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LITIGATION HIGHLIGHTS

Inside

Fourth Circuit Holds That The Material Support Bar Does Not Contain A Duress Exemption or Involuntary Support Exception

In ***Barahona v. Holder***, __F.3d__, 2012 WL 3264386 (4th Cir. August 13, 2012) (Traxler, *King*, Wynn), the Fourth Circuit held that petitioner was statutorily ineligible for NACARA special rule cancellation of removal because in the early 1980s, he had provided "material support" to a terrorist organization under INA § 212(a)(3)(B)(iv)(VI), by allowing anti-government Salvadoran guerrillas of the so-called "FMLN" (the Frente Farabundo Marti para la Liberción Nacional) the use of the kitchen of his Salvadoran home. "Material support" includes providing " a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . ., explosives, or training."

Petitioner entered the United States illegally in 1985 and filed his first application for asylum in 1987. That application was denied on July 15, 1988, and he was given 30-days of voluntary departure. He never departed. He then applied for asylum affirmatively in 1995. On May 9, 2007, his second asylum application was referred to an IJ for adjudication in removal proceedings. On November 11, 2007, petitioner was arrested in Prince William County, Virginia, and charged with a state felony for maliciously causing "bodily injury to his

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Derivative Inadmissibility: the INA and Corruption of Blood

The regulation of the alien entry initially was considered to be the responsibility of the colonies and then the States. *See, e.g., New York v. Miln*, 36 U.S. 102 (1837) (sustaining the constitutionality of a New York statute requiring vessel masters to list their passengers). *See generally* Kanstroom, *Deportation Nation, Outsiders in American History* (Harvard Univ. Press 2007), pp. 23-45. The Continental Congress unanimously resolved on September 16, 1788, to recommend "to the several states to pass laws for preventing the transportation of convicted malefactors from foreign countries to the United States." *New York v. Miln*, *supra*, 36 U.S. at 112-13. Six states did so. Id. The federal government first adopted exclusionary legislation in 1875, prohibiting the entry of aliens convicted of certain crimes as well as the importation of women for the purpose of prostitution. Act of March 3, 1875, ch. 141, 18 Stat. 477; *see* Act of August 3, 1882, ch. 376, 22 Stat. 214.

Over the next one hundred years, immigration regulation became the special province of the federal government, and the number of exclusionary grounds grew.

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No duress exception in INA § 212(a)(3)(B)

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wife, with the intent to maim, disfigure, disable, or kill." On December 11, 2007, petitioner pleaded guilty to a misdemeanor offense of domestic assault and battery, receiving a term of probation.

In December 2007, petitioner's asylum proceedings were administratively closed for failure to prosecute. His case was recalendared in May 2009 for the resolution of allegations that he was removable as an alien present in the United States without lawful admission or parole. During the subsequent IJ proceedings, conducted in late 2009, petitioner was found to be removable, but was accorded an opportunity to apply for a "special rule" cancellation of removal under NACARA § 203.

At his removal hearing petitioner testified that, for nearly a year, the FMLN guerillas took control of his home — using it as their needs arose, mainly for preparing food in its kitchen, but occasionally sleeping overnight when the weather was unfavorable. Petitioner confirmed that the FMLN guerillas would arrive at his home and announce that they were going to use the kitchen. He explained that, if he had refused to allow the FMLN access and use of his residence, they would have considered him the enemy. In that event, he would have been given twelve hours to vacate his home city or be killed. Indeed, petitioner's father and cousin had both been executed by the FMLN guerillas, and his father had not been accorded the option of leaving. From early 1984 until petitioner's departure for the United States in February 1985, as many as 200 FMLN guerillas used his kitchen. They generally utilized the water and cooking facilities of his home, but always brought their own food. On several occasions, petitioner gave the guerrillas directions through the jungle to other locations.

Following the hearing the IJ determined that petitioner was inadmissible to the United States because he had engaged in a "terrorist activity" by providing material support to a terrorist organization. The IJ accepted the fact that petitioner was under duress when he accommodated the guerrillas, and the IJ recognized that petitionr had no choice but to allow the guerrillas to use his kitchen. The IJ reasoned, however, that there is no exception for duress or involuntariness under the material support bar. On appeal, the BIA determined that petitioner's support to the FMLN was "material," agreeing with the IJ that there is no exception under the statute for *de minimis* activities. The BIA also concluded that there was no exception in the statutory language for an alien who could establish duress or involuntary contributions. Finally, the BIA declined to find a violation of international law noting that the INA provides for a discretionary waiver, subject to some limitations, that authorizes the Secretary of State or the Secretary of Homeland Security to grant a waiver of the bar.

The material support bar "contains no express exception for material support provided to a terrorist organization either involuntarily or under duress."

Before the Fourth Circuit, petitioner maintained that he did not provide material support to the FMLN because he was forced, under threat of execution, to allow the guerrillas to use his kitchen. Petitioner conceded that the material support bar is silent on whether voluntariness is a requirement thereof but asserted, relying on *Negusie v. Holder*, 555 U.S. 511 (2009), that such silence rendered the statute ambiguous.

The court determined that unlike the situation in *Negusie*, "the BIA in this case did not rely on precedent interpreting a different statute when it dismissed [petitioner's] appeal. Rather, the BIA carefully examined the Material Support Bar and determined that it 'does not contain any language to support an exception to terrorist support where an alien can establish duress or involuntary contributions.'"

Applying *Chevron*, the court determined that the material support bar "contains no express exception for material support provided to a terrorist organization either involuntarily or under duress." The court also noted that Congress has created, however, a general waiver provision for aliens who are otherwise inadmissible. Under the statute, the Secretary of State and the Secretary of Homeland Security have the discretionary authority to waive the material support bar for an alien who has provided material support, but, said the court "has excepted from such a waiver those who voluntarily provided material support." Thus, Barahona, or any similarly situated alien who has supported a terrorist organization under duress, possesses an alternative avenue of relief from inadmissibility."

Therefore, the court found that "it was thus reasonable for the BIA, in its decision here, to decline to create an involuntariness exception from the Material Support Bar. We therefore defer to the BIA's interpretation of the Bar." The court said that it its "ruling today could be reasonably viewed as yielding a harsh result. Barahona's testimony before the IJ, taken at face value and accepted as credible by the IJ, is compelling in many ways. We are constrained in our disposition of this proceeding, however, by the terms of the Material Support Bar and the BIA's reasonable interpretation thereof. . . the fact that the BIA has reached a seemingly harsh result does not vitiate the clear statutory provisions. If the governing legal principles are to be altered, that obligation rests with the legislative branch of our government, rather than with the judiciary."

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Derivative Inadmissibility Under the INA

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See, e.g., Act of Feb. 5, 1917, § 3, 39 Stat. 875. By 1980, the exclusionary provisions of the Immigration and Nationality Act of 1952, as amended, expanded to include thirty-three numbered paragraphs, with a total of 56 categories of inadmissible aliens. *See* "Immigration and Nationality Act, with Amendments and Notes on Related Law," House Judiciary Comm. Print, 96th Cong., 2d Sess. 31-39 (7th ed. 1980). With the Immigration Act of 1990, the bars to admission were reorganized into ten groups and the number of exclusion categories grew to 70. *See* Pub. L. No. 101-649, 104 Stat. 4978 (November 29, 1990).

Until 1999, exclusion was always personal to the individual alien. That is, it was the alien's own characteristics, past acts, or anticipated effect that caused him or her to be barred from the United States. However, with the FY 2000 Intelligence Authorization Act, the INA gained its first category of derivative inadmissibility: exclusion of family members who benefit from illicit drug trafficking. INA section 212(a)(2)(C) was amended to bar anyone who

> *(ii) is the spouse, son, or daughter of an alien [drug trafficker and] has, within the previous 5 years, obtained any financial or other benefit from the illicit activity . . . and knew or reasonably should have known that the financial or other benefit was the product of . . . illicit activity*.

8 U.S.C. § 1182(a)(2)(C)(ii). Now the INA would bar aliens not because of their own sins or omissions, but those of their parents or spouse.

The inadmissibility of drug traffickers' families soon was joined by the ban on the families of human traffickers and terrorists. Section 111 of the Victims of Trafficking and Violence Protection Act of 2000 excluded the anyone who

> *is the spouse, son, or daughter of an alien [trafficker and], has, within the previous 5 years, obtained any financial or other benefit from the illicit activity . . . and knew or reasonably should have known that the financial or other benefit was the product of . . . illicit activity . . . .*

8 U.S.C. § 1182(a)(2)(H)(ii). However, the exclusion does not apply if the benefit was obtained while the son or daughter was a child. 8 U.S.C. § 1182(a)(2)(H)(iii). In 2001, section 411 of the USA PATRIOT Act made inadmissible anyone who

> *is the spouse or child of an alien who is inadmissible [under INA Section 212(a)(3), regarding terrorism], if the activity causing the [spouse or parent] to be found inadmissible occurred within the last 5 years.*

8 U.S.C. § 1182(a)(3)(B)(i)(IX).

Until 1999, exclusion was always personal to the individual alien. That is, it was the alien's own characteristics, past acts, or anticipated effect that caused him or her to be barred from the United States.

The Immigration and Nationality Act, of course, long has accorded visas and other benefits based on familial relationships. *See, e.g.*, 8 U.S.C. §§ 1151, 1153(a). But the 1999-2001 amendments marked the first time that aliens were made to suffer exclusion because of those relationships. Congress offered no explanation for this new type of inadmissibility. *See* H.R. Rep. No. 106-939, 106th Cong., 2d Sess. 98-99 (Oct. 5, 2000); H.R. Rep. No. 106-457, 106th Cong., 1st Sess. 47 (Nov. 5, 1999). Among the likely concerns were the prospect of possible access to the United States through the trafficker and terrorist families, or the unseemliness of having the families of those involved in drugs, slavery, or terrorism shopping on Rodeo Drive or vacationing at Disney World. The development, however, raises some potential constitutional questions.

Sovereign Constraints

At our Founding, English law had evolved from earlier Norman French principles to include writs of attainder, which enabled the king to secure a finding of guilt and the imposition of punishment by legislative as opposed to judicial process. *See, e.g.*, *Nixon v. Administrator of General Services*, 433 U.S. 425, 473-74 & n.35 (1977); *McMullen v. United States*, 989 F.2d 603, 604-07 (2d Cir.), cert. denied, 510 U.S. 913 (1993). *See also Wikipedia*, "Attainder" and "Writ of Attainder" (visited August 17, 2011). The ability to avoid trials and the need to prove guilt was particularly attractive in political cases. *Id.* Such writs were limited to capital cases (felony or treason), and a person attainted typically lost his or her property, title, and life. *Id.* Corruption of blood was one of the consequences of attainder. Id. The descendants of an attainted person could not inherit from the criminal or from their other relatives through the criminal. *See, e.g.*, *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1875). Attainder essentially amounted to the legal death of the attainted's family. *See Wikipedia*, "Attainder" and "Writ of Attainder," *supra*.

Perhaps inspired by their successful (and arguably treasonous) revolution, our Founding Fathers included in the Constitution express bars against bills of attainder and corruption of blood. Article I, section 9, clause 3 states, "No Bill of Attainder . . . shall be passed." Article III, section 3, dealing with treason, pro-

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vides in clause 2,

> *The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture, except during the life of the person attainted.*

The constraints were explained in terms of separation of powers. "[B]ill of Attainder . . . are contrary to the first principles of the social contract and to every principle of sound legislation." *Federalist No. 44*, at 282 (J. Madison). *See Federalist No. 47*, at 303 (J. Madison) (quoting Montesquieu on the evils of imparting judicial powers to the legislative branch). Later commentators suggest that the Framers were hostile to the notion of penalizing children for their parents' conduct. *See, e.g.*, Note, *Corruption Of Blood And Equal Protection: Why The Sins Of The Parents Should Not Matter*, 44 Stan. L. Rev. 727 (1992). This sentiment was vigorously asserted by Justice Jackson in his dissent in *Korematsu v. United States,* 323 U.S. 214 (1944)(upholding the wartime internment of Japanese Americans):

> *[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable . . . [H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.*

323 U.S. at 243 (citing Article III, § 3, cl. 2).

Whatever their purpose, the constitutional provisions leave a number of questions un-resolved, including the apparent conflict between Article I which seems to bar all attainder, and Article III which contemplates attainder for treason but only with limited corruption of blood (*i.e.*, limited to the life of the person attainted). *See, e.g.*, *Wallach v. Van Riswick*, *supra* (involving the challenged conveyance of property seized from a Confederate officer under the 1862 Confiscation Act). The case law has evolved to find that a statute is a bill of attainder if (and only if) (1) it determines guilt and inflicts punishment. (2) upon an identifiable individual, (3) without the protections of a judicial trial. *See Nixon v. Administrator of General Services, supra*, 433 U.S. at 468.

Much of the early jurisprudence regarding bills of attainder was developed in the wake of the Civil War and involved the so-called "test oath" statutes.

Much of the early jurisprudence regarding bills of attainder was developed in the wake of the Civil War and involved the so-called "test oath" statutes. See, *e.g.*, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-325 (1867)(striking down a statute making it a crime for a priest to practice his vocation without forswearing support for the Confederacy); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 374-81 (1867) (striking down a federal statute prohibiting the holding of office or practice of law absent an oath of nonsupport for the Confederacy). Later bill of attainder jurisprudence involved statutory consequences imposed on "subversives". *See, e.g.*, *United States v. Brown*, 381 U.S. 437 (1965)(invalidating statute barring Communists from union employment). *See also Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 475 (Presidential Recordings and Materials Preservation Act held not to be a bill of attainder); *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010)(barring specific organization from receiving federal funds held not to be a bill of attainder). For us, an obvious question is whether the constitutional constraints have any relevancy to alien exclusion.

Immigration's Bill of Attainder Jurisprudence

Over the decade since their enactment, the INA's corruption of blood provisions have been applied to 2,084 immigrant and nonimmigrant visa applications. *Annual Reports of the Visa Office, FY 2000-2010*, accessible through www.state.gov The Visa Office further reports that inadmissibility was "overcome" in 130 of these cases. *Id.* All of the 2,084 reported cases involved families of drug traffickers, and no DOS data has been found regarding the exclusion of family members of human traffickers or terrorists. *Id.* DHS Customs and Border Protection reports that in FY 2010 they barred admission of 33 family members of terrorists (but recorded no exclusions of family members of drug or human traffickers). E-mail, Roger Kaplan, Sept. 7, 2011 (on file). It appears that neither the Board of Immigration Appeals nor the courts have ever considered cases arising under the corruption of blood provisions.

The Board and courts, however, have considered the relationship between immigration and the constitutional bar to bills of attainder. In *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985), the Board rejected a constitutional challenge to the deportation of a former Nazi, concluding that the provisions of (then) INA section 241(a)(19) were neither an impermissible *ex post facto* law nor a barred bill of attainder. On the

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latter, the Board reasoned that the constitutional bar applies to the criminal proceedings (and deportation proceedings are civil in nature), the federal courts have rejected bill of attainder challenges to deportation (*citing*, *inter alia*, *Artukovic v. INS*, 693 F.2d 894, 897 (9th Cir. 1982); *MacKay v. Alexander*, 268 F.2d 35, 37 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960); *Quattrone v. Nicolls*, 210 F.2d 513, 519 (1st Cir.), *cert. denied*, 347 U.S. 976 (1954)), and that the constitutional bar prevents legislative punishment and deportation is not punishment. 19 I&N Dec. at 334-35. *Accord Matter of P–,* 5 I&N Dec. 651, 652-53 (BIA 1954)(deportation for drug conviction, under (then) INA section 241(a)(11)). The Board has also rejected bill of attainder challenges to the deportation of "subversives" under the Internal Security Act of 1950 and the Act of 1918. *Matter of M –*, 5 I&N Dec. 242 (BIA 1953); *Matter of S –*, 4 I&N Dec. 504 (BIA 1951). On other occasions, the Board, without mentioning the foregoing contrary precedent, has rejected bill of attainder challenges on the basis that it lacks authority to consider the constitutionality of the immigration statute. *In re Fitzroy O. Artwell*, 2009 WL 4899010 (unpub. BIA Nov. 27, 2009)(mandatory 236 (c) detention); *Matter of L –,* 4 I&N Dec. 556 (BIA 1951)("subversive" deportation under the Internal Security Act).

The courts have considered bill of attainder challenges to the deportation of "subversives" under the Act of 1918, the Internal Security Act of 1950, and (then) section 241(a)(6) of the Immigration and Nationality Act. For example, *in Quattrone v. Nicolls*, *supra*, the First Circuit sustained the denial of habeas corpus relief to an alien ordered deported for affiliating with the Communist Party (*i.e.*, an organization advocating the violent overthrow of our government, as defined by the Internal Security Act), rejecting a bill of attainder challenge:

> *A bill of attainder has been defined as . . . a legislative act which inflicts punishment without a judicial trial . . . But it is well established that deportation, how-ever severe it may be on the alien, is not a punishment . . . Deportation . . . "is simply a refusal by the government to harbor persons whom it does not want."*

"A bill of attainder has been defined as . . . a legislative act which inflicts punishment without a judicial trial."

210 F.2d at 519 (citations omitted, *quoting Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913)).

The Ninth Circuit has rejected several bill of attainder deportation challenges (in cases similarly involving Communists). *See, e.g., MacKay v. Alexander*, *supra*, 268 F.2d at 37; *Ocon v. Guercio*, 237 F.2d 177, 179-80 (9th Cir. 1956). *See also Niukkanen v. McAlexander*, 265 F.2d 825, 827 (9th Cir. 1959), *aff'd*, 362 U.S. 390 (1960). The Ninth Circuit adopted the reasoning of District Judge Solomon.

> *The courts have recognized that the practice of deportation "bristles with severities." Although the law is severe and works many hardships, the right to terminate hospitality to aliens and the grounds upon which such determination shall be based are matters solely for the responsibility of Congress and are wholly outside the power of the court to control.*

Niukkanen v. Boyd, 148 F. Supp. 106, 107 (D. Or. 1956)(*quoting* and *citing Galvan v. Press*, 347 U.S. 522 (1954), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 and 597 (1952)), *aff'd*, 241 F.2d 938 (9th Cir.), *cert. denied*, 355 U.S. 905 (1957).

Earlier the Supreme Court had provided guidance on the reach of the bill of attainder bar in *Garner v. Board of Public Works*, 341 U.S. 716 (1951), rejecting a constitutional challenge to a local ordinance that required municipal employees to provide an affidavit and take an oath dis-avowing Communist Party affiliation. The Court emphasized the distinction between legislative punishment and the power to prescribe qualifications.

> *Punishment is a prerequisite. . . Whether legislative action curtailing a privilege previously enjoyed amount to punishment depends upon "the circumstances attending and the causes of the deprivation . . ." We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.*

341 U.S. at 722 (*quoting Cummings v. Missouri*, *supra*). Without citing the Supreme Court's attainder jurisprudence or its own, the Ninth Circuit in *Rubio de Cachu v. INS*, 568 F.2d 625, 627-28 (9th Cir. 1977), rejected a challenge to the 1976 amendments of the INA's immigrant visa provisions.

> *Although we are unaware of any case attacking section 1151(b) as a bill of attainder, we note that section 1151 has been held constitutional . . . Moreover, deportation has been held to be*

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a civil rather than a criminal proceeding. . . Consequently, the challenged statute cannot properly be characterized as a bill of attainder.

The next examination of the relationship between immigration and the bill of attainder bar came with several deportation cases involving former Nazis. In *Artukovic v. INS*, *supra*, the Ninth Circuit rejected *ex post facto* and bill of attainder challenges to the 1978 Holtzman Amendment barring the availability of withholding and stays of deportation to former Nazis. See Pub. L. No. 95-549, Title I, §§ 103-04, 92 Stat. 2065-2066 (1978) (codified at (then) 8 U.S.C. §§ 1251(a)(19), 1253(h). The court reiterated its conclusion in the earlier subversive cases.

Deportation . . . is not a punishment; it is simply a refusal by the government to harbor persons whom it does not wish to harbor . . . The prohibition against ex post facto laws and bills of attainder does not apply to deportation statutes.

693 F.2d at 897 (*citing Marcello v. Bonds*, 342 U.S. 302 (1955), and *Rubio de Cachu*, *supra*).

The Second Circuit was more thorough in sustaining the Holtzman Amendment against a similar bill of attainder challenge. *Linnas v. INS*, 790 F.2d 1024, 1028-30 (2d Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). Observing that the "temptation to use bills of attainder is especially strong when national security is thought to be threatened," the court applied the Supreme Court's criteria to determine whether the immigration provisions were forbidden legislative "punishment", asking,

"(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record evinces a congressional intent to punish.'"

790 F.2d at 1028-29, *quoting Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), *and Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 473. Under these criteria the court joined the Ninth Circuit and concluded that the Holtzman Amendment was not a bill of attainder. 790 F.2d at 1030. *See also McMullen v. United States*, *supra* (reversing a district court finding that an extradition treaty limiting the availability of the political offense exception was as to the alien petitioner a prohibited bill of attainder).

The Ninth Circuit rejected ex post facto and bill of attainder challenges to the 1978 Holtzman Amendment barring the availability of withholding and stays of deportation to former Nazis.

The *Linnas* Court also addressed the argument that deportation is the equivalent of banishment, and banishment is a punishment associated with bills of attainder. The court acknowledged that the exclusion of citizens has been held to be punishment the equivalent of banishment (790 F.2d at 1029, *citing Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 166-70 (1963), *see In re Low Foon Yin v. U.S. Immigration Com'r*, 145 F. 791 (9th Cir. 1906)), but found that deportation of noncitizens generally has been held not to constitute punishment. 790 F.2d at 1030 (citations omitted). The court concluded that Linnas "presents little reason for breaking with the traditional rule that deportation, although often severely burdensome, is not punishment." *.Id* Soon thereafter, the Seventh Circuit reached the same conclusion. *Schellong v. INS,* 805 F.2d 655, 662-63 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). *Accord Garcia v. Holder*, 320 Fed. Appx. 288, 291 (5th Cir. 2009) (cancellation ineligibility for aggravated felons is not a bill of attainder). *Cf. Sanabria-Casares v. Crabtree*, 73 F.3d 370 (9th Cir. 1995)(concluding that immigration detention is not punishment, in reliance on *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1448 (9th Cir.)(en banc), *cert. denied*, 516 U.S. 976 (1995)).

Only one case has been found suggesting the possible applicability of the bill of attainder bar in matters pertaining to noncitizens, and it did not involve exclusion or deportation. In *Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988), certain provisions of the Anti-Terrorism Act of 1987 (Title X of the 1988-89 Foreign Relations Authorization Act, Pub. L. 100-204, §§ 1001-1005, 101 Stat. 1331, 1406-07; 22 U.S.C. §§ 5201-03) were challenged by four United States citizens who wished to engage in various activities in support of the Palestine Liberation Organization. In the ATA, Congress declared the PLO to be a "terrorist organization" and sought to curb its operations in the United States. Finding that the statute was individualized and, based on the post-Civil War oath cases, punitive in its deprivation of livelihood, the court described the ATA as "a classic Bill of Attainder." 695 F. Supp. at 1488-89. However, the court rejected the constitutional challenge, reasoning that the bill of attainder bar implements the doctrine of separation of powers and the ATA is a legitimate

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exercise of Congress's foreign affairs powers. *Id*. The court also found significant that "the PLO, as a foreign entity, stands outside the structure of our constitutional system." *Id. Cf. Jimenez v. Barber*, 226 F.2d 449, 451 (9th Cir. 1955) (staying deportation to examine the applicability of the bill of the attainder bar to a suspension denial).

Immigration's bill of attainder jurisprudence has been relatively limited. Such cases as do exist almost all have involved deportation and turn, perhaps predictably, on the proposition that deportation is not punishment. No Board or court case has been found examining the relevance of the bill of attainder bar to admission criteria. *Cf. Rubio de Cachu*, *supra* (rejecting a challenge to the INA's immigrant visa provisions). It would seem that if the bar is inapplicable to deportation for lack of "punishment", surely exclusion (*i.e.*, the sovereign's denial of the privilege of entry) also would be immune to constitutional attack. Indeed, the off-shore extension of the bill of attainder prohibition to secure the admission of noncitizens would appear to be particularly ambitious. *But cf. Kleindienst v. Mandel*, 408 U.S. 753 (1976)(finding that the citizen audience has sufficient standing to raise a constitutional challenge to the exclusion of an inadmissible alien). Given the undisputed authority of Congress and the Executive to set criteria for alien admission, the "qualification" cases such as *Garner*, *supra*, seem possibly to offer a further bulwark against a bill of attainder challenge. *But cf. United States v. Brown*, *supra*. Moreover, additional support for the exclusion provisions might be drawn from Congress's foreign affairs power and its express constitutional authorization to regulate immigration (naturalization). Article I, § 8, cl. 4.

The immigration bill of attainder cases have not turned on the alien's immigration status. None of the cases suggest any distinction in constitutional applicability based on the alien's attachment to the United States (*i.e.*, lawfulness of entry, duration of presence, or securing lawful permanent resident status). Rather, the alien's status simply was not part of the courts' analysis, and the necessary "punishment" was found lacking without regard to whether the alien to be deported was an overstay (*e.g.*, *Artukovic*, *supra*), a lifelong resident (*e.g.*, *Niukkanen*, *supra*), or a lawful permanent resident (*e.g.*, *Quattrone*, *supra*). Nevertheless, notwithstanding Congress's contrary admonition (*e.g.*, Sen. Rep. No. 104-249, 104th Cong., 2d Sess. 7), there remains continued political and judicial pressure recognizing deportation's often punitive effect. *See*, *e.g.*, *Marcello v. Bonds*, *supra*, 349 U.S. at 320 (Douglas, J., dissenting from the rejection of an *ex post facto* deportation challenge: "Deportation may be as severe a punishment as loss of livelihood"). Particularly when the as yet untested corruption of blood prohibition is added to the constitutional analysis, it remains to be seen whether the distinction between punishment and withdrawal of privilege will be sufficient to sustain the immigration provisions.

The off-shore extension of the bill of attainder prohibition to secure the admission of noncitizens would appear to be particularly ambitious.

Immigration And Corruption Of Blood

In the absence of Board or court jurisprudence on the question, how would the INA's three corruption of blood provisions fare under constitutional scrutiny? A number of possible arguments suggest that the exclusion of the families of drug traffickers, human traffickers, and terrorists will pass muster. First, as noted above, the settled inapplicability of the bill of attainder bar to deportation (for lack of "punishment") strongly suggests the absence of any defect in the lesser "deprivation" of exclusion. Second, Article III's corruption of blood provisions are not a prohibition of such provisions but rather a limit on permissible bills of attainder. If the INA's derivative inadmissibility provisions are not bills of attainder, they cannot be constrained by Article III. Third, the Article III provisions pertain to the punishment of treason, which plainly has nothing to do with immigration regulation. Finally, even if by some analytical legerdemain Article III were pertinent to immigration, the INA's corruption of blood provisions arguably conform to the constitutional limits (*i.e.*, the bars to admission could be construed to run only during the life of the person attainted, the drug or human trafficker or terrorist).

There appears to be little if any administrative guidance on the interpretation and application of the INA's corruption of blood provisions. The regulations for EOIR and the Departments of State and Homeland Security are utterly silent on the provisions. DHS (CIS) does include the spouse and children of terrorists among its list of "asylum bars" (USCIS - Asylum Bars, accessed through www.uscis.gov visited August 23, 2011), and quotes the language of § 212(a)(3)(B)(ii) in its Asylum Officer Basic Training Course. "Mandatory Bars to Asylum and Discretion" (Participant Workbook), USCIS - RAIO, Asylum Division (March 25, 2009), p. 27. CIS also

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has instructed its adjudicators to put a "hold" on all cases involving such aliens "whether or not those aliens have applied for an immigration benefit." Memorandum of Feb. 13, 2009, Acting Deputy Director Michael Aytes to Field Leadership, "Revised Guidelines on the Adjudication of Cases involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases, accessed through www.uscis.go (visited August 23, 2011).

The lack of agency or judicial guidance on the INA's corruption of blood provisions leaves unanswered a number of interesting questions.

The Department of State includes no instructions regarding the corruption of blood provisions in its Foreign Affairs Manual. 9 FAM 40.21(b) and 40.27 (2010); *see* 9 FAM 40.6, Exhibit I (2010), p. 8. *See also* 22 C.F.R. §§ 40.23 and 40.32 ("reserving" regulations regarding drug trafficking and terrorist activities). Curiously, the current version of the agency's immigrant visa application asks about relationships to drug and human traffickers (and persons engaged in extrajudicial killing or support for certain Columbian terrorist groups), but does not ask the applicant about relationship to terrorism in general. Form DS-230 (May 2009), question # 40. The application form for nonimmigrant visas (now processed on-line) asks no questions at all about drug or human trafficking, and limits its terrorism queries to the applicant's own actions or characteristics. Form DS-160, "security and background information".

The lack of agency or judicial guidance on the INA's corruption of blood provisions leaves unanswered a number of interesting questions. While Congress barred the admission of the families of traffickers and terrorists, it made no corresponding change in the provisions regarding removal. Thus, tainted family members likely would not face deportation (unless a failure to disclose their disqualifying relationship gave rise to its own basis for removal). Such family members, however, would be barred from adjusting their status or, if the family of terrorists, from gaining asylum. 8 U.S.C. §§ 1255(a) and 1158(b)(2)(A)(v) (which includes a limited waiver).

Each of the INA's corruption of blood provisions are time-limited. That is, admission is barred only if within the previous five years the family member received a "financial or other benefit" from the drug or human trafficking, or the disqualifying terrorist activity occurred within those five years. 8 U.S.C. §§ 1182 (a)(2)(C)(ii), 1182(a)(2)(H)(ii), and 1182(a)(3)(B)(i)(IX). While minority does not matter for the barred children of drug traffickers and terrorists, it does excuse the children of human traffickers. 8 U.S.C. § 1182 (a)(2)(H)(iii). Each of the corruption of blood provisions requires that the family member know or should have known of the illicit or disqualifying activity. 8 U.S.C. §§ 1182(a) (2)(C)(ii), 1182(a)(2)(H)(ii), and 1182(a)(3)(B)(ii)(I). There is, moreover, dissimilar treatment regarding just who within the family is subject to corruption of blood. For drug and human traffickers, it is the "spouse, son, or daughter" who are barred; for terrorists it is the "spouse or child". *Compare* 8 U.S.C. §§ 1182 (a) (2)(C)(ii) and 1182(a)(2)(H)(ii), *with* § 1182(a)(3)(B)(i)(IX). This suggests that the children of terrorists can age out of their inadmissibility (at 22, *see* 8 U.S.C. § 1101(b)(1) defining "child"), while the "sons and daughters" of drug and human traffickers are barred forever (assuming they continue to benefit from the relationship). Moreover, as the provisions mention only "spouse", it appears that divorce would cure the corruption.

Beyond the language of the INA's corruption of blood provisions, there are interesting questions regarding the scope of the provisions. For example, why block the admission of spouses and children but not the boy/girlfriends or siblings of traffickers and terrorists? For that matter, are the families of traffickers and terrorists appreciably different than, say, the families of aggravated felons or some of the other immigration unsavories (*e.g.*, Nazis or tax exiles)? Given the INA's long list of the categories of inadmissible aliens, it seems that Congress has barely scratched the surface of immigration corruption of blood. If, as the courts have held, immigration regulation belongs to the political branches, and the INA and its application are not constrained by the attainder bar, there may be yet further expansion of derivative inadmissibility.

By Thomas Hussey, OIL

The views herein are purely personal, and the author does not speak for the Department of Justice or the Office of Immigration Litigation.

We encourage contributions to the Immigration Litigation Bulletin

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On October 6, 2012, the Supreme Court will hear argument in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. The Second and Third Circuits require that the government make these showings, because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution.

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Conviction — Conjunctive Plea

On September 17, 2012, an *en banc* panel of the Ninth Circuit, following oral argument on December 12, 2011, denied rehearing in ***Young v. Holder***, The pane had requested supplemental briefing on whether it should overrule *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007). The panel decision, originally published at 634 F.3d 1014 (2011), ruled that where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. In its *en banc* petition, the government argued that the panel's opinion is contrary to the court's *en banc* decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

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Asylum — Particular Social Group

During the March 20, 2012, *en banc* argument in ***Henriquez-Rivas v. Holder***, the court requested that the government determine whether the BIA would make a precedent decision on remand in *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582 (3d Cir. 2011). The BIA declined to comment on its pending case. The now-withdrawn unpublished *Henriquez-Rivas* decision, 2011 WL 3915529, upheld the agency's ruling that El Salvadorans who testify against gang members does not constitute a particular social group for asylum. Concurring judges on the panel, and the subsequent petition for rehearing, suggested *en banc* rehearing to consider whether the court's social group precedents, especially regarding "visibility" and "particularity," are consistent with each other and with BIA precedent.

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Convictions – Missing Element

On August 31, 2012, the Supreme Court granted certiorari in *Descamps v. United States*, a criminal sentencing case in which the question presented is whether the Ninth Circuit's 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 entire reasoning of *Aguila-Montes* and the "missing element" rule that it overruled.

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Asylum – Particular Social Group

On September 27, the *en banc* Seventh Circuit will hear argument on rehearing in ***Cece v. Holder***, 668 F.3d 510, 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 May 3, 2012, the Ninth Circuit issued a *sua sponte* call for en banc rehearing, and withdrew its opinion in ***Oshodi v. Holder***, previously published at 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). Supplemental briefing was ordered for en banc rehearing, calendared for oral argument the week of December 10, 2012.

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Retroactivity — Judicial Decisions

An en banc panel of the Ninth Circuit heard oral argument on June 20, 2012, in ***Garfias-Rodriguez v. Holder***, 649 F.3d 942 (9th Cir. 2011), in which the court had held that an alien inadmissible for reentering after accruing unlawful presence may not adjust his status under 8 U.S.C. § 1245(i). The court permitted supplemental briefing for the parties to address whether the court's decision, deferring to an agency precedent decision rejecting a prior circuit precedent, should be applied retroactively to cases pending at the time of the agency decision. The court also invited the parties to discuss whether the *en banc* court should overrule *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010).

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Updated by Andy MacLachlan, OIL

Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

■ **VWP Participant Knowingly and Voluntarily Waived Right to Contest Removal**

In ***Gjerjaj v. Holder***, __F.3d__, 2012 WL 3661425 (2d Cir. August 28, 2012) (Leval, Sack, Hall) (*per curiam*), the Second Circuit held that an alien who knowingly availed herself of the benefits of the VWP and participated in her asylum-only proceedings could not then "cry foul" when ICE issued a removal order after her asylum application was denied. In so doing, the court joined its sister circuits in holding that a VWP participant may not contest his removal on the basis of an adjustment of status application filed after the 90-day period during which a VWP participant may stay in the country.

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THIRD CIRCUIT

■ **Alien Who Completes All of the Statutory Requirements for Naturalization Apart from the Oath of Allegiance Remains Subject to Removal**

In ***Duran-Pichardo v. Att'y Gen. of the U.S.***, __F.3d__, 2012 WL 3764758 (*McKee*, Fuentes, Jordan) (3d Cir. August 31, 2012), the Third Circuit rejected petitioner's argument that he obtained a liberty interest in citizenship by virtue of completing all of the statutory requirements for naturalization except for taking the oath of allegiance.

The court held that statutory language governing naturalization is "clear and unambiguous," and requires that an alien publically take an oath as a condition of naturalization. Petitioner therefore remained subject to removal even though he completed all of the other prerequisites to citizenship. While the petitioner argued that the government had not acted in a timely manner in finalizing his naturalization application and enabling him to take the oath, the court observed that petitioner had failed to apply for a hearing to address this matter in district court, as he was permitted to do under 8 U.S.C. § 1447(b).

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■ **Third Circuit Holds that USCIS's Denial of Petition for Alien Relative for Marriage Fraud Supported by Substantial Evidence**

In ***Mirjan v. Att'y Gen. of the U.S.***, __F.3d__, 2012 (*Greenaway*, Roth, Tashima) (3d Cir. August 28, 2011), the Third Circuit dismissed petitioner's appeal and found USCIS's denial of the Form I-130 Petition for Alien Relative based on marriage fraud was not arbitrary and capricious. The court found that substantial evidence supported USCIS's marriage fraud findings, including discrepancies in both lease and billing records submitted to show cohabitation; the fact that the wife's family did not know about the marriage; that the alien was unaware of his wife's criminal history; that the alien was not mentioned in the wife's obituary; and, that the alien's employer did not know about the alien's marriage.

"We do not recognize economic extortion as a form of persecution under immigration law, nor do we recognize wealthy [Salvadorians] as a protected group."

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FIFTH CIRCUIT

■ **"Wealthy Salvadorans" Are Not a Particular Social Group And TPS Physical Presence Requirement Cannot Be Imputed from Eligible Parent**

In ***Castillo-Enriquez v. Holder***, __F.3d__, 2012 WL 3241959 (Davis, *Smith*, Prado) (5th Cir. August 10, 2012), the Fifth Circuit held that "wealthy Salvadorans" did not constitute a particular social group and that economic extortion did not constitute persecution to qualify for withholding of removal.

The petitioner had entered the United States unlawfully in 2002. When placed in removal proceedings he sought withholding of removal. He testified that his parents are lawful permanent residents of the United States who had left El Salvador when he was a child. He said that he feared returning to El Salvador because his grandmother received a note from anonymous individuals in 2007 demanding $6,000 and threatening harm to his family.

In upholding the BIA's denial of withholding, the court explained that "being extorted by an anonymous group of individuals who perceive petitioner's family to be wealthy does not require the Attorney General to withhold removal. 'We do not recognize economic extortion as a form of persecution under immigration law, nor do we recognize wealthy [Salvadorians] as a protected group.'"

The court also held that the physical presence and residence requirements for TPS could not be imputed from an eligible parent to his or her non-qualifying child.

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SIXTH CIRCUIT

■ **Decision Not to Interview Alien's Former Wife Did Not Violate the Administrative Procedure Act**

In ***Adi v. United States***, __F.3d__, 2012 WL 3241726 (6th Cir. August 10, 2012) (Clay, Gibbons, Korman)

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(*per curiam*), the Sixth Circuit, in an unpublished decision affirmed the district court's decision granting the government's motion for summary judgment. The court found that, upon review of the record, the district director for USCIS did not give conclusive effect to determinations in prior proceedings and adequately explained her decision denying the I-130 petition filed on the alien's behalf, and that her decision was supported by substantial and probative evidence.

Accordingly, USCIS's denial did not violate the Administrative Procedure Act. Specifically, the district director comprehensively explained why the alien's former wife's 1990 affidavit, admitting that her marriage to the alien was fraudulent, was more credible than her 2007 affidavit recanting her admission, and this explanation sufficiently upheld both the denial and USCIS's decision to not interview the alien's former wife.

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■ Court Holds 8 U.S.C. § 1227(a)(1)(H) Fraud Waiver is Available to Aliens Who Made Willful Misrepresentations Before Being Admitted

In ***Avila-Anguiano v. Holder***, 689 F.3d 566 (6th Cir. 2012) (Siler, Murphy, *Kethledge*), the Sixth Circuit held that the so-called fraud waiver under 8 U.S.C. § 1227(a)(1)(H) is available to aliens who made willful misrepresentations before being admitted as well as at the time of their admission. "What matters, for purposes of whether the Attorney General has discretion to waive removal on the ground of a particular misrepresentation, is whether the misrepresentation rendered the alien 'inadmissible at the time of admission' as an alien[ ] described in section 1182(a)(6)(C)(i),'"explained the court.

The petitioner, a Mexican citizen, in 1991 told a border inspector, falsely, that he was a United States citizen. He pled guilty the next day to making a false claim of citizenship in violation of 8 U.S.C. § 1325. He then returned to Mexico. The second misrepresentation occurred in 1993, when petitioner failed to disclose that same conviction on his application for an immigration visa. He was by then the spouse of a U.S. citizen. The Department of State granted him the visa.

The BIA had ruled that aliens who made misrepresentations before admission were ineligible for the fraud waiver because aliens who fraudulently sought an immigration benefit before being admitted were otherwise inadmissible at the time of admission.

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■ Sixth Circuit Upholds BIA's Conclusion that Mauritanian Alien Assisted in Torture Such that He Was Inadmissible and Ineligible for Adjustment of Status

In ***Abdallahi v. Holder***, __F.3d__, 2012 WL 3089345 (6th Cir. July 31, 2012) (*Siler*, Moore, Van Tatenhove), the Sixth Circuit affirmed the BIA's decision that petitioner had assisted in the torture of prisoners while serving in the Mauritanian military, rendering him inadmissible under INA § 212(a)(3)(E)(iii), and therefore statutorily ineligible to adjust his status.

The petitioner entered the United States as a non-immigrant visitor. He remained longer than permitted and applied for asylum, withholding of removal, and CAT protection but those claims were later withdrawn in favor of his request for adjustment of status based on his marriage to a U.S. citizen. However, prior to withdrawing his persecution claims, petitioner had testified about his experience as a gendarme in Mauritania. In that capacity, he had stood guard at doors outside interrogation rooms where he heard screams and acknowledged that prisoners were being tortured. Petitioner's duties required that "he pour cold water on black prisoners, kick them, and ensure that they had no food or toilet access." Petitioner's said that he could not stop these acts of violence and torture against the prisoners because he feared the same fate would happen to him if he refused to carry out the orders. Petitioner did not report the mistreatment of the prisoners to his superiors because he believed the authorities supported such treatment.

There must be some nexus between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having actually assisted or otherwise participated in that persecution.

Following the hearing, the IJ left the Immigration Court and another IJ was assigned to petitioner's case. The new IJ determined that petitioner was inadmissible to the United States, pursuant to INA § 212(a)(3)(E)(iii), for having "committed, ordered, incited, assisted, or otherwise participated in the commission of . . . any act of torture," and therefore ineligible to adjust his status. The BIA affirmed that decision and rejected petitioner's contention that his due process rights had been violated because the new IJ had not personally heard his testimony.

The court upheld the BIA's findings that petitioner "assisted" in acts of torture. The court explained that following the Supreme court decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), and *Negusie v. Holder*, 555 U.S. 511(2009), in *Diaz-Zanatta v. Holder*, 558 F.3d 450 (6th Cir. 2009), it adopted an analysis which requires: (1) that there be some nexus between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having actually assisted or otherwise participated in that persecution; (2) if such a nexus is shown, the alien must have acted with scienter; the alien must have had some level of contem-

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poraneous knowledge that the persecution was being conducted. Here, the court found that petitioner's acts of bringing prisoners to interrogation rooms and standing guard established the requisite nexus to torture, that he acted with knowledge that torture was occurring, and that he acted voluntarily.

The court also rejected the petitioner's due process claim arising from the change in IJ. However, the court at the same time rejected the government's contention that petitioner could not claim a due process violation because adjustment of status is a discretionary relief. The court explained the Fifth Amendment Due Process Clause mandates that removal hearings be fundamentally fair, and that petitioner alleged a due process violation with respect to his opportunity for a full and fair hearing.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Alien who Protested Layoffs at a State-Owned Factory Was Not Persecuted on Account of Political Opinion**

In ***Liu v. Holder***, __F.3d__, 2012 WL 3776349 (7th Cir. August 31, 2012) (Posner, Tinder, *Hamilton*), the Seventh Circuit agreed with an Immigration Judge and the BIA that a Chinese asylum applicant who was beaten and briefly detained after complaining to his boss about layoffs at a state-owned factory did not experience persecution on account of his political opinion or any other protected ground.

The court held that substantial evidence supported the agency's denial of asylum where the alien's demands were economic in nature, and not a protest of government corruption, and where the cause of the mistreatment was a "verbal quarrel" with the alien's boss, not "the content of the protest."

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■ **Seventh Circuit Holds that the BIA Reasonably Denied Motion to Reopen and Rescind In Absentia Removal Order**

In ***Marinov v. Holder***, 687 F.3d 365 (7th Cir. August 1, 2012) (Bauer, Kanne, *Tinder*), the Seventh Circuit held that petitioner received adequate notice of his removal hearing and that he failed to establish an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

A disciplinary complaint filed three days prior to filing a motion to reopen did not establish that petitioner adequately notified the attorney of the allegations against him or provided the attorney with an adequate opportunity to respond.

The petitioner, a citizen of Bulgaria, entered the United States in May 2005 as a nonimmigrant visitor, remained in the United States beyond the date authorized, and applied for asylum. His affirmative application for asylum was not granted and he was referred to the immigration court. Petitioner, assisted by counsel, conceded his removability and sought transfer of venue from the immigration court in Cleveland, Ohio, to Chicago, Illinois. The motion was granted and a hearing was then set for August 3, 2010. The attorney attended the hearing; petitioner did not. The IJ found that notice of the hearing was given to petitioner, he had a reasonable opportunity to be present but did not appear, and no reasonable cause was given for his absence. The IJ therefore ordered petitioner removed *in absentia* pursuant to 8 U.S.C. § 1229a(b)(5)(A).

On September 24, 2010, petitioner represented by new counsel, filed a motion to reopen removal proceedings based on a lack of notice and exceptional circumstances. He argued that he was not provided with actual notice of the hearing because notice was not mailed to his home address, and because his former counsel ineffectively failed to notify him of the hearing date. On October 1, 2010, the IJ denied petitioner's motion to reopen finding that he had not provided evidence that his former counsel was informed of the allegations against him or afforded an opportunity to respond. On appeal, the BIA agreed that petitioner had received proper notice because it was undisputed that written notice was provided to his counsel of record. The BIA also agreed with the IJ that petitioner had not satisfied all the *Lozada* criteria, namely the requirement that counsel be notified of the allegations and allowed an opportunity to respond before the allegations of ineffective assistance are presented to the BIA.

The court, in upholding the BIA's decision, explained that a disciplinary complaint filed three days prior to filing a motion to reopen did not establish that petitioner adequately notified the attorney of the allegations against him or provided the attorney with an adequate opportunity to respond. The court also rejected the petitioner's *per se* ineffective assistance claim because he failed to exhaust the issue and further noted that it had never made an exception to the *Matter of Lozada* requirements for *per se* ineffectiveness.

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■ **Seventh Circuit Holds that Reinstatement Proceedings Are Not Subject to Reopening**

In ***Tapia-Lemos v. Holder***, __F.3d__, 2012 WL 3764713 (7th Cir. August 31, 2012) (*Easterbrook*, Posner, Rovner), the Seventh Circuit held that it lacks jurisdiction to review the agency's refusal to reopen § 1231(a)(5) reinstatement proceedings.

The petitioner entered the United States illegally in 1992. He was removed to Mexico in 1997 without contesting the allegation that he was removable on account of convictions for aggravated felonies. Petitioner then reentered the United States illegally and was apprehended and removed again. Petitioner came back a third time and in 2010 the DHS reinstated the 1997 removal order.

The court interpreted § 1231(a)(5) as barring reopening of both an original removal order *and* any subsequent order of reinstatement. On this basis, the court concluded that the agency's refusal to consider a request to reopen reinstatement proceedings does not constitute the denial of a *bona fide* motion to reopen that can give rise to a petition for review. The court advised petitioner that he "should deem himself fortunate that the United States has not commenced a criminal prosecution in response to his multiple illegal entries."

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■ **Seventh Circuit Affirms Dismissal of Habeas Petition Challenging ICE's Execution of Removal Order**

In ***Rivas-Melendrez v. Napolitano***, 689 F.3d 732, 2012 WL 3104824 (7th Cir. 2012) (*Sykes*, Tinder, DeGuilio), the Seventh Circuit affirmed the district court's dismissal of an alien's habeas petition for lack of subject matter jurisdiction. The petitioner, who was removed to Mexico and now resides there, filed a habeas petition challenging the procedural validity of his removal order and ICE's execution of that order.

"What occurred here hardly inspires confidence in our immigration authorities. This is especially so where DHS's removal efforts are directed at a long-time permanent resident, husband, and father of four who has served in the military and remained gainfully employed."

The court found petitioner's case to be "a sympathetic one." "What occurred here hardly inspires confidence in our immigration authorities. This is especially so where DHS's removal efforts are directed at a long-time permanent resident, husband, and father of four who has served in the military and remained gainfully employed on the basis of a 30-year-old statutory-rape conviction," said the court. However, it held that the federal laws bars the alien's claims, and the only avenue for judicial review over such claims was a petition for review. The court also held that habeas relief is not available because the alien is not in United States custody.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Racketeering in Violation of North Dakota Law Is an Aggravated Felony**

In ***Spacek v. Holder***, 688 F.3d 536 (8th Cir. 2012) (Murphy, Ross, *Gruender*), the Eighth Circuit held that the alien's North Dakota conviction for racketeering constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(J), as an offense "described in" 18 U.S.C. § 1962, notwithstanding the fact that the state criminal statute lacked an interstate commerce element. The court agreed with the Ninth Circuit's reasoning in *United States v. Castillo-Rivera*, 244 F.3d 1020, 1023 (9th Cir. 2001), and the BIA's adoption of that reasoning in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207, 209–12 (BIA 2002) (*en banc*), that Congress clearly intended state crimes to serve as predicate offenses for the purpose of defining what constitutes an aggravated felony." Quoting from *Castillo-Rivera,* the court said that, "interpreting the jurisdictional element . . . to be necessary in order for a state [offense] to constitute an aggravated felony . . . would reduce the number of state [offenses] that qualify to no more than a negligible number.... If we were to construe the jurisdictional nexus of the federal . . . provision to be a necessary element for a state crime to qualify as an aggravated felony, we would undermine the language of the aggravated felony statute and the evident intent of Congress."

The court further concluded that the alien was ineligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h) because his aggravated felony conviction occurred after his admission to the United States as a lawful permanent resident under the Refugee Act.

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■ **Eighth Circuit Upholds BIA's Determination that Assault Is a Violent or Dangerous Crime, but Concludes that BIA Engaged in Improper Fact-finding**

In ***Waldron v. Holder***, __F.3d__, 2012 WL 3156002 (Riley, Smith, *Shepherd*) (8th Cir. August 6, 2012), the Eighth Circuit upheld the BIA's

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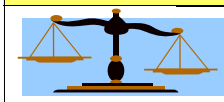

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conclusion that the petitioner's felony second degree assault conviction under Mo. Rev. Stat. § 565.060 was a "violent or dangerous crime" under 8 C.F.R. § 1212.7(d), which subjected petitioner's inadmissibility waiver application to the "exceptional and extremely unusual hardship" standard. The court concluded, however, that the BIA failed to review the immigration judge's factual findings for clear error and engaged in improper fact-finding by reversing the immigration judge's hardship assessment.

The asylum applicant failed to establish that the Israeli Government "condoned," or was "helpless" to protect against, the private behavior that was the basis of his fear of persecution, and therefore he failed to establish eligibility for asylum.

The petitioner entered the United States on April 28, 2002, as a nonimmigrant visitor and later adjusted his status to that of a conditional lawful permanent resident based on his marriage to a United States citizen. On June 30, 2005, petitioner pleaded guilty to second degree felony assault, in violation of Missouri Statute § 565.060, for "recklessly caus[ing] serious physical injury to [his victim] by striking him over the head with a glass." Petitioner was subsequently placed in removal proceedings and the IJ granted petitioner's request for a 212(h) waiver of inadmissibility and adjustment of status. The IJ found that petitioner met his burden of establishing extreme hardship to qualify for a 212(h) waiver and granted adjustment of status as a matter of discretion. On appeal, the BIA determined that petitioner's conviction constituted a "violent or dangerous crime" because petitioner's actions were "reckless in creating a substantial risk of harm and resulting in actual injury." The BIA then concluded that petitioner failed to satisfy the heightened "exceptional and extremely unusual hardship" requirement for a 212(h) waiver of inadmissibility.

The Eighth Circuit held that the BIA did not plainly err in its determination that petitioner's conviction qualified as a "violent or dangerous crime" and, thus, that the heightened hardship "exceptional and extremely unusual hardship" standard applied. The court, however, held that the BIA engaged in improper factfinding when it considered petitioner's employment prospects without addressing either petitioner's testimony or the IJ's factual findings on that issue. The court also noted that the BIA made several determinations regarding petitioner's family situation and his son's health that directly contradicted the IJ's findings and, accordingly, remanded the case.

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■ **Eighth Circuit Affirms Denial of Asylum and Related Relief and Affirms Denial of Alien's Motion to Reopen**

In ***Salman v. Holder***, 687 F.3d 991 (8th Cir. 2012) (Riley, *Melloy*, Shepherd), the Eighth Circuit held that the asylum applicant failed to establish that the Israeli Government "condoned," or was "helpless" to protect against, the private behavior that was the basis of his fear of persecution, and therefore he failed to establish eligibility for asylum, withholding of removal, or Convention Against Torture protection.

Additionally, the court concluded that the BIA's denial of petitioner's motion to reopen was proper because the motion was not supported by new, previously unavailable evidence. Petitioner had proffered an expert report on country conditions and Arabic culture in Israel paying special attention to "[t]he problem of blood feuds and honor codes in Arab society."

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NINTH CIRCUIT

■ **Ninth Circuit Holds that DHS Lacks Authority to Terminate Asylum Status**

In ***Nijjar v. Holder***, __F.3d__, 2012 WL 3104616 (9th Cir. August 1, 2012) (*Kleinfeld*, Hug, Fletcher), the Ninth Circuit held that although either the Secretary of Homeland Security or the Attorney General may grant asylum, Congress, in 8 U.S.C. § 1158(c)(2), only authorized the Attorney General to terminate asylum. Therefore, the court concluded that the regulations giving the Department of Homeland Security the authority to terminate asylum status, 8 C.F.R. § 208.24(a) and 8 C.F.R. § 1208.24(a), were *ultra vires.*

The petitioner, a citizen of India, had his asylum status terminated for failure to appear after he had been notified that USCIS sought to terminate his status for fraud. Petitioner had been previously granted asylum by the former INS, but later it was discover that he had provided allegedly false information. USCIS sent him a notice to attend a termination interview. After the interview was rescheduled several times at petitioner's request, USCIS terminated his asylum status and placed him in removal proceedings. Petitioner then moved to terminate removal proceedings on ground that his asylum status had not properly been terminated. The IJ denied the motion, finding lack of jurisdiction to review the asylum officer's termination, and ordered petitioner's removal. The BIA affirmed.

In reversing the BIA, the court explained, looking at the statute, "that Congress did not confer the

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Recent Federal Court Decisions

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authority to terminate asylum on the Department of Homeland Security. Congress conferred that authority exclusively on the Department of Justice." "True, the regulations issued by the Department of Justice say that the asylum officer may also terminate asylum, but the statute says otherwise. We cannot apply Chevron deference when 'Congress has directly spoken to the precise question at issue,'" said the court. The court also noted that the government had offered "no reading of the statute that would authorize the Department of Homeland Security to promulgate that regulation."

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■ **Ninth Circuit Concludes that it Lacks Jurisdiction to Consider a Denial of a Motion to Reopen to Seek Prosecutorial Discretion**

In ***Vilchiz-Soto v. Holder***, __F.3d__, 2012 WL 3217487 (9th Cir. August 9, 2012) (Leavy, Hawkins, McKeown) (*per curiam*), the Ninth Circuit granted the government's motion to dismiss, holding that it was without jurisdiction, pursuant to INA § 242(g), to review the agency's denial of the motion to reopen to seek prosecutorial discretion based on "the recent order of President Obama."

On October 24, 2011, the petitioners moved the BIA to reconsider its decision denying their applications for cancellation of removal and argued that the BIA had improperly weighed their hardship evidence. Petitioners also asked for reopening so that their case could be administratively closed pursuant to President Obama's prosecutorial discretion order. On December 28, 2011, the BIA concluded that petitioners failed to allege an error of fact or law in its earlier decision and denied the motion to reopen and reconsider.

The Ninth Circuit held that it lacked jurisdiction over both the BIA's "discretionary, fact-based decision" determination that petitioners failed to demonstrate the requisite hardship and the BIA's discretionary decision not to reopen for the petitioners to pursue prosecutorial discretion based on the recent directive from President Obama. Additionally, the court dismissed the petitioners' unexhausted ineffective assistance of counsel claim.

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TENTH CIRCUIT

■ **Court Lacks Jurisdiction to Review Alien's Challenge to Discretionary Denial of Adjustment**

In ***Sosa-Valenzuela v. Holder***, __F.3d__, 2012 WL 3775976 (Briscoe, *Tymkovich*, Eagan) (10th Cir. August 31, 2012), the Tenth Circuit held that it lacked jurisdiction to consider the alien's challenge to the BIA's denial of adjustment of status as a matter of discretion.

The court also held that the BIA properly applied intervening precedent in *Matter of Brieva* to sustain DHS' appeal from the Immigration Judge's denial of a motion to reconsider his grant of § 212(c) relief. The court rejected the alien's arguments that: (1) the judge's underlying grant of relief had become "final" after 30 days when not directly appealed; (2) the BIA acted beyond its scope of review by reaching the underlying order and ruling based on an issue not raised by the parties; and (3) the application of intervening precedent was impermissibly retroactive. The court remanded for the BIA to consider the alien's statutory eligibility for § 212(c) relief in light of the Supreme Court's intervening decision in *Judulang v. Holder*.

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ELEVENTH CIRCUIT

■ **Court Lacks Jurisdiction Over a Finding that Petitioner Lacked Good Moral Character under the Catchall Provision INA § 101(f)**

In ***Jimenez-Galicia v. U.S. Att'y Gen.***, __F.3d__, 2012 WL 3264287 (11th Cir. August 13, 2012) (Barkett, *Edmondson*, Fuller), the Eleventh Circuit held that the determination by the BIA that an alien lacks good moral character under the catchall provision of INA § 101(f) is a discretionary determination not subject to judicial review.

The petitioner entered the United States unlawfully on February 1, 1990. After the petitioner was convicted twice of driving under the influence of alcohol, he was placed in removal proceedings in 2006. The IJ denied his NACARA application for failure to establish good moral character after finding that petitioner's multiple arrests and two convictions for driving under the influence outweighed any positive factors in his favor. The BIA affirmed the decision.

The Eleventh Circuit held that, while it had jurisdiction over a good moral character finding under one of the *per se* categories, it lacked jurisdiction over the BIA's discretionary good moral character determination under INA § 101(f), the "catch all" provision, noting that a good moral character finding under that section is "a matter of judgment not tightly controlled by form or hard rules." The court further observed that petitioner failed to raise a colorable legal claim or question of law over which the court would have jurisdiction.

Judge Barkett dissented and argued that the court had jurisdiction to review petitioner's eligibility for cancellation of removal because the good moral character finding under section 101(f) "has not been specifically designated as being within the Attorney General's discretion."

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This Month's Topical Parentheticals

ADJUSTMENT

■ *Matter of Akram-*, 25 I.&N. Dec. 874 (BIA Aug. 1, 2012) (holding that an alien admitted to the U.S. as a K-4 nonimmigrant may not adjust status without demonstrating immigrant visa eligibility and availability as the beneficiary of an alien relative petition filed by his or her stepparent, the United States citizen K visa petitioner; further holding that a K-4 derivative child of a K-3 nonimmigrant who married the U.S citizen K visa petitioner after the K-4 reached the age of 18 is ineligible for adjustment of status because he or she cannot qualify as the petitioner's "stepchild")

■ *Gjerjaj v. Holder,* __ F. 3d __, 2012 WL __ (2d Cir. Aug. 28, 2012) (holding that a VWP alien may not contest removal by filing an adjustment of status application after overstaying the 90-day VWP admissions period because she knowingly and voluntarily waived her right to contest removal on any basis other than asylum)

ASYLUM

■ *Castillo-Enriquez v. Holder*, __F.3d__, 2012 WL 3241959 (5th Cir. August 10, 2012) (holding that extortion by anonymous group in El Salvador who perceive applicant's family to be wealthy does not qualify for asylum, because economic extortion is not persecution and "wealthy [Salvadorians]" are not a social group; also, joining Third and Fourth Circuits in holding that applicant cannot rely on parents' residence in the US to satisfy the continuous residency requirement for TPS)

■ *Nijjar v. Holder,* __ F.3d __, 2012 WL 3104616 (9th Cir. Aug. 1, 2012) (holding that DHS improperly terminated petitioner's grant of asylum because the asylum statute gives the AG sole authority to terminate asylum; holding that regulations authorizing DHS to terminate asylum are therefore *ultra vires*)

■ *Salman v. Holder,* __ F. 3d __, 2012 WL 3155973 (8th Cir. Aug. 6, 2012) (holding that a male Israeli applicant did not establish eligibility for asylum or withholding based on fear of future death by members of an Arabic family for having testified in a murder trial against members of the family, because there was no evidence the government condones or is helpless to protect the applicant from violence by the private actors; further holding that the BIA did not violate due process in denying a MTR to submit evidence regarding blood feuds in Arabic society, where there was no showing the evidence was previously unavailable, nor any motion or showing of ineffective assistance of counsel)

■ *Liu v. Holder,* __ F. 3d __, 2012 WL 3776349 (7th Cir. Aug. 31, 2012) (holding that arrest and mistreatment of Chinese withholding applicant because of disruptive behavior in private meeting between factory management and 16 co-workers protesting large layoffs was not on account of political opinion but merely because of an economic dispute; distinguishing cases in other circuits holding that arrest for organizing large-scale, public, worker demonstrations to protest Chinese government corruption in factory lay-offs were on account of political opinion [opposition to government corruption])

■ *Beltrand-Alas v. Holder*, __F.3d__, 2012 WL 3537840 (1st Cir. August 17, 2012) (upholding denial of withholding to Salvadoran applicant because people who oppose gang membership is not a legally recognized social group because it lacks social visibility and is not sufficiently particular)

■ *Khan v. Attorney General of U.S.*, __F.3d__, 2012 WL 3290155 (3d Cir. August 14, 2012) (holding that changed country conditions exception does not apply where an alien intentionally alters own circumstances knowing that he or she has been ordered removed from the United States; also that a premature petition for review can ripen)

BIA

■ *Avila-Anguiano v. Holder,* __ F. 3d __, 2012 WL __ (6th Cir. Aug. 7, 2012) (holding that the BIA erred in concluding it lacked authority under section 237(a)(1)(H) to waive misrepresentations that occurred prior to the time of petitioner's admission; reasoning that what matters is "whether the misrepresentation rendered the alien 'inadmissible at the time of admission'")

■ *Matter of A-S-J-*, 25 I.&N. Dec. 893 (BIA Aug. 24, 2012) (holding that an IJ lacks jurisdiction to review the termination of an alien's asylum status by DHS pursuant to 8 C.F.R. § 208.24(a) (Board Member Cole dissented)).

CANCELLATION

■ *Matter of Calderon-Hernandez,* 25 I.&N. 885 (BIA Aug. 3, 2012) (holding that an applicant for cancellation of removal seeking to establish exceptional and extremely unusual hardship to his or her child is not required to provide an affidavit and other documentary evidence regarding the child's care and support upon the alien's removal if the child will remain in the United States with another parent, even if the other parent is in this country unlawfully)

■ *Nino v. Holder*, __F.3d__, 2012 WL 3264559 (5th Cir. August 13, 2012) (holding that the cancellation of removal bar "convicted of an offense under" unambiguously refers to "kinds of offenses" not specific grounds of removability)

Mojica v. Holder, __F.3d__, 2012 WL 3243381 (9th Cir. August 10, 2012) (on remand from the Supreme Court, no imputation in cancellation)

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This Month's Topical Parentheticals

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CRIMES

■ *Descamps v. United States,* __ S. Ct. __, 2012 WL 1031489, *petition for cert. granted*, No. 11-9540 (U.S. Aug. 31, 2012) (question presented is whether the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca* 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, even though most other courts of appeals would not allow it)

■ *Aguilar-Turcios v. Holder*, __F.3d__, 2012 WL 3326618 (9th Cir. August 15, 2012) (holding that military conviction for unauthorized use of government computer did not "necessarily rest" on the elements of the federal child pornography statute under the modified categorical approach)

■ *Spacek v. Holder,* __ F.3d __, 2012 WL 3079216 (8th Cir. July 31, 2012) (holding that petitioner's racketeering conviction under North Dakota law qualified as an aggravated felony under section 1101(a)(43)(J) without regard to whether the racketeering activity affected interstate or foreign commerce, as required in the federal statute, and reasoning that "interstate commerce nexuses are jurisdictional and not substantive elements of federal criminal statutes")

■ *Cabantac v. Holder,* __ F.3d __, 2012 WL 3608532 (9th Cir. Aug. 23, 2012) (affirming BIA's finding that petitioner is removable for a controlled substance offense where the amended abstract of judgment and criminal complaint together establish that he pled guilty to possession of methamphetamine)

■ *Kimani v. Holder,* __ F. 3d __, 2012 WL 3590816 (7th Cir. Aug. 22, 2012) (holding that petitioner is inadmissible for voter fraud where he registered to vote, claiming to be a US citizen, and then voted in the 2004 general election; rejecting petitioner's "entrapment by estoppel" claim because he does not contend that any public official knew that he was an alien and authorized him vote)

■ *United States v. Gomez*, __F.3d__, 2012 WL 3243512 (4th Cir. August 10, 2012) (holding that the modified categorical approach only applies to those statutory offenses in which the statute itself is divisible, such that it encompasses multiple distinct categories of behavior, and at least one of those categories meets the generic definition)

■ *United States v. Laguna*, __F.3d__, 2012 WL 3290455 (7th Cir. August 14, 2012) (affirming criminal conviction for willfully interfering with a final deportation order by failing to obtain a passport)

United States v. Powell, __F.3d__, 2012 WL 3553630 (4th Cir. August 20, 2012) (holding that Supreme Court decision in *Carachuri-Rosendo* is not retroactive)

DUE PROCESS – FAIR HEARING

■ *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (holding IJ must grant a reasonable period to seek and retain counsel; advise of the right to apply for asylum, etc., and make forms available; and consider voluntary departure at the conclusion of the proceedings even alien does not waive appeal)

■ *Vartelas v. Holder,* __ F. 3d __, 2012 WL 3156153 (2d Cir. Aug. 6, 2012) (remanding to IJ to address ineffective assistance claim in light of Supreme Court's retroactivity analysis)

■ *Keathley v. Holder,* __ F. 3d __, 2012 WL 3590818 (7th Cir. Aug. 22, 2012) (remanding for IJ to further consider whether petitioner is inadmissible for voter fraud where the IJ made no findings with respect to petitioner's claim that she properly represented herself to be an alien and, notwithstanding her representation, the state voting official allowed her to vote)

EAJA

■ *Iqbal v. Holder,* __ F. 3d __, 2012 WL 3570716 (10th Cir. Aug. 21, 2012) (affirming district court's denial of EAJA fees for failure to establish prevailing party status where the district court's remand simply instructed USCIS to determine the merits of petitioner's naturalization application, and the court did not decide any aspect of the merits or grant any relief requested in the petition)

JURISDICTION

■ *Tapia-Lemos v. Holder,* __ F. 3d __, 2012 WL 3764713 (7th Cir. Aug. 31, 2012) (dismissing PFR of ICE's denial of a motion to reopen reinstatement order for lack of jurisdiction where the motion asked ICE to stay petitioner's removal; stating that reinstatement orders are not subject to reopening because allowing reopening would undermine intent of the reinstatement statute)

■ *Jathoul v. Clinton,* __ F. Supp.2d __, 2012 WL 3126773 (D.D.C. Aug. 2, 2012) (holding that the doctrine of consular nonreviewability bars the court from considering plaintiff's challenge to the denial of her husband's visa application at the Indian consulate because she did not assert a cognizable constitutional claim that might warrant an exception to nonreviewability)

■ *Castillo v. Gillen,* __ F. Supp.2d __, 2012 WL 3133090 (D. Mass. Aug. 2, 2012) (holding that petitioner's challenge to his pre-final order detention was moot once the IJ issued a removal order and petitioner did not appeal that order to the BIA)

■ *Rivas-Melendrez v. Napolitano,* __ F.3d __, 2012 WL 3104824 (7th Cir. Aug. 1, 2012) (holding that district court lacked jurisdiction over petition-

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This Month's Topical Parentheticals

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er's claim that DHS improperly executed his removal order because: (1) 242(g) deprived the court of jurisdiction; and (2) petitioner failed to satisfy the in-custody requirement for habeas review)

■ *Jimenez-Galicia v. Attorney General*, __F.3d__, 2012 WL 3264287 (11th Cir. August 13, 2012) (court lacks jurisdiction to review GMC determination under INA § 101(f), the catch-all provision, because that determination is discretionary)

■ *Vilchiz-Soto v. Holder*, __F.3d__, 2012 WL 3217487 (9th Cir. August 9, 2012)(finding no jurisdiction to review contention that BIA abused discretion in denying MTR based on prosecutorial discretion)

MOTION TO REOPEN/RECONSIDER

■ *El-Gazawy v. Holder,* __F.3d__, 2012 WL__ (upholding denial of motion to reconsider because petitioner, who sought reconsideration based on equitable tolling, failed to show of due diligence in pursuing the ineffective assistance of counsel claim)

■ *Marinov v. Holder,* __ F.3d __, 2012 WL 3111619 (7th Cir. Aug. 1, 2012) (affirming BIA's denial of reopening which found that petitioner received proper notice of his immigration hearing because the notice of hearing was sent to his counsel; further holding that petitioner failed to properly allege a claim of ineffective assistance of counsel because he did not provide evidence that he notified opposing counsel of his allegation and afforded him an opportunity to respond)

■ *Desai v. Att'y Gen. of United States,* __ F. 3d __, 2012 WL 3570718 (3d Cir. Aug. 21, 2012) (holding that the BIA may apply the departure bar in refusing to reopen proceedings *sua sponte* and reasoning that court's prior decision invalidating the departure bar does not govern this case because a motion to reopen *sua sponte* does not implicate a statutory right)

NATURALIZATION

■ *Duran-Pichardo v. Att'y Gen. of United States,* __ F.3d __, 2012 WL 3764758 (3d Cir. Aug. 31, 2012) (holding that an individual who successfully completed his naturalization examination under oath but because his file was lost by the agency never took the oath of allegiance was removable, where ten years after completing the naturalization examination he was convicted of an aggravated felony; noting that petitioner could have applied to the district court for a hearing after the government failed to act within 120 days of his naturalization examination but failed to do so)

■ *Lau v. Holder,* __ F. Supp.2d __, 2012 WL 3108863 (D. Mass. July 31, 2012) (dismissing naturalization petition in light of pending removal proceedings against petitioner, and disagreeing with Third Circuit that it can exercise jurisdiction because petitioner is entitled to declaratory relief)

PAROLE

■ *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) (adding note that a grant of parole is never guaranteed, because at the time of the alien's return, the DHS possesses discretionary authority to determine whether parole is appropriate)

PERSECUTOR

Abdallahi v. Holder, __ F.3d __, 2012 WL 3089345 (6th Cir. July 31, 2012) (upholding BIA's determination that petitioner was inadmissible [and therefore ineligible to adjust] because he assisted in torture while serving in the Mauritanian military by voluntarily and knowingly bringing prisoners to interrogation rooms and standing guard while they were tortured; rejecting due process claim arising from the fact that the IJ who issued decision did not preside over removal hearing)

REINSTATEMENT

■ *Ortiz-Alfaro v. Holder,* __ F. 3d __, 2012 WL 3641738 (9th Cir. Aug. 27, 2012) (holding that where an alien pursues reasonable fear proceedings following reinstatement of a removal order, the reinstated order does not become final for purposes of judicial review until the reasonable fear proceeding is completed)

RES JUDICATA

■ *Dormescar v. U.S. Attorney General*, __F.3d__, 2012 WL 3328998 (11th Cir. August 15, 2015) (holding that *res judicata* is not available where removal proceedings do not involve the same " cause of action" such as where an NTA charges a ground of inadmissibility vs an NTA that charges a ground of removability based on admission)

RESCISSION

■ *Adams v. Holder,* __F.3d__, 2012 WL 3329717 (2d Cir. Aug 15, 2012) (2d Cir. August 15, 2015 (5-year limitation period for rescission of LPR status does not apply in removal proceedings or where status was obtained through consular processing)

TERRORISM

■ *Barahona v. Holder*, __F.3d__, 2012 WL__ (4th Cir. August 13, 2015) (deferring to BIA's interpretation that the material support bar does not provide for a duress or involuntariness exception)

WAIVERS

■ *Sosa-Valenzuela v. Holder,* __ F. 3d __, 2012 WL 3775976 (10th Cir. Aug. 31, 2012) (holding that the BIA had authority to reverse the IJ's grant of 212(c) relief upon its review of the

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USCIS Begins Accepting Deferred Action Requests

On August 15, 2012, USCIS began accepting requests for consideration of deferred action for childhood arrivals. On June 15, Secretary of Homeland Security Janet Napolitano announced that certain people who came to the United States as children and meet other key guidelines may request, on a case-by-case basis, consideration of deferred action.

"USCIS has developed a rigorous review process for deferred action requests under guidelines issued by Secretary Napolitano," said USCIS Director Alejandro Mayorkas. "Childhood arrivals who meet the guidelines and whose cases are deferred will now be able to live without fear of removal, and be able to more fully contribute their talents to our great nation."

Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. USCIS will review requests and make decisions on a case-by-case basis. While it does not provide lawful status or a pathway to permanent residence or citizenship, individuals whose cases are deferred as part of this process will not be removed from the United States for a two-year period, subject to renewal, and may also apply for employment authorization. (From USCIS Press Statement)

This Month's Topical Parantheticals

(Continued from page 18)

IJ's denial of DHS's motion to reconsider the 212(c) grant even where DHS did not file a timely appeal of the initial IJ order granting relief; finding that the BIA committed no legal error in reversing the IJ's grant of adjustment of status; remanding to BIA to evaluate 212(c) finding in light of the Supreme Court's ruling in *Judulang*)

■ ***Waldron v. Holder,*** __ F.3d __, 2012 WL 3156002 (8th Cir. Aug. 6, 2012) (holding that the BIA reasonably concluded petitioner's conviction for recklessly causing serious injury to another was a "violent or dangerous crime" for purposes of 8 C.F.R. § 1212.7(d), and petitioner was thus required to meet the heightened hardship standard under that regulation to qualify for a 212(h) waiver; however, remanding case because the BIA impermissibly engaged in factfinding when evaluating whether petitioner met the hardship requirement)

■ ***Corpuz v. Holder,*** __ F. 3d __, 2012 WL __ (9th Cir. Aug. 31, 2012) (holding that the BIA erred in crediting all of petitioner's time in psychiatric pre-trial civil confinement [pending a determination of his competence to stand trial] toward his "term of imprisonment" for purposes of calculating his threshold eligibility for 212(c) relief without taking into account "constructive good time credit" from his period of pre-trial civil confinement)

■ ***Poveda v. United States Att'y Gen.,*** __ F. 3d __, 2012 WL 3655293 (11th Cir. Aug. 27, 2012) (upholding BIA's interpretation that a removable alien is statutorily eligible for a 212(h) waiver only if the alien is seeking readmission at the border or, if the alien is within the US, concurrently applies for adjustment of status) (Judge Martin dissented)

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

■ **October 22-25, 2012.** OIL's 18th 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. Attorneys from our client agencies and Assistant United States Attorneys are invited to attend.

■ **November 29, 2011.** Brown Bag Lunch & Learn on "Transgender Issues" with Civil Rights attorney, Sharon McGowan.

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

OIL Fall Associates

Caroline Clark (University of Maryland School of Law, 3L), ***Allison McDonnell*** (University of Georgia, School of Law, 3L), ***Victoria Braga*** (The George Washington University Law School, 2L), ***Heba Tellawi*** (American University, Washington College of Law, 2L), ***Kevin Gregg*** (Boston University, School of Law, 3L), ***Dave McConnell*** (Director, OIL), Negar Mortazavi (Boston University, School of Law, 3L), ***Marina Pantchenko*** (Golden Gate University, School of Law, 2L), ***Abby Onaghise*** (Catholic University, Columbus School of Law, 2L), ***Jessica O'Connell*** (George Mason University, School of Law, 3L), ***Harini Srinivasan*** (American University, Washington College of Law, 2L), ***Jameson Fox*** (The George Washington, University Law School 2L), ***Britania Smith*** (Bowie State University, M.P.A. Candidate), ***Daniel Honberg*** (Georgetown University, Law Center, 2L), ***Michelle Latour*** (Deputy Director, OIL).

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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