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Immigration Litigation Bulletin

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Inside

Supreme Court Finds No Bar to Review of Denial of Motions to Reopen

Since at least the beginning of the twentieth century, motions to reopen have existed as a discretionary procedural mechanism in immigration proceedings. It was well-established that courts reviewed the agency's denial of these discretionary motions under the extremely deferential abuse of discretion standard. In the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress codified motions to reopen in the INA, *see* Section 1229a(c)(7), and enacted multiple bars to judicial review, including Section 1252(a)(2)(B), which bars review of denials of discretionary relief. The relevant language of the review bar at issue provides that "no court shall have jurisdiction to review any other decision or action of the Attorney General . . . *the authority for which is specified under this subchapter to be in the discretion of the Attorney General* . . . , other than the granting of [asylum] relief." Even after IIRIRA, the government continued to argue that discretionary denials of motions to reopen were reviewable for abuse of discretion, and that Section 1252(a)(2)(B)(ii) did not preclude jurisdiction because the discretionary authority for reopening derived from the regulation, 8 C.F.R. § 1003.2, and not the subsequently-enacted statutory provision.

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En Banc Seventh Circuit Finds VWP Alien Constitutionally Entitled to Knowing and Voluntary Waiver of Rights

In ***Bayo v. Napolitano,*** __F.3d __ (7th Cir. Jan. 20, 2010), (Easterbrook, Bauer, Posner, Coffey, Flaum, Kanne, Rovner, *Wood*, Evans, Williams, Sykes, Tinder), the Seventh Circuit, sitting *en banc,* held that the petitioner, Mohammed Bayo, who had entered the United States under the VWP using a stolen Belgian passport, was constitutionally entitled to a knowing and voluntary waiver of his rights to a full immigration hearing.

Under the terms of the VWP, a citizen of a participating country may enter the United States as a visitor for up to ninety-days and bypass consular processing. Generally, prior to arrival to the United States, a VWP alien will complete and sign Form I-94W which then will be presented to the immigration inspector prior to admission. The form includes a "Waiver of Rights," including a right to a full immigration hearing.

Following his fraudulent admission as VWP visitor, Bayo settled in Indianapolis and eventually married a United States citizen. Based on that marriage, in 2006 Bayo applied for adjustment of status. When ICE investigators learned that he had entered the United States using a stolen Belgian passport they arrested him. Bayo admitted that he was in the country illegally and handed over the Belgian passport. DHS then adminis-

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VWP Alien Entitled to Due Process

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tratively ordered his removal. Bayo then filed a petition for review.

Bayo claimed that he could not understand the VWP waiver because it was in English and he speaks only French, the primary language spoken in Guinea. He also claimed that he had not completed high school, had not traveled internationally, and did not consult with an attorney before signing the waiver. A panel of the Seventh Circuit granted Bayo's petition holding that the "waivers of rights under the VWP must be "knowing and voluntary" and that he was entitled to a hearing on that issue. *Bayo v. Chertoff*, 535 F.3d 749 (7th Cir. 2008). The government then filed a petition for rehearing en banc calling it a "case of exceptional importance."

"We express no opinion on the procedures the government should adopt in order to ensure that waivers of constitutional rights occur knowingly and voluntarily with respect to language proficiency."

The Seventh Circuit *en banc* preliminarily determined that its review of the case was limited to the question of whether Bayo's waiver was valid and could not consider whether he was entitled to stay in the United States on some other grounds. The court then first addressed whether Bayo, who was not a citizen of a VWP country, could be held to the terms of the VWP waiver. Although the statute does not specifically mention the admission of aliens from non-VWP countries the implementing regulations apply the terms of the program to those who enter under the VWP, even if they are ineligible for it. The court then held that given the ambiguity in the statute, the Attorney General's interpretation, as expressed in the VWP regulations, was reasonable under the *Chevron* standard.

Second, the court determined that as an alien who had crossed the border and entered the United States, Bayo was entitled to certain constitutional rights, including the rights of due process. The government argued that Bayo had waived those rights by signing the VWP form. Bayo contended that the waiver was invalid because he did not understand it. The court found that the VWP waiver was not a "garden-variety" contract because it included a waiver of "the right to a full immigration hearing" and it "implicated both statutory rights and, in the final analysis, the constitutional right to due process." The court then, while acknowledging that immigration proceedings are civil rather than criminal, and therefore would not apply a strict criminal waiver standard, nonetheless said that it would apply a standard that would reflect the serious consequences of deportation.

The court declined to follow the government's argument that a "presumption of knowledge" of the law should apply because Bayo never disputed that he signed the waiver. The court said, *inter alia*, that it would "lead to absurd results, as it would render all waiver of constitutional rights signed without coercion valid, regardless of whether the signatory understood a single word on the page." "We decline to pursue such a radical departure from established law," said the court. At the same time, however, the court said that it did not "wish to disturb the understanding that the government is entitled to assume that people know the law."

The court said that immigration officials are under no obligation to provide legal advice to "incoming immigrants." "We also express no opinion on the procedures the government should adopt in order to ensure that waivers of constitutional rights occur knowingly and voluntarily with respect to language proficiency. The court noted that going forward this issue "has largely been solved," because the VWP visitors are now required to use the Electronic System for Travel Authorization (ESTA) which provides information in 21 languages.

The court then considered Bayo's claim, that because he did not understand the language on the form, his VWP waiver was unknowing and therefore invalid. Initially the court rejected the government contention that aliens cold not plead a want of language proficiency in VWP proceedings. The court then distinguished the Supreme Court's decision in the *Japanese Immigrant Case*, 189 U.S. 86 (1903), even though, noted the court, the government had not cited in its briefs. In that case, there is language to support the proposition that lack of language knowledge in a deportation proceeding does not constitute a due process violation. The court found that the language was dicta. Nonetheless, the court said that to prevail on a due process claim Bayo had to show prejudice, "that is, the error likely affected the result of the proceedings." The court found that Bayo could not show prejudice from not understanding the waiver because, if he had understood it, either he would still have signed it and thus be in the same situation as he is today, or he would not have signed it and would have been removed summarily at the border.

Finally, the court held that Bayo was not eligible to seek adjustment of status under an exception to VWP removal because he did not apply during the 90-day period of admission.

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Update on Derivative Asylum in the Context of FGM

On September 5, 2007, the Board of Immigration Appeals ("Board") issued its decision in *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007), in which it determined that an alien could not establish, or derive, withholding of removal eligibility based solely on his fear that his United States citizen daughters would be forcibly subjected to female genital mutilation ("FGM") in Senegal. The United States Court of Appeals for the Fifth Circuit subsequently agreed with the Board's determination, and denied A-K-'s petition for review. *See Kane v. Holder*, 581 F.3d 231 (5th Cir. 2009). This article provides a summary and overview of the state of the law in the circuit courts of appeals regarding these and other similar issues.

In *Matter of A-K-*, 24 I&N Dec. 275, the Board pointed out that A-K-'s daughters had the legal right to remain in the United States as citizens, unlike the child involved in *Abay v. Ashcroft*, 368 F.3d 364 (6th Cir. 2004), where the Sixth Circuit determined that an alien parent established her own reasonable fear of future persecution based on her fear that her minor daughter, who was not a United States citizen, would be subjected to FGM in their native Ethiopia. *Matter of A-K-*, 24 I&N Dec. at 277. The Board stated that unlike Ethiopia, where FGM was nearly universal, FGM was common only in certain areas of Senegal, such that, even if A-K-'s daughters went to Senegal, the family could relocate to an area of comparative safety. *Id.*

Perhaps most critically for the purposes of future litigation, the Board indicated that various circuit courts have concluded that acts of persecution against the family members of an asylum or withholding applicant do not establish a risk of persecution to the applicant, unless those acts establish a pattern or practice of persecution tied to the applicant himself. *Id.* at 277-78. A well-founded fear may be established, however, where family members are persecuted, for example, because of their own political opinion or activities, and that opinion is somehow imputed to the applicant. *Id.* at 278. The Board recognized that instances may arise where an applicant's family members are persecuted with the intent of harming the applicant, although the applicant is not harmed. *Id.* at 278. A-K- himself failed to make such a showing, where he testified that he did not fear any harm to himself, and that his tribe would perform FGM on his daughters because it was done to all of the female tribe members. The Board also concluded that, while section 208(b)(3)(A) of the Immigration and Nationality Act ("INA") allows for the spouse or a child of an asylee to be granted the same status if accompanying or following to join the asylee, there is no statutory basis for the converse to occur. *Id.* at 279. Thus, the statutory scheme does not permit a grant of derivative asylum status to a parent based on asylum granted to his child. Further, the INA does not in any circumstances permit for a grant of derivative withholding of removal. *Id.* A-K- declined to seek asylum at his hearing and did not timely file and application for that relief, so he could only make a withholding of removal claim.

The statutory scheme does not permit a grant of derivative asylum status to a parent based on asylum granted to his child.

Prior to the decision in *Matter of A-K-*, the Sixth Circuit was confronted with the consolidated asylum claims of a mother and daughter, who both assertedly feared that the daughter would face FGM. *See Abay*, 368 F.3d at 635-36. After finding that the record evidence compelled the conclusion that the daughter had a well-founded fear of FGM, the Sixth Circuit turned to the mother's claim, noting that the asylum statute provided no derivative protection to the mother. *Id.* at 640-41. The court determined, however, that Board precedent suggested a "governing principle" in favor of granting protection to parents who are faced with exposing their children to harm. *Id.* at 642. Consequently, the court ruled that the mother's fear of "being forced to witness the pain and suffering to her daughter is well-founded." *Id.* at 642. What the Sixth Circuit did not explain, however, was how the persecution to the daughter constituted persecution to the mother on account of the *mother's* protected characteristic. *See id.* The Board's decision in *Matter of A-K-*, and the Attorney General's decision in *Matter of J-S-*, 24 I&N Dec. 520, 530 (A.G. 2008) ("[E]very applicant for personal asylum . . . must establish his or her own eligibility for relief under specific provisions of the statute."), may cast doubt on the continuing vitality of *Abay*.

In *Kane v. Holder*, 581 F.3d 231, the Fifth Circuit, on the other hand, concluded, in pertinent part, that the INA does not recognize derivative eligibility for withholding of removal, relying on its previous decision in *Arif v. Mukasey*, 509 F.3d 677 (5th Cir. 2007), which came to the same conclusion. *Id.* at 240. Interestingly, the court stated that, taken to their logical conclusion, Kane's arguments suggest that any time an illegal alien from a country where FGM is practiced has a female child in the United States, he should prevail on a claim for asylum and withholding of removal. *Id.* at 241. The court concluded, however, that the INA indicates that Congress did *not* intend for asylum or withholding

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of removal to be granted in such a situation, and left the decision about the continuing care of the child to the alien parent. *Id.* The Fifth Circuit, quoting an earlier decision from the Fourth Circuit, *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007), declined to fashion a judicial amendment to the statute by allowing for such a derivative claim.

In *Niang*, 492 F.3d at 509, The Fourth Circuit considered whether a mother could assert a withholding of removal claim based on the "psychological harm" that she would suffer if her United States citizen daughter accompanied her to Senegal, where the daughter would face the possibility of FGM. The court answered the question in the negative, stating that the alien's claim failed "as a matter of law because it is well-established that 'persecution involves the infliction or threat of death, torture, or injury *to one's person or freedom*.'" *Id.* at 511 (citation omitted). The court also rejected the alien's effort to advance a "derivative" withholding of removal claim, noting that an alien must establish his or her own eligibility for protection and that Congress declined to provide for derivative withholding of removal claims. *Id.* at 512-13. In an accompanying footnote, the court observed that the alien's claim would also fail as a derivative asylum claim because the derivative provision does not protect the parents of United States citizen children. *Id.* at 512 n.11. Although the Fourth Circuit rejected the alien's "derivative" and direct withholding of removal claims, it observed that humanitarian asylum may be available to a mother who has undergone FGM and who fears that her daughter will also face FGM if accompanying her to the country of removal. *Id.* at 509 n.4.

The Eighth Circuit, in *Gumaneh v. Mukasey*, 535 F.3d 785 (8th Cir. 2008), reached a similar conclusion. Gumaneh, who had undergone FGM, sought withholding of removal based on the risk of FGM to her United States citizen daughters. *Gumaneh*, 535 F.3d at 787. The court rejected Gumaneh's claims, and concluded that an alien "may not establish a derivative claim for withholding of removal based upon the applicant's child's fear of persecution." *Id.* at 789. The court observed, in a footnote, that the asylum statute similarly does not provide derivative protection to the parents of asylee children. *Id.* at 789-90 n.2. In rendering its decision, the Eighth Circuit specifically declined to address any claim of "psychological harm" to the parent, noting that Gumaneh did not raise such a claim. *Id.* at 790 n.3.

The Eighth Circuit has held that an alien "may not establish a derivative claim for withholding of removal based upon the applicant's child's fear of persecution."

The Seventh Circuit has issued the most decisions on the issue of derivative asylum and withholding of removal based upon the potential risk of FGM to the applicant's minor child, and the court has either declined to address them because the Board did not do so in the first instance, or has rejected them. In *Nwaokolo v. INS*, 314 F.3d 303 (7th Cir. 2002), in addressing an alien's request for a stay of deportation (which had a lower standard of proof than an asylum or withholding of removal claim), the court determined that the alien established some likelihood of success on the merits, where it appeared that the Board did not consider the possibility that the alien's minor, United States citizen daughter would be subjected to FGM as a direct result of the decision to remove her mother. *Id.* at 308. The court therefore granted a stay of deportation pending the outcome of Nwaokolo's petition for review. The Seventh Circuit also relied on the concept of *constructive deportation*, which occurs when a minor child's parents are deported, and the child must go with those parents, in granting the stay. *Id.* at 307-08 (citing *Salameda v. INS*, 70 F.3d 447, 451 (7th Cir. 1995)).

In *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), the Seventh Circuit held that an alien parent who has no legal standing to remain in the United States may not establish a derivative claim for asylum by asserting potential hardship to the alien's United States citizen child in the event of the alien's deportation. *Id.* at 618. Oforji claimed that her United States citizen daughters would be subjected to FGM in her native Nigeria, but, as the court pointed out, she did not present any evidence as to the status of the girls' father, or on the alternative possibility of having a guardian appointed for her children in the United States. *Id.* at 616. The court noted that Oforji was in essence requesting that the court amend the law to allow aliens who did not meet the continuous physical presence requirements for cancellation of removal to attach derivatively to their childrens' right to remain in the United States, which the court refused to do. *Id.* at 617.

Similarly, in *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004), the Seventh Circuit stated that to establish eligibility for asylum or withholding of removal, an applicant must demonstrate that she herself will be persecuted if removed from the United States, and the asylum and withholding standards do not encompass any consideration of persecution that may be suffered by other individuals, including the alien's family members. *Id.* at 701. The court went on to opine that claims for derivative asylum are only cognizable when the applicant's children are

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subject to *constructive deportation* with the alien. *Id.* In Olowo's case, however, her children and their father were lawful permanent residents of the United States, such that the children had a parent available in the United States, and were under no compunction to leave. Accordingly, the facts of the case did not support a claim for derivative asylum. *Id*.

On the other hand, the Ninth Circuit has avoided directly addressing the issue of derivative asylum and withholding of removal based upon the potential risk of FGM to the applicant's minor child. In *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) (en banc), the court determined that the probability that the aliens' minor United States citizen daughter would be subjected to FGM in Ethiopia "greatly exceeded" the threshold required to establish the daughter's eligibility for asylum. *Id*. at 1043. The court then declined to reach the issue of whether the alien parents could derivatively qualify for asylum, based on the persecution that their daughter was likely to suffer, because the Board and Immigration Judge did not reach it in the first instance.

Similarly, in *Benyamin v. Holder*, 579 F.3d 970 (9th Cir. 2009), in a case involving the past FGM of an alien minor daughter and the potential future FGM of the applicant's other minor alien daughter, the court remanded the case to the Board for it to consider, in the first instance, whether the alien parents could derivatively qualify for asylum based upon the past persecution of one child and/or the well-founded fear of the other child. *Id*. at 975, 977. Interestingly, the court discussed the theory of *constructive deportation*, and stated that it is appropriate to consider the hardship to the alien child resulting from the parent's deportation. *Id*. at 974.

In *Bah v. Mukasey*, 529 F.3d 99, 116 n.22 (2d Cir. 2008), the Second Circuit declined to consider the issue of whether an alien may qualify for withholding of removal based on the risk of FGM to a daughter, finding that the aliens in that case failed to administratively exhaust such claims. Outside of the context of an FGM claim, however, the Second Circuit recognized that, in order to establish asylum eligibility, an applicant must show that *he or she* has been persecuted in the past or that a reasonable possibility of future persecution exists on account of a protected ground. *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 308-12 (2d Cir. 2007) (en banc). The court rejected a rule that allowed individuals, who had not personally faced persecution, to receive a grant of asylum based on the past harm to their spouses. *Id.* Notwithstanding the "profound emotional loss" suffered when a spouse is harmed, the court reasoned, an individual must satisfy the statutory requirements in order to obtain relief in his or her own right. *Id.* at 309. Citing *INS v. Elias-Zacarias*, 502 U.S. 478. 482 (1992), the Second Circuit stated that the asylum statute extends protection only to the *victim* of the persecution and to derivative beneficiaries under the Act. *Shi Liang Lin*, 494 F.3d at 311-12.

The Ninth Circuit has avoided directly addressing the issue of derivative asylum and withholding of removal based upon the potential risk of FGM to the applicant's minor child.

The Third Circuit has not published a decision regarding derivative asylum and withholding of removal claims based upon a fear of FGM to the applicant's child, but did issue an unpublished decision, *Misoka v. Attorney General*, 283 F. App'x 927 (3d Cir. 2008), which concluded that an alien was not eligible for derivative withholding of removal based upon the potential risk of FGM to his United States citizen daughter in his native Kenya. 283 F. App'x at 930. The court pointed out that both the alien's wife and daughter were United States citizens, such that the daughter could remain in the United States, and that Misoka did not point to any statute or case-law that would entitle him to derivative relief on that ground. *Id.*

The Eleventh Circuit has not issued a published decision addressing this issue either, but has favorably cited *Matter of A-K-* in an unpublished decision, indicating that applicants seeking derivative asylum status must establish a principal applicant's entitlement to asylum in his or her own right. *See Suharti v. Attorney General*, 2009 WL 3326404 (11th Cir. Oct. 16, 2009). Like the Eleventh Circuit, the First Circuit has favorably cited *Matter of A-K-* outside the context of an FGM claim. In *Kechichian v. Mukasey*, 535 F.3d 15, 22 (1st Cir. 2008), the First Circuit ruled that the Board "has foreclosed" a parent's claim "of psychological harm based solely on a child's potential persecution[.]" In an accompanying footnote, the court further noted that the withholding of removal statue does not provide for "derivative withholding of removal under any circumstances." *Id.* at 22-23 n.4. For its part, the Tenth Circuit has not decided the issue but did observe, in an unpublished decision, that all circuit courts to have considered the issue of derivative withholding of removal, or restriction on removal, have concluded that "restriction on removal does not allow for derivative beneficiaries[.]" *Terreros-Guarin v. Holder*, 2009 WL 4282847 at *4 n.5 (10th Cir. 2009).

Every court to have specifically considered the issue of *derivative* asylum or withholding of removal

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News from Department of Homeland Security

Haiti Designated for TPS

On Jan. 15, 2010, Secretary of Homeland Security Janet Napolitano designated TPS for eligible Haitian nationals as a result of the catastrophic earthquake that occurred in Haiti on Jan. 12, 2010.

The TPS designation for Haiti will remain in effect through July 22, 2011. The designation means that eligible Haitian nationals will not be removed from the United States and will also be eligible to apply to work in the United States. The 180-day registration period for eligible Haitian nationals to apply for TPS ends on July 20, 2010.

The designation applies only to those Haitians who resided in the United States on or before Jan. 12, 2010; TPS will not be granted to Haitian nationals who entered the United States after Jan. 12, 2010.

Haiti joins El Salvador, Honduras, Nicaragua, Somalia, and Sudan as countries currently designated for TPS.

DHS Announces Streamlined Citizenship Application Process For Members Of The Military

On January 19, 2010, DHS published a rule amending DHS regulations to conform to the National Defense Authorization Act of 2004, reducing the time requirements for naturalization through military service from three years to one year for applicants who served during peacetime, and extending benefits to members of the Selected Reserve of the Ready Reserve of the U.S. Armed Forces. Service members who have served honorably in an active-duty status or in the Selected Reserve of the Ready Reserve for any time since Sept. 11, 2001, can file immediately for citizenship.

The rule also eliminates the requirement for members of the military to file biographic information forms (Form G-325B) with their naturalization applications — removing administrative redundancy and increasing efficiency for those who risk their lives for the nation's security.

476 gang members, associates and other criminals were put on ICE during Project Big Freeze

U.S. Immigration and Customs Enforcement (ICE) announced on January 27, the arrests of 476 gang members, associates, and other criminals. Agents seized 47 firearms as part of Project Big Freeze, an intensive ICE-led law enforcement operation executed in 83 cities across the country focusing on gangs with ties to drug trafficking organizations. Through Project Big Freeze, ICE agents worked side by side with our federal, state and local law enforcement partners in a coordinated national initiative against transnational criminal street gangs in the United States.

Transnational street gangs have significant numbers of foreign-national members and are frequently involved in human smuggling and trafficking; narcotics smuggling and distribution; identity theft and benefit fraud; money laundering and bulk cash smuggling; weapons smuggling and arms trafficking; cyber crimes; export violations; and other crimes with a nexus to the border.

"Project Big Freeze is the largest nationwide ICE-led enforcement operation targeting transnational gangs with ties to drug trafficking organizations," said Assistant Secretary for ICE John Morton. "Through gang enforcement operations like Project Big Freeze, ICE continues to target and dismantle transnational gangs to rid our streets not only of drug dealers, but the violence associated with the drug trade."

Of the 476 arrests, 207 were arrested for criminal offenses and face prosecution for various federal and state crimes, including narcotics smuggling and distribution, firearms violations, identity theft, aggravated assault, obstruction, entry without inspection and re-entry after deportation. Of those arrested, 151 were U.S. citizens and 366 were foreign nationals and face deportation either now or when their criminal prosecution is complete. In addition, ICE agents arrested another 41 individuals on administrative immigration violations.

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claims, based on the potential risk of FGM to the applicant's daughter, has concluded that such claims are unavailable under the INA. The emerging circuit split centers on the availability of *direct* protection to an applicant based on the risk of FGM to his or her daughter. Although *Matter of A-K-* did not foreclose such claims in circumstances in which the persecutor seeks to harm the applicant's daughter as a means of inflicting harm on the *applicant*, the Board's decision reiterated the long-standing principle that it is incumbent upon an applicant to establish his or her *own* eligibility for protection based on persecution to the *applicant* on account of a protected ground.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony – Second or Subsequent State Controlled Substance Conviction

The Supreme Court has calendared argument in ***Carachuri-Rosendo v. Holder*** (Sup. Ct. No. 09-60) for March 31, 2010. In the government's response to the petition for writ of certiorari, the Solicitor General agreed that certiorari is appropriate in view of an inter-circuit split regarding the circumstances under which an alien's state conviction for illegal possession of a controlled substance qualifies as an "aggravated felony." Defending the judgment below (570 F.3d 263 (5th Cir. 2009)), the Solicitor General argued, contrary to the interpretation of the Board of Immigration Appeals (***Matter of Carachuri-Rosendo***, 24 I. & N. Dec. 382 (BIA 2007) (*en banc*)), that such a conviction constitutes an aggravated felony if the conduct occurred after a prior illegal drug conviction has become final, regardless of whether the recidivist nature of the crime was established in the prosecution.

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Aggravated Felony — Term of Imprisonment

On January 7, 2010, the government filed a petition for rehearing en banc in ***Shaya v. Holder***, 586 F.3d 401 (6th Cir. 2009), challenging the court's holding that Shaya's conviction was not an aggravated felony crime of violence, which requires that the term of imprisonment be at least one year. The court held that the language of 8 U.S.C. § 1101(a)(43)(F) is ambiguous and that its application to an indeterminate sentence was primarily a function of state law. The government argues that the panel ignored the federal statutory definition of "term of imprisonment" contained in 8 U.S.C. § 1101(a)(48)(B), and failed to defer to the Board's reasonable interpretation of the immigration statute.

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Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction. The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) ---incorporating the Department of Defense Directive prohibiting use of government computers to access pornography---was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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Aggravated Felony— Loss to Victim(s) Exceeding $10,000

On September 15, 2008, the government filed a petition for rehearing en banc in ***Kawashima v. Gonzales***, 503 F.3d 997 (9th Cir. 2007), challenging the court's holding that to sustain a charge of removability for the aggravated felony of fraud or deceit with a loss exceeding $10,000 (8 U.S.C. § 1101(a)(43)(M)(i)) based on conviction for signing a false tax return, must the government prove, using only the categorical approach, not the modified categorical approach, that the alien was convicted of an offense with the elements of fraud or deceit and loss over $10,000. In August 2009 the parties filed supplemental briefs regarding the impact of *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), on this case and *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*).

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VWP — Waiver, Due Process Particularly Serious Crimes

In June 2009, the government filed a petition for panel rehearing and opposed petitioner's petition for rehearing and rehearing en banc in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the Board determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal? Proceedings are currently stayed pending the Supreme Court's decision in *Kucana v. Holder*, because its decision on the scope of the jurisdictional stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) may affect the Ninth Circuit's decision on the rehearing petitions.

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Summaries Of Recent Federal Court Decisions

FIFTH CIRCUIT

Fifth Circuit Holds that the Board Permissibly Found that Under 8 U.S.C. § 1229b(a)(2) There Is No Imputation of Continuous Residence of Parent to Child

In ***Deus v. Holder***, __ F.3d __, 2009 WL 4936392 (5th Cir. December 23, 2009) (Garwood, *Davis*, Dennis), the Fifth Circuit deferred to the BIA's interpretation that petitioner could not satisfy the seven-year continuous residence requirement for cancellation based on his presence as a minor child living with his lawfully-admitted parents.

The Fifth Circuit declined to impute petitioner's mother residence for purpose of satisfying the residency requirement for cancellation of removal.

The petitioner, Deus, a citizen of Haiti, was born on August 28, 1978. At the age of one, she entered the United States on November 8, 1979, without inspection but apparently with her mother. Her mother was granted LPR status on that date. On May 10, 1996, Deus adjusted her status to that of a lawful permanent resident. On May 5, 1999, Deus was convicted in Florida of two felony offenses: fraudulent use of a credit card and grand theft.

On March 25, 2005, Deus applied for naturalization. On May 1, 2006, USCIS denied the application because Deus did not establish good moral character. On June 19, 2006, removal proceedings were commenced against Deus on the basis that she had been convicted within 5 years of admission of a crime involving moral turpitude. She then applied for cancellation of removal under INA § 240A(a). The IJ and the BIA found her statutorily ineligible because she could not satisfy the 7-years residency requirement. The BIA rejected Deus' argument that she met the requirement by imputing her mother's residence to her and declined to follow the Ninth Circuit's rulings in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005).

The Fifth Circuit upheld the BIA's interpretation finding it "not inconsistent with the statute and therefore permissible under Chevron's deferential standard." The court specifically rejected the contrary position of the Ninth Circuit in *Cuevas-Caspar*, and instead found persuasive the rationale of the Third Circuit in *Augustin v. AG of the United States*, 520 F.3d 264 (3d Cir. 2008). The court explained that because Deus had entered illegally in 1979, she was not "admitted" until she became an LPR in 1996, and her conviction in 1999, cut off accumulation of 7 years of residency.

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Mistaken Belief About Correct Hearing Date Does Not Constitute Exceptional Circumstances for Failure to Appear

In ***Acquaah v. Holder***, 589 F.3d 332 (6th Cir. 2009) *(*Siler*, Gilman,* Rogers*)*, the Sixth Circuit upheld the BIA's denial of two motions to reopen removal proceedings.

The petitioner entered the United States in January 2000 as a nonimmigrant student to attend the University of Arkansas. When he stopped attending school the following year, the former INS instituted removal proceedings. He was subsequently scheduled for a telephonic master-calendar hearing on July 5, 2005, but he failed to appear at the office of his attorney. Consequently, the IJ ordered him removed in absentia. Petitioner acknowledged that he had received proper notice but he mistakenly believed that the hearing was on July 7.

The court concluded that the alien's mistake as to the correct date was a "less compelling circumstance" than that required for relief under 8 U.S.C. § 1229a(e)(1), as it was not beyond his control or of an extraordinary nature. The court also determined that the alien was "disengaged" from his removal proceedings and "blindly relied" on his counsel, distinguishing agency's conclusions from *Kaweesa v. Gonzales*, 450 F.3d 62 (1st Cir. 2006).

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SEVENTH CIRCUIT

Seventh Circuit Holds that Former Gang Membership Is an Immutable Characteristic

In ***Ramos v. Holder***, 589 F.3d 426 (7th Cir. December 15, 2009) (Cudahy, *Posner*, Rovner), the Seventh Circuit held that petitioner was a member of a particular social group because former gang membership was an immutable characteristic that was impossible to change because he could not safely resign from his gang.

The petitioner, who grew up in El Salvador, joined the Mara Salvatrucha, a violent street gang, in 1994, when he was 14. He remained a member of the gang until 2003, when he came to the United States. Shortly afterward, having become a born-again Christian, he decided that if he returned to El Salvador he could not rejoin the gang without violating his Christian scruples, and that the gang would kill him for his refusal to rejoin and the police would be helpless to protect him. The BIA denied asylum on the ground that "tattooed, former Salvadoran gang members" do not constitute a particular social group; nor can "membership in a criminal gang . . . constitute membership in a particular social group."

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The Seventh Circuit found, following its reasoning in *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006), and its progeny, that "a gang is a group, and being a former member of a group is a characteristic impossble to change, except perhaps by rejoining the group." In *Sepulveda* the group was composed of former subordinates of the Attorney General of Colombia who had information about the insurgents. "One could resign from the attorney general's office but not from a group defined as *former* employees of the office," said the court in that case. The court distinguished petitioner's case from *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), reasoning that petitioner's proposed social group of "former" gang members was different than Arteaga's proposed group of "inactive" gang members.

The court further determined that the *Chenery* doctrine foreclosed the government's argument that petitioner failed to establish the social visibility and particularity of his proposed social group, and further reaffirmed its holding in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), regarding its criticisms of the agency's social visibility requirement.

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■ **Seventh Circuit Holds That Denationalization May Constitute Persecution In Certain Circumstances Such As When It Results in Statelessness**

In ***Haile v. Holder***, __ F.3d __, 2010 WL 22372 (7th Cir. January 6, 2010) (*Posner*, Kanne, Rovner), the Seventh Circuit held that an alien born in Ethiopia to Eritrean parents was stateless after being denationalized by Ethiopia, and therefore his denationalization on account of his being born in Eritrea was persecution.

The petitioner was born in Ethiopia in 1976. His parents, who are of Eritrean origin, moved to Eritrea in 1992, a year before that country declared its independence. Petitioner, however, remained in Ethiopia. In 1998, following a conflict between the two countries, Ethiopia expelled thousands of Ethiopian citizens. Petitioner fled the country before he could be expelled and traveled to the United States. Petitioner then sought asylum on the basis that he had been stripped of Ethiopian citizenship. The IJ determined that taking away one's citizenship was not, without more persecution. The BIA affirmed that decision.

"If to be made stateless is persecution, as we believe . . . . then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution."

A panel of the Seventh circuit subsequently remanded the case to the BIA with instructions to consider the relation of denationalization to persecution, and to determine whether petitioner was still an Ethiopian citizen. On remand, the BIA again denied asylum holding that while denationalization can be a "harbinger of persecution," an IJ must look at the circumstances surrounding the loss of nationality then, on an individual basis, determine whether the circumstances rise to the level of persecution due to a protected ground.

The Seventh Circuit found that the BIA was correct that not all denationalizations are instances of persecution. However, in this case, petitioner was stateless because there was no evidence that his Eritrean ethnicity made him an Ertirean citizen. "If to be made stateless is persecution, as we believe," said the court, "then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution even if the country will allow you to remain and will not bother you as long as you behave." The court then explained that it was unclear, "because of the confused state of the record," whether someone in petitioner's circumstances could be readmitted to Ethiopian citizenship under a 2003 law. The court declined to decide this issue and again remanded the case to the BIA to determine whether the petitioner would be considered a citizen of Ethiopia upon his return.

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■ **Seventh Circuit Affirms Denial of Withholding of Removal Claim Based on Changed Country Conditions in Serbia**

In ***Milanouic v. Holder***, __ F.3d __, 2010 WL 22371 (7th Cir. January 6, 2010) (Manion, *Rovner*, Wood), the Seventh Circuit affirmed the BIA's denial of withholding of removal to an applicant from Serbia because that country's conditions had changed. The petitioner who was born in Yugoslavia but is an ethnic Serb, entered the United Sates in 1996 as a visitor but did not depart when his visa expired. When placed in removal proceedings in 2004, he applied for asylum, withholding of removal, and CAT protection. Petitioner claimed that when he lived in the former Yugoslavia he had been mistreated by military police and on one occasion beaten by supporters of the then president Milosevic. The IJ found that although petitioner had been subject to persecution, the changed country conditions rebutted the presumption of a fear of future persecution. and denied the requested reliefs.

The Seventh Circuit found that the IJ could reasonably concluded, in light of the country report, that "with the removal of Milosevic and his party from power, petitioner would not face the fear of future persecu-

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tion for his actions in working toward that ouster." The court noted that petitioner could have proved "entitlement to withholding if he had shown that local officials were still in power" or that there was continued persecution in the country against those who had opposed Milosevic.

The Seventh Circuit also noted that the transcription of the IJ's oral decision was incomplete, and while "to its credit the government pointed out that discrepancy," incomplete administrative records are "unacceptable."

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NINTH CIRCUIT

■ **Ninth Circuit Concludes that California Crime of Carjacking Was an Aggravated Felony**

In ***Nieves-Medrano v. Holder***, __ F.3d __, 2010 WL 27339 (9th Cir. January 7, 2010) (Trott, W. Fletcher, Rawlinson) (*per curiam*) the Ninth Circuit held that the alien's conviction under California Penal Code § 215 for carjacking was categorically a crime of violence under 8 U.S.C. § 1101(a)(43)(F), so as to render the alien removable under 8 U.S.C. § 1227(A)(2)(a)(iii) for having been convicted of an aggravated felony.

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■ **Under the REAL ID Act, an Adverse Credibility Determination Is Reasonable in Light of Unresponsive, Undetailed, and Inconsistent Testimony**

In ***Shrestha v. Holder***, __ F.3d __, 2010 WL 10982 (9th Cir. January 5, 2010) (*Gould*, Tallman, Benitez), the Ninth Circuit held that an adverse credibility determination was reasonable in light of a pattern of unresponsiveness, vague assertions which lacked detail, inconsistent descriptions of underlying events, and a failure to produce reasonably obtainable corroborating evidence. After a detailed discussion of the impact of the REAL ID Act on adverse credibility findings, the court concluded that an IJ's analysis of an alien's credibility, which calls for a "healthy measure of deference" by the court, must specifically take into account the "totality of the circumstances, and all relevant factors."

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■ **Ninth Circuit Holds that It Has Jurisdiction to Review Whether an Alien Has Demonstrated "Extreme Hardship" for Purposes of Establishing Eligibility for a Waiver Under 8 U.S.C. § 1186a(c)(4)(A)**

The court held that it had jurisdiction to review the threshold question of whether an alien has demonstrated "extreme hardship" and is thus eligible for a waiver under 8 U.S.C. § 1186a(c)(4)(A).

In ***Singh v. Holder,*** __ F.3d __, 2010 WL 47359 (9th Cir. January 8, 2010) (*Berzon*, Schroeder,Strom), the Ninth Circuit affirmed the BIA's denial of an alien's hardship waiver under the joint petition requirement. In reaching this conclusion, the court held that it may review the threshold question of whether an alien has demonstrated "extreme hardship" and is thus eligible for a waiver under 8 U.S.C. § 1186a(c)(4)(A) of the joint filing requirement to remove the conditions on residence because that determination is "not committed to the Attorney General's discretion." However, the court concluded that the BIA did not err in its hardship determination, and denied the petition for review.

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■ **Ninth Circuit Denies Rehearing and Amends Opinion Holding that LPR May Not Re-Adjust under INA § 209(b) for A Second Time**

In ***Robleto-Pastora v. Holder***, __ F.3d __, 2010 WL 60087 (*Callahan*, Beezer, Gould) (9th Cir. January 11, 2010), the Ninth Circuit denied panel rehearing and amended its prior opinion in *Robleto-Pastora v. Holder*, 567 F.3d 437 (9th Cir. 2009). The court's amended opinion explicitly declines to decide whether an alien can concurrently retain the status of a lawful permanent resident and asylee. However, the court concluded that, at the time he sought to "re-adjust" under INA § 209(b), Robleto-Pastora retained his status as a lawful permanent resident, and as such, the provision in INA § 209(b) permitting the adjustment of status for asylees did not apply to him.

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■ **Entry of Diversionary Judgment on Drug Charge with Simultaneous Imposition and Suspension of Fine Does Not Constitute a Conviction for Immigration Purposes**

In ***Retuta v. Holder***, __ F.3d __, 2010 WL 27470 (9th Cir. January 7, 2010) (W. Fletcher, Clifton, *Pollak*), the Ninth Circuit held that a California State court's entry of a deferred judgment, and simultaneous imposition and suspension of a $100 fine, did not render the alien "convicted" of a drug offense for immigration purposes. The court rejected the alien's claim that the court record was insufficiently clear to prove the nature of the state court action, but it ruled that the document did not evidence a sufficient punishment, penalty, or restraint on the alien's liberty to constitute a conviction for immigration purposes. Accordingly, the court ruled that the government had failed to prove that the entry of judgment, in which the alien pled no contest to possession of methamphetamine, rendered the alien deportable.

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■ **Ninth Circuit Holds That Domestic Violence Conviction Renders an Alien Statutorily Ineligible for Cancellation of Removal**

In *Vasquez-Hernandez v. Holder*, __ F.3d __, 2010 WL 22374 (9th Cir. January 6, 2010) (*Nelson,* Bybee, Smith), the Ninth Circuit affirmed the BIA's denial of an alien's application for cancellation of removal based on his conviction for corporal injury to a spouse under California Penal Code § 273.5. The court held that the alien's domestic violence conviction constituted an offense described in 8 U.S.C. § 1227(a)(2), and that regardless of whether his conviction met the requirements of the petty offense exception in § 1182(a)(2)(A)(ii), the alien was statutorily ineligible for cancellation of removal.

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■ **Ninth Circuit Holds that Notice Must Be Sent to Represented Alien's Counsel**

In *Hamazaspyan v. Holder*, __ F.3d __, 2009 WL 4893659 (9th Cir. December 21, 2006) (Schroeder, Tashima, *Bea*), the Ninth Circuit held that serving a hearing notice on an alien, but not on his counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court. The IJ had ordered petitioner's removal *in absentia* after he failed to appear at a scheduled hearing. Petitioner had not received notice of the time and place of the hearing because he failed to include his apartment number on the address he supplied to the immigration court. The alien's counsel had not been served with the notice.

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DISTRICT COURT

■ **District of Nevada Affirms Denial of Extraordinary Ability Immigrant Visa Petition Filed by Security Consultant for Celine Dion on Grounds that He Failed to Demonstrate He Has Risen to the Very Top of His Field of Endeavor**

In *Skokos v. USCIS*, No. 09-cv-00193 (D. Nev. January 12, 2010) (Hunt, J.), after initially dismissing the complaint for lack of jurisdiction, the district court reconsidered and granted the government's summary judgment motion. USCIS had denied plaintiff's self-petition for Alien of Extraordinary Ability on the ground that as a security consultant for Celine Dion, he had failed to demonstrate an entitlement to an employment-based immigrant visa. The court agreed that plaintiff had failed to satisfy the required three out of ten criteria set forth in DHS regulations, and consequently failed to establish that he had reached the top of his field. USCIS had found that plaintiff had failed to submit evidence that his professional contributions were original or of major significance, that he played a lead or critical role in the success of his employer, or that his salary was significantly higher than other security consultants in his field.

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■ **Massachusetts District Court Rules Alien Has Standing to Sue for Denial of Intra-Company Tranferee Visa But Holds That USCIS's Denial Was Not Arbitrary, Capricious, or Unlawful**

In *Ore v. Clinton*, No. 08-11409 (D. Mass. December 23, 2009) (Young, J.), the court found that an alien had standing to sue in district court over USCIS's denial of an intra-company transferee visa even though he lacked standing to appeal the denial through the administrative appeals process. It held that standing in district court was not dependent on agency regulations and that a party need only show injury, causation, and a substantial likelihood that the requested relief will remedy the injury. The court then ruled that USCIS's denial was not arbitrary, capricious, or unlawful because the record indicated that the alien was not employed as a manager; there was no qualifying relationship between the U.S. company filing the petition and the foreign company; and the alien did not show one year continuous employment outside the U.S. at the time of filing.

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■ **District Court for the Southern District of Florida Dismisses Petition for Writ of Mandamus for Lack of Subject Matter Jurisdiction Over Plaintiffs' Claims.**

In *Hachem v. Swacina*, No. 09-22496 (S.D. Fla.) (King, J.), USCIS denied plaintiff's citizenship application because it was revealed during her naturalization interview that she procured a visa or admission to the United States by fraud or by willfully misrepresenting a material fact. Soon after the denial she was placed in removal proceedings. Plaintiff filed a complaint on October 30, 2009, alleging that the denial of her application was arbitrary and motivated by "hatred for Arabs and Muslims." Defendants moved to dismiss the INA claim on two grounds: (1) the court lacked jurisdiction because plaintiff failed to exhaust her administrative remedies, and (2) plaintiff failed to state a claim because she is in removal proceedings. The court found that it lacked subject matter jurisdiction, but declined to address plaintiff's failure to state a claim because the lack of subject matter jurisdiction was enough for the court to dismiss the complaint "without prejudice."

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Court Agrees With Government That Denial of MTR Is Reviewable

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Prior to the Supreme Court's recent decision, the circuits were split on the issue. The Seventh Circuit was the only circuit to conclude that Section 1252(a)(2)(B)(ii) barred review of motions to reopen generally. The majority of the circuits held that the judicial review bar did not apply to motions to reopen because the discretionary authority for reopening is specified in a regulation, not the statute. Last term, the Supreme Court granted *certiorari* to determine whether Section 1252 (a)(2)(B)(ii) "removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals." In ***Kucana v. Holder***, __ U.S. __, 2010 WL 173368 (2010), the Supreme Court held that the statute's "key words 'specified under this subchapter' refer to statutory, but not to regulatory, specification" of discretion, thereby overruling the Seventh Circuit and concluding that motions to reopen are reviewable.

The case involved an Albanian citizen who was ordered removed *in absentia*. The agency denied Kucana's first motion to reopen to rescind his *in absentia* removal order. Over four years later, Kucana filed a second motion to reopen his proceedings, asserting eligibility for relief and protection based on changed country conditions, which the Board denied. On appeal, the Seventh Circuit dismissed the case for lack of jurisdiction. Although both parties agreed that the proper standard of review was abuse of discretion, the court held that it lacked jurisdiction under Section 1252(a)(2)(B)(ii) to consider a challenge to the reopening denial. The court acknowledged that a regulation, rather than the INA itself, conferred discretion to grant or deny a motion to reopen, but the court found this difference immaterial. In the court's view, Section 1252(a)(2)(B)(ii) applied to discretionary decisions under regulations based on and implementing the INA, and that the reopening regulation conferring discretion drew its force from statutory provisions allowing immigration judges to govern their own proceedings.

Kucana sought *certiorari*, which the Court granted over the government's opposition. Because the parties agreed on the jurisdictional issue, the government filed its brief in support of Petitioner, and the Court appointed amicus to defend the Seventh Circuit's position. In an opinion delivered by Justice Ginsburg, the Court held that the judicial review bar applied only to discretionary determinations where the discretionary authority was specified by statute, and not, as in the case of motions to reopen, by regulation. The Court was persuaded by the long-standing judicial review of motions to reopen, the text and context of Section 1252(a)(2)(B), and the statutory history of the judicial review bar and reopening provision. The Court also considered both the presumption of judicial review and separation of powers concerns. The Court declined to address whether the statute precludes review of a reopening denial where the court would lack jurisdiction to review the underlying claim for relief, and expressed no opinion on whether the courts can review the Board's *sua sponte* reopening denials.

The Court held that the judicial review bar applied only to discretionary determinations where the discretionary authority was specified by statute, and not, as in the case of motions to reopen, by regulation.

In discussing the long history of judicial review over reopening denials, the Court reiterated its observation from *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008), that motions to reopen are "'an important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings. The Court noted that review of reopening denials dated back to "at least 1916," and that it had previously reviewed reopening denials on multiple occasions under a deferential standard of review. It emphasized that although motions to reopen were codified in 1996, the statute did not codify the regulatory authorization of discretion, or otherwise "specif[y] that reopening decisions are 'in the discretion of the Attorney General.'"

The Court rejected amicus's argument that the word "under" in Section 1252(a)(2)(B)(ii) implicitly included discretionary authority authorized by implementing regulations. Recognizing that "under" has numerous meanings, the Court looked to the context of the statutory provision, and found the placement of Section 1252 (a)(2)(B)(ii) relevant. Specifically, it noted that subsection (B) was "sandwiched" between two other review bars, both of which included "defining references [that] are statutory; none invoke[] a regulation." The Court further relied subsection (B)(ii)'s relation to subsection (B)(i), the latter precluding review of certain administrative judgments "made discretionary by legislation" and not regulation. In addition, the Court compared the "character" of the "substantive decisions" shielded from judicial review in subsection (B)(i), along with other decisions specified by statute to be discretionary, to the "adjunct ruling" of the procedural motion to reopen, noting that the Court's reversal of the latter "does not direct the Executive to afford the alien substantive relief." The Court observed that if Congress had wanted to insulate regulatory discretionary decisions, it "could easily have said so."

The Court determined that the statute's history "corroborated" its conclusion. It noted that IIRIRA both codified motions to reopen, but not the authorization of discretion, and barred judicial review of numerous agency determinations, including discretionary determinations specified by statute. This fact, combined with the

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Supreme Court Finds No Bar to Review MTRs

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long history of judicial review over reopening denials, persuaded the Court that Congress did not intend to revoke judicial oversight of reopening denials. The Court further noted that the enactment of the REAL ID Act in 2005, which included amendments to the judicial review provisions, "did not disturb the unbroken line of decisions upholding court review" of reopening denials.

To the extent that there was "[a]ny lingering doubt" about the reach of Section 1252(a)(2)(B)(ii), the Court pointed to the presumption of judicial review over immigration decisions. More importantly, it stressed separation of powers concerns as a "a paramount factor" in its decision. Specifically, under the Court's reading, only Congress is able to limit the courts' jurisdiction. Under the Seventh Circuit's reading of the statute, the Executive could insulate its own decisions from judicial review simply by labeling them discretionary in a regulation. The Court concluded that "[s]uch an extraordinary delegation of authority cannot be extracted from the statute Congress enacted."

In a concurring opinion, Justice Alito opined that he would decide the case on a "narrow[er] ground that, even if some regulations can render a decision fo the Attorney General unreviewable, the regulation at issue in this case does not have that effect." He noted that the relevant statutory language, "under this *subchapter*," referenced Subchapter II of the INA. He concluded that because the relevant regulation was "grounded on authority conferred under" Section 1103(a), located in Subchapter I, the statutory bar did not apply.

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DISTRICT COURT

■ **Central District of California Upholds USCIS's Interpretation of Statute Prohibiting Adjustment of Status When Alien Fails to Maintain Lawful Status in Excess of 180 Days**

In ***Velasco, et al. v. USCIS***, No. 9-cv-1341-AHM (C.D. Cal. December 21, 2009) (*Matz, J*), the district court granted the government's summary judgment motion, concluding that the interpretation by USCIS of 8 U.S.C. § 1255(k) was neither arbitrary nor capricious and that a "period of stay authorized by the Attorney General" pursuant to 8 U.S.C. § 1182(a)(9)(B) is not a "lawful status" that counts toward § 1255(k)'s 180-day grace period. USCIS had denied plaintiffs' adjustment of status applications on the ground that plaintiffs failed to continuously maintain a "lawful status" for a period in excess of 180 days during the time that their Petition for Nonimmigrant Worker, Form I-129, and Application to Extend/ Change Nonimmigrant Status, Form I-539, were pending.

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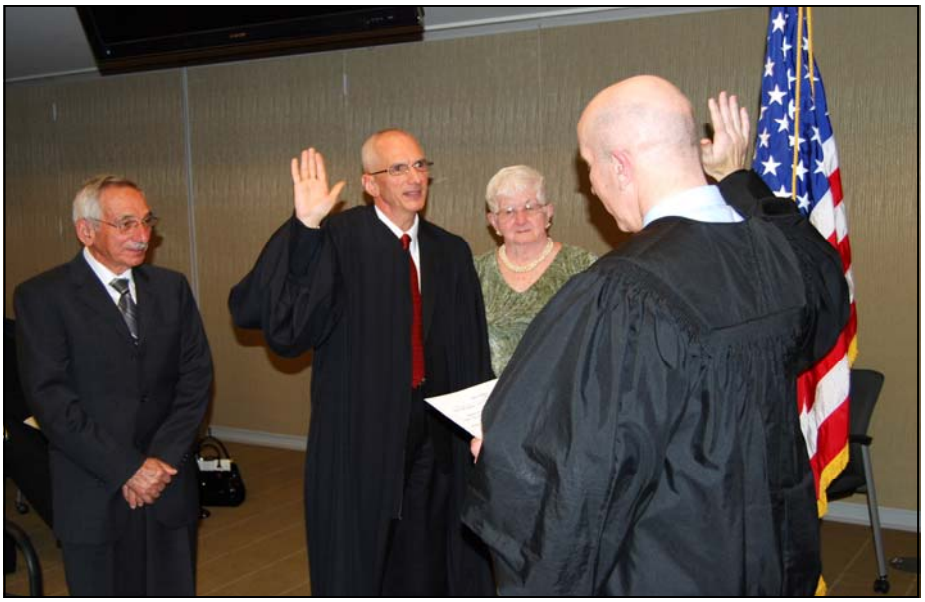
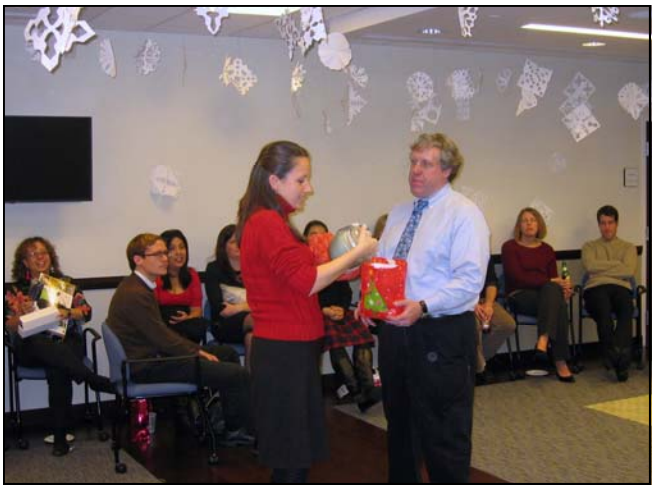
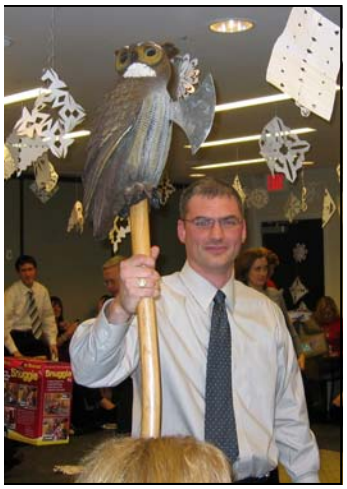
Contributions to the Immigration Litigation Bulletin Are Welcomed!



Former OIL Assistant Director Barry Pettinato being sworn-in as an Immigration Judge by Jeffrey L. Romig, Assistant Chief Immigration Judge.

INSIDE OIL — Dave's White Elephant Party





On December 17, 2009, OIL held its Annual Holiday Party and Dave's Annual White Elephant Affair. Snuggies are in at OIL this winter!

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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