did not qualify for a 212(h) waiver)

■ *Jimenez-Juarez v. Holder,* __ F.3d __, 2011 WL 1183698 (9th Cir. Mar. 31, 2011) (holding that a felony conviction for child molestation in the third degree under the Revised Code of Washington categorically constitutes a crime of child abuse within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i) because it requires conduct which, at a minimum, constitutes maltreatment of a child and impairs the child's mental well-being)

DUE PROCESS – FAIR HEARING

■ *United States v. Delgado-Ramos,* __ F.3d __, 2011 WL 1312778 (9th Cir. Apr. 7, 2011) (reaffirming "longstanding rule" that a district court has no obligation under Rule 11 of the Federal Rules of Criminal Procedure or the Fifth Amendment's due process clause to advise a defendant of the immigration consequences of a guilty plea; distinguishing *Padilla* because that case involved an ineffective assistance of counsel claim under the Sixth Amendment)

■ *Ravulapalli v. Napolitano*, __ F.Supp.2d __, 2011 WL 1126055 (D.D.C. Mar. 29, 2011) (holding that although there was no violation of due process, a DHS denial of adjustment of status violated the APA based on alleged departure from DHS's own policy guidelines and failure to follow notice-and-comment procedures)

■ *Perez-Mejia v. Holder*, __ F.3d __, 2011 WL 1496990 (9th Cir. Apr. 21, 2011) (holding that petitioner's admissions to allegations in NTA, including concession that he was convicted of possession of cocaine for sale, were binding and established his removability; rejecting estoppel claim and reasoning that grant of adjustment (despite petitioner's clear ineligibility) was a mistake but did not constitute affirmative misconduct; affirming that cocaine conviction rendered petitioner ineligible for 212(h) waiver)

JURISDICTION

■ *Sugule v. Frazier*, __ F.3d __, 2011 WL 1226128 (8th Cir. Apr. 4, 2011)

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(after finding jurisdiction in spite of 8 U.S.C. § 1252(a)(2)(B) to review a DHS decision to revoke a labor certification, holding that the DHS decision failed to take the whole record into account and is not supported by substantial evidence)

■ *Singh, Vijendra v. Holder,* __ F. 3d __, 2011 WL 1226379 (9th Cir. Mar. 31, 2011) (holding that district court retained habeas jurisdiction to consider questions of law and constitutional claims that arise from the denial of bond; further holding that given the substantial liberty interests at stake for aliens facing prolonged detention while their PFRs are pending: (1) the government has the burden of proving by clear and convincing evidence at a bond hearing before an IJ that the alien's continued detention is justified; and (2) the immigration court is required to make a contemporaneous record of the hearing, and that an audio recording would suffice)

■ *Lemos v. Holder,* __ F.3d __, 2011 WL 1305437 (7th Cir. Apr. 7, 2011) (dismissing reinstatement PFR as untimely where the petition was not filed within 30 days of the date petitioner and his counsel were aware of the order even though petitioner claims the petition was filed within 30 days of the date the order was officially served on petitioner)

■ *Reyes-Torres v. Holder*, __ F.3d __, 2011 WL 1312570 (9th Cir. Apr. 7, 2011) (applying its prior decision in *Coyt* and holding that an alien who is involuntarily removed and subsequently files a motion to reopen from abroad within the 90-day MTR period is not precluded by the departure bar from pursuing the MTR; holding, pursuant to *Ledezma-Garcia*, that because petitioner's conviction for alien transportation occurred prior to November 18, 1988, it cannot constitute a removable aggravated felony)

MOTION TO REOPEN

■ *Patel v. Att'y Gen. of United States,* __ F. 3d __, 2011 WL __ (3d Cir. Feb. 25, 2011) (granting government's motion to publish opinion on April 25, 2011) (affirming BIA's decision refusing to reopen an *in absentia* order where petitioner's counsel of record, who was hired by petitioner's family, was notified of the hearing date but was unable to contact petitioner because petitioner failed to keep himself apprised of his immigration proceedings and his whereabouts were unknown)

■ *Ashfaque v. Holder*, __ F.3d __, 2011 WL 1364474 (8th Cir. Apr. 12, 2011) (upholding denial of a motion to reopen to rescind an *in absentia* order of removal where evidence showed that alien had been personally served with NTA)

■ *Alzaarir v. Attorney General of U.S.*, __ F.3d __, 2011 WL __ (3d Cir. Apr. 14, 2011) (publishing an unpublished decision still found at 2011 WL 668119 (3d Cir. Feb. 25, 2011)) (holding that BIA properly exercised its discretion when it declined to apply equitable tolling to motion to reopen where alien did not exercise due diligence)

■ *Vukmirovic v. Holder,* __ F.3d __, 2011 WL 1318967 (9th Cir. Apr. 6, 2011) (granting rehearing after concluding that its original opinion interpreted too broadly the "exceptional circumstances" safe harbor for aliens removed *in absentia*, and explaining that petitioner failed to demonstrate the diligence needed to establish exceptional circumstances because he had failed to advise his new lawyer and the immigration court of his whereabouts)

STAY OF REMOVAL

■ *Leiva-Perez v. Holder,* __ F.3d __, 2011 WL 1204334 (9th Cir. Apr. 1, 2011) (granting stay of removal and holding that after *Nken* the general balancing approach for determining whether to grant a stay of removal pending a PFR remains in place, but that aliens must now show irreparable harm would be "probable," and not just "possible," if the stay was denied)

WAIVERS

■ *United States v. Gomez-Hernandez,* __ F. Supp.2d __, 2011 WL 1458691 (E.D.N.Y. Apr. 18 2011) (holding in a criminal re-entry case that the IJ erred in failing to advise alien of the potential availability of section 212(c) relief, but denying motion to dismiss indictment for lack of prejudice because alien did not show a reasonable probability he would have been granted a 212(c) waiver)

■ *Judulang v. Holder*, __ S.Ct. __, 2011 WL 1457529 (Apr. 18, 2011) (order granting certiorari)(presenting the question of whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did not depart and re-enter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from the removal under former INA § 212(c))

MISCELLANEOUS

■ *United States v. State of Arizona,* __ F.3d __, 2011 WL 1346945 (9th Cir. Apr. 11, 2011) (affirming district court's preliminary injunction which enjoined the enforcement of several Arizona statutory provisions because they violate the Supremacy Clause on the grounds that they are preempted by the INA) (Judge Noonan issued a concurring opinion; Judge Bea concurred in part and dissented in part)

Noted

After the Flood: The Legacy of the 'Surge' of Federal Immigration Appeals

For many years, the big news in United States Courts of Appeals was the skyrocketing immigration caseload. For courts that traditionally had busy immigration dockets, the effect was tsunamic. One of those circuits, the Second, instituted a non-argument calendar that, over the past five years, has enabled the court to regain some control over its swollen docket. While this administrative strategy has rescued the court from drowning, the flow of cases continues, somewhat abated, but with enduring force.

The so-called surge had unanticipated consequences extending far beyond court management changes. As a result of their increased exposure to immigration cases at the hearing stage – reading transcripts and Immigration Judge decisions – federal judges increasingly found fault with immigration adjudication, criticizing the quality of both the judging and the lawyering. The glaring attention generated public reaction, forcing some reforms from the inside and continuing pressure from the outside. This paper examines the legacy of this exposure and its positive impact on the quest for better access to justice for immigrants facing removal.

Stacy Caplow, Brooklyn Law School, Northwestern Journal of Law & Social Policy, Winter 2011, Brooklyn Law School, Legal Studies Paper No. 231.

David McConnell

(Continued from page 1)

Operations in 1999. From 1984 to 1990, he worked in the Labor Department's Solicitor's Office, Division of Mine Safety and Health. McConnell is a graduate of the University of Virginia and the Wake Forest University School of Law.

McConnell is an Adjunct Professor of Law at American University Washington School of Law, where he teaches courses in immigration law and refugee law.

AAG West also thanked outgoing OIL Appellate Director Thom Hussey "for his years of leadership during which he guided OIL Appellate through some of its most challenging times." "We will always be grateful for Thom's contributions," he said.

Defining "admission"

(Continued from page 4)

§ 1227(a)(2)(A)(i), but it also recognized the still-present discrepancies of the circuit courts' treatment of adjustment of status as an "admission" in some contexts. 25 I. & N. Dec. at 401.

The Board and the circuit courts agree on the necessity of uniform statutory interpretation of "admission," but there is still not a complete consensus on what that interpretation should be. While the Board in *Matter of Alyazji* may not have explicitly answered the question of how to treat post-entry adjustment of status as an "admission" in every context, it at least clarified the issue and addressed the circuit courts' concerns with respect to "the date of admission" in 8 U.S.C. § 1227(a)(2)(i). 25 I. & N. Dec. 397.

By Anna Nelson, OIL
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INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

■ **May 26, 2011.** Brown Bag Lunch with Claudia Bernard, the 9th Circuit's Chief Mediator.

■ **June 13-14, 2011.** *Criminal Aliens:* Thjs training will focus on criminal grounds of removability and will provide guidance on a variety of related issues. CLEs available.

■ **October 3-7, 2011.** OIL's 17th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. 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.

INSIDE OIL

OILer Competes 10-Mile Race

OIL Trial Attorney, ***Beth Young*** proved beyond doubt on Sunday, April 3, 2011, that one can work full time and be a national class athlete, running 62:21 in the Cherry Blossom 10 Mile race, good for 21st place. To put the time and place into perspective, Beth averaged 6:15 minutes per mile.

There were 9,000 women finishers, and of the 20 women who finished ahead of Beth, four of them are full time professional runners from Kenya and Ethiopia. In short, this was a national caliber performance. Beth's run was outstanding under any circumstances, but in light of the fact that Beth had major surgery on her hip in October, it is downright remarkable.

Beth's success has not gone unnoticed in the running world, as Beth receives sponsorship from the shoe company Sacuony, and she trains with the elite Georgetown Running Company Race Team. More great performances are on the way this year—stay tuned!

Take Our Daughters And Sons To Work Day

PHOTO BY NANNETTE ANDERSON

OIL parents brought their chi ldren to work on April 28, the "Take our Daughters and Sons to Work Day." The kiddies enjoyed eating pizza, blowing bubbles, and playing the Wii game. Thanks to Karen Drummond and Nannette Anderson for putting this event together!

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

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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