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

Immigration Litigation Bulletin

Vol. 14, No. 7 *July 2010*

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Are Guatemalan Women A Particular Social Group For Purpose of Asylum?

The Ninth Circuit in ***Perdomo v. Holder***, __ F.3d __, 2010 WL 2721524 (9th Cir. July 12, 2010) (Nelson, Fletcher, *Paez*), opened the door to the possibility that "all women in Guatemala," could qualify for asylum in the United States because they constitute a particular social group under INA § 208. The court disagreed with the BIA's interpretation that such a group would be too broad to be recognized. "While we have not held expressly that females, without other defining characteristics, constitute a particular social group, we have concluded that females, or young girls of a particular clan, met our definition of a particular social group," said the court.

The petitioner, Lesly Perdomo, left Guatemala when she was fifteen, and entered the United States illegally in 1991, to join her mother. In 2003, the former INS commenced removal proceedings against on the basis that she had unlawfully entered the United States. Perdomo conceded removability, and requested asylum, withholding and CAT protection.

At the asylum hearing Perdomo claimed that she did not want to return to Guatemala because she feared persecution as a member of a particular social group consisting of women between the ages of fourteen and forty. She testified that her fear was based on the high incidence of murder of women in Guatemala, and her own status as a Guatemalan woman. She provided the IJ with several reports by the Guate-

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Application of the Fourth Amendment Exclusionary Rule in Removal Proceedings

This article will explore the extent to which the door to application of the exclusionary rule in immigration proceedings has been left open by the "egregious violations" exception mentioned by the Supreme Court in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). As a general rule in criminal proceedings, all evidence obtained, directly or indirectly, as a result of an unlawful search or seizure in violation of the Fourth Amendment, is excluded. *See Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963) ("The exclusionary prohibition extends as well to the indirect as the direct products of such invasions [of a defendant's Fourth Amendment rights]."). The Supreme Court, however, has held that the Fourth Amendment exclusionary rule generally does not apply in civil deportation proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *see also Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) ("we have generally held the exclusionary rule to apply only in criminal trials").

In *Lopez-Mendoza*, the Court

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mala Human Rights Commission, which is based in the United States, documenting the torture and killing of women, the brutality of the killings, the non-responsiveness of the Guatemalan government to such atrocities, among other matters. She also claimed that she would be targeted because she would not be accepted as a native citizen in Guatemala, but would be considered an American with financial resources due to the number of years that she has lived in the United States. The IJ denied asylum, declining to make a finding o the social group issue.

On appeal, the BIA agreed with the IJ's determination that Perdomo failed to establish a well-founded fear of future persecution in Guatemala on account of her membership in a particular social group. The BIA considered the group of "women between the ages of fourteen and forty who are Guatemalan and live in the United States" to be too broad to qualify as a protected social group. The BIA also rejected Perdomo's revised definition of the protected social group-"all women in Guatemala." The BIA concluded that this social group was even broader, and was a demographic rather than a cognizable social group under the INA.

The Ninth Circuit preliminarily noted that although the INA does not provide a definition for the term "particular social group," the BIA has interpreted it to mean a group with members who "share a common, immutable characteristic" that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). The BIA also has clarified that a group must have "social visibility" and adequate "particularity" to constitute a protected social group. *In re A-M-E & J-G-U-*, 24 I&N Dec. 69 (BIA 2007). The BIA has recognized as a "particular social group" women who belong to a particular tribe and who oppose female genital mutilation because that group is defined by characteristics that cannot be changed or should not be changed. *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996). However, noted the court, "whether females in a particular country, without any other defining characteristics, could constitute a protected social group remains an unresolved question for the BIA."

A "'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members."

Ninth Circuit Case Law

The court then considered its own case law, noting that under its seminal case of *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), it required a "voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group." In that case, the court held that "young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador" did not constitute a particular social group for purposes of asylum. The court also said that a group could not be defined by a "sweeping demographic division" where its members "naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." The court reasoned that the term "particular social group" was intended to apply to "cohesive, homogeneous group[s]" in order to avoid "extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country."

However, more recently, the court said that it had developed a two-pronged approach to recognizing a protected social group, partly because that members of some social group do not associate by choice. Thus, in *Hernandez-Montiel v.INS*, 225 F.3d 1084 (9th Cir. 2000), the court held that a "'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." Applying this definition, the court held that "gay men with female sexual identities in Mexico" constituted a particular social group. The court reasoned that "[s]exual orientation and sexual identity are immutable" and "are so fundamental to one's identity that a person should not be required to abandon them." The court also explained that consistent with the BIA's interpretation, "social visibility" and "particularity" are factors to consider in determining whether a group constitutes a "particular social group" under the INA. *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744 (9th Cir. 2008). The court then noted that although it had not "held expressly that females, without other defining characteristics, constitute a particular social group" it has concluded that females, or young girls of a particular clan, meet it definition of a particular social group. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). In *Mohammed*, the court said that it recognized gender as an "innate characteristic" that is "fundamental to [one's] identit[y]," consistent with the INS, now USCIS, Gender Guidelines, and those of the UNHCR.

Perdomo's Asylum Claim

Perdomo claimed that that women in Guatemala comprise a "particular

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held that "a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws." *Lopez-Mendoza*, 468 U.S. at 1039. Thus, "[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *Id*. at 1051. The Court held that the social costs of imposing an exclusionary rule in civil deportation proceedings outweighed the incremental increase in deterrence from exclusion, and therefore courts may not impose even a prudential rule excluding reliable evidence obtained through peaceful arrests that might have violated the Fourth Amendment. *Lopez-Mendoza*, 468 U.S. at 1050. The Court also held that application of the exclusion rule in civil deportation proceedings "provides no remedy for completed wrongs" and "'is unlikely to provide significant, much less substantial, additional deterrence'" to future unlawful conduct by immigration officials. *Id*. at 1046 (internal citations omitted). Moreover, the Court specifically declined to apply the exclusionary rule where it would compel the release of "persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country." *Id*. at 1050; *see also id.* at 1047.

Four out of the five Justices in the *Lopez-Mendoza* majority added a final paragraph in which they noted that *Lopez-Mendoza* did not present "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." 468 U.S. at 1050-51. The Court, however, did not state explicitly that such violation would provide an exception to the general rule or elaborate on what it considered to be an egregious violation of the Fourth Amendment in context of deportation proceedings. Instead, these justices cited to the Court's decision in *Rochin v. California*, 342 U.S. 165 (1952), where the Court held that evidence was inadmissible because the police conduct, which involved forcible stomach-pumping and physical abuse of defendant, "shock[ed] the conscience" and "offend[ed] even hardened sensibilities." It also appears that the plurality intended to leave the door open for a possible exception to the exclusionary rule for another case – "if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." *Lopez-Mendoza*, 468 U.S. at 1050. The plurality then repeated that credible evidence gathered in connection with peaceful arrests by INS officers should not be suppressed in a civil deportation hearing. 468 U.S. at 1051.

The Supreme Court has held that the Fourth Amendment exclusionary rule generally does not apply in civil deportation proceedings.

In decisions issued post-*Lopez-Mendoza*, a majority of federal courts of appeals, the First, Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits, have recognized the existence of an "egregious violations" exception, at least in dicta. *See Kandamar v. Gonzales*, 464 F.3d 65, 70-71 (1st Cir. 2006) (noting that "in the immigration context, the Supreme Court has left only a 'glimmer hope of suppression'" of the evidence which was obtained in violation of the Constitution) (internal citations omitted); *Melnitsenko v. Mukasey*, 517 F.3d 42, 47-48 (2d Cir. 2008) (recognizing and discussing application of the egregiousness exception under *Lopez-Mendoza*); *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir.), *as amended* (2006) (holding that "absent the kind of egregious circumstances referred to in *Lopez-Mendoza* . . . the Fourth Amendment does not provide a basis for an alien to suppress his/her immigration file, or information in that file."); *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005) (recognizing the existence of the "egregious violations" exception under *Lopez-Mendoza*); *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002) (where the court did not reach the question of egregiousness but recognized the "egregious violations" exception under *Lopez-Mendoza*); *Orhorhaghe v. INS*, 38 F.3d 488, 492-93, 503-04 (9th Cir. 1994) (where the court found the Fourth Amendment violation to have been "egregious" because, *inter alia*, agents had initially targeted the alien for investigation based on the "racial" factor of his "Nigerian-sounding name") ; *United States v. Olivares-Rangel*, 458 F.3d 1104, 1115 n.9 (10th Cir. 2006) (where the court in dicta recognized the existence of the egregious exception violation under *Lopez-Mendoza*). Additionally, the second part of the same sentence in *Lopez-Mendoza* as the "egregious violations" exception gave rise to the "probative value" exception applied by the Second Circuit in *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009). Instead of focusing on any Fourth Amendment violations, the court noted that violations that undermined the probative value of the evidence obtained warranted exclusion. *Singh*, 553 F.3d at 215.

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The Exclusionary Rule in Removal Proceedings

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Four circuits, the Fourth, Fifth, Eighth, and Eleventh Circuits, have not decided whether there is an "egregious violations" exception, either not mentioning the existence of such an exception, or explicitly declining to decide whether an exception exists. *See Ali v. Gonzales*, 440 F.3d 678, 681 (5th Cir. 2006) (stating that the exclusionary rule does not apply to immigration proceedings, with no mention of any exception); *Patel v. INS*, 790 F.2d 720, 721 (8th Cir. 1986) (same); *United States v. Oscar-Torres*, 507 F.3d 224, 227 n.1 (4th Cir. 2007) (explicitly not deciding the existence of an exception); *Rampasard v. U.S. Atty. Gen.*, 147 Fed.Appx. 90 (11th Cir. 2005) (unpublished disposition) (assuming *arguendo* the existence of an exception).

The Ninth Circuit initially defined its "egregious violations" exception in a tax case, *Adamson v. Commissioner of Internal Revenue*, 745 F.2d 541, 545-46 (9th Cir. 1984), in which the court found no "egregious violations" and therefore did not order exclusion of the evidence. *Adamson*, 745 F.2d at 545 n.1., seemed to minimize application of the Supreme Court's citation to *Rochin* in *Lopez-Mendoza* because the Ninth Circuit did not believe that the Supreme Court's citation to *Rochin* "was meant to limit 'egregious violations' to those of physical brutality." According to the Ninth Circuit, an egregious violation of the Fourth Amendment occurs "[w]hen evidence is obtained by deliberate violations of the fourth amendment, or by conduct a reasonable officer should know is in violation of the Constitution, the probative value of that evidence cannot outweigh the need for a judicial sanction." *Id.* at 545.

Next, the Ninth Circuit applied the *Adamson* standard in two precedent civil deportation decisions, both issued in 1994: *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (where a divided panel held that evidence obtained in bad faith as a result of racial profiling must be suppressed in a civil deportation proceeding), *reh'g and reh'g en banc denied*, 37 F.3d 1421 (1994), and *Orhorhaghe*, 38 F.3d 488. Then, in *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), *reh'g en banc denied sub nom*, *Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (2009), the court concluded that exclusionary rule applied in removal proceedings despite the Supreme Court's holding in *Lopez-Mendoza*, where evidence is obtained as a result of "conduct a reasonable officer should know is in violation of the fourth amendment." *Id.* at 1019. The Court noted that its conclusion was "underscored by [the court's] cognizance of the 'extensive training INS agents receive in Fourth Amendment Law.'" *Id.* (citing to *Orhorhaghe*, 38 F.3d at 503 n.23).

The Fourth Amendment exclusionary rule as applied to immigration proceedings is relatively undeveloped in a majority of federal courts of appeals.

However, the dissent in the court's order denying en banc rehearing in *Lopez-Rodriguez* observed that "the Supreme Court clearly held the exclusionary rule does not apply to bar illegally procured evidence from admission in a deportation hearing," but the panel had "held precisely the opposite." 560 F.3d at 1099. The dissent described how the standard applied by the panel developed, 560 F.3d at 1099-1102, then described how the result is in conflict with *Lopez-Mendoza*. *Id.* at 1102-05. According to the dissent, the panel "turned Supreme Court plurality dicta into majority dicta" and "applied that dicta, in a manner not consistent with the sole case cited in dicta, to create a new rule – one never envisioned by either the Supreme Court majority or the plurality." *Id.* at 1099. As suggested above, the "egregious violations" language is dicta in *Lopez-Mendoza*, and further relates only to the conduct of the officers and not to the officers' knowledge. *Id.* at 1100, 1104 (noting that the sole case cited in the dicta, *Rochin*, 342 U.S. 165, addressed the officers' conduct and not the officers' knowledge).

The Fourth Amendment exclusionary rule as applied to immigration proceedings is relatively undeveloped in a majority of federal courts of appeals. The First and Second Circuits, the only other courts of appeals outside of the Ninth Circuit that have attempted in precedent decisions to define an "egregious violations" exception to the holding in *Lopez-Mendoza*, have interpreted the exception to relate to the conduct of the law enforcement officers, and not to their knowledge. *See Lopez-Rodriguez*, 560 F.3d at 1106 (Bea, J., dissenting). *Cf. Kandamar*, 464 F.3d at 70-74; *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-36 (2d Cir. 2006). The *Lopez-Mendoza* exceptions defined by the First and Second Circuits focus on the conduct of the government officers, not the officers' knowledge of constitutional law.

Conclusion

The courts of appeals recognized that the Supreme Court in *Lopez-Mendoza* established that exclusionary rule does not apply in civil immigration proceedings. A majority of the circuits also acknowledged, at least in dicta, that there is an "egregious violations" exception to the holding of *Lopez-Mendoza*. However, no circuit other than the Ninth has held that a violation is egregious merely because the violation was so obvious that a reasonable officer should know it. Judge Bybee, who wrote concurring opinion in *Lopez-*

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Guatemalan women as a particular social group

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social group" at high risk of "femicide," and that as a woman she has an objectively well-founded fear of future persecution in Guatemala. The court noted that the BIA dismissed Perdomo's appeal solely on the ground that "all women in Guatemala" could not constitute a cognizable social group, without reaching the question of whether Perdomo had demonstrated a nexus between her membership in that group and her fear of persecution. In particular, the BIA determined that the group "all women in Guatemala" was overly broad and internally diverse, and constituted "a mere demographic division . . . rather than a particular social group." The BIA relied on for its holding on *Sanchez-Trujillo*. The court found that this was an error because "an analysis of whether a particular social group qualifies for asylum does not end with *Sanchez-Trujillo*."

Under *Hernandez-Montiel*, said the court, which is based in large part on the BIA's *Acosta* decision, an innate characteristic may be the basis for a protected social group." Moreover, the court noted that it had "the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum." In those cases where the court rejected certain social groups as too broad, the court said that those groups lacked a "unifying relationship or characteristic to narrow th[e] diverse and disconnected group." The court gave as examples *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005), where it determined that "business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity" was too broad because such a group had neither a voluntary relationship nor an innate characteristic to bond its members, and *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151-52 (9th Cir. 2010), where the court noted that the proposed social group, "returning Mexicans from the United States," was similar to the types of large and diverse social groups" considered in *Ochoa* and *Sanchez-Trujillo*.

Consequently, the court found that the BIA had failed to apply both prongs of the *Hernandez-Montiel* definition to Perdomo's claim that women in Guatemala constitute a particular social group, and also found that the BIA's decision was inconsistent with its own opinions in *Matter of Acosta*, and its progeny. Accordingly, the court remanded the case to the BIA to "determine in the first instance whether women in Guatemala constitute a particular social group, and, if so, whether Perdomo has demonstrated a fear of persecution 'on account of' her membership in such a group."

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NOTED: Excerpts from a July 25, 2010, editorial in the *Los Angeles Times*

Too many cultures see violence against women as a prerogative, not a crime. The United States must continue to fight against this and offer protection to the most endangered people, but it cannot be expected to provide refuge to all women at risk. Though it is important to broaden the umbrella to include groups of persecuted people who don't fall into the prescribed categories, the designation of all Guatemalan women is simply too broad. On points like this, either the U.S. attorney general or the U.S. Congress could help by clarifying what constitutes a protected social group.

The solution to the broader problem of violence against women, however, is not just to accept victims into the United States but to forcefully address the cultural biases and lack of justice in the countries where it is taking place. One way to do this would be for Congress to pass the bipartisan International Violence Against Women Act, which seeks to make the issue a priority for the Department of State and the U.S. Agency for International Development. This would direct U.S. support and assistance to educational, economic and other programs that address the root causes of violence against women, and build up rule of law to hold abusers accountable.

Exclusionary Rule in Removal Proceedings

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Rodriguez, 536 F.3d at 1019-20, observed that the Ninth Circuit definition of its exception to the holding of *Lopez-Mendoza* "is almost certain, over time, to swallow up the rule." *Id.* at 1020. It also appears that the Ninth Circuit position set that court "on a collision course with the Supreme Court." *Id*.

Depending on the facts of their particular case, the government litigators, before addressing an argument involving the "egregious violations" exception, should try to ascertain whether violation of the Fourth Amendment occurred in the first place. If the facts of the case reveal that no violation of the Fourth Amendment occurred, then, no basis for exclusion of evidence exists. The government litigators should also keep in mind that the Supreme Court in *Lopez-Mendoza*, 468 U.S. at 1050, did not provide the definition of "egregious violations" and the court of appeals created their own definition of that term. Consequently, if the applicable circuit has established a definition for the term, it is necessary to ascertain or some other meaning.

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FURTHER REVIEW PENDING: Update on Cases & Issues

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 BIA 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?

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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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Derivative Citizenship Equal Protection

On March 22, 2010, the Supreme court granted certiorari in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court will consider the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 USC 1326? The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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Due Process– Duty to Advise

In ***U.S. v. Lopez-Velasquez***, 568 F.3d 1139 (9th Cir. 2009), the court held that defendant's due process rights were violated when the IJ did not inform him that he was eligible for discretionary relief even though defendant was indeed not eligible under the law as it then existed. On March 8, 2010, the Ninth Circuit granted rehearing en banc and vacated the panel's opinion.

The question presented is: Whether an illegal reentry defendant had a due process right to be advised in his underlying deportation proceeding of his potential eligibility for discretionary relief under INA 212(c), where the defendant was not then eligible for that discretionary relief, but there was a plausible argument that the law would change in defendant's favor.

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Convictions - State Expungements

On July 7, 2010, the government filed a petition for en banc rehearing in *Nunez-Reyes v. Holder*, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of congressionally-created immigration law.

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Aggravated Felony — Pre-1988

On June 14, 2010, the government filed a petition for rehearing en banc in ***Ledezma-Garcia v. Holder***, (9th Cir. 2010), where the Ninth Circuit had held that the Anti-Drug Abuse Act of 1988, that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988. The petitioner had been order removed from the U.S. based on his commission of an aggravated felony of sexually molesting a minor. The question presented to the court is whether the Anti-Drug Abuse Act that made aliens deportable for aggravated felony convictions applies to convictions entered prior to its enactment on November 18, 1988.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Dismisses Petition For Review For Prudential Reasons Because Petitioner Filed The Petition Before IJ Ruled On Application For Voluntary Departure

In *Hakim v. Holder*, __ F.3d __, 2010 WL 2698613 (1st Cir. July 9, 2010) (*Torruella*, Stahl, Souter (Assoc. Justice)), the First Circuit dismissed the alien's petition for review for lack of jurisdiction. The petitioner sought review of the BIA's finding that evidence of mistreatment he experienced in his native Indonesia failed to rise to the level of persecution. However, the BIA, in addition to denying petitioner's application for asylum, had remanded the case to the IJ for consideration of an application for voluntary departure.

The First Circuit concluded that the Attorney General's 2008 voluntary departure regulation contemplated that an alien would be permitted to retain a grant of voluntary departure or file a petition for review, which would terminate a grant of voluntary departure. The court held that dismissal of the petition was appropriate because reviewing it would have permitted petitioner to circumvent the regulation by seeking judicial review and voluntary departure.

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First Circuit Holds That An Alien Is Bound By His Attorney's Responses In A Sworn Interview Before An Immigration Officer

In *Toribio-Chavez v. Holder*, __ F.3d __, 2010 WL 2680784 (1st Cir. July 8, 2010) (Lynch, Torruella, *Thompson*), the First Circuit upheld the BIA finding that the alien was removable and statutorily ineligible for cancellation of removal for presenting false testimony under oath before an immigration officer in order to obtain an immigration benefit.

The court concluded that, even if the alien's attorney answered the immigration officer's questions regarding marital history during the adjustment interview, the alien would be bound by his attorney's responses later found to be false because the attorney was participating in the interview pursuant to the alien's authority. The court also ruled that the Due Process Clause does not preclude the use of hearsay evidence in administrative proceedings.

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Fundamental Change In Political Circumstances In Albania Defeats Petitioner's Asylum Claim

In *Nako v. Holder*, __ F.3d __, 2010 WL 2674506 (1st Cir. July 7, 2010) (*Lynch*, Howard, Thompson), the First Circuit held that even if petitioner had suffered past persecution because of his membership in the Albanian Democratic Party, fundamental changes in Albania's political system rebutted the presumption that he had a well-founded fear of persecution on account of his political opinion. "Even accepting Nako's assertion that some of the people who persecuted him in Durrës still occupy positions in the local government, it does not follow that these unnamed individuals would still seek retribution for Nako's participation in demonstrations denouncing the Socialist Party more than ten years ago in a climate where politically motivated retribution has considerably lessened," said the court.

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The court ruled that the Due Process Clause does not preclude the use of hearsay evidence in Administrative proceedings

SECOND CIRCUIT

Second Circuit Holds That Second Degree Sexual Assault Under Connecticut Law Constitutes An Aggravated Felony

In *Costa v. Holder* __ F.3d __, 2010 WL 2632186 (2d Cir. July 2, 2010) (Winter, Hall, Cedarbaum) (*per curiam*), the Second Circuit affirmed the agency's decision denying the alien's motion to terminate and ordering him removed as an aggravated felon based on a crime of violence. The court relied on *Chery v. Ashcroft*, 347 F.3d 404 (2d Cir. 2003), and determined that amendments made after *Chery* to the relevant sexual assault statute, Conn. Gen. Stat. § 53a-71, did not change the outcome.

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THIRD CIRCUIT

Third Circuit Holds That Asylum Applicant's Business And Social Ties To The Columbian Government Were Sufficient To Show Imputed Anti-FARC Political Opinion

In *Espinoza-Cortez v. Attorney Gen. of the United States,* 607 F.3d 101 (3d Cir. 2010) (Rendell, Ambro, *Fuentes*), the Third Circuit held that Espinoza-Cortez and his family were persecuted by the FARC on the basis of his imputed political opinion, and that the BIA's opinion rejecting their asylum claim was not supported by substantial evidence.

Espinosa-Cortez and his family entered the United States as tourists in 2003 following telephonic threats from the FARC. In Colombia,

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Espinoza-Cortez had wide-ranging connections with the military and government as a result of his social and business activities. He had long participated in equestrian events in Colombia and was a member of the Federal Equestrian Board; Espinosa-Cortez testified that he and his wife would attend equestrian events every weekend, where they would socialize with government ministers and high-ranking military personnel. He also developed relationships with governmental and military figures through his business activities. In particular, Espinosa-Cortez owned a catering business that supplied food to governmental and military institutions, and he owned a store within the military academy that sold food to cadets.

According to his testimony the FARC wanted him to be an informant and "that we stop providing for the army and work with them and they needed-that they wanted part of the money that I had, that I made." The IJ denied asylum, finding principally that Espinosa-Cortez had been threatened because of his social and professional ties to the government, not his political beliefs. The BIA affirmed the IJ's finding.

The court concluded that generalized threats by the FARC to the alien and his family could be construed as death threats, and that because the alien ran a catering business at a Columbian military school and had social ties to the Columbian police through his equestrian club membership, the FARC could have imputed an anti-FARC political opinion to the alien and his family. In particular, the court found that the BIA overlooked "the inescapable political overtones in the FARC's pursuit of Espinosa-Cortez, and it completely disregarded evidence showing that the FARC knew of Espinosa-Cortez's anti-FARC principles, even as the guerrillas threatened him for not betraying those principles Accordingly, the court held that a reasonable factfinder would be compelled to conclude that the political opinions that the guerrillas imputed to Espinosa-Cortez were "at least one central reason" for the FARC's threats.

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■ **Third Circuit Holds Violations Of Regulations Promulgated To Protect Constitutional Or Statutory Rights Do Not Require Showing Of Prejudice To Warrant Relief**

In ***Leslie v. Attorney Gen. of the United States***, __ F.3d __, 2010 WL 2680763 (3d Cir. July 8, 2010) (Ambro, Smith, *Aldisert*), the Third Circuit held that violations of regulations promulgated to protect fundamental constitutional or statutory rights do not require a showing of prejudice to warrant relief.

The court also found that the violation of the regulation entitled petitioner to a new removal hearing without a showing of prejudice.

The petitioner, a native of Jamaica and an LPR, was convicted on a dug felony offense in 1998. While serving his sentence he was placed in removal proceedings. Apparently, the NTA that was served upon petitioner did not include the list of organizations and attorneys that could provide free legal services. This was inferred from the fact that the list was not in the administrative record. Petitioner appeared before an IJ at York County Prison on April 16, 2008. When the IJ inquired if petitioner was seeking an attorney, he replied, "I don't have the money, Sir." The IJ did not explain the availability of free legal resources, nor did he ascertain whether Leslie had received the "Legal Services List." The IJ ordered Leslie removed as an alien convicted of an aggravated felony. The BIA affirmed that decision.

The Third Circuit initially rejected the government's contention that it lacked jurisdiction. The court found that petitioner raised a question of law because he claimed that his NTA was deficient under 8 U.S.C. § 1229 (a)(1)(G)(i), thereby denying him a meaningful opportunity to be heard, and also a constitutional question because he argued that the IJ's failure to inform him of the availability of free legal services, in violation of 8 C.F.R. § 1240.10(a)(2)-(3), deprived him both of his constitutional right to due process and his statutory right to counsel under 8 U.S.C. § 1362. The court then found it undisputed that the IJ had violated 8 C.F.R. § 1240.10(a)(2)-(3) when he failed to advise petitioner of the availability of free legal services and neglected to confirm Leslie's receipt of the list of these programs.

The court also found that the violation of the regulation entitled petitioner to a new removal hearing without a showing of prejudice. In particular, the court held that "when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."

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■ **Third Circuit Holds Immigration Judges Lack Jurisdiction To Review Agency's Termination Of Asylee Status**

In ***Bhargava v. Holder***, __ F.3d __, 2010 WL 2607256 (*Barry*, Roth, Dalzell) (3d Cir. July 1, 2010), the Third Circuit held that an IJ's decision that he lacked jurisdiction to review the DHS's termination of an alien's asylee status was not arbitrary, capricious, or plainly erroneous or inconsis-

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tent with 8 C.F.R. § 208.24. The regulation permits DHS to terminate a grant of asylum if one of three conditions exists, including asylum fraud, and requires the agency to initiate removal proceedings upon the termination of asylee status.

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■ **Fourth Circuit Holds That Immigration Judge's Adverse Credibility Determination Was Erroneous**

In ***Lin v. Holder***, __ F.3d __, 2010 WL 2723147 (4th Cir. July 12, 2010) (*King*, Motz, Duncan), the Fourth Circuit found that the IJ's adverse credibility finding was erroneous where the IJ relied heavily on facts from another case. The petitioner sought asylum claiming that he and his wife had run afoul of China's one-child policy because they were not married at the time of the birth of their child. When the IJ found that petitioner was not credible the IJ used facts from an unrelated case. The government conceded that it was an error. The court held that "predicating an adverse credibility determination on unrelated facts derived from another case is manifestly contrary to law and constitutes an abuse of discretion."

"Predicating an adverse credibility determination on unrelated facts derived from another case is manifestly contrary to law and constitutes an abuse of discretion."

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■ **Fourth Circuit Affords *Chevron* Deference To The Board's Decision In *Matter of Briones,* And Holds Alien Ineligible For Adjustment Of Status**

In ***Ramirez v. Holder***, __ F.3d __, 2010 WL 2499988 (4th Cir. On June 22, 2010) (*Shedd*, Niemeyer, Gregory), the Fourth Circuit upheld the BIA denial of the alien's application for adjustment of status under 8 U.S.C. § 1255(i) because he was inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I). The court determined that, because the interplay between 8 U.S.C. § 1182 (a) and 8 U.S.C. § 1255(i) would otherwise render 8 U.S.C. § 1255(i) a nullity, the statutory language of 8 U.S.C. § 1255(i) was ambiguous and, under the second step of *Chevron*, deferred to the Board's reasonable interpretation in *Matter of Briones*, 24 I&N. Dec. 355 (BIA 2007), that aliens who are inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having entered the United States unlawfully after accruing more than a year of prior unlawful presence, are foreclosed from adjusting their status under 8 U.S.C. § 1255(i).

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FOURTH CIRCUIT

■ **Fourth Circuit Holds No Grandfathering For Substitute Labor Certification Beneficiary**

In ***Suisa v. Holder***, __ F.3d __, 2010 WL 2598322 (4th Cir. June 30, 2010) (Niemeyer, Davis, *Keenan*), the Fourth Circuit, afforded deference to the Attorney General's promulgation of 8 C.F.R. § 1245.10(j), under which an alien substituted as the beneficiary of a labor certification after the April 30, 2001 sunset date cannot qualify as a grandfathered alien for purposes of 8 U.S.C. § 1255(i).

The court presumed that Congress acted purposefully when it included the sunset provision in § 1255 (i), and in doing so plainly demonstrated its intent that the benefits of the provision be temporary and available to a discrete group of aliens. Allowing an alien to substitute many years later as the beneficiary of a labor certification would frustrate Congress' intent. Thus, the court held that the Attorney General's interpretation of the statute expressed in the regulation is a reasonable construction of the statute.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds That A Person Born In The Philippines During Its Status As A United States Territory Was Not "Born . . . In The United States" For Purposes Of The Fourteenth Amendment**

In ***Nolos v. Holder***, __ F.3d __, 2010 WL 2704845 (5th Cir. July 9, 2010), (Jolly, Dennis, Jordan)(*per curiam*), the Fifth Circuit held that an alien born in the Philippines during its status as a United States territory was not "born . . . in the United States" for purposes of the Fourteenth Amendment. The court further held that the alien's conviction under Nevada Revised Statutes § 205.0832 qualified as an aggravated felony under 8 U.S.C. § 1101 (a)(43)(G) under the modified categorical approach.

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■ **Fifth Circuit Joins The Eighth Circuit In Holding That Notice May Be Served On A Minor Who Is At Least Fourteen Years Age**

In ***Lopez-Dubon v. Holder,*** __ F.3d __ , 2010 WL 2384010 (5th Cir. June 16, 2010) (*Dennis*, Jolly, Boyle), the Fifth Circuit affirmed the BIA's denial of an alien's motion to reopen and rescind his *in absentia* deportation order. The alien claimed that he did not receive proper notice of his deportation hearing because he was only seventeen years old at the time notice was sent to his last

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known address via certified mail. Although the Ninth Circuit has held that minors are incapable of receiving notice until turning the age of eighteen, *Flores-Chaves v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004), the Fifth Circuit joined the Eighth Circuit, *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008), in holding that 8 C.F.R. § 103.5 (a), only requires service of notice for immigration proceedings on a responsible adult "in the case of a minor under 14 years of age."

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■ **Fifth Circuit Holds That Error Regarding Notice Of Biometrics Requirements Was Not Prejudicial**

In ***Ogunfuye v. Holder***, __ F.3d __, 2010 WL 2557545 (5th Cir. June 29, 2010) (Garwood, Stewart, *Clement*), the Fifth Circuit, held that, although the Immigration Judge did not give the alien proper notice of the biometrics requirements at his merits hearing as required under the regulations, and then denied her relief application as abandoned, the error was not prejudicial where her counsel received actual notice of the requirements. The court also held that under 8 U.S.C. § 1252 (a)(2)(C) it lacked jurisdiction to review the Judge's denial of a continuance.

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■ **Fifth Circuit Upholds Reinstatement Order, Rejecting Alien's Claim That Passport Stamp Proved Her Lawful Reentry**

In ***Anderson v. Napolitano***, __ F.3d __, 2010 WL 2698751 (5th Cir. July 9, 2010) (Stewart, *Dennis*, Hayes), the Fifth Circuit held that the DHS properly reinstated an alien's removal order where she reentered the United States at a border checkpoint two years after her deportation to Nigeria. In so holding, the court rejected petitioner's claim that the stamp on her passport indicated that her reentry was lawful, and thus precluded reinstatement of her prior removal order.

The court explained that the passport stamp indicated only that she was erroneously admitted at the border, and did not constitute evidence that the Attorney General had consented to her application for readmission, as required for a lawful reentry.

"A false representation of citizenship by an alien for the purpose of obtaining private employment is a "purpose or benefit" under the INA."

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That Alien's False Representation Of United States Citizenship To A Private Employer Rendered Him Removable**

In ***Ferrans v. Holder,*** __ F.3d __, 2010 WL 2720030 (6th Cir. July 12, 2010) (Batchelder, White, *Greer*), the Sixth Circuit held, as a matter of first impression, that an alien's false representation of U.S. citizenship, although made for the purpose of obtaining employment from a private employer, constituted a false representation of citizenship for "any purpose or benefit" within meaning of the INA and thus rendered him removable under INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D).

The petitioner, a citizen of Colombia, entered the United States in 1996 as a nonimmigrant B-2 visitor with authorization to remain in the United States for a temporary period not to exceed July 21, 1996. However, he remained in the United States beyond the expiration of the time prescribed. In November 2000, he falsely represented himself to be a United States citizen on an Employment Eligibility Verification Form ("Form I-9") in order to obtain employment at Jiffy Lube in West Bloomfield, Michigan. Subsequently, he applied for adjustment and when interviewed by USCIS on February 9, 2004, he confirmed this false statement on the I-9. Petitioner was denied adjustment under INA § 212(a)(6)(C)(ii) and placed in proceedings.

The court noted that the Fifth Circuit addressed the precise question in *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007), and denied review of a BIA decision that a false representation of citizenship to gain or retain private sector employment is a "purpose or benefit" under the INA. That court relied on "the plain language of the statute." Similarly, the Tenth Circuit held in *Kechkar v. Gonzales,* 500 F.3d 1080, 1084 (10th Cir. 2007), that "[i]t appears self-evident that an alien who misrepresents citizenship to obtain private employment does so, at the very least, for the 'purpose' of evading § 1324a(a)(1)(A)'s prohibition on 'a person or other entity' knowingly hiring aliens who are not authorized to work in this country." And, the Eighth Circuit has held "that an alien who marks the 'citizen or national of the United States' box on a Form I-9 for the purpose of falsely representing himself as a citizen to secure employment with a private employer has falsely represented himself for a benefit or purpose under this Act." *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008). Accordingly, the court joined all of the circuits who have considered the issue and held that "a false representation of citizenship by an alien for the purpose of obtaining private employment is a "purpose or benefit" under the INA, done, at the very least, for the "purpose" of evading § 1324a's provisions."

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■ **Petitioner's String Of Job Losses In Kyrgyzstan Did Not Amount To Persecution**

In ***Japarkulova v. Holder***, __ F.3d __, 2010 WL 2680190 (6th Cir. July 8, 2010) (*Kethledge*, Ryan, Martin), the Sixth Circuit upheld the BIA's denial of the petitioner's asylum claim, finding that her string of job losses, which were a result of her opposition to the corruption of the wife of the former president, Askar Akayev, did not amount to persecution when each time she was fired she moved quickly to another high-level position in the Kyrgyz economy.

Petitioner was originally admitted to the United States in 1997 under a Fulbright Scholarship. She returned to the U.S. in September 2001 and before her visitor's visa expired she affirmatively applied for asylum. When USCIS did not grant her application, she was placed in removal proceedings. Petitioner testified that in 1993, when she was working at an educational foundation in the Kyrgyz Republic, she had reported to the Minister of Education that Askar was selling the scholarships awarded by the foundation. Instead of help, she was threatened with jail if she proceeded with the matter. She also claimed that she was fired from a series of jobs because of her opposition to corruption. The IJ denied asylum finding that the mistreatment she had received did not rise to the level of persecution.

The court concluded that substantial evidence supported the BIA conclusion that petitioner did not establish a well-founded fear of future persecution where, although conditions in Kyrgyzstan may have not improved as much as one would expect given that Ayakev is no longer in power, there was no reason to believe that conditions have become worse. However, the court ruled that the BIA's treatment of the threat petitioner received from President Akayev's security minister , was "problematic," explaining that without further explanation, "it's hard to understand the BIA's conclusion that this treatment amounted only to 'verbal harassment or intimidation.'"

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SEVENTH CIRCUIT

■ **Seventh Circuit Remands For Further Examination Of Petitioner's Well-Founded Fear Claim**

In ***Qiu v. Holder***, __ F.3d __, 2010 WL 2721443 (7th Cir. July 12, 2010) (Ripple, Manion, *Tinder*), the Seventh Circuit, remanded to the BIA for a closer examination of petitioner's claim, and held that the BIA erred by finding petitioner had failed to establish a well-founded fear because he could not show the type of punishment he would face by the Chinese government for practicing Falun Gong.

"Asylum exists to protect people from having to return to a country and conceal their beliefs."

The petitioner had presented evidence that he was practicing Falun Gong, that he had fled China to escape persecution on account of his practice, that he had protested by practicing Falun Gong here in America, that the Chinese were aware of his activities, and, that event the State Department reports stated that Falun Gong practitioners were persecuted in China.

The court rejected part of the BIA's reason for denying asylum, namely that petitioner could avoid persecution by ceasing the practice of Falun Gong or hope to evade discovery. "Putting [petitioner] to such a choice runs contrary to the language and purpose of our asylum laws., " said the court. "Asylum exists to protect people from having to return to a country and conceal their beliefs." Accordingly the court remanded the case to the BIA to "reconcile the dilemma facing Qiu, the level of persecution he would face in China's administrative system, and the asylum statute."

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■ **Alien Must Be Afforded Compulsory Process To Attempt To Locate Witness Before Hearsay Evidence Can Be Admitted**

In ***Malave v. Holder,*** __ F.3d __, 2010 WL 2574176 (7th Cir. June 29, 2010) (*Easterbrook*, Bauer, Rovner), the Seventh Circuit held that, while NACARA § 202(f) bars review of NACARA adjustment applications, it does not bar review of removal orders. The court also held that NACARA § 202(e)(2) requires compliance with 8 U.S.C. § 1229a (b)(4)(B), which directs the agency to afford each alien "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government." The court thus granted the alien's petition and remanded for the agency to grant the petitioner's request for a subpoena regarding a person whose statements were relied on to find that he had engaged in marriage fraud.

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■ **Seventh Circuit Holds That Immigration Judge Properly Exercised Discretion In Denying A Continuance To Present Fingerprint Data**

In ***Umezurike v. Holder,*** __ F.3d __, 2010 WL 2696532 (7th Cir. July 9, 2010), (Manion, *Rovner*, Tinder), the Seventh Circuit held that the IJ prop-

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erly exercised her discretion in denying a continuance to present fingerprint data for lack of good cause where the alien was given three warnings that he needed to submit the data and two-and-a-half years to do so.

The petitioner, citizen of Nigeria, entered the United States in 2003, as a non-immigrant visitor for pleasure and remained in this country after his visa expired. On June 28, 2004, he filed an affirmative application for asylum. DHS referred the asylum application to the Immigration Court and placed petitioner in removal proceedings on August 9, 2004. Petitioner, with counsel, appeared before an IJ on August 24, 2004, and admitted the factual allegations contained in the NTA. Petitioner was advised, among other matters, that he needed to be re-fingerprinted if he had not done so already. Petitioner was warned again at two reconvened hearings. Three day's prior to a January 19, 2007, hearing, petitioner's counsel sent his client to Chicago for fingerprinting but, the biometric data was not available in time for the hearing. Petitioner's counsel then sought, an additional continuance to rectify the fingerprint and documentary evidence deficiencies. The IJ denied the continuance request, found petitioner to be removable as charged, deemed his applications for relief and protection abandoned and issued an order of removal to Nigeria. The BIA affirmed.

Despite the absence of fraud in procuring his lawful permanent resident status, the alien was not "lawfully admitted" because adjustment of status requires compliance with substantive legal requirements, not mere procedural regularity.

The court found that "it clearly was not an abuse of discretion for the immigration judge to find that [petitioner] had not supplied good cause for failing to present fingerprint data despite having three warnings that he needed to comply, and two-and-a-half years in which to do so."

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■ **"Lawfully Admitted For Permanent Residence" Requires Compliance With All Substantive Legal Requirements**

In *Estrada-Ramos v. Holder*, __ F.3d __, 2010 WL 2605859 (*Evans*, Posner, Easterbrook) (7th Cir. July 1, 2010), the Seventh Circuit affirmed the BIA conclusion that the alien was ineligible to adjust his status in 1997 because he had been convicted of a controlled substance violation in 1991. The court agreed with the BIA that the alien's expunged California conviction remained valid for immigration purposes. The court also concluded that, under *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), and despite the absence of fraud in procuring his lawful permanent resident status, the alien was not "lawfully admitted" because adjustment of status requires compliance with substantive legal requirements, not mere procedural regularity.

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NINTH CIRCUIT

■ **Misapplication Of Bank Funds By Bank Employee Constitutes An Aggravated Felony**

In *Carlos-Blaza v. Holder*, __ F.3d __, 2010 WL 2600554 (9th Cir. June 30, 2010) (*Bea*, Rawlinson, O'Scannlain), the court held that the alien's conviction for misapplication of bank funds by a bank employee under 18 U.S.C. § 656 constituted an aggravated felony under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i). The court concluded that while 18 U.S.C. § 656 does not categorically match the aggravated felony definition, the alien's plea to misapplication of bank funds met the definition under the modified categorical approach.

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■ **Ninth Circuit Limits The Binding Nature Of Judicial Admissions When The Government Vigorously Contests A Previously Pleaded Fact**

In *Cortez-Pineda v. Holder*, __ F.3d __, 2010 WL 2635620 (*Gould*, Wardlaw, Ware) (9th Cir. July 2, 2010), the Ninth Circuit affirmed the BIA's conclusion that the alien failed to establish that he entered the United States in time to qualify for special rule cancellation of removal under NACARA, notwithstanding that the Notice to Appear alleged an entry date that would have made the alien eligible. The alien admitted the alleged entry date, but the DHS later contested the date of entry, after ample notice and an evidentiary hearing. The court ruled that DHS adequately contested the entry date, and thus overcame the judicial admission, despite never amending the NTA. The court also affirmed an adverse credibility finding regarding the alien's asylum application based on inconsistencies between the alien's claim about when he suffered alleged persecutory events and his claim about when he allegedly entered the United States.

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■ **Eleventh Circuit Holds That Agency Misinterpreted Phrase "At The Conclusion Of Proceeding" In Voluntary Departure Statute**

In *Alvarado v. U.S. Att'y Gen.* __ F.3d __, 2010 WL 2680321 (11th Cir. July 8, 2010) (Dubina, Fay, *Albritton*), the Eleventh Circuit held that the IJ and the BIA misinterpreted the phrase "at the conclusion of a proceeding" in the voluntary departure statute, INA

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§ 240B(b)(1), 8 U.S.C. § 1229c(b)(1), when they concluded that the alien could not request voluntary departure for the first time after the IJ issued an oral decision.

The petitioners, citizens of Colombia, were admitted to the United States in May 2001, as visitors for pleasure. When their visas expired and they failed to depart, DHS charged them with removability under INA § 237(a)(1)(B), as aliens who overstayed their visas. Petitioners then applied for asylum and withholding but did not seek voluntary departure. After the IJ denied their requested reliefs and issued an oral decision, petitioners requested voluntary departure. The IJ refused to consider their request because they did not mention voluntary departure at the master calendar hearing or at any point during the merits hearing before the IJ rendered his oral decision. The BIA affirmed both decisions.

The court found that, in considering the statutory scheme governing voluntary departure as a whole, the government's argument that an alien cannot request post-conclusion voluntary departure immediately after the IJ issues an oral decision on removal was unreasonable. The court said that the statutes and regulations governing voluntary departure never state that an alien must request post-conclusion voluntary departure before an IJ issues an oral decision on removal. Here, the petitioners requested voluntary departure during the hearing as reflected in the transcript. Moreover, the court explained that "allowing an alien to apply for voluntary departure immediately after the IJ issues an oral decision on removability is consistent with the design, object, and policy of the statutes and regulations governing such relief." Accordingly the court vacated the decision below and remanded the case for a VD determination.

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■ **Eleventh Circuit Holds Government Failed To Show Fundamental Change In Country Conditions To Rebut Presumption That Alien's Life Would Be Threatened In Indonesia**

In ***Imelda v. U.S. Att'y Gen.***, __ F.3d __, 2010 WL 2720876 (11th Cir. July 12, 2010) (Tjoflat, *Wilson*, Ebel), the Eleventh Circuit held that the government failed to show a fundamental change in country conditions to rebut the presumption that the petitioner's life would be threatened upon removal to Indonesia on account of her religion.

Neither the BIA nor the IJ considered whether petitioner "could avoid a future threat to [her] life or freedom by relocating to another part of Indonesia."

The petitioner, an ethnic Chinese Christian from Indonesia, entered the United States as a visitor and never departed. In 2003, she affirmatively applied for asylum, and in 2005 she was placed in removal proceedings where she renewed her claim to asylum, and applied for withholding and CAT protection. Petitioner, who owned a grocery store with her husband, claimed that she had been persecuted in Indonesia because of her religion and ethnicity and testified to several incidents. The IJ denied all claims for asylum, finding that the alleged incidents did not "rise to the level of persecution and that she had not shown a well-founded fear nor a clear probability of future persecution. On appeal, the BIA assumed that even if petitioner "had established past persecution, . . . [it] would find that the presumption of future persecution is rebutted" because of a "fundamental change in circumstances," basing its determination solely on the Country Report.

Before the Eleventh Circuit, petitioner argued that the BIA had erred in relying on the Country Report alone in making its determination, that it did not make an individualized finding in relation to Imelda's situation, and that the changed conditions described in the Country Report are not fundamental because persecution still exists for Christians and ethnic Chinese in Indonesia

The court agreed with petitioner finding that reasoned that the BIA had failed to conduct an individualized analysis, such as considering the specific conditions where the petitioner lived in Indonesia. In particular, the court said that while it did "not require unrealistic specificity from the government in establishing changed conditions, it is insufficient to point to two regions in a country - regions in which the petitioner did not live - and conclude that fundamental changes have occurred because there were some improvements in those regions." The court also pointed out that neither the BIA nor the IJ considered whether petitioner "could avoid a future threat to [her] life or freedom by relocating to another part of [Indonesia] and, under all the circumstances, it would be reasonable to expect [her] to do so." Accordingly, the case was remanded to the BIA to consider the two issues.

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Contributions to the Immigration Litigation Bulletin Are Welcomed

This Month's Topical Parentheticals

ASYLUM

■ ***Ahmed v. Holder,*** __ F. 3d __, 2010 WL 2740018 (1st Cir. July 13, 2010) (holding that "secularized and westernized Pakistanis perceived to be affiliated with the United States" are not a cognizable social group because the proposed group does not satisfy the particularity requirement or the visibility test)

■ ***Rahimzadeh v. Holder***, __ F.3d __, 2010 WL 2890998 (9th Cir. July 26, 2010) (affirming denial of asylum to a Christian convert who was born in Iran and expressed a fear of returning to the Netherlands (where he had previously been granted asylum) because he failed to show that the Dutch government was unwilling or unable to control Muslim extremists who targeted him)

■ ***Afriyie v. Holder***, __ F.3d __, 2010 WL 2891002 (9th Cir. July 26, 2010) (holding that the BIA made "numerous factual errors in its 'unable or unwilling' to control analysis by ignoring evidence favorable to petitioner (a Ghanian Baptist preacher who feared persecution by Muslims), misstating his testimony, and improperly treating as irrelevant police reports made by individuals other than petitioner; further remanding for BIA to apply proper legal standards for relocation analysis)

■ ***Ni v. Holder,*** __ F. 3d __, 2010 WL 2745786 (4th Cir. July 13, 2010) (affirming denial of withholding of removal and applying *Brand X* to BIA's decision in *Matter of J-S-*, which held that a persecution claim based on forced abortion may only be brought by the individual who has undergone the procedure)

■ ***Pathmakanthan v. Holder,*** __ F. 3d __, 2010 WL 2794604 (7th Cir. July 16, 2010) (affirming denial of ethnic Tamil's claim of persecution by Sri Lankan government, and reasoning that a single death threat neither constituted past persecution nor formed basis for a well-founded fear; further rejecting claim of a pattern and practice of persecution against young Tamil males)

■ ***Perdomo v. Holder,*** __ F.3d __, 2010 WL 2721524 (9th Cir. July 12, 2010) (finding BIA's social group analysis insufficient and remanding for BIA to determine in first instance whether women in Guatemala constitute a particular social group, and, if so, whether petitioner demonstrated a fear of persecution "on account of" her membership in such a group)

■ ***Imelda v. United States Att'y Gen.,*** __ F. 3d __, 2010 WL 2720876 (11th Cir. July 12, 2010) (holding that the government failed to show a fundamental change in country conditions to rebut the presumption that petitioner's life would be threatened upon removal to Indonesia on account of her religion; reasoning that the BIA failed to conduct an individualized analysis, including considering the specific conditions where petitioner had lived)

■ ***Restrepo v. Holder,*** __ F.3d __, 2010 WL 2557763 (7th Cir. June 28, 2010) (holding that court lacked jurisdiction pursuant to 8 U.S.C. § 1158(a)(3) to review IJ's determination that alien failed to establish changed circumstances for purposes of one-year asylum bar and noting its disagreement with the Ninth Circuit; affirming BIA's denial of withholding of removal)

■ ***Qui v. Holder,*** __ F.3d __, 2010 WL 2721443 (7th Cir. July 12, 2010) (remanding to BIA for a closer examination of petitioner's claim, and holding that BIA erred in finding petitioner failed to establish a well-founded fear because he could not show the type of punishment he would face by the Chinese government for practicing Falun Gong)

■ ***Bhargava v. Att'y Gen. of United States,*** __ F.3d __, 2010 WL 2607256 (3d Cir. July 1, 2010) (holding that BIA properly affirmed IJ's decision that he lacked jurisdiction to review DHS's termination of petitioner's asylum status where the statute and regulations are silent with respect to the IJ's jurisdiction)

■ ***Nako v. Holder,*** __ F.3d __, 2010 WL 2674506 (1st Cir. July 7, 2010) (holding that substantial evidence supported the BIA's and IJ's conclusion that fundamental changes in the Albanian political situation since 2001 rebutted the presumption that petitioner had a well-founded fear of persecution by his socialist party adversaries)

■ ***Japarkulova v. Holder,*** __ F.3d __, 2010 WL 2680190 (6th Cir. July 8, 2010) (holding that while the BIA erred in failing to provide a reasonable explanation for concluding that petitioner, a citizen of the Kyrgyz Republic, did not experience past persecution as a result of a death threat from the President's security minister, the error was harmless because remand would not lead to a different result) (Judge Martin concurred)

ADJUSTMENT, VISAS

■ ***Suisa v. Holder,*** __ F.3d __, 2010 WL 2598322 (4th Cir. June 30, 2010) (holding that the Attorney General's interpretation of 8 U.S.C. § 1255(i) – that an alien who was substituted for the previous beneficiary of a labor certification application after April 30, 2001 is not considered a "grandfathered alien" – is entitled to *Chevron* deference because that is a permissible construction of § 1255(i))

■ ***Estrada- Ramos v. Holder,*** __ F.3d __, 2010 WL 2605859 (7th Cir. July 1, 2010) (holding that in order to be "lawfully admitted for permanent residence," an adjustment must comply with substantive legal requirements, not mere procedural regularity, and that, because petitioner's conviction was expunged for rehabilitative purposes, he was ineligible to adjust at the time INS adjusted his status)

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This Month's Topical Parentheticals

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■ ***Toribio-Chavez v. Holder,*** __ F.3d __, 2010 WL 2680784 (1st Cir. July 8, 2010) (finding that substantial evidence supported BIA's decision that petitioner was inadmissible at time INS adjusted his status to an LPR given his false testimony under oath and misrepresentations on various immigration forms regarding marital history and children; further affirming the BIA's denial of cancellation because false testimony precluded a finding of good moral character)

CANCELLATION

■ ***Padilla-Romero v. Holder,*** __ F.3d __, 2010 WL 2700106 (9th Cir. July 9, 2010) (holding that the cancellation statute requires an alien to have current LPR status, and rejecting petitioner's "strained" reading that the "has been" language in the statute allows aliens who previously had LPR status but no longer do to remain eligible for cancellation)

CONVENTION AGAINST TORTURE

Kang v. Att'y Gen. of United States, __ F.3d __, 2010 WL 2680752 (3d Cir. July 8, 2010) (holding that the BIA's reversal of the IJ's grant of CAT protection was not supported by substantial evidence and the record compels the opposite conclusion where "the BIA ignored the most telling evidence that [petitioner] presented" of torture by the Chinese government for his role in providing food and shelter for North Korean refugees)

CREDIBILITY

■ ***Lin v. Holder,*** __ F. 3d __, 2010 WL 2723147 (4th Cir. July 12, 2010) (finding that IJ's adverse credibility finding was erroneous where judge relied heavily on facts from another case; rejecting government's argument that the error was harmless)

■ ***Makalo v. Holder,*** __ F. 3d __, 2010 WL 2802642 (1st Cir. July 19, 2010) (holding substantial evidence supported IJ's findings that petitioner did not present credible evidence he would be persecuted in Gambia for political reasons)

CRIMES

■ ***Carlos-Blaza v. Holder,*** __ F.3d __, 2010 WL 2600554 (9th Cir. June 30, 2010) (holding that petitioner's conviction under 18 U.S.C. § 656 [applying to a bank employee who embezzles, abstracts, purloins or willfully misapplies" bank funds] is an aggravated felony fraud or theft offense under the modified categorical approach where the plea agreement shows she "knowingly stole, embezzled, and misapplied moneys" in the amount of $65,000)

■ ***Banuelos-Ayon v. Holder,*** __ F.3d __, 2010 WL 2757372 (9th Cir. July 14, 2010) (holding that a conviction for Corporal Injury to a Spouse/ Cohabitant" under California Penal Code § 273.5(a) categorically qualifies as a crime of domestic violence under 18 U.S.C. § 16(a) because it requires the direct use of force against a person)

■ ***Costa v. Holder,*** __ F.3d __, 2010 WL 2632186 (2d Cir. July 2, 2010) (denying petitioner's motion to terminate, and holding that his conviction for sexual assault in the second degree under Connecticut law constituted a crime of violence because it involved a substantial risk of physical force)

■ ***Dwumaah v. Att'y Gen. of United States,*** __ F.3d __, 2010 WL 1434405 (3d Cir. April 12, 2010) (granting motion to publish on June 29, 2010) (holding that substantial evidence supports the IJ's finding that petitioner is removable for falsely claiming citizenship in connection with federal student loan applications)

■ ***United States v. Esparza,*** __ F. Supp.2d., 2010 WL 2593616 (S.D. Tex. June 29, 2010) (concluding that the issuance of an amended decree regarding defendant's custody status does not legitimately call into question the validity of the prior decree or other evidence establishing that defendant, for purposes of a criminal reentry prosecution, is an alien and has not acquired derivative citizenship).

■ ***Nolos v. Holder,*** __ F.3d __, 2010 WL 2704845 (5th Cir. July 9, 2010) (rejecting petitioner's citizenship claim and agreeing with other circuits that persons born in the Philippines during its status as a US territory were not "born . . . in the United States" for purposes of the Fourteenth Amendment; further finding under the modified categorical approach that petitioner was convicted of an aggravated felony theft offense)

DUE PROCESS, FAIR HEARING

Leslie v. Att'y Gen. of United States, __ F.3d __, 2010 WL 2680763 (3d Cir. July 8, 2010) (holding that violations of regulations promulgated to protect fundamental constitutional or statutory rights do not require a showing of prejudice to warrant relief; further finding that the regulation requiring aliens to be informed of the availability of free legal services protects the fundamental right to counsel at removal hearings)

■ ***Umezurike v. Holder,*** __ F.3d __, 2010 WL 2696532 (7th Cir. July 9, 2010) (holding that IJ properly exercised her discretion in denying continuance to present fingerprint data where petitioner was given three warnings that he needed to submit the data and two-and-a-half years to do so)

■ ***Malave v. Holder,*** __ F.3d __, 2010 WL 2574176 (7th Cir. June 29, 2010) (holding that section 202(f) of NACARA does not bar review of petitioner's claim that her hearing did not comply with the INA, and finding that the IJ erred in refusing to grant petitioner's request to issue a subpoena to find and require her ex-husband to be available at the immigration hear-

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ing for cross-examination, where DHS' primary evidence of marriage fraud was the husband's signed statements that petitioner paid him money to marry her)

■ *Ogunfuye v. Holder,* __ F.3d __, 2010 WL 2557545 (5th Cir. June 28, 2010) (holding that although the IJ did not give petitioner proper notice of the biometrics requirements at the hearing and denied her relief application as abandoned for failure to fulfill the requirements, the error was not prejudicial where her counsel otherwise received actual notice of the requirements; further finding that it lacked jurisdiction to review the IJ's denial of a continuance under 8 U.S.C. § 1252(a)(2)(C))

■ *Cortez-Pineda v. Holder,* __ F.3d __, 2010 WL 2635620 (9th Cir. July 2, 2010) (holding that the government should not be held to have made a binding judicial admission about petitioner's entry date based on the charge in the NTA where it "vigorously disputed" the entry date during the immigration hearing, and petitioner never expressly objected on the grounds of judicial admission, instead stipulating to an evidentiary hearing on the issue at the government's request)

EAJA

■ *Saysana v. Gillen,* __ F.3d __, 2010 WL 2763391 (1st Cir. July 14, 2010) (refusing to grant EAJA fees in a section 236(c) mandatory detention habeas case where the interpretation of section 236(c)'s "when released" language was a novel one, and the government's interpretation was reasonable in law and fact)

JURISDICTION

■ *Marin-Rodriguez v. Holder,* __ F.3d __, 2010 WL 2757321 (7th Cir. July 14, 2010) (rejecting BIA's position that the departure bar divests BIA of jurisdiction over a deported alien's case but suggesting that the BIA "may well be entitled to recast its approach as one resting on a categorical exercise of discretion")

■ *Neves v. Holder,* __ F.3d __, 2010 WL 2836948 (1st Cir. July 21, 2010) (holding that court has jurisdiction to review BIA's decision to deny equitable tolling of motion-to-reopen period for failure to show due diligence, but lacks jurisdiction to review the BIA's refusal to exercise its sua sponte authority to reopen)

■ *Borovsky v. Holder*, __ F.3d __, 2010 WL 2891074 (7th Cir. July 26, 2010) (declining to remand case even though BIA erroneously applied Eighth Circuit precedent where proper venue was in the Seventh Circuit because there was no prejudice; affirming denial of withholding of removal because the anti-Semitic attacks, insults and threats that the alien endured as a child in the Ukraine did not rise to the level of past persecution)

■ *Zajanckauskas v. Holder,* __ F.3d __, 2010 WL 2740012 (1st Cir. July 13, 2010) (holding that court lacked jurisdiction to review denial of waiver of deportability for denaturalized Nazi prison guard because, while the BIA denied the waiver on statutory grounds, it also determined that a waiver was not merited in the exercise of discretion)

■ *Hakim v. Holder,* __ F.3d __, 2010 WL 2698613 (1st Cir. July 9, 2010) (refusing to reach issue of whether a BIA order denying relief from removal and remanding for consideration of voluntary departure is a final order for judicial review purposes, and instead declining to exercise jurisdiction over the PFR for prudential reasons in light of recently-promulgated voluntary departure regulation)

MOTIONS TO REOPEN & RECONSIDER

■ *Vega v. Holder,* __ F. 3d __, 2010 WL 2802617 (9th Cir. July 19, 2010) (holding that a MTR is timely if it is filed within 90 days of the BIA's initial merits determination, but not within 90 days of the denial of a motion to reconsider)

■ *Hernandez-Velasquez v. Holder,* __ F. 3d __, 2010 WL 2757358 (9th Cir. July 14, 2010) (holding that the BIA abused its discretion in failing to discuss petitioner's declaration, attached to her MTR, which set forth her claim that she did not receive notice of the BIA's decision and that she had complied with the requirement to submit a change-of-address form)

■ *Li v. Holder,* __ F.3d __, 2010 WL 2778900 (7th Cir. July 15, 2010) (holding that the BIA's denial of the motion for reconsideration was erroneous where the original order denying asylum failed to mention petitioner's three-day detention for helping her cousin evade China's one-child policy)

REINSTATEMENT

■ *Anderson v. Napolitano,* __ F.3d __, 2010 WL 2698751 (5th Cir. July 9, 2010) (applying substantial evidence standard to review reinstatement order and holding that a passport stamp is not evidence that the Attorney General consented to petitioner reapplying for admission for purposes of determine whether her entry was "illegal")

REMOVABILITY

■ *Surganova v. Holder,* __ F. 3d __, 2010 WL 2813631 (7th Cir. July 20, 2010) (holding that substantial evidence supported IJ's finding that petitioner is removable for marriage fraud)

■ *Ferrans v. Holder,* __ F.3d __, 2010 WL 2720030 (6th Cir. July 12, 2010) (holding that petitioner's false representation of US citizenship for the purpose of obtaining employment from a private employer (Jiffy Lube) rendered petitioner deportable under 8 U.S.C. § 1227(a)(3)(D) because it

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Summaries Of Recent District Court Decisions

District Of New Jersey Holds Court Lacks Jurisdiction To Review Denial Of Adjustment Of Status Application Under LIFE Act

In *Nasser Barbour v. Holder*, No. 09-cv-03062 (D.N.J. June 28, 2010) (Hayden, J.), the district court held that it lacked jurisdiction to review the denial of an adjustment of status application under the LIFE Act because the Immigration and Nationality Act only allows judicial review of such an application in a petition for review following the issuance of an order of removal. The court further held that there was no exception in this case as the alien failed to allege that he was challenging an unconstitutional policy or procedure and was not deprived of meaningful administrative review of his application.

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District Of New Jersey Dismisses $100,000,000.00 Bivens Action

In *Abulkhair v. Bush*, No. 08-cv-05410 (D. N.J. June 14, 2010) (Cavanaugh, J.), the district court dismissed an alien's complaint wherein he sought damages for alleged civil rights violations that occurred during the consideration of his naturalization application. Namely, the alien alleged that his naturalization application was delayed and later denied because he is Muslim. The court held that the alien did not plead a valid constitutional claim and that the suit against the United States was barred by sovereign immunity.

The court dismissed the alien's *Bivens* claims because the alien failed to show that the individual federal defendants were directly responsible for any alleged constitutional violation and because the alien failed to file his *Bivens* action before the statute of limitations expired. The court dismissed the alien's naturalization claims because he failed to demonstrate continuous residence.

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was done for "any purpose or benefit" under the INA)

VOLUNTARY DEPARTURE

■ *Alvarado v. United States Att'y Gen,* __ F. 3d __, 2010 WL 2680321 (11th Cir. July 8, 2010) (holding that the IJ and the BIA misinterpreted the phrase "at the conclusion of a proceeding" for purposes of the voluntary departure statute when they concluded that petitioner could not request voluntary departure for the first time after the IJ issued an oral decision)

WAIVERS

■ *Iliev v. Holder*, __ F. 3d __, 2010 WL 2802819 (10th Cir. July 19, 2010) (rejected petitioner's claim that the BIA committed an error of law by applying a "presumption of fraud" against him in denying a hardship waiver for purposes of removing the conditional basis of his permanent residence; finding that it lacked jurisdiction to review petitioner's challenge to the BIA's credibility finding because that issue is statutorily committed to the AG's discretion)

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OIL TRAINING CALENDAR

■ OIL's 14th Annual Immigration Litigation Conference will be held at the National Advocacy Center in Columbia, South Carolina on September 27—October 1, 2010. This is an advanced immigration law conference intended for experienced attorneys who are litigating in the federal courts or advising their client agencies on immigration matters that may lead to litigation.

■ OIL's 16th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC on November 15-19, 2010. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

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

INSIDE OIL

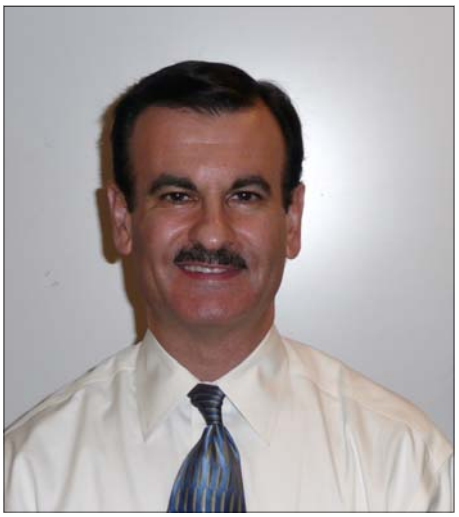
A warm welcome to OIL to the following three attorneys:

Nancy Canter received a BA in History from Amherst College in

2004 and her JD from the Ohio State University College of Law in 2007. Prior to joining OIL, Nancy was with Squire, Sanders & Dempsey, where she litigated commercial disputes and toxic tort matters.

Charles (Chad) Greene earned his BA from Duke University in 1989, served as a Military Intelligence officer in the United States Army, and then earned his JD from the University of California at Berkeley's Boalt Hall School of Law in 1997. After clerking for the Honorable Judge William H. Orrick in the Northern District of California, Chad joined the Criminal Division as an Honors attorney, then moved to Hogan and Hartson as an associate. Chad joined OIL from the National Security Division, where he worked on both counterterrorism and counterintelligence matters, most recently as a deputy unit chief in the Counterintelligence Unit.

Frank M. Johnson received his B.A. in Government from the University of Maryland in 1984 and his JD from the University of Notre Dame in 1987. He worked for 13 years in legal services for the poor and elderly. He joined OIL after working in county government law offices for 10 years, in which he most recently handled state and federal government relations.



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"

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