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

Immigration Litigation Bulletin

Vol. 17, No. 2 FEBRUARY 2013

LITIGATION HIGHLIGHTS

Inside

Ninth Circuit Holds That it Lacks Jurisdiction if Extraordinary Circumstances Facts are Disputed

In *Gasparyan v. Holder*, __ F.3d __, 2013 WL 617075 (9th Cir. Feb. 20, 2013) (*Wallace,* Farris, Bybee*)*, an Armenian domestic-abuse survivor argued that under 8 U.S.C. § 1158(a)(2)(D), "extraordinary circumstances" excused her untimely asylum application. Her delayed filing was allegedly caused by mental health issues, but she also testified that language and money problems kept her from applying sooner. The BIA resolved the factual dispute about the filing delay's cause, and found that the primary reason was actually money and language issues, which were not extraordinary. Thus, the agency granted withholding of removal and Convention Against Torture protection, but denied asylum as untimely.

On appeal, Gasparyan challenged the adverse extraordinary circumstances finding, arguing that her mental health issues were extraordinary circumstances that caused the filing delay. For the first time in a published decision, the court held that because the facts underlying the extraordinary circumstances claim were disputed — here, mental health issues versus language and money problems — the court lacked jurisdiction to review the extraordinary circumstances determination. *See* 8 U.S.C. § 1158(a)(3); *Husyev v. Holder*, 528 F.3d 1172, 1178 (9th Cir. 2008).

Gasparyan also argued that the BIA erred in failing to apply a three-part test contained in 8 C.F.R. § 1208.4(a)(5). That regulation provides, in part, that "extraordinary circumstances" may excuse an untimely

(Continued on page 4)

"Discretionary Status" Versus "Discretionary Relief": A Due Process Distinction, But What's the Difference?

After the close of testimony the IJ who presided over Mohamed Abdallahi's hearing left the immigration court, so another IJ issued the decision denying status adjustment. Abdallahi argued that this IJ switch violated his Due Process right to a fundamentally fair hearing. The Sixth Circuit's resolution of this issue raised many questions for textualist observers of Due Process jurisprudence in immigration law. *See Abdallahi v. Holder*, 690 F.3d 467 (6th Cir. 2012).

The Sixth Circuit recognized a Due Process right to a fundamentally fair hearing, despite apparently acknowledging that Abdallahi lacked a liberty interest in discretionary relief. The Circuit has long accepted the government's no-liberty-interest-so-no-Due-Process argument. So to nevertheless find a Due Process right without the requisite liberty interest, the court stated that "the AG conflates 'discretionary relief' with 'discretionary status.'" The court then implied that Abdallahi had a liberty interest in "discretionary status," although it did not say why, or explain what "discretionary status" is.

(Continued on page 2)

"Discretionary Status" Versus "Discretionary Relief": A Due Process Distinction

(Continued from page 1)

This Note argues that the court's unexplained "discretionary status"-versus-"discretionary relief" dichotomy raises troubling questions that the government must be prepared to answer. This Note also asks why the Sixth Circuit reached a constitutional Due Process issue at all. Consistent with the separation-of-powers and constitutional avoidance doctrines, courts and practitioners should resolve immigration hearing procedural fairness claims on regulatory and statutory analysis alone. Courts should only reach constitutional questions if the alien argues that the statutes or regulations are constitutionally inadequate. Indeed, as discussed below, the *Abdallahi* court resolved the case with a straightforward regulatory analysis — it found that the IJ complied with the IJ-switching regulation.

Courts should only reach constitutional questions if the alien argues that the statutes or regulations are constitutionally inadequate.

I. The Fateful IJ Switch

In 2005, the government charged Abdallahi with overstaying his visa; Abdallahi conceded removability and sought status adjustment. After testimony closed but before issuing a decision, presiding IJ Grant left the immigration court; the case was transferred to IJ O'Leary. Regulations specify a procedure for transferring a case to another IJ: "The new [IJ] shall familiarize himself or herself with the record . . . and shall state . . . that he or she has done so." Abdallahi, however, requested a new hearing. IJ O'Leary denied the request, twice stated that he had reviewed the record, and denied status adjustment. The Board affirmed.

Abdallahi's review petition argued that the IJ switch violated his: (1) statutory and regulatory right to present evidence; and (2) constitutional Due Process right to a fair hearing, especially given that the IJ decision contained factual errors.

II. Procedural fairness in immigration proceedings: Constitutional "Due Process" versus statutory and regulatory "due process"

This Note distinguishes between constitutional Due Process, on the one hand, and statutory and regulatory due process, on the other. Due Process is that process, if any, which the Constitution requires. Lowercase due process, by contrast, is the process required by statute and regulation. The concepts overlap, but are not coterminous: A regulation or statute might provide more, the same, or less process than the Constitution requires.

But INA provisions are rarely struck on Due Process grounds. Thus, if the alien received the process due under statute and regulation — and as long as the alien does not argue that the statutes or regulations are constitutionally inadequate — then the alien received constitutional Due Process.

A. Constitutional Due Process

The Fifth Amendment's Due Process clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Supreme Court has held that procedural Due Process only applies to deprivations of liberty and property interests; to have a protectable interest in a thing, a person must "have a legitimate claim of *entitlement* to it." Thus, for instance, as the Supreme Court also explained, a prisoner seeking a pardon or a sentence commutation lacks a cognizable interest in that relief. So to determine if an alien has a liberty interest during a removal hearing, the proper inquiry is whether the favorable action sought is truly an entitlement.

Given the ramifications of removing a person who is not removable, this Note argues that people have a liberty interest during a removal hearing's removability phase: Asking whether a person is removable is conceptually identical to asking whether she is entitled to stay in the U.S.

But once removability is established, a new kind of hearing begins. Determining whether the alien has a Due Process right during the relief phase turns on whether the alien has a liberty interest in what she seeks. And this depends on whether the requested relief or protection is mandatory or discretionary.

Withholding of removal, for instance, is mandatory; the government has no discretion to deny withholding to qualifying aliens, so aliens seeking withholding may arguably have a liberty interest and may be entitled to Due Process. *But see* INA § 241(h). Cancellation of removal, by contrast, is discretionary; the government can deny this relief in any event, so aliens seeking only cancellation lack a liberty interest. Further, as the Supreme Court has explained, the right to apply for discretionary relief does not itself create a liberty interest.

Consistent with these principles, the Sixth Circuit has held that "[t]he failure to be granted discretionary relief does not amount to a deprivation of a liberty interest . . . ." Thus, the court has found no liberty interest (so no Due Process rights) in the denial of a continuance pending a visa petition adjudication, the denial of a motion to remand for adjudication of a status-adjustment application, the denial of voluntary departure, and adverse evidentiary rulings. Although the court has not issued a published decision concluding that there is no liberty interest in status adjustment, it has so assumed in unpublished cas-

(Continued on page 3)

"Discretionary Status" Versus "Discretionary Relief"

(Continued from page 2)

es. Moreover, the court has, in a published case, rejected for lack of a liberty interest a Due Process claim arising out of a continuance denial where the alien ultimately sought status adjustment. Further, at least seven other circuits hold that status adjustment is discretionary relief in which aliens lack a liberty interest or Due Process rights. And until *Abdallahi*, it seemed that the Sixth Circuit would follow suit.

B. Statutory and regulatory due process, and avoiding the Constitution

Although aliens seeking only discretionary relief lack constitutional Due Process rights in a removal hearing's relief phase, they are not without statutory and regulatory fairness guarantees. For instance, aliens have the right to reasonable notice of the removal charges, representation at no government expense, and information on free or low-cost legal services and appeal rights; they also have the right to present evidence, cross-examine government witnesses, and examine and object to government evidence.

Many claims advanced by aliens as Due Process claims are in fact best understood as arguments about whether the alien received a statutory or regulatory right. For instance, imagine that an IJ cut off direct examination because counsel asked too many leading questions. The alien might argue, "Due Process violation." But rather than pose the constitutional question in the first instance, it is sufficient — and required — to merely ask whether the IJ violated the alien's regulatory right to present evidence. This is the heart of constitutional avoidance.

Courts should avoid Constitutional rulings; the Constitution is precious, so judges should exercise care before interpreting it. Further, separation-of-powers principles underscore the special importance of constitutional avoidance in immigration matters. As the Supreme Court explained, the immigration power "[i]s a fundamental sovereign attribute exercised by the . . . political departments largely immune from judicial control." "[O]ver no conceivable subject is the legislative power of Congress more complete."

Thus, the political branches have a particularly strong interest in immigration decisions. A judicial resolution of a procedural fairness claim that relies on constitutional interpretation in the first instance excludes the other coequal branches of government from the conversation. But when courts view a claim as a statutory or regulatory challenge, the other branches effectively get a say in the matter. If they disagree with the court, they can clarify the scope of existing procedural rights, create new rights, or even remove rights they no longer wish to bestow.

Respect for coequal branches of Government should lead courts to resolve procedural fairness questions, where often possible, on statutory or regulatory grounds, rather than on constitutional ones.

So understood, respect for coequal branches of government should lead courts to resolve procedural fairness questions, where often possible, on statutory or regulatory grounds, rather than on constitutional ones. This Note now turns to the Sixth Circuit's resolution of Abdallahi's procedural fairness claims.

III. Is there a correlation between the Fifth Amendment and whether the agency complied with a regulation?

A. No liberty interest in discretionary relief, so why Due Process?

Abdallahi claimed that the IJ switch violated his constitutional right to a fair hearing and his statutory right to present evidence. The Government argued, correctly, that Abdallahi lacked a liberty interest in status adjustment — discretionary relief — and so had no Due Process rights, and anyway, the IJ complied with the IJ-switching regulation. Based on the weight of authority, an observer would have predicted that the court would find that Due Process did not apply because Abdallahi lacked a liberty interest in discretionary relief.

Instead, the court recognized a Due Process right:

> [T]he AG conflates "discretionary status" with "discretionary relief." While it is true that "the failure to be granted discretionary relief . . . does not amount to a deprivation of a liberty interest," we have also held that the Fifth Amendment's Due Process Clause mandates that removal hearings be fundamentally fair . . . .

The court provided no explanation for its discretionary relief / discretionary status dichotomy; nor did it explain why Due Process applied where the claimant lacked a liberty interest in discretionary relief. In future litigation, the court will be asked to explain what "discretionary status" is. Likewise, in future litigation a party will likely ask the court to reconcile its "discretionary relief / discretionary status" dichotomy with cases stating that when an alien seeks discretionary relief, the alien lacks a liberty interest — and so lacks Due Process right.

B. Why reach a constitutional issue if regulatory analysis suffices?

After recognizing a Due Process right to a fundamentally fair hearing, the court turned to whether the IJ-switching procedure violated procedural fairness.

(Continued on page 4)

A Due Process Distinction

(Continued from page 3)

Although acknowledging the absence of a liberty interest in discretionary relief, the court appeared to perform a Due Process analysis anyway, inquiring whether Abdallahi showed a violation and prejudice. The court found neither, concluding that IJ O'Leary complied with the IJ-switching regulation and acted neutrally, and that although his decision contained factual errors, the errors were immaterial. The court did not state whether its regulatory analysis wholly explained — or merely contributed to — its conclusion that the Due Process right that the court identified was satisfied.

The court did not state whether its regulatory analysis wholly explained — or merely contributed to — its conclusion that the Due Process right that the court identified was satisfied.

Moreover, because the Sixth Circuit resolved the case on regulatory analysis, future cases will likely ask whether the court's statements about "discretionary status" and Due Process were necessary to the court's holding that the IJ did not violate the regulation. Abdallahi claimed that the IJ switch violated his statutory and regulatory right to present evidence, but, as the court properly concluded, the IJ followed the IJ-switching regulation, so Abdallahi received the regulatory process he was due. Because the court apparently found that its regulatory analysis disposed of Abdallahi's fairness claims, it is unclear why the court addressed whether the hearing also complied with constitutional standards.

Conclusion and Recommendations

Abdallahi sought only status adjustment — discretionary relief in which he lacked a liberty interest. Absent a liberty interest, the Sixth Circuit did not explain why it recognized a "fundamental fairness" Due Process right, other than to suggest that there may be a distinction between "discretionary relief" and "discretionary status." *Abdallahi* leaves open what "discretionary status" is and how it intersects with liberty interest and Due Process jurisprudence.

Even assuming that Due Process applies, the court did not explain why it engaged in constitutional analysis at all, where the court resolved the procedural fairness claim by finding that the IJ complied with the regulations. Future litigation will address the relationship between regulatory compliance and the Due Process right identified by *Abdallahi*.

Abdallahi raised many questions for future cases. Meanwhile, consistent with separation-of-powers concerns, this Note recommends that courts restrict immigration hearing procedural fairness analysis to whether the agency complied with statutes and regulations. Courts should only reach Due Process if aliens raise constitutional challenges to the regulatory regime itself by identifying process that they believe was both due and missing.

Practitioners, too, have a role to play. By cloaking statutory and regulatory procedural fairness claims in constitutional garb, aliens' attorneys cheapen the meaning of Due Process. Attorneys should restrict Due Process challenges to those rare circumstances where they believe that the agency applied the regulation, but the regulatory regime is constitutionally inadequate.

As for government attorneys — and Board members and immigration judges — care should be placed on identifying procedural fairness claims unnecessarily characterized as constitutional. If a statutory or regulatory analysis suffices, say so, and say why reaching a constitutional issue is inappropriate. Together, lawyers and judges contribute to the exposition of Due Process jurisprudence. The law develops best when stakeholders recall Justice Marshall's cautionary words: "We must never forget that it is a *constitution* we are expounding."

By Benjamin Mark Moss, OIL
☎ 202- 307-8675

Jurisdiction Over Extraordinary Circumstances Determinations

(Continued from page 1)

asylum application if: (1) the alien did not intentionally create the circumstances; (2) the circumstances were directly related to the filing delay; and (3) the delay was reasonable.

The Ninth Circuit decided this first-impression issue, holding that the 8 C.F.R. § 1208.4(a)(5) "three-part test" does not determine whether extraordinary circumstances exist. Rather, before assessing the three factors, the Board must first determine whether the circumstances of the filing delay were, in fact, extraordinary. The court held that because the Board found no extraordinary circumstances, it did not need to reach the three-part test.

Alternatively, the court held that the BIA applied the 8 C.F.R. § 1208.4(a)(5) three-part test implicitly. In rejecting Gasparyan's claim based on matters linked to two of the test's conjunctive prongs, the BIA adequately provided reasons corresponding to the regulatory factors.

Contact: Benjamin Mark Moss, OIL
☎ 202-307-8675

FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On October 6, 2012, the Supreme Court heard 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.

Contact: Manning Evans, OIL
☎ 202-616-2186

Motion to Reopen — Deadline

On February 19, 2013, the government filed responses supporting petitions for en banc rehearing in ***Avila-Santoyo v. Att'y Gen.***, 11th Cir. No. 11-14941, and ***Ruiz-Turcios v. Att'y Gen.***, 700 F.3d 1270 (11th Cir. 2012). The government responses agreed with the petitioners that the agency filing deadline for a motion to reopen a removal proceeding is not "mandatory and jurisdictional," and the court should reconsider its precedents holding that equitable tolling is foreclosed by that jurisdictional deadline. The government argued that the question of the applicability of equitable exceptions to the deadline should then be remanded to the Board to determine in the first instance.

Contact: Patrick Glen, OIL
☎ 202-305-7232

Asylum — Particular Social Group

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

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

Asylum — Corroboration

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

Contact: John W. Blakeley, OIL
☎ 202-514-1679

Convictions — Modified Categorical Approach

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

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

Convictions — Modified Categorical Approach

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

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

Consular Nonreviewability

The government filed a petition for rehearing en banc in ***Rivas v. Napolitano***, 677 F.3d 849 (9th Cir. 2012), which held that the district court had jurisdiction to review a consular officer's failure to act on the alien's request for reconsideration of the visa denial. The petition argues that the longstanding doctrine of consular nonreviewability recognizes that the power to exclude aliens is inherently political in nature and that consular decisions and actions are generally not, therefore, appropriately subject to judicial review. The court ordered appointed pro bono counsel, who responded to the government petition on December 26, 2012.

Contact: Craig A. Defoe
☎ 202-532-4114

Updated by Andy MacLachlan, OIL
☎ 202-514-9718

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Threats and Face-Slapping of Ecuadorian Educator Did Not Rise to the Level of Persecution

In *Guaman-Loja v. Holder*, __ F.3d __, 2013 WL 491984 (1st Cir. February 7, 2013) (Lynch, Boudin, *Lipez*), the First Circuit concluded that mistreatment and threats against the petitioner were not so severe or frequent as to rise to the level of persecution.

Petitioner, a native and citizen of Ecuador, entered the United States without inspection in 2003 and was subsequently placed in removal proceedings. Petitioner submitted an application for asylum, claiming that she was threatened and, in one instance, slapped by individuals who opposed her work advocating for indigenous peoples and teaching them how to read and write. The IJ found that the harm petitioner suffered did not rise to the level of persecution. The BIA upheld the IJ's decision.

The First Circuit agreed that the threats and limited mistreatment did not rise to the level of persecution. "Even assuming that these attacks were connected to her family members' political affiliations, the ability of petitioner and her family members to avoid harassment for such a lengthy period of time undermines any inference of persecution," explained the court. The court also concluded that petitioner failed to identify an independent well-founded fear of persecution based on her speculative belief that her brother died in a car accident because of his political activities.

The court further held that petitioner did not demonstrate that the government was unable or unwilling to control the individuals who harassed petitioner to deter her from educating indigenous persons. The court reviewed the Department of State report and determined that it provided sound basis for the BIA's findings, "as the discrimination against indigenous individuals in Ecuador is offset at least in part by the community's growing political strength and various reforms designed to make the nation's society more open to people of indigenous descent."

Contact: Tiffany Walters, OIL
☎ 202-532-432

SECOND CIRCUIT

Second Circuit Holds Third Degree Criminal Sale of a Controlled Substance Under New York Law Is an Aggravated Felony

In *Pascual v. Holder*, __ F.3d __, 2013 WL 599519 (2d Cir. Feb. 19, 2013) (Jacobs, Kearse, Carney)(*per curiam*), the Second Circuit concluded that the elements of N.Y. Penal Law § 220.39 would be punishable under 21 U.S.C. § 841(a)(1) and thus constituted a "drug trafficking crime" aggravated felony.

The petitioner, a citizen of the Dominican Republic, entered the United States as an LPR in 1993. In 2003 he was charged with removal under INA § 237(a)(2)(B)(i), by reason of a 2000 Connecticut state conviction for cocaine possession. In December of 2011, he was served with an additional charge under INA § 237(a)(2)(A)(iii) by reason of an aggravated felony, citing a 2008 New York state conviction for third-degree criminal sale of a controlled substance, cocaine, in violation of NYPL § 220.39(1). Petitioner conceded removability as an alien convicted of a controlled substance offense, but challenged the claim that his New York conviction constituted an aggravated felony. The IJ and the BIA found that the NY conviction was an aggravated felony and therefore he was statutorily ineligible for cancellation of removal.

The Second Circuit, applying the categorical approach, rejected petitioner's argument that offering to sell controlled substances is not a "drug trafficking crime." The court held that "distribution" under 21 U.S.C. § 841(a)(1) includes not only sale but also actual, constructive or attempted transfer of controlled substances. Consequently, the court ruled that the petitioner's aggravated felony conviction deprived the court of jurisdiction and declined to address petitioner's remaining challenges to his removal order.

Contact: Benjamin Mark Moss, OIL
☎ 202-307-8675

FIFTH CIRCUIT

Fifth Circuit Holds De Novo Naturalization Claim May Be Disposed of on Summary Judgment

In *Kariuki v. Tarango*, __ F.3d __, 2013 WL 644469 (5th Cir. Feb. 21, 2013) (*Stewart*, Garza, Elrod), the Fifth Circuit, in a matter of first impression, joined the Second Circuit in finding that in a suit challenging the denial of a naturalization application, the district court's hearing *de novo*, requested under INA § 310(c), may be decided on summary judgment under FRCP 5, without an evidentiary hearing.

The petitioner entered the United States on a six-month visitor visa. He never left and, in the ensuing years, misrepresented his immigration status repeatedly. In 2000, petitioner enlisted in the U.S. Army by means of a false passport stamp denoting permanent residency. He was discharged for "fraudulent enlistment." In 2001, petitioner pleaded guilty to violating 18 U.S.C. § 911. He had violated the statute by checking the box on an INS Form I–9 which attested, under penalty of perjury, that he was a "citizen or national of the United States." In 2004 petitioner applied for naturalization and claimed under oath that he never had falsely represented himself as a U.S. citizen. USCIS denied his application finding that he was not "a

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)
person of good moral character," as required by INA § 316(a).

Petitioner then challenged the USCIS denial in the district court. In July of 2011, during a deposition he again claimed under oath that he never had falsely represented himself as a U.S. citizen. The government then moved for summary judgment and in response petitioner sought an evidentiary hearing. The district court granted the motion because of among other reasons, petitioner's continuing denial that he had never falsely represented himself as a U.S. citizen.

The Fifth Circuit affirmed the district court's consideration of conduct occurring outside the one-year period specified for applicants under the military naturalization statute, in order to determine the petitioner's good moral character. The court determined that evidence of petitioner's bad prior conduct was relevant to ruling on his naturalization application, and petitioner needed to rebut it with sufficiently probative evidence of good present conduct to survive summary judgment. Moreover, the court also concluded that petitioner's self-serving, conclusory affidavits of good conduct were, without more, not sufficient to "create a genuine issue of material fact in the face of conflicting probative evidence."

Contact: Gisela Westwater, OIL-DCS
☎ 202-532-4174

SIXTH CIRCUIT

■ Sixth Circuit Holds that Conspiracy to Traffic in Identification Documents Constitutes a Crime Involving Moral Turpitude

In *Yeremin v. Holder*, __ F.3d __, 2013 WL 535755 (6th Cir. Feb. 14, 2013) (*Moore*, Cook, Bertelsman), the Sixth Circuit upheld the BIA's determination that under the categorical approach, a conviction for conspiracy to traffic in fraudulent identification documents in violation of 18 U.S.C. § 1028(a)(3) constitutes a CIMT.

The petitioner, a Russian citizen who lawfully entered the United States on February 3, 1999, had been indicted for his alleged participation in a "scheme to assist others to fraudulently obtain Michigan driver's licenses using other fraudulent identification documents," and subsequently pleaded to a single count under 18 U.S.C. § 1028(f), for conspiracy to traffic in fraudulent identification documents in violation of 18 U.S.C. § 1028(a)(3). Petitioner was sentenced to five months of imprisonment followed by two years of supervised release. Both the IJ and the BIA determined that petitioner's conviction was for an offense that inherently involved fraud, and thus was a CIMT.

"Once nonreceipt [of a notice of hearing] is attested in an affidavit and there is no conclusive evidence of evasion, the alien is entitled to an evidentiary hearing."

The court further rejected petitioner's argument that the IJ had erred by looking to the indictment to determine whether the conviction was for a CIMT. The court explained that both the IJ and the BIA applied the categorical approach by focusing on the language of the statute and concluding that the "inherent nature of the underlying offenses " clearly involved fraud.

Contact: Rachel Browning, OIL
☎ 202-532-4526

SEVENTH CIRCUIT

■ Seventh Circuit Holds that Alien Who Does Not Receive a Notice of Hearing Is Entitled to an Evidentiary Hearing

In *Smykiene v. Holder*, __F.3d__, 2013 WL 514556 (7th Cir. Feb. 13, 2013) (*Posner*, Flaum, Sykes), the Seventh Circuit held that the IJ and BIA erred in denying the petitioner's motion to reopen her in absentia removal order by improperly equating the government's proper service of notice of the hearing date with the petitioner's receipt of such notice. "Once nonreceipt is attested in an affidavit and there is no conclusive evidence of evasion, the alien is entitled to an evidentiary hearing," the court ruled.

The petitioner, a Lithuanian national, entered the United States in 1995 on a visitor's visa. Six months after it expired, in April 1996, she was arrested by U.S. Border Patrol officers in upstate New York. She was not jailed, but the arresting officers gave her an order to show cause why she should not be deported and also told her to provide them with her address. She gave the address of an apartment house owned or leased by her employer where she lived with five other Eastern European women, all of whom, like her, worked as maids. On July 22, 1996, the Immigration Court sent by certified mail to the address that petitioner had given that her hearing before the court would be held on December 11. The Postal Service returned the mail to the sender with the notation "Attempted—Not Known," which means that delivery was attempted but that the addressee was not known at the address to which the letter was delivered. On December 11, when petitioner did not appear at her hearing, the IJ ordered her deported in absentia.

Petitioner subsequently married an LPR who is now a U.S. citizen. On November 23, 2010, immigration officers showed at her home to execute the 14-year old order of removal. Petitioner then filed a motion to reopen, with an affidavit, in which she swore that she had not received the notice and that at the time she was handed the order to show cause she couldn't understand English.

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

In reversing the denial of the motion to reopen, the court explained that the IJ had "confused notice with receipt, as well as overlooking our statement in *Joshi v. Ashcroft*, 389 F.3d 732 (7th Cir. 2004), that an affidavit of nonreceipt is evidence of nonreceipt." Here, said the court, petitioner "concedes that proper notice was sent; the government agrees that it was not received; so the only question is whether she evaded receipt. Once nonreceipt is attested in an affidavit and there is no conclusive evidence of evasion, the alien is entitled to an evidentiary hearing."

Contact: Melissa Lott, OIL
☎ 202-532-4603

■ **Seventh Circuit Rejects for Lack of Prejudice Petitioner's Claim That IJ Violated His Procedural Rights under the INA by Deciding Entire Case, Rather Than Transferring Portion of Case to Another Immigration Court**

In ***Boadi v. Holder***, __ F.3d __, 2013 WL 452506 (7th Cir. February 7, 2013) (Posner, *Flaum*, Williams), the Seventh Circuit recognized that it generally lacked jurisdiction to review the denial of the petitioner's application for a good-faith marriage waiver under INA § 216(c)(4)(B). The court further held that any errors in the IJ's determinations regarding venue, witness testimony, and continuances were harmless because the petitioner failed to demonstrate prejudice.

The petitioner, a citizen of Ghana, married a United States citizen and subsequently applied to adjust his status to that of a conditional permanent resident. In 2009, DHS terminated petitioner's legal status after discovering he may have lived with his ex-wife during his second marriage and could not identify his current wife's children or her address. The petitioner and his wife divorced and he requested a good-faith marriage waiver. After petitioner appeared *pro se* and attempted to explain the discrepancies in his adjustment application, the IJ found him not credible and denied his request for a waiver. The BIA affirmed.

The Seventh Circuit rejected petitioner's due process claim related to (1) the IJ's decision to not change venue, (2) the petitioner's inability to find counsel after a continuance, and (3) the fact that petitioner was required to conduct cross-examinations, because of a "glaring absence of prejudice." The court also concluded that it lacked jurisdiction to consider petitioner's challenges to the IJ's weighing of the evidence and adverse credibility determination under both INA § 242(a)(2)(B) and INA § 216.

"The BIA reasonably determined that the single conversation with a non-supervisory police officer in the hospital did not mean that the government was unable or unwilling to protect [petitioner]."

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

■ **Seventh Circuit Upholds Agency Finding That Alien Failed to Show Government's Inability or Unwillingness to Protect Him**

In ***Vahora v. Holder***, __ F.3d __, 2013 WL 656477 (7th Cir. Feb. 25, 2013) (Manion, Kanne, *Williams*), the Seventh Circuit concluded that substantial evidence supported the denial of asylum to an Indian applicant who failed to show that India's government was unable or unwilling to protect him from persecution by private actors.

The petitioner, a citizen of India and a Muslim, claimed that in 2002 a train caught fire near where he lived. Many Hindu pilgrims and activists were killed, and violence between Hindus and Muslims followed. Petitioner testified that he and several Muslim friends were shot in the days after the train fire by local Hindu religious or political leaders. Petitioner claimed that a police officer visited him in the hospital and advised him to tell people that he was shot randomly during a police fight. Petitioner never sought help from any authorities but claimed that these persons continued to pursue him throughout India in the four years he remained there.

Although the IJ determined that petitioner's story was somewhat implausible, the IJ did not make an adverse credibility finding but found that petitioner had not presented a cognizable claim of past persecution or shown that he had a well-founded fear of future persecution because he did not demonstrate that the Indian government was unable or unwilling to protect him. On appeal, the BIA issued its own opinion but also ruled that petitioner failed to show that he suffered past persecution or that he had a well-founded fear of future persecution by a group that the government is unable or unwilling to control.

In upholding the BIA's ruling, the court explained that although police apathy can indicate an unwillingness to provide protection, "the BIA reasonably determined that the single conversation with a non-supervisory police officer in the hospital did not mean that the government was unable or unwilling to protect [petitioner]." Moreover, the court noted that petitioner "never sought and been refused police assistance nor had he ever made a report to the police or government authorities of what he now claims happened to him."

Contact: David Schor, OIL
☎ 202-305-7190

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

■ **Seventh Circuit Holds It Lacks Jurisdiction to Review the Denial of a Motion for Continuance**

In *Moral-Salazar v. Holder*, __ F.3d __, 2013 WL 717060 (7th Cir. Feb. 28, 2013) (*Manion*, Kanne, Tinder), the Seventh Circuit held that, under INA § 242(a)(2)(C), it lacked jurisdiction to review the denial of a criminal alien's motion for a continuance.

The petitioner, a citizen of Ecuador, was placed in removal proceedings because of his multiple criminal convictions, including unlawful use of a weapon and sexual abuse of a minor. The IJ granted five continuances, four of which allowed petitioner to pursue state-court post-conviction proceedings seeking to set aside his guilty plea for sexual abuse of a minor. After petitioner informed the IJ that the state criminal court dismissed his petition, the IJ denied his request for another continuance and ordered his removal. The BIA denied the appeal and denied his request for additional continuances.

The court held that § 242(a)(2)(C) is "an explicit jurisdictional bar on reviewing 'any final order of removal' includes prior procedural orders like a motion for continuance."

The court held that § 242(a)(2)(C) is "an explicit jurisdictional bar on reviewing 'any final order of removal' includes prior procedural orders like a motion for continuance." Accordingly, the court declined to extend *Kucana v. Holder*, 558 U.S. 233 (2010), to removal orders where an alien has been convicted of a crime covered by the jurisdictional bar in subsection (C). The court, however, stated that nothing in its opinion, "should be understood to preclude judicial review of a denial of the exceptional remedy of deferral of removal under CAT, which bars its signatories from returning a person to a country where he is likely to be tortured."

Contact: Wendy Benner-León, OIL
☎ 202-305-7719

EIGHTH CIRCUIT

■ **Failure to Indict Petitioner for Identity Theft Crime Within Forty-Eight Hours of Arrest Violates Her Fourth Amendment Rights But Causes No Prejudice**

In *United States v. Chavez*, __ F.3d __, 2013 WL 440097 (8th Cir. February 6, 2013) (Wollman, Bye, *Benton*), the Eighth Circuit held that ICE officials violated the petitioner's Fourth Amendment rights by failing to indict her within forty-eight hours of her arrest, but concluded that dismissal of the charges was not appropriate because petitioner failed to demonstrate any prejudice.

DHS investigated all I-9 forms at Nebraska Beef, Inc., and subsequently interviewed employees with possibly suspect forms. On May 3, 2011, after petitioner refused to answer questions during the interview, DHS arrested her without warrant for identity theft and an immigration offense. On May 20, 2011, petitioner was indicted for the identity theft crime. Petitioner moved to dismiss because the government failed to indict her within forty-eight hours of her arrest pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure. The district court found that Rule 5(a) did not apply to petitioner's arrest for immigration violations since it was civil in nature and denied the motion to dismiss.

The Eighth Circuit reversed the lower court and found that petitioner was subjected to a criminal arrest because the arresting officer only had probable cause as to the identity theft crime sufficient to conduct a warrantless arrest. By contrast, the court noted that the arresting officer had only reasonable suspicion as to the immigration violation. The court held, however, that dismissing the charges was not an appropriate remedy because petitioner could not show prejudice and, even if she could, the correct remedy would be suppression of statements made during the period of unnecessary delay between the arrest and the indictment.

Contact: Frederick Franklin, AUSA
☎ 202- 402-661-3700

NINTH CIRCUIT

■ **Ninth Circuit Holds That *Matter of Lozada*'s Bar Complaint Requirement Is Hortatory and Orders Reopening of Case Where Attorney Admitted Failure to File Application for Relief**

In *Correa-Rivera v. Holder*, __ F.3d __, 2013 WL 440647 (9th Cir. February 6, 2013) (*Kozinski*, Reinhardt, Thomas), the Ninth Circuit held that the BIA abused its discretion in denying petitioner's motion to reopen for failure to comply with the requirement in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), that a motion alleging ineffective assistance of counsel "should reflect whether a [bar] complaint has been filed," because the petitioner's counsel did not include proof that the bar complaint (a copy of which was included in the motion) was received by the state bar.

Petitioner illegally entered the United States almost thirty years ago and surrendered to DHS in 2006. After petitioner indicated his intent to apply for cancellation of removal, the

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

IJ ordered him to file his application no later than April 6, 2007. Petitioner's counsel failed to file the application and, almost six months after the deadline, the IJ found that petitioner abandoned his application. Petitioner appealed to the BIA and alleged ineffective assistance of counsel and the BIA affirmed the IJ's decision.

"Nothing in the statute or elsewhere suggests that Congress intended that the reinstatement provision would not apply to aliens who were able to dupe border officials into thinking that they had authorization to enter, or that Congress otherwise intended to reward fraudulent behavior."

The Ninth Circuit concluded that the BIA erred in faulting petitioner for failing to present evidence that he actually filed the complaint with the state bar because his motion stated that he filed the complaint. It also held that the petitioner's lawyer's admitted failure to file his cancellation application prejudiced him.

Contact: Nairi Gruzenski, OIL
☎ 202-305-7601

■ **Reinstatement Provision in 8 U.S.C. § 1231(a)(5) Applies to Aliens Whose Entry into the United States Was Procedurally Regular but Substantively Unlawful**

In *Tamayo-Tamayo v. Holder*, __ F.3d __, 2013 WL 718455 (9th Cir. Feb. 28, 2013) (Noonan, *Graber*, Fisher), the Ninth Circuit held that the INA's reinstatement provision applies when an alien's reentry is substantively unlawful, even if it is procedurally regular.

The petitioner, a Mexican citizen, initially entered the United States in 1973. In 1989, the INS ordered him removed to Mexico and removed him that same day. Petitioner reentered the United States without permission. In 1993, the government again ordered petitioner removed to Mexico and removed him the next day. The petitioner reentered the United States without legal authorization yet again. According to petitioner, he entered at a border crossing by presenting his pre–1989 permanent resident card to the border official. The border official allowed petitioner physically to enter the country. Thereafter petitioner filed an application to replace his permanent resident card. Upon receiving the application, the government realized that petitioner had no legal authority to be in the country. The government sent petitioner a letter advising him of an appointment — ostensibly to discuss his application. When petitioner arrived for his appointment, however, the government arrested him and reinstated the 1989 removal order.

The court first rejected petitioner's "bald assertion" that the 1989 removal order was "superseded" or otherwise invalidated simply because a later removal order exists. Second, although the court agreed with petitioner's argument that his most recente entry into the U.S. was procedurally regular, "nothing in the statute or elsewhere suggests that Congress intended that the reinstatement provision would not apply to aliens who were able to dupe border officials into thinking that they had authorization to enter, or that Congress otherwise intended to reward fraudulent behavior." The court distinguished its decision in *Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010), where it had held that the term "admission" as defined in the INA § 101(a)(13)(A) only required a procedurally regular entry. "Nothing suggests that Congress intended the procedural definition to apply to the phrase "reentered the United States illegally" under INA § 241(a)(5), said the court.

Contact: Edward Wiggers, OIL
☎ 202-616-1247

ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds that Resisting Arrest with Violence Constitutes a Crime Involving Moral Turpitude**

In *Cano v. Holder*, __F.3d__, 2013 WL 557171 (11th Cir. Feb. 15, 2013) (Tjoflat, Martin, Fay) (*per curiam*), the Eleventh Circuit upheld the BIA's determination that a conviction for resisting an officer with violence in violation of Florida Statutes Annotated § 843.01 categorically constitutes a crime involving moral turpitude.

The petitioner, a Bolivian citizen, entered the United States in March 1990 as a nonimmigrant and later adjusted his status. In 2003 and 2010, he pleaded guilty to certain crimes including one for resisting an officer with violence.

In upholding the BIA's decision, the court explained that since the Florida law requires intentional violence against an officer, the statute criminalizes conduct that exhibits a deliberate disregard for the law, which is a violation of the accepted rules of morality and the duties owed to society.

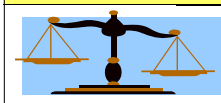
Contact: Anthony C. Payne, OIL
☎ 202-616-3264

■ **Eleventh Circuit Holds Shoplifting Is Not Categorically an Aggravated Felony Theft Offense**

In *Ramos v. United States Att'y Gen.*, __ F.3d __, 2013 WL 599552 (11th Cir. Feb. 19, 2013) (Carnes, *Cox*, Restani), the Eleventh Circuit determined that shoplifting pursuant to Georgia state law is not categorically a "theft offense" aggravated felony under 8 U.S.C. § 1101(a)(43)(G).

The petitioner, a citizen of the

(Continued on page 11)



Summaries Of Recent Federal Court Decisions

(Continued from page 10)

Philippines and an LPR, was charged under the Georgia statute for taking three video games from a Costco "with the intent of appropriating [the] merchandise to his own use without paying for same." He pled guilty to this charge and was sentenced to twelve months' imprisonment to be served on probation.

The Eleventh Circuit, concluding that the construction of "theft offense" in *Jaggernauth v. United States Att'y Gen.*, 432 F.3d 1346 (11th Cir. 2005), controlled, held that the Georgia statute punishes conduct that does not constitute a "theft offense" because it includes shoplifting with intent to appropriate merchandise to one's own use without paying for it, ratherthan an intent to deprive. The court remanded for consideration of alternate grounds of removal.

Contact: Jennifer Williams, OIL
☎ 202-616-8268

■ **Eleventh Circuit Remands for Agency to Determine Whether *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980), Has Been Overruled**

In ***Lawal v. Holder***, __ F.3d __, 2013 WL 718444 (11th Cir. Feb. 28, 2013) (Tjoflat, Marcus, Kravitch) *per curiam*, the Eleventh Circuit ordered a remand for the BIA to consider whether its current interpretation of INA § 212(h), 8 U.S.C. § 1182(h), which provides that an alien seeking § 212(h) relief who has not filed an adjustment of status application must remain "outside our borders while applying for relief," overruled *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980), which treats certain aliens in the United States as if they were outside our borders seeking admission to the United States.

Contact: Tiffany Walters, OIL
☎ 202-532-4321

■ **Eleventh Circuit Holds That Week-Long Police Detention and Interrogation of Chinese National Constitutes Persecution**

Evidence of several incidents of mistreatment during a week-long detention of the applicant, taken cumulatively and in the context of police interference with the petitioner's manner of worship, compelled the conclusion that petitioner suffered past persecution.

In ***Jiaren Shi v. Holder***, __ F.3d __, 2013 WL 424360 (11th Cir. February 5, 2013) (*Marcus*, Martin, Gold (by designation)), the Eleventh Circuit ruled that evidence of several incidents of mistreatment during a week-long detention of the applicant, taken cumulatively and in the context of police interference with the petitioner's manner of worship, compelled the conclusion that petitioner suffered past persecution.

Petitioner entered the United States in 2002 and timely filed for asylum, claiming that he was persecuted on account of his Christianity. The IJ denied his application for failure to establish past persecution or an independent well-founded fear of persecution and the BIA agreed.

The Eleventh Circuit concluded that petitioner suffered past treatment that cumulatively rose to the level of persecution where the police arrested petitioner with a group of other worshippers, confiscated their bibles, detained petitioner for a week, interrogated him twice, physically abused him and left him handcuffed in the rain overnight, after which he became ill.

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

DISTRICT COURTS

■ **District Court for the District of Columbia Denies Petitioner's Motion for Discovery in Action to Compel Adjudication of Her Adjustment Application**

In ***Beshir v. Holder***, __F. Supp. __, 2013 WL 485683 (D.D.C. February 8, 2013) (Bates), the District Court for the District of Columbia found that the petitioner's conclusory claims that USCIS acted in bad faith in compiling the administrative record were insufficient to warrant discovery in a case governed by the Administrative Procedure Act ("APA").

Petitioner, a native and citizen of Ethiopia, was granted asylum and later sought to adjust her status to that of a permanent resident. After initially denying her application based on information that petitioner provided material support to a terrorist organization, DHS later reopened her application but placed it in abeyance "per USCIS policy." Petitioner filed a writ of mandamus to compel USCIS to adjudicate her application and moved for discovery of information related to her application and similar applications adjudicated by USCIS.

The District Court recognized that discovery is inappropriate in APA cases and found that petitioner's "conjectural, vague, and unsupported" claims of bad faith were insufficient to demonstrate that discovery was warranted. The court further noted that courts have never permitted discovery in cases where a petitioner seeks to compel adjudication of an application for adjustment of status.

Contact: Kimberly Helvey, OIL-DCS
☎ 202-532-4667

(Continued on page 15)

This Month's Topical Parentheticals

ADJUSTMENT

■ *Toro v. Napolitano,* 707 F.3d 1224 (11th Cir. Feb. 4, 2013) (affirming the district court's decision that petitioner was not eligible to adjust her status through a self-petition under VAWA as a battered alien of a Cuban spouse because her spouse's criminal history rendered him inadmissible for permanent residence; further holding that a rational basis exists for treating battered aliens differently based on the immigration status of their Cuban spouses)

■ *Boadi v Holder,* __F.3d__, 2013 WL 452506 (7th Cir. Feb. 7, 2013) (upholding termination of conditional status and denial of a good-faith marriage waiver where the IJ did not find petitioner credible)

■ *Lopez-Vasquez v. Holder,* __ F. 3d __, 2013 WL 387903 (9th Cir. Feb. 1, 2013) (finding petitioner ineligible for adjustment based on his felony conviction for possession of marijuana for sale and holding that he failed to carry his burden to prove he was entitled to relief under the Federal First Offender Act, despite the fact that the state court set aside his felony conviction and deemed it to be a misdemeanor) (Judge Bright issued a concurring opinion)

■ *Williams v. Secretary, DHS,* __ F. Supp.2d __, 2013 WL 749487 (M.D. Fla. Feb. 27, 2013) (holding that amended 8 U.S.C. § 1151(b)(2)(A)(i) explicitly limits an alien widow's right to acquire immigration benefits based on a first marriage after the widow has remarried, and finding petitioner ineligible for adjustment)

ASYLUM

■ *Quinteros v. Holder,* __ F. 3d __, 2013 WL 764719 (8th Cir. March 1, 2013) (rejecting claim that "family members of a local business owner" are a particular social group because the terms "family" and "business owner" are too amorphous to adequately describe a PSG; holding that past murder of brother, past gang threat to rape sister, past gang recruitment of applicant, and past gang extortion of father do not establish "well-founded fear" of future persecution of applicant where his father, mother and sisters continue to live unharmed in El Salvador)

■ *Henriquez-Rivas v. Holder,* __ F. 3d __, 2013 WL 518048 (9th Cir. Feb. 13, 2013) (regarding a claim that "people testifying against or otherwise [opposing] gangs in El Salvador" are a PSG, affirming the reasonableness of "social visibility" and "particularity" requirements for "particular social group," and thus rejecting CA7 and CA3's reading that "social visibility" means literal (ocular) visibility, and holding that BIA and court have applied "social visibility" as meaning a group that is "understood" or "perceived" "in the society" to be a group, and "particularity" as meaning that a putative group "can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." But remanding the "social visibility" requirement for the BIA to clarify if it is the "society's" or the "persecutor's" perception that determines if a PSG exists, with majority suggesting in dicta that the "persecutor's" perspective should be the benchmark, and a concurrence and dissent quoting Board, UNHCR, and other sources that "society's" perspective is the benchmark and taking position majority overstepped its authority in suggesting what approach Board should take. Also remanding the claim that "people testifying against or otherwise opposing gangs" meets the "social visibility" requirement, given El Salvador's enactment of a victim-witness protection law)

■ *Gasparyan v. Holder,* __ F. 3d __, 2013 WL 617075 (9th Cir. Feb. 20, 2013) (holding that where the facts underlying the delay in applying for asylum are disputed, the court lacks jurisdiction to review the BIA's "extraordinary circumstances" finding; further rejecting claim that the BIA should have applied the "three-part test" in 8 C.F.R. § 1208.4(a)(5), and reasoning that before reaching this test, the BIA must determine whether the circumstances were, in fact, extraordinary; here the filing delay was due to money and language issues, not extraordinary circumstances)

■ *Vahora v. Holder,* __ F. 3d __, 2013 WL 656477 (7th Cir. Feb. 25, 2013) (substantial evidence supports conclusion that Muslim asylum applicant from India failed to prove that Indian government was unable or unwilling to protect him from violence by two local Hindu leaders who shot the applicant in 2002 as part of anti-Muslim violence following deaths of Hindus in a train fire, where the applicant never sought, nor was denied, help from police; never officially reported the shooting or subsequent threats to officials, and country reports show that the government was willing to and did take measures to investigate and prosecute the Muslim violence when notified; further holding that single, apathetic remark by a non-supervisory police officer in hospital where applicant went after being shot does not compel the conclusion that the government is unable or unwilling to control the persecution)

■ *Shi v. Attorney General*, __F.3d__, 2013 WL 424360 (11th Cir. February 5, 2013) (reversing denial of asylum in Chinese house-worship case, holding that alien established past conduct rising to severity of "persecution" based on cumulative effect of police disruption of house church worship service; confiscation of bibles; arrest of 9 or 10 people including alien and his father; 7-day detention of alien with 2 interrogations, slaps to face, threat to hit with a baton, and handcuffing to an iron bar overnight in rain, causing fever and sore throat requiring medical

(Continued on page 13)

This Month's Topical Parentheticals

(Continued from page 12)
attention; remanding for BIA to apply the presumption of well-founded fear and determine if it was rebutted)

■ *Guaman-Loja v. Holder,* __ F. 3d __, 2013 WL 491984 (1st Cir. Feb. 11, 2013) (affirming agency's denial of asylum for woman from Ecuador on ground that several past incidents of harassment of her, and past threats or mistreatment of family members occurring in 1991, do not compel conclusion of past conduct rising to the severity of past "persecution")

■ *Mustafa v. Holder,* __ F. 3d __, 2013 WL 491012 (7th Cir. Feb. 11, 2013) (pre-REAL ID Act "on account of" asylum case, holding that IJ and BIA erred in concluding that "sole" motive for physical attack against asylum applicant from Pakistan was personal revenge for testifying against his former boss in a corruption prosecution and in failing to conduct mixed-motive "at least in part" analysis on account of "political opinion," where agency ignored and did not address "evidence showing highly politicized political context" in which attack took place showing the former boss was a political official, government corruption investigation was by his political opponents, and the boss had emphasized he had political power when threatening the applicant)

CITIZENSHIP

■ *Kariuki v. Tarango,* __ F. 3d __, 2013 WL 644469 (5th Cir. Feb. 21, 2013) (affirming district court's determination that petitioner was ineligible to naturalize for failure to demonstrate good moral character, and reasoning it was proper for the court to consider petitioner's visa overstay, prior conviction for fraud involving immigration documents, and discharge from the army for "fraudulent enlistment" in evaluating good moral character, even though these events preceded his application filing by more than one year)

CRIMES

■ *Ramos v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 599552 (11th Cir. Feb. 19, 2013) (holding that the BIA erred in determining that a conviction under Georgia Code § 16-8-14 for shoplifting categorically qualifies as an aggravated felony where the statute of conviction covers both intent-to-deprive and intent-to-appropriate offenses, and is therefore divisible)

■ *Yeremin v. Holder,* __ F. 3d __, 2013 WL 535755 (6th Cir. Feb. 14, 2013) (holding that a conviction under 18 U.S.C. § 1028(f) for conspiracy to traffic in identification documents categorically qualifies as a CIMT because it inherently involves deceptive conduct)

■ *Patel v. Holder,* __ F. 3d __, 2013 WL 388046 (1st Cir. Feb. 1, 2013) (holding the BIA erred in concluding that petitioner's conviction for conspiracy to commit larceny stemming from a scheme in which he stole property from the dorm rooms of his college classmates constituted a CIMT, and reasoning that the record of conviction failed to show that petitioner intended to permanently deprive the owner of the property in question)

■ *Cano v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 557171 (11th Cir. Feb. 15, 2013) (holding that a conviction under Florida Statute § 843.01 for resisting an officer with violence categorically qualifies as a CIMT because it requires intentional violence against an officer)

■ *Pascual v. Holder,* __ F. 3d __, 2013 WL 599519 (2d Cir. Feb. 19, 2013) (holding that a conviction for third degree criminal sale of a controlled substance (cocaine) under NY law constitutes an aggravated felony because it involves illicit trafficking of a controlled substance)

DUE PROCESS – FAIR HEARING

■ *Smykiene v. Holder,* __ F. 3d __, 2013 WL 514556 (7th Cir. Feb. 13, 2013) (holding that the IJ and BIA erred in denying motion to reopen *in absentia* order by equating the government's proper service of *notice* of the hearing date with the petitioner's *receipt* of such notice; reasoning that where an alien is contesting receipt of a notice of hearing, "[o]nce nonreceipt is attested in an affidavit and there is no conclusive evidence of evasion, the alien is entitled to an evidentiary hearing")

■ *Gupta v. McGahey,* __ F. 3d __, 2013 WL 562879 (11th Cir. Feb. 15, 2013) (affirming district court's decision that 8 U.S.C. § 1252(g) precluded petitioner's *Bivens* action based on ICE's alleged wrongful arrest, detention, and search and seizure, and reasoning that "[s]ecuring an alien while awaiting a removal determination constitutes an action taken to commence proceedings")

FOIA – DISCOVERY

■ *Darnbrough v. Dept. of State,* __ F. Supp.2d __, 2013 WL 619773 (D.D.C. Feb. 20, 2013) (denying government's motion for summary judgment in FOIA suit requesting documents relating to petitioner's renunciation of U.S. citizenship, and reasoning that the document in question does not relate to the issuance or refusal of a visa or permit (which would be protected), and is not exempt from disclosure simply because it is found in a database that holds information regarding the issuance or refusal of visas and permits)

■ *Beshir v. Holder*, 2013 WL 485683 (D.D.C. Feb. 8, 2013) (denying motion for discovery where applicant for adjustment from Ethiopia sought information about USCIS decision-making process)

■ *Menasha Corp. v. United States Dept. of Justice,* __ F.3d __, 2013 WL 615326 (7th Cir. Feb. 20, 2013) (holding that the attorney work prod-

(Continued on page 14)

This Month's Topical Parentheticals

(Continued from page 13)

uct privilege protects from pretrial discovery work product exchanged between DOJ lawyers who provide legal assistance to federal agencies that have conflicting interests; reasoning that attorney work product exchanged among DOJ's lawyers is not information exchanged among adverse parties and is therefore privileged)

JURISDICTION

■ ***Moral-Salazar v. Holder,*** __ F. 3d __, 2013 WL 717060 (7th Cir. Feb. 28, 2013) (holding that 8 U.S.C. § 1252(a)(2)(C), which is "phrased more broadly" than 8 U.S.C. § 1252 (a)(2)(B), preludes jurisdiction over the agency's denial of a continuance; distinguishing court's prior decision in *Calma* and Supreme Court's decision in *Kucana*, and reasoning that under section 1252(a)(2)(C), "even procedural decisions made discretionary by regulation are unreviewable . . . .")

■ ***Namarra v. Mayorkas,*** __ F. Supp.2d __, 2013 WL 619777 (D. Minn. Feb. 20, 2013) (holding that the court lacked jurisdiction under both the INA's discretionary review bar and the APA's "committed to agency discretion" bar to review the reasonableness of the government's delay in adjudicating plaintiffs' applications for adjustment of status where the applications were on hold because plaintiffs belonged to a Tier III terrorist organization, and because there had not yet been a determination regarding that particular organization)

PROSECUTORIAL DISCRETION

■ ***United States v. Boliero,*** __ F. Supp.2d __, 2013 WL 541291 (D. Mass. Feb. 13, 2013) (granting defendant's motion to dismiss indictment in illegal reentry prosecution and stating that "the Executive should explicitly import the [prosecutorial discretion] factors established for determining whether to pursue a civil immigration enforcement action into the criminal enforcement context")

REINSTATEMENT

■ ***Tamayo-Tamayo v. Holder,*** __ F. 3d __, 2013 WL 718455 (9th Cir. Feb. 28, 2013) (holding that petitioner's entry through an invalid permanent resident card, while "procedurally regular," was substantively illegal, and met the illegal reentry requirement to trigger reinstatement of his prior order (distinguishing *Hing Sum*); rejecting due process argument for lack of prejudice where petitioner claimed ICE used a ruse to arrest him when he appeared at an appointment to replace his resident card)

RIGHT TO COUNSEL

■ ***Chaidez v. United States,*** __U.S. __, 2013 WL 610201 (Feb. 20, 2013) (holding that the Court's prior ruling in *Padilla v. Kentucky* (that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea) does not apply retroactively to persons whose convictions became final before *Padilla* was decided)

■ ***Correa-Rivera v Holder,*** __F.3d__, 2013 WL 440647 (9th Cir. Feb. 5, 2013) (holding that BIA abused its discretion in applying *Matter of Lozada* where petitioner had submitted with his appeal a complaint to the bar, and finding ineffective assistance of counsel and prejudice where attorney admitted in declaration that he had not properly filed application for cancellation)

WAIVER

■ ***Lawal v. United States Att'y Gen.,*** __ F. 3d __, 2013 WL 718444 (11th Cir. Feb. 28, 2013) (remanding for BIA to consider whether its current interpretation of INA § 212(h), which provides that an alien who is not applying for adjustment of status must apply for a 212(h) waiver in conjunction with an application for admission, overruled its prior decision in *Matter of Sanchez* or is a continuation of *Sanchez*)

NOTED

■ ***U.S. v Chavez,*** __F.3d__, 2013 WL 440097 (8th Cir. Feb. 6, 2013) (conviction for identity theft upheld even though Fed. R. Crim. P. 5(a) was violated because she was not taken promptly before magistrate judge)

■ ***Mendoza v. Solis,*** __ F. Supp.2d __, 2013 WL 632958 (D.D.C. Feb. 21, 2013) (dismissing plaintiffs' APA challenge to two Department of Labor guidance letters that were promulgated without notice-and-comment rulemaking based on lack of standing; reasoning that plaintiffs, four former open-range agricultural workers, have not established a cognizable injury-in-fact and fall outside the INA's "zone of interests")

■ ***Clapper v. Amnesty International USA,*** 2013 WL 673253 (Feb. 26, 2013)(*Alito, J.)*(holding that plaintiffs (various attorneys and human rights, labor, legal and media organizations) lack Article III standing to challenge the constitutionality of amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA), which allow the AG and Director of National Security to authorize surveillance of individuals who are not US "persons" and are reasonably believed to be located outside the US; reasoning that plaintiffs theory of future injury is too speculative, and they cannot "manufacture standing by choosing to make expenditures based on hypothetical future harm that is certainly not impending") (Justice Breyer along with three other justices dissented)

USCIS to Accept H-1B Petitions for FY 2014 on April 1, 2013

USCIS will begin accepting H-1B petitions subject to the FY 2014 cap on Monday, April 1, 2013. Cases will be considered accepted on the date that USCIS receives a properly filed petition for which the correct fee has been submitted; not the date that the petition is postmarked.

The cap (the numerical limitation on H-1B petitions) for FY 2014 is 65,000. In addition, the first 20,000 H-1B petitions filed on behalf of individuals with U.S. master's degree or higher are exempt from the fiscal year cap of 65,000.

USCIS anticipates that it may receive more petitions than the H-1B cap between April 1, 2013 and April 5, 2013. USCIS will monitor the number of petitions received and notify the public of the date on which the numerical limit of the H-1B cap has been met. This date is known as the final receipt date. If USCIS receives more petitions than it can accept, USCIS will use a lottery system to randomly select the number of petitions required to reach the numerical limit. USCIS will reject petitions that are subject to the cap and are not selected, as well as petitions received after it has the necessary number of petitions needed to meet the cap. The lottery for the H-1B cap was last used in April 2008.

In addition, H-1B cap cases can continue to request premium processing concurrently. Due to the historic premium processing receipt levels, combined with the possibility that the H-1B cap will be met in the first five business days of the filing season, USCIS has temporarily adjusted its current premium processing practice. To facilitate the prioritized data entry of cap-subject petitions requesting premium processing, USCIS will begin premium processing for H-1B cap cases on April 15, 2013.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, including, but not limited to, scientists, engineers, and computer programmers.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

We encourage contributions to the Immigration Litigation Bulletin

Case Summaries

(Continued from page 11)

■ **District of Arizona Holds that Alien Seeking Admission Is Not Subject to Mandatory Detention and Is Entitled to a Bond Hearing**

In *Fernandez Unzueta v. Kane*, No. 12-cv-1100 (D. Ariz. Feb. 11, 2013) (Bolton, J.), the District Court for the District of Arizona granted the alien's motion for a preliminary injunction regarding his petition for a writ of habeas corpus and ordered the government to provide him with a bond hearing before an immigration judge. U.S. Immigration and Customs Enforcement detained Fernandez as an alien seeking admission since February 2008, throughout his removal proceedings and his still-pending petition for review in the Ninth Circuit. The district court ruled that, because the removal proceedings have since concluded, he is no longer subject to mandatory detention and is eligible for bond unless the government proves that he is a flight risk or a danger to the community.

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

■ **Northern District of California Finds Three-and-One-Half Year Adjudication Delay Reasonable**

In *Dosouqi v. Heinauaer*, No. 12-cv-3946 (N.D. Cal. Feb. 22, 2013) (Hamilton, J.), the District Court for the Northern District of California granted summary judgment in favor of the government, holding that United States Citizenship and Immigration Services' three-and-one-half year delay in adjudicating the plaintiff's adjustment application was not unreasonable. The court noted that, in general, adjudication delays of up to five years in cases involving terrorist-related inadmissibility grounds were not unreasonable. The court denied the alien's cross motion for summary judgment without prejudice should the delay in this case become unreasonable in the future.

Contact: Jessica Dawgert, OIL–DCS
☎ 202-616-9428

INSIDE OIL

Lori Scialabba, the Deputy Director of USCIS since May 2011, was OIL's special speaker at the brown bag luncheon held on February 19. Before joining DHS, Ms. Scialabba served as BIA Chairman. She began her career with the Department in 1985 through the Attorney General's Honor Program as a trial Attorney for the INS in Chicago. She joined OIL in 1989, and left in 1994 when she was appointed Deputy General Counsel for INS.

USCIS Deputy Director Lori Scialabba

John Blakeley Appointed to Ninth Circuit Rules Committee

As of February 15, 2013, Mark Walters has stepped down after more than ten years representing the Department of Justice on the Advisory Committee on Rules and Internal Operating Procedures for the Ninth Circuit Court of Appeals. On a rotating basis, the Chief Judge of the Ninth Circuit appoints a sixteen member committee, under Ninth Circuit Rule 47-2, which consists of three judges, twelve practitioners, and one member of a law faculty. The committee provides a forum for monitoring and recommending revisions to the Court's rules and internal operating procedures. Through periodic meetings, the Committee gathers public comments on rules proposed by the Court or by the Committee, and provides comments and recommendations for adoption by the Court.

Because of the sustained high volume of immigration cases in the Ninth Circuit, the court has allotted one of the practitioner positions to the Civil Division. Mark has filled that role, serving with great success during a period of dynamic change for the court and immigration litigation. Not only did the court face an exponential growth in the number of immigration cases, but it completed a smooth transition into the digital age and electronic filing.

During Mark's tenure, the Committee provided recommendations regarding attorney discipline and immigration scams, procedures for processing stays of orders of removal, citation of unpublished dispositions, appropriate language for remand orders, mediation procedures, contents of briefs, and draft and final procedures for ecf filing, among many others. Mark's expert guidance ensured that the Department's interests were protected and that the Rules would facilitate the administration of justice both fairly and efficiently.

John Blakeley has been appointed as Mark's replacement. Any comments regarding proposed rule changes or any suggestions for future revisions should be addressed to him.

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

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

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

Office of Immigration Litigation

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

If you would like to receive the *Immigration Litigation Bulletin* electronically send your email address to:

linda.purvin@usdoj.gov