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LITIGATION HIGHLIGHTS

Inside

En Banc Ninth Circuit Holds That BIA Can Designate On A Case-By-Case Basis Crimes As "Particularly Serious" For Purpose of Asylum and Withholding

In ***Delgado v. Holder***,__ F.3d __, 2011 WL 3633695(9th Cir. August 19, 2011) (Kozinski, Canby, Reinhardt, O'Scannlain, McKeown, *Fisher*, Bybee, Callahan, Bea, Smith, Jr., Smith), the *en banc* Ninth Circuit held that for purposes of eligibility for withholding of removal, an offense need not be a statutorily defined aggravated felony to be a particularly serious crime under INA § 241.

The petitioner, a Salvadoran citizen, entered the United States in 1980 at age 10, on a nonimmigrant visa and did not depart when his visa expired. During his time in the United States he was convicted of DUI three times, in 1992, 2000, and 2001. In 2001, when petitioner was released from prison where he had served time for the 2000 DUI conviction, DHS took petitioner into custody and instituted removal proceedings. DHS charged petitioner as an overstay and as an alien convicted of an aggravated felony.

Petitioner, who was *pro se*, conceded removability but sought asylum, withholding, and CAT deferral. The IJ found him ineligible for relief because he had been convicted of a particularly serious crime, and also ineligible for CAT deferral as a result of improved country conditions. The BIA affirmed

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Third Circuit Finds That Post-Departure Bar Regulations Are Inconsistent With IIRIRA

In ***Prestol-Espinal v. Att'y Gen.***, __ F.3d __, 2011 WL 3314945 (3d Cir. August 3, 2011) (*Sloviter*, Greenaway, Jr., Pollak), the Third Circuit held that 8 C.F.R § 1003.2(d), which bars an alien from filing a motion to reconsider or reopen after departing the United States, is inconsistent with IIRIRA's motion to reconsider and reopen provisions (codified in 8 U.S.C. § 1229a(c)), which give aliens a statutory right to file one motion to reconsider and one motion to reopen.

The petitioner, a citizen of the Dominican Republic, was placed in removal proceedings as an alien present in the United States without being admitted or paroled. DHS later also charged him with being removable as an alien convicted of an offense relating to a controlled substance and as alien convicted of two or more CIMTs. Petitioner conceded removability but sought asylum, withholding, and CAT protection, claiming that because he had assisted the DEA, he feared that he would be targeted for violence by drug dealers in the Dominican Republic. The IJ denied his requested reliefs and, on November 3, 2009, the BIA affirmed the IJ's decision. On November 24, 2009, petitioner was removed from the United States to the Dominican Republic.

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"Particularly Serious Crime"

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in an unpublished decision, finding also that Petitioner's record of conviction rose to the level of being particularly serious crimes.

The Ninth Circuit initially determined that it had jurisdiction to review the BIA's determination that an alien has been convicted of a "particularly serious crime" and is therefore ineligible for withholding of removal. The court overruled its prior decision in *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), where it had held that INA § 242(a)(2)(B)(ii), removed jurisdiction to review "any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security." The court explained, and the government conceded, that *Matsuk* had to be overruled in light of the Supreme Court's decision that § 242(a)(2)(B)(ii) bars judicial review "only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana v. Holder*, __ U.S. __, 130 S. Ct. 827, 837 (2010).

"Although Congress has amended the asylum statute's particularly serious crime bar over time, none of its actions have called into question the BIA's authority to designate offenses as particularly serious crimes through case-by-case adjudication."

Next, the court deferred to the BIA's interpretation in *Matter of N-A-M-*, 24 I&N Dec. 336, 337 (BIA 2007) that, for purposes of withholding of removal, an offense need not be an aggravated felony to be a particularly serious crime. The court explained that although § 241(b)(3)(B)(ii) does not define "particular serious crime," it provides that certain aggravated felony convictions fall within this category. The court determined that § 241(b)(3)(B) was ambiguous and that the BIA's interpretation in *N-A-M-* was permissible under *Chevron*. "The statute includes no express requirement that the Attorney General consider particularly serious crimes as a subset of aggravated felonies.

Furthermore, as the BIA emphasized, its interpretation is supported by the statutory history of the particularly serious crime bar," explained the court. In particular, the court noted that in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), the BIA applied the case-by-case balancing test to its interpretation of "particularly serious crime" bar to withholding of removal. Accordingly, the court concluded that the BIA had authority to determine whether petitioner's DUI convictions were particularly serious crimes, barring him from withholding of removal.

The court also rejected petitioner's contention that the BIA lacked authority to designate his DUI convictions as particularly serious crimes for purpose of his asylum application.

The asylum statute, particularly § 208(b)(2)(B), does not define "particularly serious crime," but provides that that all aggravated felonies are particularly serious crimes and authorizes the Attorney General to designate additional crimes as particularly serious crimes by regulation. Petitioner argued that aggravated felonies and only those offenses designated by the Attorney General through regulation could be considered particularly serious crimes. The court explained that "although Congress has amended the asylum statute's particularly serious crime bar over time, none of its actions have called into question the BIA's authority to designate offenses as particularly serious crimes through case-by-case adjudication."

On the merits, the court determined that the BIA's decision finding that petitioner had been convicted of particularly serious crimes, was too vague to allow for meaningful judicial review. The court could not determine whether the BIA properly concluded that the alien's multiple DUI convictions constituted particularly serious crimes or whether one of his crimes rose to the level of particularly serious. Accordingly, the court remanded the case to the BIA "for a clear explanation."

Finally, the court affirmed the BIA's denial of petitioner's request for CAT deferral finding that the evidence did not compel the conclusion that he would be tortured by the Salvadoran government.

By Francesco Isgro, OIL

Contact: Erica Miles, OIL
☎ 202-353-4433

I-9 Settlement Agreement

On August 22, DOJ announced a record anti-discrimination settlement agreement with Farmland Foods, Inc. to resolve allegations that the company engaged in a pattern or practice of discrimination during the I-9 process. Farmland, a major producer of pork products in the United States, had a practice of requiring all newly hired non-U.S. citizens and some foreign-born U.S. citizens at its Monmouth, Illinois plant to present specific and, in many cases, extra work-authorization documents beyond those required by law. Under the terms of the settlement, Farmland has agreed to pay $290,400, the highest civil penalty paid through a settlement since the INA's anti-discrimination provision went into effect in 1986.

FURTHER REVIEW PENDING: Update on Cases & Issues

212(c) - Comparability

Oral argument has been scheduled for October 12, 2011, before the Supreme Court in ***Judulang v. Holder*** (No. 10-694). The question presented is 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 reenter between his conviction and the commencement of proceedings is categorically foreclosed from seeking discretionary § 212(c) relief?

Contact: Alison Drucker, OIL
☎ 202-616-4867

Aggravated Felony - Tax Fraud

Oral argument has been scheduled for November 7, 2011, before the Supreme Court in ***Kawashima v. Holder*** (No. 10-577). The question presented is whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under INA § 101(a)(43) (M)(i), and petitioners were therefore removable.

Contact: Bryan Beier, OIL
☎ 202-514-4115

MTR - Post-Departure Bar

On August 2, 2011, the Tenth Circuit granted the alien's petition for en banc rehearing over the government's opposition, in ***Contreras-Bocanegra v. Holder***, 629 F.3d 1170 (10th Cir. 2010). A panel of the court had held that the BIA appropriately applied the post-departure bar codified at 8 C.F.R. § 1003.2(d) when it determined it lacked jurisdiction to consider a motion to reopen filed by an alien who had already been removed. In upholding the BIA's determination, the court relied on its precedential decisions in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), and *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009), both of which affirmed the validity of the post-departure bar. The en banc argument will be held during the week of November 14, 2011.

Contact: Greg Mack, OIL
☎ 202-616-4858

Cancellation - Imputation

On June 23, 2011, the Solicitor General filed a petition for certiorari in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543), two cases raising the question of whether the parent's time of legal residence be imputed to the child so that the child can satisfy the 7 years continuous residence requirement for cancellation of removal.

Contact: Carol Federighi, OIL
☎ 202-514-1903

Aggravated Felony — Missing Element

Based on its en banc decision in ***U.S. v. Aguila-Montes de Oca***, --- F.3d ----, 2011 WL 3506442 (Aug. 11, 2011), the Ninth Circuit has withdrawn its decision in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009). The government had filed a petition for rehearing en banc challenging the court's use of the "missing element" rule. The panel majority held that the alien's conviction by special court martial for violating 10 U.S.C. § 892 — incorporating the DoD 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 10 U.S.C. § 892 nor the DoD directive required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus both were missing an element of the generic crime altogether.

Contact: Holly M. Smith, OIL
☎ 202-305-1241

Cancellation - Burden of Proof

On March 31, 2011, the government filed a petition for rehearing en banc in ***Rosas-Castaneda v. Holder,*** 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.

Contact: Bryan Beier, OIL
☎ 202-514-4115

Adjustment - Unlawful Presence

The Ninth Circuit has requested the government to respond to a petition for rehearing filed in ***Carrillo de Palacios v. Holder***, __F.3d ___, 2011 WL 2450985 (9th Cir. June 21, 2011. The question presented is: Is an alien inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i), and ineligible for adjustment of status under 8 U.S.C. § 1255(i), if she was unlawfully present in the United States for more than a year before April 1, 1997, and then illegally re-entered the United States afterward?

Contact: Andy MacLachlan, OIL
☎ 202-514-9718

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that Albanian Asylum Applicants Demonstrated Past Persecution and That Their Fear of Future Persecution Was Not Rebutted by Changed Country Conditions

In *Precetaj v. Holder*, __ F.3d __, 2011 WL 3505540 (1st Cir. August 11, 2011) (Lynch, *Boudin*, Thompson), the First Circuit overturned the agency's decision denying petitioners' application for asylum.

The petitioners, husband and wife, are citizens of Albania. The wife entered the United States on May 5, 2002, on a temporary tourist visa that expired on November 4, 2002, while the husband entered the United States on July 26, 2002, using a false Italian passport. In January 2003, the husband filed an application for asylum and withholding of removal that listed his wife as a derivative beneficiary. Later, the wife separately applied for asylum, withholding of removal, and CAT protection. Following a series of hearings, the IJ, on July 7, 2008, denied the applications finding that the level of harm suffered did not rise to past persecution and, alternatively, that country conditions had changed. On appeal the BIA affirmed the finding of no past persecution, and ruled that any harm of future persecution had been rebutted by the changed country conditions.

The court held that petitioners' experience, including incidents of threats and violence over a decade, combined with the kidnaping and assaults their children experienced, were sufficient to rise to the level of persecution. The court further held that petitioners countered the government's show of changed country conditions by submitting evidence demonstrating that their persecutors still exercised power at a local level.

Contact: Andrea Gevas, OIL
☎ 202-305-0100

THIRD CIRCUIT

Third Circuit Rules That BIA Erred In Construing Alien's Appeal As One From Interlocutory Order

In *Higgs v. Att'y Gen. of the U.S.*, __F.3d __, 2011 WL 3715784 (3d Cir. August 25, 2011) (*Fuentes*, Fisher, Nygaard), the Third Circuit held that the BIA erred by dismissing petitioner's appeal as one from an interlocutory ruling by the immigration judge.

The petitioner, who was born in the Bahamas in 1981, became an LPR in 1999. In 2005, petitioner was charged with possession of, and intent to deliver, marijuana and knowing and intentional possession of a controlled substance. On the basis of those two offenses, DHS charged him with removability as an alien convicted of a controlled substance violation and as an alien convicted of an aggravated felony.

Petitioner's notice of appeal "clearly complied with the principle that a petitioner has satisfied his administrative remedies if he made 'some effort, however insufficient, to place the Board on notice of a straightforward issue being raised on appeal.'"

The IJ ruled that petitioner's prior convictions did not satisfy either charge of removability and terminated the removal proceedings. However, upon reconsideration and further submission of evidence by the government, the IJ issued an interlocutory ruling finding that petitioner possessed more than 30 grams of marijuana at the time of his arrest and therefore was removable on the controlled substance violation. The petitioner filed a *pro se* notice of appeal challenging the IJ's finding. The BIA rejected the notice as non-compliant because the form lacked the necessary first page. When petitioner resubmitted his notice, the BIA construed petitioner's appeal as an "interlocutory appeal" and dismissed as moot because it had been superceded by a final order of removal. Petitioner then filed his petition for review claiming the BIA erred in failing to construe his notice of appeal liberally.

The Third Circuit rejected the government's contention that the BIA's decision was not a final order of removal for purposes of judicial review. The court explained that "the IJ's final order of removal still stands, and the Board's July 2 order which mooted [petitioner's] appeal has the same effect as an order of removal." The court also rejected the government's contention that petitioner had failed to exhaust his administrative remedies. The court determined that petitioner's notice of appeal "clearly complied with the principle that a petitioner has satisfied his administrative remedies if he made 'some effort, however insufficient, to place the Board on notice of a straightforward issue being raised on appeal.'"

Next, the court held that the BIA should have construed petitioner's notice of appeal as seeking review of the immigration judge's final order of removal, rather an interlocutory appeal, especially given that petitioner was *pro se*. The court did not find persuasive the government's argument that it was "unreasonable" to expect the BIA to "read between the lines" of a notice of appeal, given the number of cases the BIA reviews. "The Government's argument runs counter to the principles underpinning the policy of liberally construing pro se admissions," said the court. The court concluded by remanding the case with instructions for the BIA to consider the petitioner's appeal on the merits.

Contact: Kate Balaban, OIL
☎ 202-305-2045

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■ **Third Circuit Holds That Agency Abused Its Discretion By Failing To Consider All Five Relevant Factors Before Denying Alien's Request For Continuance**

In ***Simon v. Holder***, __ F.3d __, 2011 WL 3606854 (3d Cir. August 17, 2011) (Sloviter, Fuentes, *Garth*), the Third Circuit held that the BIA abused its discretion when it failed to apply the criteria for adjudicating motions for continuances established in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

The petitioner, a citizen of Guyana who entered the U.S. in 1994 on a tourist visa, overstayed his visa. When placed in removal proceedings, he indicated on July 26, 2007, that he had applied for adjustment of status based on a family and a work visa petition, but requested a continuance because no visa numbers were immediately available. The IJ granted the continuance, but warned that because he had granted three prior continuances, he would not grant any further continuances if there was no visa number available by the next court date. On February, 2008, a visa was still not immediately available and the IJ denied the request for another continuance, declined to administratively close the case pending the availability of a visa number, and ordered petitioner removed. The BIA upheld the decision noting that "future availability of a visa number is speculative and insufficient to establish good cause for a continuance." Petitioner then filed a motion to reconsider in light of the BIA's decision in *Hashmi*, which had not been cited in the prior ruling. The BIA denied the motion noting that the *Hashmi* factors were not applicable because petitioner could not establish prima facie eligibility for adjustment, namely that a visa was immediately available.

In reversing the BIA, the court noted that in *Hashmi*, the BIA had set forth five criteria to be considered in evaluating whether to grant a motion to continue removal proceedings pending an adjustment of status application premised on a pending visa petition, and that those factors were not all considered in petitioner's case. Specifically, the court reiterated that visa availability is only one factor among the five *Hashmi* considerations, and is essentially a component of the *Hashmi* test, not a separate consideration, and remanded the case to the BIA for its reconsideration.

"Applying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law."

Contact: Margot L. Carter, OIL
☎ 202-616-3057

FIFTH CIRCUIT

■ **Fifth Circuit Upholds BIA's Application Of Fugitive Disentitlement Doctrine**

In ***Bright v. Holder,*** __ F.3d __, 2011 WL 3435833 (5th Cir. August 8, 2011) (Jones, Higginbotham, Southwick), the Fifth Circuit affirmed the BIA's application of the fugitive disentitlement doctrine to deny relief to petitioner who had failed to surrender for removal.

The petitioner, a citizen of Nigeria and an LPR since 1985, pled guilty in 1986 in Texas state court to attempted second-degree murder. On March 21, 2007, DHS instituted removal proceedings against petitioner on the basis that his 1986 conviction was a deportable offense under INA § 237(a)(2)(A)(iii). Petitioner was released from DHS custody on a $2,000 bond. At his removal hearing, petitioner conceded his removability, but sought, unsuccessfully, § 212(c) relief. The IJ ordered him removed and the BIA dismissed his appeal on December 23, 2008. He did not seek judicial review.

On January 12, 2009, DHS ordered petitioner's counsel to surrender petitioner. When petitioner failed to appear, DHS issued a notice declaring that his bond had been breached, and that a warrant had been issued for his arrest. On March 9, petitioner filed a motion to reopen and a request to stay the removal order. On September 4, the BIA denied the motion and the stay request, determining that, pursuant to the fugitive disentitlement doctrine, petitioner's failure to report for removal rendered him ineligible for consideration of additional relief. Petitioner then filed a motion for reconsideration which the BIA also denied.

In upholding the BIA's application of the fugitive disentitlement doctrine, the court noted a split in the circuits where, like petitioner, an alien has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien following his failure to report for removal. The Second and Seventh Circuit have applied the doctrine in *Gao v. Gonzales,* 481 F.3d 173, 176 (2d Cir. 2007) and *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir.2004), while the Ninth Circuit, in *Sun v. Mukasey*, 555 F.3d 802 (9th Cir. 2009), held that an alien's failure to report for removal does make an alien a fugitive where his whereabouts are known by his counsel, DHS, and the court. "Applying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law," said the Fifth Circuit.

Contact: Mona Yousif, OIL
☎ 202-616-4287

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■ **Sixth Circuit Holds It Has Jurisdiction To Review BIA Order Remanding For Voluntary Departure Determination But Declines Review On Prudential Grounds**

In ***Giraldo v. Holder***, __ F.3d __, 2011 WL 3524304 (6th Cir. August 12, 2011) (Batchelder, *Suhrheinrich*, Griffin), the Sixth Circuit held that a BIA order was final for purposes of judicial review, even though the BIA had remanded the case to the IJ to allow petitioner to apply for voluntary departure.

"If petitioners are granted voluntary departure, they 'can at that point decide whether to comply with the relevant departure provisions, 8 U.S.C. § 1229c(b), or else to file a petition for judicial review..'"

The petitioner and her daughter, are Colombian citizens who illegally entered the United States in 2002. In 2006 they applied for asylum, withholding, and CAT. Because the asylum application was untimely, their case was referred to the immigration court where they renewed their request for asylum. Following an evidentiary hearing the IJ denied petitioners' application for asylum as untimely and declined to withhold removal under CAT for lack of proof. However, the IJ granted petitioners withholding of removal under 8 U.S.C. § 1231(b)(3). The IJ further "order[ed] both [petitioners] to be removed in accordance with Section 241(b) [8 U.S.C. § 1231(b)] to any country other than Colombia." DHS appealed the decision. On October 30, 2009, the BIA concluded that petitioners failed to establish a clear probability of future persecution in Colombia on account of political opinion. It sustained the DHS's appeal, and "remanded" the record to the IJ "for the sole purpose of allowing [petitioners] to apply for voluntary departure."

In concluding that the BIA's order was "an administrative final order or removal," the court explained that the definition of "order of removal" is defined in the disjunctive under INA § 101(a)(47) as "the order of the special inquiry officer . . . concluding that the alien is [removable] or ordering [removal]." Here, said the court, "the BIA's order reversing the IJ's grant of withholding of removal to Colombia amounted to such an order because it left in place the IJ's order that petitioners were removable and that they be removed in accordance with § 241(b)." Furthermore, the court reasoned that because the IJ's decision regarding voluntary departure is not subject to judicial review, the BIA's order reversing the IJ's grant of withholding of removal is, in effect, a "final order."

Nonetheless, the court declined to exercise jurisdiction on prudential grounds, in light of the voluntary departure regulations under 8 C.F.R. § 1240.26(i) and *Hakim v. Holder*, 611 F.3d 73 (1st Cir. 2010). "If petitioners are granted voluntary departure, they 'can at that point decide whether to comply with the relevant departure provisions, 8 U.S.C. § 1229c(b), or else to file a petition for judicial review' of their application for withholding of removal," said the court.

Contact: Emily Anne Radford, OIL
☎ 202-616-4885

■ **Sixth Circuit Rejects Alien's Challenge To 8 C.F.R. § 1240.26(i)**

In ***Hachem v. Holder***, __ F.3d __, 2011 WL 3795164 (6th Cir. August 29, 2011) (*Batchelder*, Sutton, McKeague), the Sixth Circuit held that it lacked "discretion" to stay a grant of voluntary departure. Specifically, the court afforded *Chevron* deference to 8 C.F.R. § 1240.26(i), holding that the regulation, which automatically terminates a grant of voluntary departure upon the filing of a petition for review, is a permissible construction of 8 U.S.C. § 1229c(b)(1). The court also rejected the alien's argument that the regulation violated the principle of separation of powers.

Contact: Andrew O'Malley, OIL
☎ 202-305-7135

SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Conviction For Aiding And Abetting Conspiracy To Commit Prostitution Is Not An Aggravated Felony**

In ***Rosario v. Holder***, __ F.3d __, 2011 WL 3715279 (7th Cir. August 24, 2011) (Bauer, Flaum, *Williams*), the Seventh Circuit held that the portion of INA § 278 that prohibits the "importation into the United States of any alien for the purpose of prostitution," is not categorically an "offense that relates to the owning, controlling, managing or supervising of a prostitution business," and is therefore not an aggravated felony pursuant to INA § 101(a)(43)(K)(i).

The petitioner, an LPR since 1999, pled guilty in November 2007, to aiding and abetting a conspiracy, the object of which was a violation of INA § 278, which prohibits the "importation into the United States of any alien for the purpose of prostitution, or for any other immoral purpose." Petitioner's role consisted of distributing condoms to what he knew were brothels. In early 2010, DHS instituted removal proceedings against the petitioner on the grounds that he had committed a CIMT and for having indirectly or directly procured prostitutes or persons for the purpose of prostitution, pursuant to INA § 212(a)(2)(D)(ii). At the hearing, petitioner conceded removability for the CIMT, denied the prostitution charge, and applied for cancellation. The IJ applying the modified categorical approach found that "an offense that relates to the owning, controlling, managing or supervising of a prostitution business," constituted an aggravated felony under INA § 101(a)(43)(K)(i), rendering

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petitioner statutorily ineligible for cancellation. The BIA affirmed.

The court held that the IJ and the BIA erred in their application of the modified categorical approach in petitioner's case. "The modified categorical approach does not permit examination of the charging instrument and plea agreement for the purpose of learning the specific facts of a specific conspiracy, such as the fact that this specific conspiracy involved a prostitution business, or what the defendant's specific role was in aiding and abetting that conspiracy," explained the court. Otherwise, the court said that it could not find that the importation into the United States of any alien for the purpose of prostitution, under INA § 278, "categorically 'relates to' the ownership, control, supervision, or management of a prostitution business. Because the "statute, by its very terms, includes conduct that might have nothing to do with ownership, control, management or supervision of a business," said the court. Accordingly, the court found that petitioner had not been convicted of an aggravated felony and remanded to the BIA for the adjudication of petitioner's application for adjustment.

"The modified categorical approach does not permit examination of the charging instrument and plea agreement for the purpose of learning the specific facts of a specific conspiracy."

Contact: Sabatino F. Leo, OIL
☎ 202-514-8599

■ **Seventh Circuit Holds That Alien Who Was Not Charged With Deportability For Fraud Is Ineligible To Receive Former Section 241(f) Waiver**

In ***Torres-Rendon v. Holder***, __ F.3d __, 2011 WL 3773344 (7th Cir. August 23, 2011) (*Bauer*, Flaum, Evans), the Seventh Circuit held that petitioner could not apply for a section 212(c) waiver to waive his deportability for having committed a drug offense, because his lawful permanent resident status had been obtained by way of a bigamous marriage to a U.S. citizen and therefore, he was never an LPR.

Petitioner, a native an citizen of Mexico, was placed in deportation proceedings due to a 1987 drug conviction. He sought a § 212(c) waiver, but in order to obtain it he had to first obtain another waiver under 241(f) because he had fraudulently obtained his LPR status. The § 241(f) waiver applies to "aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation." However, the government did not charge petitioner with deportability on the grounds of fraud, despite the fact that it could have. As a result of this charging decision, the court concluded that petitioner was statutorily ineligible to apply for a waiver under section 241(f) and therefore could not apply for a section 212(c) waiver.

Petitioner also sought suspension of deportation, but the court denied such relief because under the stop time rule, his period of continuous physical presence ended at the time he committed his drug crime in 1987, or, in the alternative, when an Order to Show Cause was issued to him in 1988. "He cannot restart the clock and accrue time for purposes of establishing his continuous physical presence and thus cannot establish 10 years of continuous physical presence," said the court.

Contact: Tim Hayes, OIL
☎ 202-532-4335

■ **Seventh Circuit Identifies Three Legal Errors In Agency's Decision Denying CAT Protection**

In ***Wani Site v. Holder***, __ F.3d __, 2011 WL 3809362 (7th Cir. August 26, 2011) (Manion, *Wood*, Hamilton), the Seventh Circuit reversed the BIA's denial of petitioner's application for deferral of removal to Sudan under CAT.

The court preliminarily noted that following oral argument in the case, South Sudan declared its independence and that country was formally recognized by the United States. Petitioner's home town is now the capital city of South Sudan thus "the geopolitical circumstances framing his petition have changed fundamentally," noted the court.

The court rejected the government's argument that under 8 U.S.C. § 1252(a)(2)(C) it lacked jurisdiction to review the BIA's conclusion that petitioner was unlikely to be tortured in Sudan. The court noted that it retains jurisdiction to review legal errors and held that the government's failure to rebut the alien's argument that the agency committed three such errors constituted a forfeiture of that point. Specifically, the court agreed that the BIA erred by (1) relying on the fact that the alien's sister, who was not similarly situated, remained in Sudan unharmed; (2) requiring the alien to have specific knowledge that he will be tortured, and; (3) failing to properly consider evidence that showed a pattern of persecution of repatriated nationals. The court added, "what perplexes us about this case is why the government itself did not move to remand to the Board once it decided not to remove [petitioner] to Sudan. It chose instead to ask us to find that the petition is moot solely because of counsel's statement that

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[petitioner] will not be removed to Sudan. We decline the invitation. As long as there is an outstanding removal order (which as we understand the facts, there is) and this court retains power to grant relief, the appeal is not moot," concluded the court.

Contact: Jesse Bless, OIL
202-305-2028

■ **Seventh Circuit Confirms It Lacks Jurisdiction To Review Discretionary Denial Of Adjustment Of Status**

In *Wroblewska v. Holder*, __ F.3d __, 2011 WL 3773457 (7th Cir. August 24, 2011) (Rovner, *Wood*, Gottschall (by designation)), the Seventh Circuit held that it lacked jurisdiction to review the BIA's discretionary denial of petitioner's application for adjustment of status, regardless of whether it agreed with the weight that was given to petitioner's various equities.

The petitioner, a citizen of Poland who came to the United States on a visitor's visa in 1994, was caught allegedly trying to bribe an immigration officer in November 1999 in Operation Durango. Before her removal proceedings began, petitioner married, a U.S. citizen who promptly filed a visa petition on her behalf. In October 2006, shortly after the petition was approved, petitioner filed an application for adjustment. When she appeared for her removal hearing petitioner conceded that she had overstayed her visa but sought, at the same time, to suppress all of the adverse evidence that had been collected in 1999 through Operation Durango.

The IJ found petitioner removable, denied her motion to suppress, and decided that she was not entitled to adjust her status. In the IJ's opinion, adjustment was not warranted because the evidence from Operation Durango showed that she had bribed an immigration official, and that behavior outweighed all of the equities in favor of relief. The BIA dismissed petitioner's appeal.

"Were we in the IJ's shoes, faced with the government's assertion that an alien had bribed a federal immigration official, we would demand more than weak circumstantial evidence to support that allegation."

In ruling that that it lacked jurisdiction to review the discretionary denial of adjustment, the court noted nonetheless that the IJ's "evaluation of the equities [was] not particularly persuasive." "Were we in the IJ's shoes, faced with the government's assertion that an alien had bribed a federal immigration official, we would demand more than weak circumstantial evidence to support that allegation," said the court.

The court also rejected petitioner's "cursory" and "unsatisfactory" due process claim, that Operation Durango was "an egregious violation of due process rights." The court noting that this argument was "squarely foreclosed" by its decision in *Krasilych v. Holder*, 583 F.3d 962 (7th Cir. 2009), criticized the performance of the petitioner's attorney for not fully articulating the due process argument and relying on arguments that had been foreclosed by the court's opinion in *Krasilyc.* The court explained that petitioner's "effort fell far below the minimum standards for competent representation in this court," and requested the Clerk of the Court to forward a copy of its opinion to the Illinois Attorney Registration & Disciplinary Commission.

Contact: Kate DeAngelis, OIL
☎ 202-305-2822

EIGHTH CIRCUIT

■ **Eighth Circuit Upholds Denial Of Asylum, Withholding, and CAT Protection To Anti-Chavez Asylum Applicant**

In *Lopez-Amador v. Holder*,__ F.3d __ , 2011 WL 3557854 (8th Cir. August 15, 2011) (Melloy, Benton, Gritzner (by designation)), the Eighth Circuit upheld the BIA's denial of petitioner's applications for asylum, withholding, and CAT protection.

The petitioner, a Venezuelan citizen who was admitted to the United States as a tourist on July 26, 2002, applied for a student visa but, when it was denied, remained in the U.S. without authorization. In 2003, petitioner filed an asylum application pro se where she alleged that she had suffered past persecution due to her sexual orientation. On October 22, 2004, petitioner was placed in removal proceedings where she filed a revised asylum application. In that application and in her testimony before an IJ, she principally claimed fear of persecution because of her political views against Hugo Chavez. However, petitioner again claimed that she was persecuted in Venezuela for being a lesbian and feared being harassed or jailed for her sexual orientation if she returns.

The IJ found the initial application untimely and, in the alternative, denied asylum, withholding and CAT on the merits. On appeal, the BIA affirmed on same grounds. Petitioner then filed a motion to reopen with the BIA proffering additional evidence including the State Department 2009 report discussing violence against opposition leaders and lesbian, gay, transgender communities. She also claimed that the Chavez government has access to a list of asylum seekers and using that list to deny passports. The BIA denied the motion.

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With both BIA decisions before it, the court first ruled that the petitioner's arguments were not sufficiently persuasive to warrant overturning the BIA's determination that two of the incidents of harm she alleged were not on account of her political opinion, and the remaining incident (on account of her sexual orientation) did not rise to the level of persecution.

Second, the court ruled that the BIA did not abuse its discretion in denying the motion to reopen because the new evidence was principally about the killing of transgender individuals, but petitioner did not claim to be transgender. Also, the court found no evidence that the list of asylum seekers possessed by Chavez was used to persecute individuals on that list.

Contact: Jeffrey Bernstein, OIL
☎ 202-353-9930

NINTH CIRCUIT

■ **Ninth Circuit Overturns Adverse Post-REAL ID Credibility Determination But Affirms Agency's Finding That Chinese Alien Failed To Provide Sufficient Corroboration**

In ***Ren v. Holder***, __ F.3d __, 2011 WL 3633694 (9th Cir. August 19, 2011) (Hug, Reinhardt, Silverman), the Ninth Circuit held that the IJ's adverse credibility determination "was impermissibly based on mischaracterizations" of petitioner's testimony "as well as inconsistencies that, considering the totality of the circumstances, were trivial."

The petitioner, a citizen of China, entered the United States as a visitor on February 27, 2005, and, four months later filed for asylum, withholding, and CAT. He claimed that in 2003, following the closing of his restaurant due to SARS, he was introduced to Christianity leading to participating in underground church meetings. When his activities came to the attention of the Chinese authorities, he was arrested and detained for five days where police abused him. When he was released, petitioner signed a letter promising to break away from Christianity and to stop spreading the Gospel. Petitioner then decided he could no longer remain in China and paid a snakehead to be smuggled into the United States, leaving his wife and daughter behind.

Under the REAL ID Act, after the IJ concludes that corroboration is necessary, the alien must be given notice and an opportunity to either produce the evidence or explain why it is unavailable before ruling.

On July 19, 2005, petitioner was placed in removal proceedings where he renewed his request for asylum. Following a merits hearing, the IJ informed petitioner that that it was "really important for him to have corroborating evidence in this case." The IJ then granted a continuance to allow petitioner to gather specific corroborating evidence. At the reconvened hearing the IJ determined that petitioner had failed to meet his burden of proof for lack of corroborating evidence and denied his application for asylum, as well as all other relief. The IJ also determined, in the alternative, that petitioner was not credible. The BIA affirmed the IJ without opinion.

The court initially rejected the government's contention that it could not review the finding of corroboration because it had not been raised to the BIA. The court liberally construed petitioner's *pro se* notice of appeal to find that his statement claiming that had established his case sufficient to put the BIA on notice.

The court then, after acknowledging that the REAL ID Act expanded the bases on which an IJ may rest an adverse credibility determination, determined that the substantial evidence standard of review had not been altered. Under that standard, said the court, "IJs remain obligated to provide 'specific and cogent reasons supporting an adverse credibility determination.'" The court reviewed each of the five inconsistencies cited by the IJ and determined that they were either trivial or insignificant both individually and in their totality. The court then determined whether petitioner's application was nonetheless properly denied because he had failed to provide sufficient corroborating evidence. The court first stated that under the REAL ID Act, after the IJ concludes that corroboration is necessary, the alien must be given notice and an opportunity to either produce the evidence or explain why it is unavailable before ruling. Here, the court found that petitioner had been given adequate notice and opportunity to explain, and yet still failed to provide corroborating evidence. Accordingly, the court denied the petition for review.

Contact: Lance Jolley, OIL
☎ 202-616-4293

■ **Ninth Circuit Holds Parent's Abandonment Of LPR Status May Be Imputed To Minor Child**

In ***Khoshfahm v. Holder***, __ F.3d __, 2011 WL 3715699 (9th Cir. August 25, 2011) (Fletcher, Smith, Brewster), the Ninth Circuit held that the intent of a parent to abandon lawful permanent residency may be imputed to a minor child over whom the parent has custody and control. Applying this framework, the court ruled that substantial evidence

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did not support the conclusion that the government met its burden to show that the petitioner's parents abandoned their intent to return to the United States prior to petitioner turning eighteen. As petitioner returned to the United States almost immediately after turning eighteen, the court concluded that he did not abandon his LPR status.

The Ninth Circuit ruled that the government had not shown by "clear, unequivocal, and convincing evidence" that the petitioner did not maintain a "continuous, uninterrupted intention to return to the United States."

The petitioner was born in Iran in 1988. In 2001, when he was thirteen, he came with his parents to the United States. He and his parents obtained LPR status through a petition filed on their behalf by petitioner's United States citizen uncle, who lives in Sacramento, California. Petitioner and his parents lived in the United States with this uncle for seven months. Petitioner' family then decided to go back to Iran to sell the property they owned there in order to raise money to live in the United States. Petitioner testified that it was always their intent to return to the United States. One week after their return to Iran, the 9/11 terrorist attacks occurred and petitioner had difficulty obtaining airline tickets. Other events followed that precluded petitioner's parents return to the United States. On February 28, 2007, petitioner applied for admission at San Francisco Airport. He was initially paroled, but parole was later revoked and he was place in removal proceedings as an alien who at the time of application for admission was not in possession of a valid entry document.

At the removal hearing petitioner sought asylum and withholding. The IJ denied the applications. The IJ also determined that petitioner's parents did not have a continuous, uninterrupted intention to return to the United States during the entirety of their visit to Iran and ruled, that because he was a minor at the time he was in Iran, he had abandoned his lawful permanent resident status. The BIA affirmed both decisions.

The Ninth Circuit ruled that the government had not shown by "clear, unequivocal, and convincing evidence" that the petitioner's trip abroad was not "relatively short" and that the petitioner did not maintain a "continuous, uninterrupted intention to return to the United States," thereby abandoning his status. The court found that petitioner had "credibly testified that his parents always intended to return to the United States. He further testified that his parents were prevented from returning by the September 11th attacks and then by his father's heart condition." The court explained that the "record contains no evidence of whether petitioner's parents' abandonment occurred before or after petitioner turned 18."

Contact: Kathryn McKinney, OIL
☎ 202-532-4099

■ **En Banc Ninth Circuit Overrules "Missing Element" Rule But Holds Alien's California Burglary Conviction Is Not A Generic Burglary Conviction**

In ***United States v. Aguila-Montes de Oca***,__ F.3d __, 2011 WL 3506442 (9th Cir. August 11, 2011) (Kozinski, Rymer, Silverman, W. Fletcher, Gould, Berzon, Rawlinson, *Bybee*, Callahan, M. Smith, N.R. Smith), a divided en banc panel of the Ninth Circuit held, in an illegal-reentry sentencing case, that an alien's conviction for first-degree residential burglary under California law does not qualify as a crime of violence.

The court overruled *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*), insofar as it established a rule restricting use of the "modified categorical approach" using the records of a prior conviction when the statute is determined to be "missing an element." However, the court also overruled circuit precedent that a California burglary conviction can be a generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), if the defendant pleaded guilty to a charge that he "unlawfully" entered a building, and concluded that the defendant's conviction records did not establish that he was convicted of committing an "unlawful or unprivileged entry" as required under *Taylor*.

Contact: Mark Rehe, AUSA
☎ 619-557-6248

■ **Ninth Circuit Holds That It Has Jurisdiction Over BIA Decision Denying Asylum But Remanding for Voluntary Departure Proceedings**

In ***Pinto v. Holder***, __ F.3d __, 2011 WL 3523718 (9th Cir. August 12, 2011) (Fisher, Bybee, Shea (by designation)), the Ninth Circuit held that it has jurisdiction to review a BIA's decision that reverses a grant of asylum, but remands to the immigration judge for the limited purpose of determining the alien's eligibility for voluntary departure. The court concluded that where the immigration judge had not yet considered the alien's voluntary departure request and the alien filed his petition for review before the revised voluntary departure regulations took effect, there was no *quid pro quo* violation as discussed in *Dada v. Mukasey*, 544 U.S. 1 (2008), if the court maintained jurisdiction. The court also explained that because it lacks jurisdiction over any challenge to the agency's grant or denial of

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voluntary departure, the BIA decision was final for the purposes of judicial review because "the only lingering question on remand is how petitioner will leave: by removal or through voluntary departure."

Contact: Dalin Holyoak, OIL
☎ 202-514-9289

■ **Ninth Circuit Upholds Agency Determination That Government Did Not Violate Confidentiality Provision Of Special Agricultural Workers (SAW) Program**

In Soriano-Vino v. Holder, __ F.3d __, 2011 WL 3487026(9th Cir. August 10, 2011)(Goodwin, Rawlinson, Zouhary (by designation)), the Ninth Circuit held that immigration inspectors did not violate the confidentiality provision of the statute that implements the SAW program where the challenged information was obtained as a result of the inspectors' questioning of the alien at the airport, not from the SAW application itself. The court determined that Congress was just as concerned with fraud in the application process as it was with shielding applicants from unauthorized disclosures, and further held that "the plain language of the statute counsels against a broad interpretation of the confidentiality provision."

Contact: Christina Parascandola, OIL
☎ 202-514-3097

TENTH CIRCUIT

■ **Tenth Circuit Upholds Agency's Determination That Felony Menacing Is A Crime of Violence**

In *Damaso-Mendoza v. Holder*, __ F.3d __, 2011 WL 3455825 (10th Cir. August 9, 2011) (Kelly, Hartz, Holmes), the Tenth Circuit affirmed the BIA's determination that a felony conviction under Colorado Revised Statute § 18-3-206 for menacing categorically constitutes a crime of violence pursuant to 18 U.S.C. § 16(a) because it requires the threatened use of physical force against another person.

The petitioner, a citizen of Mexico and an LPR, argued that that there was insufficient evidence to find him removable because the state-court judgment did not specify whether he had been convicted under § 18–3–206(1)(a) or under § 18–3–206(1)(b). The IJ ruled that regardless of which subsection petitioner was convicted under, his conviction was for a crime of violence. The BIA affirmed and the court upheld the BIA's determination.

Contact: Papu Sandhu, OIL
☎ 202-616-9357

DISTRICT COURTS

■ **Middle District Of Florida Court Upholds Government's Denial Of Aliens' Asylum-Based Applications For Employment Authorization**

In ***Gjondrekaj, et al. v. Napolitano, et al***, No. 11-cv-347 (Dalton, J.) (M.D. Fla. August 2, 2011), the Middle District of Florida granted the government's motion to dismiss plaintiffs' complaint challenging USCIS denial of plaintiffs' asylum-based applications for employment authorization documents ("EAD"). USCIS denied plaintiffs' EAD applications because their "asylum clocks" never reached the minimum 180 days required by regulation for USCIS to approve an EAD application. The IJ stopped plaintiffs' asylum clock when they requested additional time for a hearing on the merits of their asylum application, and USCIS deferred to the IJ's calculation.

The court upheld USCIS's reliance on the IJ's asylum clock calculation because it was both "realistic and efficient," and, therefore, the court held that USCIS lawfully denied plaintiffs' EAD applications. The court also rejected plaintiffs' request for discovery, holding that its review was limited to the administrative record.

The court determined that plaintiff entered the United States on an erroneously granted fiancé visa, as plaintiff had not satisfied the requirement that he meet his fiancée in person prior to issuance of the visa.

Contact: Craig Defoe, OIL DCS
☎ 202-532-4114

■ **Eastern District Of Virginia Grants Summary Judgment To Government In De Novo Naturalization Proceeding After Finding Alien Not Lawfully Admitted**

In ***Nesari v. Taylor***, __ F.Supp.2d __, 2011 WL 3586489 (E.D.Va. August 11, 2011) (Brinkema, J.), the district court granted the government's motion for summary judgment and denied the plaintiff's application for naturalization under 8 U.S.C. § 1421(c). The court determined that plaintiff entered the United States on an erroneously granted fiancé visa, as plaintiff had not satisfied the statute's and regulation's prerequisite requirement that he meet his fiancée in person prior to issuance of the visa.

Moreover, after concluding that plaintiff failed to carry his burden of demonstrating that he qualified for an exemption, the court determined that plaintiff's visa was void *ab initio* and conferred no lawful status. Because the plaintiff was not lawfully admitted in accordance with applicable law, the court further determined that he was statutorily ineligible to naturalize.

Contact: Sherease Pratt, OIL DCS
☎ 202-616-0063

This Month's Topical Parentheticals

ASYLUM

■ ***Precetaj v. Holder,*** __ F.3d __, 2011 WL 3505540 (1st Cir. Aug. 11, 2011) (vacating and remanding conclusions that Albanian man failed to establish past or a well-founded fear of future persecution on account of political opinion)

■ ***Lopez-Amador v. Holder,*** __ F.3d __, 2011 WL 3557854 (8th Cir. Aug. 15, 2011) (affirming denial of withholding of removal for Venezuelan woman, because (1) indiscriminate police firing on crowd of protesters, routine police stops at checkpoints affecting all citizens, and verbal ridicule by police due to sexual orientation do not rise to the level of persecution)

CAT

■ ***Wani Site v. Holder,*** __ F.3d __, 2011 WL __ (7th Cir. Aug. 26, 2011) (holding that court has jurisdiction to review BIA's conclusion that Sudanese man failed to show that future torture is more likely than not, and BIA erred in denying CAT deferral where (i) government did not contest alien's claim of 3 legal errors by the BIA, and (ii) recent independence of South Sudan and government's intent not to return man to Sudan do not moot review petition but are changed circumstances requiring remand for BIA to take another look at case)

CITIZENSHIP

■ ***Brandao v. Attorney General of U.S.***, __F.3d__, 2011 WL 3584317 (3d Cir. Aug. 16, 2011) (holding that alien was not "child born out of wedlock," and thus not eligible for derivate citizenship)

CONFIDENTIALITY

■ ***Soriano-Vino v. Holder,*** __ F.3d __, 2011 WL 3487026 (9th Cir. Aug. 10, 2011) (holding that immigration inspectors did not violate the confidentiality provision of the Special Agricultural Worker (SAW) program where the challenged information was obtained as a result of the inspectors' questioning of the alien at the airport rather than from the SAW application itself)

CREDIBILITY

■ ***Ren v. Holder***, __F.3d__, 2011 WL 3633694 (9th Cir. Aug. 19, 2011) (holding that trivial inconsistencies marred by mischaracterizations by the IJ did not support an adverse credibility finding, but that alien had notice and opportunity to submit corroboration or explain his failure to do so where he was given a five-month continuance to obtain such evidence)

■ ***Dehonzai v. Holder***, __F.3d__, 2011 WL 3558113 (1st Cir. Aug. 15, 2011)(denying alien's petition for rehearing challenging panel's standard of review of credibility determinations)

■ ***Carrizo v. Holder***, __ F.3d __, 2011 WL 3828561 (11th Cir. Aug. 31, 2011) (holding that substantial evidence supported the IJ's and BIA's adverse credibility findings where the record contained numerous material inconsistencies between petitioner's testimony and the documentary evidence submitted in support of his asylum application)

■ ***Lin v. Holder***, __ F.3d __, 2011 WL 3805751 (7th Cir. Aug. 30, 2011) (holding that the agency erred in applying its decision in *Huang v. Gonzales* to find petitioner incredible, and explaining that *Huang* does not *per se* require an adverse credibility finding when an abortion certificate is submitted, but that the agency should consider additional corroborating evidence)

CRIMES

■ ***Rosario v. Holder***, __ F.3d __, 2011 WL 3715279 (7th Cir. Aug. 24, 2011) (holding that the portion of 8 U.S.C. § 1328 which prohibits the importation "of any alien for the purpose of prostitution," is not categorically an "offense that relates to the owning, controlling, managing or supervising of a prostitution business," and is therefore not an aggravated felony under 8 U.S.C. § 1101 (a)(43)(K)(i)) (further holding that the IJ and BIA erred in applying the modified categorical approach))

■ ***Delgado v. Holder***, __F.3d__, 2011 WL 3633695, (9th Cir. Aug. 19, 2011) (holding that, (1) court has jurisdiction to review discretionary PSC determinations where the §242(a)(2)(C) criminal bar does not apply; (2) a crime constituting a PSC for withholding of removal purposes need not be an aggravated felony; (3) for asylum purposes, the Attorney General has the authority to designate offenses as PSC through case-by-case adjudication as well as regulation)

■ ***United States v. Aguila-Montes De Oca***, __ F.3d __, 2011 WL 3506442 (9th Cir. Aug. 11, 2011) (a majority of the *en banc* court overruled its prior *en banc* decision in *Navarro-Lopez v. Gonzales*, which held that the modified categorical approach does not apply "[w]hen the crime of conviction is missing an element of the generic crime altogether") (furthermore, a different majority overruled prior decisions to the extent they held that a conviction under Cal. Pen. Code § 459 qualifies as a generic burglary conviction if the defendant pleaded guilty to entering a building "unlawfully" or a jury found the defendant guilty as charged in an indictment reciting that allegation) (applying this ruling, the majority concluded that defendant's conviction under § 459 cannot be used to enhance his sentence)

■ ***Damaso-Mendoza v. Holder,*** __ F.3d __, 2011 WL 3455825 (10th Cir. Aug. 9, 2011) (affirming the

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This Month's Topical Parentheticals

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BIA's decision that a conviction under Colorado Revised Statute § 18-3-206 for felony menacing categorically constitutes a crime of violence pursuant to 18 U.S.C. § 16(a) because it requires the threatened use of physical force against another person)

■ *Hachem v. Holder,* __ F.3d __, 2011 WL 3795164 (6th Cir. Aug. 29, 2011) (affirming adverse credibility finding under REAL ID Act against Algerian asylum applicant based and rejecting statutory and constitutional challenges to AG's voluntary departure regulation)

JURISDICTION – JUDICIAL REVIEW

■ *Giraldo v. Holder*, __ F.3d __, 2011 WL 3524304 (6th Cir. Aug. 12, 2011) (holding that the BIA's decision reversing IJ's grant of withholding of removal, but remanding for voluntary departure determination is a final order of removal for judicial review purposes, and declining to exercise jurisdiction in light of amendments to voluntary departure regulation)

■ *Pinto v. Holder*, __ F.3d __, 2011 WL 3523718 (9th Cir. Aug. 12, 2011) (holding that the BIA's decision denying asylum and withholding, but remanding to IJ for voluntary departure determination is a final order of removal for judicial review purposes; further holding that neither the amendments to the voluntary departure regulation nor the Supreme Court's decision in *Dada* undermine this conclusion or warrant the court's refusal to exercise jurisdiction as a prudential matter)

■ *Bright v. Holder*, __ F.3d __, 2011 WL 3435833 (5th Cir. Aug. 8, 2011) (affirming BIA's application of fugitive disentitlement doctrine to deny relief to an alien who failed to surrender for removal even where the alien maintained the same address throughout his removal proceedings, his address was known to DHS, and DHS made no efforts to locate or arrest him following his failure to surrender)

■ *Higgs v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 3715784 (3d Cir. Aug. 25, 2011) (holding that the BIA's order dismissing petitioner's appeal of an IJ order styled as an "Interlocutory Ruling on Motion," was a final order of removal for purposes of judicial review; further holding that the BIA should have construed petitioner's notice of appeal of the interlocutory order as seeking review of the IJ's final order of removal, especially given that petitioner was unrepresented)

■ *Wroblewska v. Holder,* __ F.3d __, 2011 WL 3773457 (7th Cir. Aug. 24, 2011) (holding that the discretionary review bar precludes the court's review of agency's denial of adjustment of status where the IJ and BIA determined that the balance of equities weighed against petitioner because of her attempt to bribe an immigration official in order to obtain a green card)

DUE PROCESS – FAIR HEARING

■ *Lopez-Gabriel v. Holder*, __ F.3d __, 2011 WL 3862586 (8th Cir. Sept. 2, 2011) (affirming the BIA's finding that petitioner failed to present evidence of an "egregious violation" of his liberty that would warrant suppression of evidence where petitioner offered no evidence to support his claim that his traffic stop and arrest were racially motivated)

United States v. FNU LNU, __ F.3d __, 2011 WL __ (2d Cir. Aug. 9, 2011) (rejecting government's claim of a categorical "routine border questioning exception to *Miranda*"; holding, however, that CBP Officer's questioning of alien at airport regarding her admissibility did not constitute a "custodial interrogation" where no restraints were used or weapons drawn, and therefore *Miranda* warnings were not required)

■ *Withanachchi v. United States*, __F.Supp.2d__, 2011 WL 3586218 (D.Md. Aug. 15, 2011) (finding invalid plea and IAC due to failure to advise of immigration consequences)

■ *Simon v. Holder*, __F.3d__, 2011 WL 3606854, (3d Cir. Aug. 17, 2011) (holding that BIA abused its discretion where continuance request had not been evaluated under *Matter of Hashmi*)

■ *Matter of Henriquez Rivera*, 25 I.&N. Dec. 575 (BIA Aug. 8, 2011) (holding that when an application for TPS that has been denied by the USCIS is renewed in removal proceedings, the IJ may, in the appropriate circumstances, require the DHS to provide the application that the applicant filed with the USCIS).

■ *Matter of E-R-M-F- & A-S-M-*, 25 I.&N. Dec. 580 (BIA Aug. 11, 2011) (holding that until an alien who is arrested without a warrant is placed in formal proceedings by the filing of a Notice to Appear, the regulation at 8 C.F.R. § 287.3(c) does not require immigration officers to advise the alien that he or she has a right to counsel and that any statements made during interrogation can subsequently be used against the alien)

LPR

■ *Khoshfahm v. Holder*, __ F.3d __, 2011 WL 3715699 (9th Cir. Aug. 25, 2011) (holding that the intent of a parent to abandon LPR status may be imputed to a minor child over whom the parent has custody and control; applying this framework, the court concluded that substantial evidence did not support the BIA's conclusion that the government met its burden of showing that petitioner's parents abandoned their intent to return to the United States prior to petitioner turning 18, or that petitioner himself lacked such an intent after turning 18)

This Month's Topical Parentheticals

MOTION TO REOPEN

■ *Espinal v. Holder*, __ F.3d __, 2011 WL 3314945 (3d Cir. Aug. 3, 2011) (holding that 8 C.F.R § 1003.2(d), which bars an alien from filing a motion to reconsider and/or reopen after departure from the United States, is inconsistent with 8 U.S.C. §§ 1229a(c)(6)(A) & (7)(A), which provide aliens with the right to file one motion to reconsider and one motion to reopen)

■ *Patel v. Holder*, __ F.3d __, 2011 WL 3820847 (8th Cir. Aug. 31, 2011) (affirming IJ's and BIA's denials of motions to reopen because petitioners failed to present substantial and probative evidence to rebut the presumption of effective service of the OSCs and hearing notices where the immigration court sent those documents by certified mail and received signed return receipts)

PROSECUTIONS

■ *United States v. Hong*, __ F.3d __, 2011 WL 3805763 (10th Cir. Aug. 30, 2011) (concluding that the Supreme Court's decision in *Padilla v. Kentucky* announced a new rule of constitutional law under the framework set forth in *Teague v. Lane*, and therefore *Padilla*'s holding does not apply retroactively to petitioner's collateral challenge to his conviction)

■ *United States v. Barajas-Alvarado*, __ F.3d __, 2011 WL 3689244 (9th Cir. Aug. 24, 2011) (holding that there must be "some meaningful review" of an expedited removal order if it is used as a predicate for criminal prosecution of an alien; such review is limited to the determination whether the removal proceeding that resulted in the ER order was fundamentally unfair because it violated due process and resulted in prejudice)

■ *United States v. Marguet-Pillado*, __F.3d__, 2011 WL 3524198 (9th Cir. Aug. 12, 2011) (holding that, in the second trial, defendant could require the government to come forward with proof that defendant was an alien and did not have derivative citizenship)

■ *Chaidez v. United States*, __ F.3d __, 2011 WL 3705173 (7th Cir. Aug. 23, 2011) (concluding that the Supreme Court's decision in *Padilla v. Kentucky* announced a "new rule" under the framework set forth in *Teague v. Lane*, and therefore *Padilla*'s holding does not apply retroactively to petitioner's collateral challenge to her conviction) (Judge Williams dissented)

■ *United States v. Rios-Cortes*, __ F.3d __, 2011 WL 3370352 (5th Cir. Aug. 5, 2011) (holding that an illegally reentering alien was subject to an enhancement in sentencing based on his prior aggravated felony theft conviction even though his two-year imprisonment sentence for that crime had been suspended)

■ *United States v. Diaz-Corado*, __ F.3d __, 2009 WL 8239170 (5th Cir. Aug. 2, 2011) (holding that an illegally reentering alien was subject to an enhancement in sentencing because his conviction for unlawful sexual conduct in violation of Colo. Rev. Stat. § 18-3-404(1)(a) was a "forcible sex offense" that constituted a crime of violence)

WAIVERS

■ *Torres-Rendon v. Holder*, __ F.3d __, 2011 WL 3773344 (7th Cir. Aug. 23, 2011) (holding that petitioner was ineligible for discretionary relief under former section 241(f) of the INA because he was not charged with deportability based on fraud)

■ *Rana v. Holder*, __ F.3d __, 2011 WL 3805790 (5th Cir. Aug. 30, 2011) (holding that a waiver of inadmissibility pursuant to section 212(h) of the INA is not available to an applicant who has been convicted of two separate offenses of possessing 30 grams or less of marijuana, and has already received a 212(h) waiver relating to the first offense)

USCIS Publishes Regulation Designed to Facilitate Electronic Filing

DHS has published the first in a series of regulations intended to promote the migration of USCIS benefit filings from a paper-based environment to an electronic one. The regulation is an important step toward modernizing how USCIS handles the more than 6 million benefit applications submitted annually. 76 Fed. Reg. 53763 (August 29, 2011)

Over the next several years, USCIS expects to roll out a secure, customer-friendly online account system that will enable and encourage customers to submit benefit requests and supporting documents electronically. This new Web-based system will greatly simplify the process of applying for immigration benefits. It will assign new customers a unique account which will enable them to access case status information, respond to USCIS requests for additional information, update certain personal information, and receive timely decisions and other communications from USCIS.

The new regulation revises more than 50 parts of DHS regulations contained in Title 8 of the Code of Federal Regulations. The regulation eliminates references to outdated USCIS benefit request forms and descriptions of paper-based procedures. In addition, the regulation removes numerous obsolete provisions of the regulations.

INSIDE OIL

Congratulations to **Anh Mai-Windle** who has been selected to participate in the Leadership Excellence and Achievement Program.

OIL welcomes onboard new Trial Attorney **Lizzy Chapman**. Ms. Chapman received her B.A. from the University of California at Berkeley in 2005 and her J.D. from George Washington University Law School in 2010. In 2009 she was a SLIP intern at OIL - District Court Section, and after graduating she joined the District Court Section through the Honors Program.

Lizzy Chapman

Post-Departure Bar Invalidated

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On December 3, 2009, petitioner filed a timely motion to reconsider with the BIA. On January 19, 2010, the BIA denied the motion to reconsider based on what it deemed a lack of jurisdiction resulting from petitioner's removal from the United States.

The Third Circuit found that "the plain text of the statute provides each alien with the right to file one motion to reopen and one motion to reconsider, provides time periods during which an alien is entitled to do so, and makes no exception for aliens who are no longer in this country." The court rejected the government's contention that there was a statutory gap that warranted the publication of the post-departure rule. The court noted that the Fourth, Sixth, and Ninth Circuits "have squarely held under *Chevron* that the post-departure bar conflicts with the statutory right to file a motion to reopen and/or reconsider." Additionally, the Seventh Circuit and, in part, the Sixth Circuit, have invalidated the post-departure bar based on the Supreme Court's decision in *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs,* 130 S. Ct. 584 (2009), where the Supreme Court held that an administrative agency cannot rely on an agency-created procedural rule to disclaim jurisdiction. The court also explained that the Second Circuit in its recent decision in *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011), likewise concluded that the BIA had to consider an alien's motion to reopen even if the alien is no longer in the United States.

The court also found support in *Dada v. Mukasey*, 554 U.S. 1 (2008), where the Court ruled that the plain language of section 1229a (c) "leaves no room for the post-departure bar" because it clearly expresses Congress' intent to allow all aliens to file one timely motion to reconsider and one timely motion to reopen, "and makes no exception for aliens who are no longer in this country."

Accordingly, the court reversed the BIA's decision that it lacked jurisdiction over the alien's motion to reconsider and remanded the case.

Contact: Yanal Yousef, OIL
☎ 202-532-4319

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OIL TRAINING CALENDAR

■ **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.

■ **October 20, 2011.** Brown Bag Lunch & Learn with author and Professor Christopher Heath Wellman co-author of the just-published book: "*Debating the Ethics of Immigration: Is there a Right to Exclude?*"

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

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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.

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