U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 17, No. 4 APRIL 2013

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Supreme Courts Holds That Conviction for Small Amount of Marijuana Not an Aggravated Felony

In ***Moncrieffe v. Holder*** the Supreme Court held that "if a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA."

The petitioner, a Jamaican citizen, was found by police to have 1.3 grams of marijuana in his car. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. DHS then sought to remove petitioner alleging that his conviction was an aggravated felony because possession of marijuana with intent to distribute is a CSA offense, 21 U.S.C. § 841(a), punishable by up to five years' imprisonment, § 841(b)(1)(D). An IJ ordered petitioner removed, and the BIA affirmed. The Fifth Circuit agreed with the administrative rulings and rejected petitioner's reliance on § 841(b)(4), which makes marijuana distribution punishable as a misdemeanor if the offense involves a small amount for no remuneration, and held that the felony provision, § 841(b)(1)(D), provides the default punishment for his offense. 662 F.3d 397 (5th Cir. 2011)

In reversing the Fifth Circuit, the Court explained that under the categorical approach the noncitizen's actual conduct is irrelevant. Instead "the state statute defining the crime of conviction" is examined to see whether it fits within the "generic" federal definition of a corresponding aggravated felony. The state offense is a categorical match only if a conviction of

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Jurisdictional CATastrophe in the Seventh Circuit, The Criminal Alien Review Bar and CAT Claims

This article traces the development of case law in the Seventh Circuit regarding the court's interpretation of 8 U.S.C. § 1252(a)(2)(C), as applied to review of agency determinations regarding deferral of removal under the Convention Against Torture ("CAT").

In a series of decisions, the court has gone out of its way to make the point that Section 1252(a)(2)(C) does not preclude review of the agency's denial of deferral of removal even though the issue was not before the court in *any* of these cases. This article reviews the varying theories the court has proffered in support of its dicta, and shows why none of these explanations are persuasive. At bottom, the denial of deferral of removal, like the denial of other forms of protection or relief, is part of a "final order of removal," and is therefore barred from the court's review by Section 1252(a)(2)(C) (unless the alien raises a question of law or constitutional claim).

Section 1252(a)(2)(C) and Case Law

Section 1252(a)(2)(C) provides that "no court shall have jurisdiction

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to review any final order of removal against an alien who is removable by reason of having committed" certain specified criminal offenses, such as an aggravated felony or drug crime. Every circuit to address the issue, other than the Ninth Circuit (see *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008)), has held that this bar precludes its review of a challenge to a denial of CAT deferral, unless the denial raises constitutional claims or questions of law.

The Seventh Circuit is struggling to come up with a coherent rationale that will allow it to review denials of deferral of removal in these cases.

In earlier decisions, the Seventh Circuit agreed with most other circuits, applying the criminal review bar to preclude the court's review of deferral of removal. *LaGuerre v. Mukasey*, 526 F.3d 1027, 1040 (7th Cir. 2008); *Petrov v. Gonzales*, 464 F.3d 800, 802-03 (7th Cir. 2006); *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005). Since those decisions, however, the court has included dicta in three published opinions stating that it would have jurisdiction to review a denial of deferral of removal even if the alien was convicted of a crime listed in Section 1252(a)(2)(C). Each of these decisions proposes slightly different rationales.

Seventh Circuit's Dicta

In *Issaq v. Holder*, 617 F.3d 962 (7th Cir. 2010), the court considered an alien's petition seeking review of the denial of *withholding of removal* under CAT but *not deferral of removal*. Nevertheless, Judge Wood (writing for the majority) reached the issue. She justified doing so by observing that the court had "struggled with the question whether judicial review of orders denying relief under the CAT based on the commission of an aggravated felony is jurisdictionally barred," and that the court's prior decision in *Petrov* did not resolve the question as to deferral of removal. *Id.* at 969.

She then opined that if an alien were seeking deferral of removal under the CAT (as opposed to withholding of removal under CAT), that would require a "distinct analysis," and Section 1252(a)(2)(C) would not bar review because deferral of removal is "inherently non-final." *Id.* at 970. Judge Wood distinguished the "inherently non-final remedy of deferral of removal" from "a final order of removal," and concluded that when an alien seeks the former, "then § 1252(a)(2)(C) (which speaks only of a final order) appears to be inapplicable." *Id.* None of this had any impact on the case because Issaq was not seeking deferral of removal. *Id.*

In *Wanjiru v. Holder*, 705 F.3d 258 (7th Cir. 2013), the government conceded the court had jurisdiction over the deferral of removal denial because Wanjiru's crime did not qualify under the criminal review bar. *Id.* at 262-63. Nonetheless, the court stated that because "there is a split in the circuits on this point," it would be "prudent" to address the issue. *Id.* at 263.

Citing its analysis in *Issaq*, the court explained that "Section 1252(a)(2)(C) addresses only judicial review of final orders of removal," and "deferral of removal is like an injunction" in that "for the time being, it prevents the government from removing the person in question, but it can be revisited if circumstances change." *Id.* at 264. The court concluded by noting that this is why a deferral-of-removal order "can be final enough to permit judicial review, but at the same time not be the kind of 'final' order covered by § 1252(a)(2)(C)." *Id.*

In *Moral-Salazar v. Holder*, 708 F.3d 957 (7th Cir. 2013), the Seventh Circuit held that Section 1252(a)(2)(C) bars judicial review of a denial of a continuance when the alien has a qualifying crime, distinguishing its prior decision in *Calma v. Holder*, 663 F.3d 868 (7th Cir. 2011), which interpreted a different jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B). Again, however, the court went out of its way to make the point that review of deferral of removal would remain available even though that issue was not before the court. *Moral-Salazar*, *supra* at 962. "Nothing in this opinion . . . should be understood to preclude judicial review of the exceptional remedy of deferral of removal under the Convention Against Torture." *Id.*

The court cited its discussions in *Issaq* and *Wanjiru* and stated that "[d]eferral of removal under the CAT is a unique remedy that requires a distinct jurisdictional analysis." *Id.* at 962. The court explained that "[a]n erroneous denial of deferral of removal may result in a person being tortured or killed in his home country," and judicial review "helps ensure that this country is meeting its international obligations." *Id.*

As the summaries of the above cases illustrate, the Seventh Circuit is struggling to come up with a coherent rationale that will allow it to review denials of deferral of removal in these cases. It has provided at least three different reasons in support of its dicta. We should resist its efforts.

We should begin by citing the cases in which the Seventh Circuit *has held* that Section 1252(a)(2)(C) precludes review of deferral of removal denials. We should then explain why the court's subsequent dicta is unsound. In that regard, below are some arguments we should make. For more detailed arguments, contact Andy MacLachlan and Aimee Carmichael who have filed pleadings addressing the issue. *See Pierre v. Holder*, No. 13-1076 (brief addressing court's jurisdiction in CAT case); *Wan-*

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jiru v. Holder, No. 11-3396 (motion to amend).

1. The Denial of Deferral of Removal is Part of a Final Order of Removal

The bar at Section 1252(a)(2)(C) precludes review of "any final order of removal" based on a qualifying offense. One rationale the Seventh Circuit has offered is that deferral of removal is not a final order of removal, and therefore is not subject to Section 1252(a)(2)(C). *Issaq*, 617 F.3d at 970 (characterizing deferral of removal as an "inherently non-final remedy"). This argument runs into immediate problems because Section 1252 (a)(1)'s judicial review provision contains the *identical* language, authorizing review only over "final order[s] of removal." If a denial of deferral of removal is an "inherently non-final" order, how can the court review that denial through a petition for review in the first place when the court's review is limited to final orders of removal?

Recognizing this inconsistency, the Seventh Circuit adjusted its rationale in *Wanjiru*, reasoning that a denial of deferral of removal "can be final enough to permit judicial review, but at the same time not be the kind of 'final' order covered by § 1252(a)(2)(C)." 705 F.3d at 264. But the court's creation of a "final enough" standard for § 1252 judicial review finds no support in the law, and the court cites no authority for its novel proposition.

Indeed, the Seventh Circuit's theory is fundamentally at odds with Supreme Court precedent holding that a final order of removal includes "all determinations made during and incident to the administrative [removal] proceeding." *Foti v. INS*, 375 U.S. 217, 229 (1963); *see also INS v. Chadha,* 462 U.S. 919, 938 (1983) (final order of deportation includes "all matters on which the validity of the final order is contingent"). Deferral of removal is adjudicated in removal proceedings, and the agency's denial of such protection has always been judicially reviewed in conjunction with the removal order. Therefore, the denial of deferral is plainly a part of the final order of removal.

Furthermore, the Seventh Circuit's theory contains other fundamental weaknesses. As a textual and structural matter, the court's proposal to interpret the *same language* ("final order of removal") in two *closely-related* jurisdictional statutes found in the *same section* of the INA – where one statute, 8 U.S.C. § 1252(a)(2)(C), operates as an *express limitation* to the other statute's authorization of judicial review, *see* 8 U.S.C. § 1252(a)(1) – violates basic principles of statutory construction mandating that identical language found in different parts of a statute be interpreted consistently. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, __ U.S. __, 132 S. Ct. 1997, 2004-05 (2012).

The Seventh Circuit's theory is fundamentally at odds with Supreme Court precedent holding that a final order of removal includes "all determinations made during and incident to the administrative [removal] proceeding."

The government's textual argument is further bolstered by the fact that in 2005, Congress specifically amended Section 1252 by adding a provision making it extra clear that denials of CAT protection may be reviewed only through a Section 1252 (a)(1) petition for review. REAL ID Act of 2005, § 106(a), Pub. L. No. 109-13, 119 Stat. 231, 310-11 (codified at 8 U.S.C. § 1252(a)(4)). Thus, Congress specifically linked review of deferral of removal denials with the "final order of removal" language found in Section 1252(a)(1). Its codification of this principle in the Immigration and Nationality Act reaffirms prior legislation implementing CAT in 1998. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G., Title XXII, § 2242(d), 112 Stat. 2681-822 (Oct. 21, 1998) ("[N]o court shall have jurisdiction to . . . consider or review [torture] claims . . . except as *part of the review of a final order of removal* pursuant to section 242 of the [INA] . . . ."") (emphasis added). Thus, if review of deferral denials is available at all, then such review may occur only where a final order exists in the first place.

2. The Nature of Deferral of Removal Does Not Affect the Jurisdictional Analysis Under Section 1252(a)(2)(C)

As part of its analysis, the Seventh Circuit has focused on the "unique" nature of deferral of removal, highlighting its differences from withholding of removal. In *Wanjiru*, for example, the court reasoned that "deferral of removal is like an injunction" in that "for the time being, it prevents the government from removing the person in question, but it can be revisited if circumstances change." 705 F.3d at 264.

But the court's focus on the "unique" nature of a deferral of removal *grant* provides no support for its conclusion that a deferral of removal *denial* is not a part of the final order of removal. For purposes of the jurisdictional analysis, it is irrelevant that a *grant* of CAT may be "revisited if circumstances change," because no one (neither the alien nor the Government) would normally petition for review of such a grant, which is clearly not a "final order of removal." Rather, the pertinent question is whether a deferral of removal *denial* is reviewable as part of the final order. As to that question, the court's injunction analogy falls apart. There is nothing "non-final" about the BIA's denial of deferral of removal. It is an executable order. It is clearly final unless and until the alien convinces the BIA to reopen proceedings.

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The court's theory further breaks down because deferral of removal is not "unique" given that withholding of removal under CAT also does "not protect against removal to a different country from the one in which the alien is likely to be tortured." *See Issaq*, 617 F.3d at 969; 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(f). Additionally, withholding may also be "revisited" by DHS if conditions change.

While it is true that it is procedurally easier for the government to terminate a grant of deferral than withholding (for example, deferral may be terminated based on diplomatic assurances that the Secretary of State receives from the home country's government that the alien will not be tortured if returned, *compare* 8 C.F.R. § 1208.17(d) *with* 8 C.F.R. § 1208.24 (f)), that distinction has no bearing on the extent of the finality of a deferral of removal *denial* or whether such denial is subject to §1252(a)(2)(C).

3. The United States' International Obligations Under CAT Do Not Affect the Jurisdictional Analysis Under Section 1252(a)(2)(C)

In its most recent decision, *Moral-Salazar v. Holder*, the Seventh Circuit noted in support of its dicta that "[a]n erroneous denial of deferral of removal may result in a person being tortured or killed in his home country," and judicial review "helps ensure that this country is meeting its international obligations." 708 F.3d at 962. This is consistent with the court's earlier observation in *Wanjiru* that it should not "lightly presume that Congress has shut off avenues of judicial review that ensure this country's compliance with its obligations under an international treaty." 705 F.3d at 265. The court's apparent point is that given the significance of an alien's right to apply for deferral of removal (a right protected by international law), and the general presumption in favor of judicial review, courts should not assume Congress intended to preclude review over deferral determinations. But that is exactly what courts *should conclude* given a fair reading of Section 1252.

Congress's intent is clear. First, it enacted a broad jurisdictional bar precluding review over final orders of removal for criminal aliens, well aware of the Supreme Court's expansive interpretation of the phrase "final order of removal." Second, it specifically enacted a provision linking CAT claims with Section 1252(a)(1)'s final order language. 8 U.S.C. § 1252(a)(4). Third, it carved out a specific exception to the applicability of jurisdictional bars in the INA for "questions of law" and constitutional claims, 8 U.S.C. § 1252(a)(2)(D), but provided no exception for deferral of removal claims or other claims ordinarily implicating substantial evidence review. Fourth, the legislative history reveals in fact that Congress intended to preclude review over substantial evidence questions raised by aliens who were convicted of crimes listed in Section 1252(a)(2)(C). *See* H.R. REP. No. 109-72, at 175 (2005).

In light of the statutory scheme and legislative history, Congress's intent to preclude deferral of removal claims is "fairly discernible." *See Block v. Community Nutrition Institute,* 467 U.S. 340, 351 (1984).

The question of whether to exempt deferral of removal denials from judicial review is a policy decision for Congress, and Congress appears to have spoken clearly.

The Seventh Circuit is correct that deferral of removal may be the only protection separating a criminal alien from torture in his or her home country. The stakes in such cases can therefore be high. But the question of whether to exempt deferral of removal denials from judicial review is a policy decision for Congress, and Congress appears to have spoken clearly. Congress has reasonably concluded that the agency process, involving a full due process hearing before an Immigration Judge, and an administrative appeal to the BIA, is sufficient to protect an alien's right to apply for deferral of removal, and that such review satisfies our international obligations.

Conclusion

In an effort to retain its jurisdiction over deferral of removal claims, the Seventh Circuit has engaged in three rounds of jurisdictional gymnastics to support its dicta regarding Section 1252(a)(2)(C). Notwithstanding the court's vigorous resistance to the application of the criminal alien review bar, its conclusion that it retains jurisdiction is simply incorrect. OIL attorneys should acknowledge the growing dicta in the circuit and address that dicta head-on, explaining why it is wrong.

By Papu Sandhu, OIL

Wage Methodology for the H–2B Program

DOL and DHS have jointly issued an interim final rule in response to the court's order in *Comitè de Apoyo a los Trabajadores Agricolas v. Solis*, which vacated portions of DOL's current prevailing wage rate regulation, and to ensure that there is no question that the rule is in effect nationwide in light of other outstanding litigation. The rule also contains certain revisions to DHS's H–2B rule to clarify that DHS is the Executive Branch agency charged with making determinations regarding eligibility for H–2B classification, after consulting with DOL for its advice about matters with which DOL has expertise, particularly, in this case, questions about the methodology for setting the prevailing wage in the H –2B program. 78 *Fed. Reg.* 24048 (April 24, 2013).

FURTHER REVIEW PENDING: Update on Cases & Issues

Convictions – Modified Categorical Approach

On January 7, 2013, the Supreme Court heard oral argument in ***Descamps v. United States***, a criminal sentencing case in which the question presented is whether the Ninth Circuit was correct in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach. Resolution of the case is expected to implicate the reasoning of *Aguila-Montes* and the "missing element" rule that it overruled. The government's brief was filed on December 3, 2012.

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Asylum – Particular Social Group

On September 27, 2012, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510 (2012), which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Asylum — Corroboration

On December 11, 2012, an *en banc* panel of the Ninth Circuit heard argument on rehearing in ***Oshodi v. Holder***. The court granted a *sua sponte* call for en banc rehearing, and withdrew its prior published opinion, 671 F.3d 1002, which declined to follow, as *dicta*, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed *en banc* supplemental briefs.

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Convictions – Modified Categorical Approach

On January 4, 2013, the government filed a petition for panel rehearing in ***Aguilar-Turcios v. Holder***, 691 F.3d 1025 (9th Cir. 2012), in which the Ninth Circuit applied *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), and held that the alien's convictions did not render him deportable. The rehearing petition argues that the court should grant rehearing and hold the case, and decide it when the Supreme Court rules in *Descamps v. United States*. The petition also argues that the court should permit the agency to address other grounds for removal on remand.

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Jurisdiction – Fact Issues regarding CAT

On March 4, 2013, the government filed a petition for en banc rehearing in ***Alphonsus v. Holder***, 705 F.3d 1031 (9th Cir. 2013), challenging the court's rule that the jurisdictional bar in INA § 242(a)(2)(C) does not apply to claims under the Convention Against Torture where the application was not denied based on a criminal offense specified in the jurisdictional bar. Judge Graber had dissented from the panel opinion, arguing that the court's rule is wrong as described in her concurring opinion in *Pechenkov v. Holder*, 705 F.3d 444, 449-52 (9th Cir. 2013), that the *Alphonsus* case squarely presents the jurisdictional question, and that the court should take the case en banc. The court has since ordered and received a response from *Alphonsus*.

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Convictions – Relating to a Controlled Substance

After oral argument before a panel of the Second Circuit in ***Rojas v. Holder***, No. 12-1227, the court *sua sponte* ordered *en banc* rehearing on January 23, 2013. The case presents the issue of whether a conviction for possession of drug paraphernalia under 35 Pa. Stat. Ann.780-113 (a)(32) categorically is a conviction of a violation of a law of a State relating to a controlled substance under INA § 237(a)(2)(B)(i). Oral argument before the panel suggests that the court's concern is whether possession of drug paraphernalia "relates to" a controlled substance. En banc oral argument has been calendared for May 29, 2013.

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Child Status Protection Act Aging Out

On January 25, 2013, the government filed in the Supreme Court a petition for a writ of certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio, et al., v. Mayorkas, et al***., 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argues that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the Board of Immigration Appeals reasonably interpreted INA § 203(h)(3). The aliens' response is due May 3, 2013.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Upholds Credibility Finding Based on Alien's Demeanor and Inconsistent Testimony Related to His Wife's Forced Abortion

In ***Liu v. Holder***,__ F.3d __, 2013 WL 1715533 (1st Cir. April 22, 2013) (*Lynch,* Lipez, Thompson), the First Circuit held that substantial evidence supported the adverse credibility finding where the petitioner claimed for the first time during the merits hearing that he was hit and forced into hiding after protesting his wife's abortion.

Petitioner entered the United States without being admitted or paroled and filed an affirmative application for asylum. After the Attorney General issued *Matter of J-S-*, 24 I. & N. Dec. 520 (AG 2008) (overruling earlier case law that a husband was presumptively entitled to asylum based on his wife's forced abortion), petitioner amended his asylum application to include claims that he was assaulted by Chinese officials and also converted to Falun Gong. The IJ denied his claim for lack of credibility and the BIA dismissed the appeal.

The First Circuit held that the inconsistencies supported the adverse credibility finding, especially because petitioner only added new claims after the change in law. The court further determined that the IJ was entitled to rely on the credibility concerns related to the family planning claim to question petitioner's newfound adherence to Falun Gong.

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SECOND CIRCUIT

Second Circuit Holds that Attempted Arson in the Second Degree is an Aggravated Felony

In ***Santana v. Holder***, __ F.3d __, 2013 WL 1707830 (2d Cir., April 22, 2013) (*Chin*, Droney, Restani (by designation)), the Second Circuit determined that the petitioner's conviction for attempted arson in the second degree under New York law constituted an aggravated felony.

In 1991, petitioner, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, pled guilty to attempted arson in the second degree. Upon returning from a trip abroad in 2007, petitioner was placed in removal proceedings. The IJ denied petitioner's application for cancellation of removal because his arson conviction constituted an aggravated felony crime of violence under the INA. The BIA dismissed the appeal.

The Second Circuit held that conduct punishable under the statute constitutes an aggravated felony crime of violence because it involves a substantial risk of the intentional use of physical force, a fire, against another person because the statute requires that, at the time the fire begins, a person other than a participant is in the building.

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THIRD CIRCUIT

Third Circuit Holds that ICE Does Not Lose Authority to Mandatorily Detain Criminal Aliens Even After a Gap in Custody

In ***Sylvain v. Att'y Gen.***, __ F.3d __, 2013 WL 1715304 (3d Cir., April 22, 2013) (*Smith*, Greenaway, and Van Antwerpen), the Third Circuit held that the government did not lose its authority to act under 8 U.S.C. § 1226(c) when it failed to detain a criminal alien at the precise moment of his release from criminal detention. As a result of this ruling, both the Third and the Fourth Circuit Court of Appeals have now endorsed the government's position that ICE has authority to detain criminal aliens under the mandatory detention statute after a gap between criminal detention and immigration detention. The court also rejected the alien's argument that he was not covered by 8 U.S.C. § 1226(c) because he had not received a sentence of criminal incarceration and therefore was not "released" for purposes of the statute. Although the alien had waived this argument by not raising it in the district court, the court pointed out that his release following his arrest for his removable offense was sufficient to satisfy the "when released" language.

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SIXTH CIRCUIT

Sixth Circuit Upholds Pretermission of Alien's Cancellation of Removal Application Because He Previously Received Cancellation of Removal under NACARA

In ***Sejdini v. Holder***, __ F.3d __, 2013 WL 1694606, (6th Cir. April 19, 2013) (*Martin*, Gilman, Fowlkes (by designation)), the Sixth Circuit held that a petitioner who previously received special-rule cancellation under the Nicaraguan Act was statutorily barred, under section 240A(c)(6) of the INA, from reapplying for, and receiving, cancellation of removal under section 240A(a).

In 2003, petitioner, a native and citizen of Yugoslavia, was granted special-rule cancellation of removal under NACARA. In 2010, petitioner was convicted of drug possession in Michigan and again placed in removal proceedings. Petitioner sought cancellation of removal under 240A(a) but the IJ pretermitted petitioner's application because he already received cancellation of removal under NACARA. The BIA affirmed.

The Sixth Circuit upheld the agency's determination that, because petitioner previously received cancellation

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of removal under NACARA, he was statutorily barred from reapplying for and receiving cancellation of removal under 240A(a), the vehicle through which petitioner received his first grant of cancellation of removal.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Groups' Attacks and Recruitment Efforts Were on Account of Political Opinion, and Not to Increase Group's Numbers**

In ***Jabr v. Holder***, 711 F.3d 835 (7th Cir. 2013) (Posner, Wood, *Williams*), the Seventh Circuit held that the IJ and the BIA overlooked material evidence in the record demonstrating that members of the Palestinian Islamic Jihad attacked the petitioner on account of his political opinion, rather than due to a desire to increase the group's numbers.

The petitioner, a native of Nablus, a city located in the West Bank, claimed that for over two years members of the Palestinian Islamic Jihad ("PIJ"), an organization that violently opposes the existence of Israel, tried to recruit him to join their group. Petitioner resisted their efforts because he is a member of Fatah, a political party that, at least according to him, is more open to cooperation with Israel. Petitioner's resistance left the PIJ frustrated and so its members harassed him, beat him, and labeled him a traitor to their cause. After surviving a brutal attack at the hands of the PIJ in 2006, petitioner fled the West Bank and headed to the United States. Following his departure, members of the PIJ slipped a letter under the door of his mother's house, declaring that petitioner "will never escape the punishment of God and the anger of the people." The letter further called "upon all of our people in the city of Nablus to reject and persecute this person."

The IJ denied asylum concluding that members of the PIJ were simply interested in recruiting petitioner and found nothing in the record to suggest that they beat him because of his political opinion or allegiance to the Fatah group. The BIA similarly concluded that the men who attacked petitioner did not say anything that would indicate they beat him on account of either an express or imputed political opinion.

"The text of the PIJ's letter, in conjunction with the harassment and beating that preceded it, provides the required link between his political beliefs and the motives of his attackers"

The court held that the letter slipped under the door of the house of petitioner's mother calling upon people of the city of Nablus to persecute the alien provided evidence that petitioner's attackers were motivated by his political opinion. "The text of the PIJ's letter, in conjunction with the harassment and beating that preceded it, provides the required link between his political beliefs and the motives of his attackers," said the court. Petitioner "did not refuse to cooperate with the PIJ because joining them was against the law or because he was afraid of retaliation by the government. He refused because he was politically opposed to the PIJ, and he directly communicated that disagreement to them."

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EIGHTH CIRCUIT

■ **Eighth Circuit Concludes that Alien Failed to Demonstrate a Clear Probability of Future Persecution in Columbia**

In ***De Castro-Gutierrez v. Holder***, __ F.3d __, 2013 WL 1705972 (8th Cir., April 22, 2013) (Murphy, Smith, *Gruender),* the Eighth Circuit upheld the agency's determination that the petitioner, who was threatened but never physically harmed, failed to establish that it would be unreasonable for her to relocate within Columbia to avoid future persecution.

Petitioner overstayed her visitor visa and, after DHS placed her in removal proceedings, petitioner requested asylum and withholding of removal. The BIA adopted the IJ's decision denying petitioner's applications.

The Eighth Circuit agreed with the agency that petitioner failed to demonstrate that she was unable to relocate, especially as the threats stopped after she relocated within Columbia in 2004. The court also recognized (1) that the mistreatment petitioner experienced did not rise to the level of persecution, (2) that her purported social group claim based her "membership within the Donado family" was not cognizable, and (3), even if it were cognizable, that petitioner failed to establish membership in that group where she was only connected to the Donado family because she had a child with one of the family members.

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■ **Eighth Circuit Dismisses Terrorism-Related Inadmissibility Case as Moot and Concludes that Voluntary Cessation Exception Was Not Satisfied**

In ***Ayyoubi v. Holder***, __ F.3d __, 2013 WL 1296396 (8th Cir. April 2, 2013) (Riley, Smith, *Colloton,*), the Eighth Circuit Court of Appeals held that USCIS's approval of Salahaddin Ayyoubi's application to adjust status mooted his appeal of a district court judgment in the Eastern District of Missouri.

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In February 2008, USCIS denied Ayyoubi's application for adjustment finding him to be statutorily ineligible based on a determination that he had supported and received training from the Kurdish Democratic Party of Iran ("KDPI"), a "Tier III" or "undesignated" terrorist organization under INA § 212(a)(3)(B). However, several months later USCIS reopened the case and placed his application on "hold-in-abeyance status." The reopening was precipitated by a USCIS policy memo instructing its adjudicators to withhold adjudications and to review prior denials in certain categories cases involving material support to terrorists.

On October 6, 2010, Ayyoubi sued USCIS, among others, alleging that the agency had acted unlawfully by withholding adjudication on his application without periodic review under Terrorism-Related Inadmissibility Grounds under 8 C.F.R. § 103.2(b)(18). The district court agreed with the government's contention that that rule was not applicable to Ayyoubi's case. On October 1, 2012, following a policy memorandum on implementation of a discretionary exemption for association with Tier III terrorist organizations, and while the appeal was pending, USCIS granted Ayyoubi a "Limited General" exemption and approved his application for adjustment of status.

In dismissing the appeal as moot, the Eight Circuit explained that Ayyoubi's uncertainty about the reasons for the agency's approval and his subjective fears about future applications or eventualities were insufficient to establish a continuing controversy and that the voluntary cessation exception to the mootness doctrine was not satisfied. "The threat of government action here is 'two steps removed from reality,'" said the court.

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■ **Eighth Circuit Determines ICE Officers' Actions Were Not Sufficiently Egregious to Implicate the Exclusionary Rule**

In ***Martinez Carcamo v. Holder,***__ F.3d__, 2013 WL 1688861 (8th Cir. April 19, 2013) (*Riley*, Colloton, Gruender), the Eighth Circuit held that ICE officers' warrantless early morning entry into the petitioners' trailer was not an egregious violation of the Fourth Amendment necessitating application of the exclusionary rule to suppress the aliens' identities.

ICE officers' warrantless early morning entry into the petitioners' trailer was not an egregious violation of the Fourth Amendment necessitating application of the exclusionary rule to suppress the aliens' identities.

After one petitioner was detained by ICE agents and yelled for the others to not open the door "because it was immigration," ICE agents searched the trailer and arrested three other occupants. The IJ denied petitioners request to suppress evidence taken during the warrantless search, including their passports, because the agents' conduct was not sufficiently egregious to warrant exclusion. The IJ also questioned the credibility of one of the petitioners after accidentally conflating his testimony with another witness. The BIA dismissed the appeal.

The Eighth Circuit concluded that the agents' conduct was not an egregious violation of the Fourth Amendment and rejected petitioners' argument that it became egregious because it was a deliberate violation that involved a home. Additionally, while the court acknowledged the "clear factual errors" made by the agency in assessing petitioner's credibility, the court rejected petitioners' claims related to the removal order because they failed to demonstrate prejudice.

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NINTH CIRCUIT

■ **Ninth Circuit Holds that a Conviction for Assault with a Deadly Weapon Constitutes a Crime Involving Moral Turpitude**

In ***Ceron v. Holder***, 712 F.3d 426 (9th Cir. 2013) *(Graber*, Ikuta, and Bright (by designation)), the Ninth Circuit held that a conviction for assault with a deadly weapon under Cal. Penal Code § 245(a)(1) constituted a crime involving moral turpitude, relying on *Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953). The court distinguished *Carr v. INS,* 86 F.3d 949, 951 (9th Cir. 1996), because *Carr* concerned with Cal. Penal Code section 245(a)(2), assault with a firearm, while petitioner here was convicted under § 245 (a)(1), assault with a deadly weapon.

In dissent, Judge Ikuta argued that the majority's opinion disregarded binding precedent established in *Navarro–Lopez v. Gonzales*, 503 F.3d 1063, 1074-75 (9th Cir. 2007) (*en banc*) (relying on *Carr* and finding that assault with a deadly weapon does not involve moral turpitude).

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■ **Ninth Circuit Holds that 8 U.S.C. § 1231(b)(3)(B)(iv) Unambiguously Creates Only One Category of *Per Se* Particularly Serious Crimes for Withholding Purposes**

In ***Blandino-Medina v. Holder***, __ F.3d __, 2013 WL 1442508 (9th Cir., April 10, 2013) (*Bea,* Hurwitz, Sessions), the Ninth Circuit held that the BIA erred by concluding that the

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alien's conviction for lewd and lascivious acts with a child under the age of fourteen, under Cal. Penal Code § 288(a), was *per se* a particularly serious crime. The court held that INA § 241(b)(3)(B)(iv) unambiguously creates only one category of per se particularly serious crimes for withholding purposes: aggravated felonies with sentences of at least five years' imprisonment. The court determined that petitioner's self-removal rendered him inadmissible under INA § 212(a)(9)(A)(ii). The court remanded for the agency to engage in a case-specific analysis to determine whether petitioner's conviction was particularly serious, rendering him statutorily ineligible for withholding.

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■ **Ninth Circuit Holds Adverse Credibility Determination Based on Implausibilities and Inconsistencies Supported by Substantial Evidence**

In ***Cui v. Holder***, 712 F.3d 1332 (9th Cir. 2013) (*Callahan,* Hurwitz, Ikuta), the Ninth Circuit held that petitioner's inconsistent statements concerning police surveillance, his failure to explain why he did not seek to enter the United States during his two-year stay in Mexico, and his voluntary return to China from Mexico, provided substantial evidence supporting the BIA's adverse credibility finding.

The petitioner claimed that he has been, and will be, persecuted because of his practice of Da Zang Gong ("DZ Gong"), a teaching of Tibetan Buddhism. Petitioner claimed that the police arrestred him on one occasion and warned that if he continued to practice DZ Gong, he would be detained even longer. Petitioner then left China in 2000 and traveled to Mexico where he remained for two years. He then returned to China and, two days after his arrival was detained for two weeks in one facility and beaten. He was then transferred to another jail, where he was again interrogated, beaten, and tortured. He asserted that he was released at the end of November 2002 and warned that if he continued to practice DZ Gong he would again be arrested and detained for even longer. Petitioner left China for Mexico in March 2003, with the intent of seeking asylum in the United States. Within days of his arrival in Tijuana, he arranged to be smuggled into the United States. He relates that early in a morning he was hidden under a van, but half an hour later he was discovered by Border Patrol agents, and subsequently placed in removal proceedings.

Congress rationally concluded that most aliens convicted of crimes warranting at least six months of incarceration lack the good moral character to warrant discretionary relief from removal.

An IJ found petitioner not to be credible, and denied him asylum, withholding of removal, and CAT protection. The IJ based his adverse credibility determination on five inconsistencies, two material omissions, nine instances of inherently implausible testimony, and a lack of corroborative evidence. The BIA dismissed the appeal, agreeing with the IJ's determination that it was "implausible that someone would travel all the way from China to Mexico, with the claimed purpose of applying for asylum in the United States, and ultimately simply return to China despite fears of harm awaiting him there."

In upholding the adverse credibility finding, the court determined, *inter alia*, that the IJ reasonably found that, if petitioner's "reason for going to Mexico was to escape political or religious persecution by seeking asylum in the United States, he surely would have made some attempt to enter the United States during the two years he resided in Mexico." The court therefore concluded that petitioner failed to demonstrate eligibility for asylum, withholding of removal, and CAT protection.

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■ **Ninth Circuit Holds that Good Moral Character Bar for Length of Confinement Does Not Violate Equal Protection**

In ***Romero-Ochoa v. Holder***, 712 F.3d 1328 (9th Cir. 2013) (Berzon, *Watford*, Rakoff (by designation)), the Ninth Circuit ruled that plausible reasons support the conclusive presumption under INA § 101 (f)(7) that an individual lacks good moral character based on the length of the period of incarceration, rather than on the nature of the underlying criminal conduct.

The petitioner, a citizen of Mexico, first came to the United States in 1973, when he was 18 years old. His wife is an LPR, and three of his five children are U.S. citizens. Petitioner's mother is also an LPR and his younger brother is a U.S. citizen as well. In 2005, the government initiated removal proceedings against petitioner, prompted by his then-recent 2004 conviction for vehicular manslaughter. Petitioner pleaded guilty to killing a person while unlawfully driving under the influence of alcohol in violation of California Penal Code § 192(c). He received a sentence of 16 months in prison and served approximately half of that time in custody.

When placed in removal proceedings he filed an application for cancellation of removal which required him to show, among other things, that he is a person of "good

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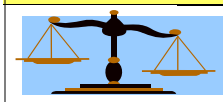

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moral character" during the 10–year period immediately preceding his application.

The IJ found that petitioner could not show good moral character because he fell within the category of individuals who have been "confined, as the result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more" during the period for which good moral character must be shown under INA § 101(f)(7). On appeal, petitioner contended that § 101(f)(7) was facially unconstitutional on the ground that it violates the equal protection component of the Fifth Amendment's Due Process Clause. He argued that in deciding which crimes are sufficiently serious to warrant that presumption, Congress may not use the length of time served in custody as a proxy for seriousness. Instead, Congress must use conduct-based classifications, as it has elsewhere in § 101(f), by specifying the particular criminal offenses which trigger the conclusive presumption that an individual lacks good moral character.

The court reasoned that Congress rationally concluded that most aliens convicted of crimes warranting at least six months of incarceration lack the good moral character to warrant discretionary relief from removal. The statute's reliance on periods of incarceration generated by state sentencing regimes that are not uniform in operation did not violate equal protection principles. "Whether Congress should have drawn the line at six months in custody, or one year or ten years, is not for us to second-guess," said the court.

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■ **Ninth Circuit Affirms Preliminary Injunction Order in Class Challenge to Prolonged Immigration Detention**

In ***Rodriguez v. Robbins,*** __ F.3d __, 2013 WL 1607706 (9th Cir. April 16, 2013) (*Wardlaw,* Gould, Haddon (by designation)), the Ninth Circuit affirmed a preliminary injunction order that requires the government to provide two subclasses of mandatorily detained aliens criminal aliens and arriving aliens with recorded bond hearings before an immigration judge with the government bearing the burden of establishing flight risk and/or dangerousness by clear and convincing evidence.

The court held that the statutes must be read to authorize mandatory detention only for a period of six months. After six months, continued detention is discretionary and governed by 8 U.S.C. § 1226(a)

The court held that the subclasses are likely to succeed on the merits of their claim that six months of detention without a bond hearing is prolonged and raises constitutional concerns. To avoid those concerns, the court held that the statutes must be read to authorize mandatory detention only for a period of six months. After six months, continued detention is discretionary and governed by 8 U.S.C. § 1226(a).

The court side-stepped the government's argument that prolonged detention of newly arriving aliens is constitutionally permissible by explaining that the arriving alien statute also applies to lawful permanent residents ("LPRs"), who have constitutional due process rights. As a result, the court concluded that the statute must be construed so that it may be constitutionally applied to LPRs.

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ELEVENTH CIRCUIT

■ ***En Banc* Eleventh Circuit Holds that 90-Day Motion to Reopen Deadline is Not Jurisdictional and is Subject to Equitable Tolling**

In *Avila-Santoyo v. U.S. Att'y Gen.,* __ F.3d __, 2013 WL 1499419 (11th Cir. April 12, 2013), the *en banc* Eleventh Circuit, in a *per curiam* opinion, held that the BIA's 90-day deadline for filing a motion to reopen is a non-jurisdictional claim-processing rule subject to equitable tolling.

The BIA had concluded that it lacked jurisdiction under the departure bar and, alternatively, that the motion was filed more than 90 days after petitioner's final order of removal and was not subject to equitable tolling. The BIA rejected petitioner's equitable tolling argument relying on *Abdi v. U.S. Att'y Gen.,* 430 F.3d 1148, 1150 (11th Cir. 2005), which held that the 90–day deadline for filing a motion to reopen is "mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling." A panel of the Eleventh Circuit, had initially affirmed the BIA's determination on the ground that the 90–day deadline is jurisdictional and not subject to equitable tolling in an unpublished panel decision, *Avila–Santoyo v. U.S. Att'y Gen.*, 487 Fed.Appx. 478 (11th Cir. 2012).

Overruling its prior decision, *Abdi v. U.S. Att'y Gen.*, 430 F.3d 1148, 1150 (11th Cir. 2005) (filing deadline jurisdictional and not subject to tolling), the court rejected the contention that it should remand to allow the BIA to determine if and when equitable tolling of the deadline should be allowed. Citing congressional intent, the wording of the statute, and the precedents of other appeals courts, the court decided in the first instance that equitable tolling was not jurisdictionally barred.

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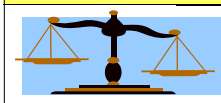

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The court, however, remanded for the BIA to determine whether the circumstances in petitioner's case warranted tolling.

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■ Eleventh Circuit Upholds District Court's Grant of a Preliminary Injunction Against the Department of Labor's 2012 H-2B Temporary Non-Agricultural Worker Rule

In ***Bayou Lawn & Landscape Services v. Secretary of Labor,***__F.3d__, 2013 WL 1286129 (11th Cir. April 1, 2013) (*Hill*, Wilson, Huck, (by designation)), the Eleventh Circuit upheld a preliminary injunction, finding that plaintiffs were likely to succeed on the merits of their claim that DOL lacked legislative rulemaking authority to promulgate rules governing the H-2B non-agricultural workers program under INA § 101(a)(15)(H)(ii)(b).

In 2011 DOL published proposed rules that would have made significant changes to the administration of the program, including a decrease in the maximum number of months an employer may employ an H–2B worker from ten to nine; a requirement that employers guarantee that H–2B employees will work at least seventy-five percent of the hours certified in any twelve-week period and, if not, pay the employees the difference for the time not worked; a requirement that employers pay non H–2B workers' wages and benefits at least equal to those paid to H–2B workers if the two perform "substantially the same work;" and a requirement that employers pay for the round-trip airfare and subsistence costs of H–2B workers.

A group of H-2B employers then challenged DOL's rulemaking arguing that it lacked the authority to issue the rules. The employers contended that only the Department of Homeland Security has authority under INA to issue legislative rules imposing substantive obligations on employers in the H-2B program. The District Court for the Northern District of Florida granted the plaintiffs' motion for a preliminary injunction, and the government appealed.

The Eleventh Circuit held that Congress delegated "limited rulemaking authority" to DOL over the H-2A agricultural program under § 101(a)(15)(H)(ii)(a), but omitted such delegation under the H-2B program. The court rejected the government's argument that since the Secretary of DHS had the authority to consult with appropriate agencies of the government over whether to grant a visa to a foreign worker under § 214(c)(1), DOL "has authority to issue legislative rules to structure its consultation with DHS." "Under this theory of consultation" explained the court, "any federal employee with whom the Secretary of DHS deigns to consult would then have the 'authority to issue legislative rules to structure [his] consultation with DHS.' This is an absurd reading of the statute and we decline to adopt it."

The court also disagreed with the government's contention that the structure of the INA evidenced a congressional intent that DOL should exercise rulemaking authority over the H-2B program. "Even if it were not axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegated to it by Congress, [ ] we would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency," said the court.

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■ Eleventh Circuit Holds BIA Must Weigh *Hashmi* and *Rajah* Factors When Ruling on Continuance Motions

In ***Ferreira v. U.S. Att'y Gen.***__F.3d __, 2013 WL 1566636 (11th Cir. April 16, 2013) (Tjoflat, Pryor, *Rothstein* (by designation)), the Eleventh Circuit held that the BIA abused its discretion when it failed to consider factors set forth in *Matter of Hashmi*, 24 I. & N. Dec. 785 (BIA 2009), and *Matter of Rajah,* 25 I. & N. Dec. 127 (BIA 2009), in ruling on a motion to continue removal proceedings.

The Eleventh Circuit determined that the BIA abused its discretion by relying solely on the fact that a visa was not immediately available to deny the motion to continue because, even in cases where visa availability is remote, the BIA must articulate or weigh all of the *Rajah* and *Hashmi* factors

The petitioner, a native and citizen of Brazil, overstayed a visitor visa and was placed in removal proceedings. Petitioner requested a continuance after USCIS approved an I-140 visa petition filed on his behalf but the IJ denied the request because it appeared a visa would not be available for several years. The BIA dismissed petitioner's appeal and later denied a motion to reconsider.

The Eleventh Circuit determined that the BIA abused its discretion by relying solely on the fact that a visa was not immediately available to deny the motion to continue because, even in cases where visa availability is remote, the BIA must articulate or weigh all of the *Rajah* and *Hashmi* factors, as required by the BIA's own precedent.

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We encourage contributions to the Immigration Litigation Bulletin

This Month's Topical Parentheticals

ADJUSTMENT

■ ***Ayyoubi v. Holder***, __ F. 3d __ 2013 WL 1296396 (8th Cir. Apr. 2, .2013.) (holding that the complaint which alleged that DHS unlawfully withheld adjudication and periodic review of an adjustment application while it considered applying an exemption to the material support bar was moot in light of USCIS's decision approving the application)

■ ***Geneme v. Holder***, __ F. Supp.2d __, 2013 WL 1291237 (D.D.C. Mar. 31, 2013) (holding that the government's delay in adjudicating an adjustment application for eight years - five of which were due to USCIS holding the case in abeyance while it considered applying a discretionary exemption to the material support bar was not reasonable; concluding that USCIS's decision to place adjudication of the application on hold does not fall within the discretionary review bar at 8 U.S.C. § 1252(a)(2)(B))

■ ***Matter of Butt,*** 26 I.&N. Dec. 108 (BIA Apr. 19, 2013) (holding that for purposes of adjustment of status eligibility under INA § 245(i), an alien seeking to be "grandfathered" must be the beneficiary of an application for labor certification that was "approvable when filed"; further holding that an alien will be presumed to be the beneficiary of a "meritorious in fact" labor certification if the application was "properly filed" and "non-frivolous," and if no apparent bars to approval of the labor certification existed at the time it was filed).

ASYLUM & WITHHOLDING

■ ***Cui v. Holder,*** __ F. 3d __, 2013 WL 1442496 (9th Cir. Apr. 10, 2013) (upholding pre-REAL ID Act adverse credibility finding regarding claim of persecution in China for practicing DZ Gong, on grounds that applicant travelled to Mexico, stayed for two years without entering the US or applying for asylum in Mexico, and voluntarily returned to China; holding that these actions were inconsistent with and undermined the genuineness of a claimed fear of persecution, which goes to the heart of the claim. Further holding that the adverse credibility finding was also supported by a lack of corroboration; vague and unresponsive explanations regarding stay in Mexico and return to China; and failure to remember whether alien was under police surveillance when in China)

■ ***Blandino-Medina v. Holder,*** __ F.3d __, 2013 WL 1442508 (9th Cir. Apr. 10, 2013) (holding that the BIA erred in concluding that petitioner's conviction for lewd and lascivious acts with a child under the age of 14 was *per se* a "particularly serious crime," and reasoning that the bar on withholding protection creates only one category of *per se* particularly serious crimes, aggravated felonies for which the alien was sentenced to at least five years' imprisonment, and precludes the agency from creating additional categories of facially particular serious crimes)

■ ***Ni v. Holder,*** __ F. 3d __, 2013 WL 1776501 (7th Cir. Apr. 26, 2013) (holding that BIA abused its discretion in denying man's MTR with record of 1,000 pages raising a new, successive asylum claim of future forced sterilization based on changed personal circumstances of birth of two U.S. children, because BIA arbitrarily treated this solely as changed personal circumstances, without addressing new evidence offered to show changed country conditions)

■ ***Castro-Gutierrez v. Holder,*** __ F. 3d __, 2013 WL 1705972 (8th Cir. Apr. 22, 2013) (affirming denial of withholding for female applicant from Colombia claiming past threats and future harm by FARC on account of membership in a PSG of "the Donado family,. . . a wealthy family of landowners who have been victims of extortion, murder, attempted murder, internal displacement and intimidation [by FARC] for over fifteen years," because: i) this is too amorphous to be a PSG; ii) the family is no different from other families that have experienced FARC violence; and iii) the applicant did not show FARC would deem her to be a family member where she simply lived out of wedlock with a family member and bore his child)

■ ***Liu v. Holder,*** __ F. 3d __, 2013 WL 1715533 (1st Cir. Apr. 22, 2013) (REAL ID Act credibility case, affirming finding that male asylum applicant from China claiming past persecution due to forced abortion of his wife, and future persecution for practicing Falun Gong in U.S, was not credible)

■ ***Romero-Ochoa v. Holder,*** __ F. 3d __, 2013 WL 1442484 (9th Cir. Apr. 10, 2013) (holding that there are plausible reasons supporting 8 U.S.C. § 1101(f)(7)'s conclusive presumption that an individual lacks good moral character based on a period of incarceration, rather than on the nature of the criminal conduct, and that Congress rationally concluded that most aliens convicted of crimes warranting at least six months of incarceration lack the good moral character to warrant discretionary relief; further holding that § 1101(f)(7)'s reliance on periods of incarceration generated by state sentencing regimes that are not uniform in operation did not violate equal protection principles)

■ ***Jabr v. Holder***, __ F. 3d __, 2013 WL 1296720 (7th Cir. Apr. 2, 2013) (holding that BIA overlooked material evidence showing Palestinian terrorist organization beat and threatened asylum applicant on account of his political opinion rather than to recruit him)

CANCELLATION

■ ***Sejdini v. Holder,*** __ F.3d __, 2013 WL 1694606 (6th Cir. Apr. 19, 2013) (holding that because petition-

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er already received special-rule cancellation of removal under NACARA, he is statutorily barred under section 240A(c)(6) of the INA from receiving cancellation of removal under section 240A(a); reasoning that section 203(f)(1) of NACARA references the INA's cancellation provision)

CONVENTION AGAINST TORTURE

■ *Suarez-Valenzuela v. Holder,* __ F.3d __, 2013 WL 1749518 (4th Cir. Apr. 24, 2013) (affirming denial of CAT claim by Peruvian man claiming past torture (shooting and stabbing) and fear of future torture (killing) by a rogue Peruvian policeman, where evidence showed: (i) that government did not acquiesce by turning a blind eye to the policeman's actions because the government denounced and prosecuted him as a rogue cop; (ii) country condition evidence shows that the government of Peru is cracking down on official corruption; and (iii) there is no evidence that officials would permit the man to use the government's database to locate the applicant)

CRIMES

■ *Ceron v. Holder*, __ F. 3d __, .2013 WL 1296723 (9th Cir. Apr. 2, 2013) (holding that a conviction for assault with a deadly weapon in violation of Cal. Pen. Code § 245(a)(1) constitutes a CIMT and a felony)

■ *Moncrieffe v. Holder,* __ U.S. __, 2013 WL 1729220 (Apr. 23, 2013) (holding that if a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under the INA)

■ *Santana v. Holder,* __ F.3d __, 2013 WL __ (2d Cir. Apr. 22, 2013) (holding that arson in the second degree under NY law is a felony that, by its nature, involves a substantial risk of the intentional use of physical force (fire) against the person or property of another, and therefore attempted arson in the second degree is a "crime of violence" rendering petitioner ineligible for cancellation of removal and the court without jurisdiction)

■ *United States of America v. Garza-Guijan,* __ F.3d __, 2013 WL 1798607 (5th Cir. Apr. 29, 2013) (holding that for purposes of a sentencing enhancement a conviction for sexual battery under Florida law constitutes a crime of violence within the scope of the enumerated category of "forcible sex offenses" under the sentencing guidelines)

■ *United States v. Cabezas*, __ F. Supp.2d __, 2013 WL 1310498 (D. Mass. Apr. 2, 2013) (applying Supreme Court's recent decision in *Chaidez* to reject defendant's *Padilla* claim (that his attorney failed to advise him of the immigration consequences of pleading guilty) because his conviction became final prior to the *Padilla* decision)

DETENTION

■ *Sylvain v. Att'y Gen. of United States,* __ F. 3d __, 2013 WL 1715304 (3d Cir. Apr. 22, 2013) (reversing the district court and holding that ICE does not lose authority to impose mandatory detention under 8 U.S.C. § 1226(c) if it fails to do so "when the alien is released")

■ *Rodriguez v. Robbins,* __ F. 3d __, 2013 WL 1607706 (9th Cir. Apr. 16, 2013) (affirming district court's injunction requiring the government to identify all class members detained for six months or longer pursuant to 8 U.S.C. §§ 1226(c) and 1225(b), and to provide each of them with a bond hearing before an IJ; reasoning that petitioners were likely to succeed on the merits of their claim that due process requires that these sections be construed to authorize only 6 months of mandatory detention, after which detention is authorized by section 1226(a) and an IJ bond hearing is required)

DEPARTMENT OF LABOR

■ *Bayou Lawn and Landscape Svs. v. Secretary of Labor*, __ F. 3d __, 2013 WL 1286129 (11th Cir. Apr. 1, 2013) (affirming district court's issuance of a preliminary injunction prohibiting the enforcement of DOL rules governing the employment of temporary, non-agricultural foreign workers because, inter alia, plaintiffs showed a substantial likelihood of success in arguing that DOL exercised rulemaking authority it did not possess)

DUE PROCESS – FAIR HEARING

■ *Ruiz-Turcios v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 1689072 (11th Cir. Apr. 19, 2013) (on rehearing, vacating panel opinion and remanding MTR for ineffective assistant of counsel to BIA in light of en banc decision in *Availa-Santoyo* holding that the 90-day deadline for MTRs is subject to equitable tolling)

■ *Ferreira v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 1566636 (11th Cir. Apr. 16, 2013) (remanding case to BIA because it failed to apply its own precedent in denying petitioner's continuance for lack of good cause where its denial was based solely on the fact that an immigrant visa was not immediately available, and was therefore contrary to its precedent which requires that it consider other relevant factors)

■ *Martinez-Carcamo v. Holder,* __ F. 3d __, 2013 WL 1688861 (8th Cir. Apr. 19, 2013) (holding that ICE officers' warrantless early morning entry into aliens' trailer was not an egregious violation of the Fourth Amendment necessitating application of the exclusionary rule to suppress the aliens' identities; reasoning that the mere fact that the violation involved a search of a home or deliberate conduct by ICE officers did not establish egregiousness)

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JURISDICTION

■ *Avila-Santoyo v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 1499419 (11th Cir. Apr. 12, 2013) (en banc) (overruling prior precedent and holding that the 90-day deadline to file a MTR removal proceedings is not jurisdictional, but rather is a claim-processing rule; further holding that the 90-day rule is subject to equitable tolling because: (1) it uses "fairly simple language"; (2) is not "unusually generous"; and (3) the AG has promulgated a regulatory exception to the rule permitting the BIA and IJs to reopen *sua sponte* at any time and for any reason)

■ *Salgado-Toribio v. Holder,* __ F. 3d __, 2013 WL 1731220 (10th Cir. Apr. 23, 2013) (denying petitioner's in *forma pauperis* application and granting the government's motion to dismiss after concluding that the petition was frivolous in light of governing precedent; further noting that petitioner "has repeatedly taken advantage" of the court of appeals' stay procedures by filing three PFRs in the Ninth Circuit – an improper venue for his petitions)

NATURALIZATION

■ *Mondaca-Vega v. Holder,* __ F.3d __, 2013 WL 1760795 (9th Cir. Apr. 25, 2013) (holding that the proper standard of review of the district court's findings of fact on petitioner's nationality claim is for clear error, and that the district court correctly placed the burden on petitioner to prove citizenship by a preponderance of the evidence, and then properly shifted the ultimate burden of proof to the government to prove by clear and convincing evidence that he was removable; further concluding that the district court's finding that petitioner never became a USC is not clearly erroneous) (Judge Pregerson dissented)

■ *Tesfay v. Holder,* __ F. Supp.2d __, 2013 WL 1785397 (D. Nev. Apr. 26, 2013) (holding that district court lacked jurisdiction to amend the date of birth on petitioner's Certificate of Naturalization because in IMMACT Congress shifted the statutory authority to naturalize persons as citizens from the courts to the Attorney General; further noting that petitioner cannot rely on the APA to establish subject matter jurisdiction because the APA does not apply to immigration proceedings)

■ *Richmond v. Holder,* __ F. 3d __, 2013 WL __ (2d Cir. Apr. 30, 2013) (remanding case to the BIA to address in the first instance whether making a false claim to US citizenship for the purpose of avoiding removal proceedings counts as a "purpose or benefit" under the INA or any other federal or state law, and thus constitutes a ground of inadmissibility under 8 U.S.C. § 1182(a)(6)(C)(ii)(I))

REMOVAL

■ *Ortiz-Bouchet v. United States Att'y Gen.,* __ F. 3d __, 2013 WL __ (11th Cir. Apr. 23, 2013) (rejecting government's argument that a "presumption" that petitioner had knowledge of the fraudulent petition filed on his behalf by his representative was sufficient to sustain the inadmissibility charge for willful misrepresentation; reasoning that the fraud charge requires evidence of an actual misrepresentation)

VISAS

■ *Mangwiro v. Napolitano,* __ F. Supp.2d __, 2013 WL 1499373 (N.D. Tex. Apr. 12, 2013) (dismissing for failure to state a claim plaintiffs' claims that defendants violated the APA by denying the I-130 visa petitions of US citizen plaintiff and violated due process by denying plaintiffs' request for copies of the recorded interviews)

Summaries Of Recent Federal District Court Decisions

■ **N.D of California Holds Alien Ineligible to Naturalize Because of Father's False Asylum Claim**

In *Atina Bertos v. Janet Napolitano, et al.*, No. 5:12-cv-3531 (Whyte, J. (N.D. Cal. April 9, 2013), the District Court for the Northern District of California granted the government's motion to dismiss. The court held that a derivative-asylee is not eligible to naturalize, even if she previously adjusted to permanent residence status, because asylum fraud committed by the parent flows to derivative child. The court applied *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986), and held that "lawfully admitted for permanent residence" applies equally to naturalization proceedings under INA §§ 316(a) and 318, and rendered the applicant ineligible to naturalize.

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■ **Southern District of California Affirms Revocation of EB-1 Extraordinary Ability Visa for Classical Flute Player**

In *Payne v. Rhew*, No. 12-cv-440 (Miller, J.) (S.D. Cal. April 15, 2013), the District Court for the Southern District of California affirmed the Administrative Appeals Office's ("AAO") decision affirming USCIS's revocation of an alien's EB-1 visa petition seeking classification as a classical flute player of extraordinary ability. The court held that the AAO properly considered only the evidence the alien submitted at the time she filed the visa petition. The court also held that the Secretary of Homeland Security had broad discretion to revoke the visa petition at any time for good and sufficient cause.

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Supreme Court Holds That Conviction for Small Amounts of Marijuana Not an Aggravated Felony

(Continued from page 1)

that offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." Because a court examines what the state conviction necessarily involved and not the facts underlying the case, it presumes that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, before determining whether even those acts are encompassed by the generic federal offense.

Here the Court determined that the categorical approach applied to petitioner's because "illicit trafficking in a controlled substance" is a "generic crim[e]." Thus, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct. Possession of marijuana with intent to distribute is clearly a federal crime. The question is whether Georgia law necessarily proscribes conduct punishable as a felony under the CSA. Title 21 U.S.C. § 841(b)(1)(D) provides that, with certain exceptions, a violation of the marijuana distribution statute is punishable by "a term of imprisonment of not more than 5 years."

However, one of those exceptions, § 841(b)(4), provides that "any person who violates [the statute] by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, *i.e.*, as a misdemeanant. These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, the other not. The fact of a conviction under Georgia's statute, standing alone, does not reveal whether either remuneration or more than a small amount was involved, so petitioner's conviction could correspond to either the CSA felony or the CSA misdemeanor. Thus, said the Court, the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA.

The Court found the government's arguments unpersuasive. It rejected the contention that any marijuana distribution conviction is presumptively a felony, but the CSA makes neither the felony nor the misdemeanor provision the default. The Court said that the government's approach would lead to the absurd result that a conviction under a statute that punishes misdemeanor conduct only, such as § 841(b)(4) itself, would nevertheless be a categorical aggravated felony.

The Court also rejected the suggestion that noncitizens be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration. The Court found this approach "inconsistent with both the INA's text and the categorical approach." The government's procedure would require the "Nation's overburdened immigration courts" to conduct precisely the sort of post hoc investigation into the facts of predicate offenses long deemed undesirable, and would require uncounseled noncitizens to locate witnesses years after the fact," said the Court.

Finally, the Court found "exaggerated", the government's concerns about the consequences of its decision. "Escaping aggravated felony treatment does not mean escaping deportation. It means only avoiding mandatory removal," said the Court. "Any marijuana distribution offense will still render a noncitizen deportable as a controlled substances offender." Having been found not to be an aggravated felon, the Court said that the noncitizen may seek relief from removal such as asylum or cancellation of removal, but "the Attorney General may, in his discretion, deny relief" if he finds that the noncitizen is actually a more serious drug trafficker.

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OIL TRAINING CALENDAR

May 9 2013. Brown Bag Lunch & Learn with Claudia Bernard, Chief Mediator for the Ninth Circuit Court of Appeals

May 23, 2013. Book presentation by Georgetown Law School Professors Philip Schrag and Andrew Schoenholtz on a their soon to be published book: *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security.* Professors Schoenholtz and Schrag will present a preview of their findings, with more than 30 graphic illustrations.

NOTED

Temporary Protected Status Extended for Hondurans

DHS has extended Temporary Protected Status (TPS) for eligible nationals of Honduras for an additional 18 months, beginning July 6, 2013, and ending Jan. 5, 2015. Current Honduran beneficiaries seeking to extend their TPS status must re-register during the 60-day re-registration period that runs from April 3, 2013, through June 3, 2013.

The 18-month extension also allows TPS re-registrants to apply for a new employment authorization document (EAD). Eligible Honduran TPS beneficiaries who request an EAD and meet the re-registration deadline will receive a new EAD with an expiration date of Jan. 5, 2015. USCIS recognizes that some re-registrants may not receive their new EADs until after their current EADs expire. Therefore, USCIS is automatically extending current TPS Honduras EADs that have a July 5, 2013, expiration date for an additional six months. These existing EADs are now valid through Jan. 5, 2014.

Temporary Protected Status Extended for Nicaraguans

DHS has extended TPS for eligible nationals of Nicaragua for an additional 18 months, beginning July 6, 2013, and ending Jan. 5, 2015. Current Nicaraguan beneficiaries seeking to extend their TPS status must re-register during the 60-day re-registration period that runs from April 3, 2013, through June 3, 2013.

The 18-month extension also allows TPS re-registrants to apply for a new employment authorization document (EAD). Eligible Nicaraguan TPS beneficiaries who request an EAD and meet the re-registration deadline will receive a new EAD with an expiration date of Jan. 5, 2015. USCIS recognizes that some re-registrants may not receive their new EADs until after their current EADs expire. Therefore, USCIS is automatically extending current TPS Nicaragua EADs that have a July 5, 2013, expiration date for an additional six months. These existing EADs are now valid through Jan. 5, 2014.

USCIS Reaches FY 2014 H-1B Cap

For the first time since 2008, USCIS has reached the statutory H-1B cap of 65,000 for fiscal year (FY) 2014 within the first week of the filing period. USCIS has also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the advanced degree exemption.

USCIS received approximately 124,000 H-1B petitions during the filing period, including petitions filed for the advanced degree exemption. On April 7, 2013, USCIS used a computer-generated random selection process to select a sufficient number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the advanced degree exemption limit. For cap-subject petitions not randomly selected, USCIS will reject and return the petition with filing fees, unless it is found to be a duplicate filing.

All advanced degree petitions not selected were part of the random selection process for the 65,000 limit.

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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