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

Immigration Litigation Bulletin

Vol. 15, No. 7 *July 2011*

LITIGATION HIGHLIGHTS

■ **ADJUSTMENT**

▶Denial of adjustment upheld when CSPA applicant failed to apply within one year of visa availability date (11th Cir.) **21**

■ **ASYLUM**

▶BIA failed to articulate the requisite amount of harm necessary to find persecution (7th Cir.) **14**

▶Asylum applicant need not expose government corruption to outside agency to qualify as a whistleblower (9th Cir.) **17**

■ **CRIME**

▶Conviction for sale of counterfeit trademark is an aggravated felony (9th Cir.) **16**

■ **DETENTION**

▶Court permits class action declaratory judgement to challenge detention (3d Cir.) **12**

■ **JURISDICTION**

▶Court lacks jurisdiction to review discretionary denial of cancellation (4th Cir.) **12**

▶Court declines to apply fugitive disentitlement doctrine (2d Cir.) **10**

■ **MOTIONS TO REOPEN**

▶BIA abused discretion by denying MTR where alien had received ineffective assistance of counsel (9th Cir.) **19**

Inside

9. Further review pending
10. Summaries of court decisions
23. Topical parentheticals
26. Inside OIL

En Banc Ninth Circuit Holds That Equal Protection Does Not Require That FFOA Treatment Be Extended To State Court Expungements

In *Nunez-Reyes v. Holder*,__ F.3d __, 2011 WL 2714159 (9th Cir. July 14, 2011) (Kozinski, Schroeder, *B. Fletcher*, *Pregerson*, O'Scannlain, Thomas, *Graber*, Wardlaw, Callahan, M. Smith, Ikuta) (*dissenting judges in italics*), an *en banc* panel of the Ninth Circuit held that the Constitution's guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a controlled-substance possession offense the same as a federal controlled-substance possession offense disposed of under the FFOA. Accordingly, the court overruled *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), in which it announced its "equal protection rule," as well as subsequent cases that followed and/or expanded the rule.

The petitioner, a Mexican citizen, entered the United States in 1992. In 2001, he was charged in California state court with one felony count of possession of methamphetamine, and one misdemeanor count of being under the influence of methamphetamine. He pleaded guilty to both counts, but the state court eventually dismissed the charges. Nonetheless, an IJ found and the BIA affirmed, that the state convictions rendered petitioner deportable and ineligible for any form of relief.

(Continued on page 25)

What Does it Cost to Regulate Immigration? Three Measurements to Calculate Costs

Any discussion of reform should include consideration of the costs of immigration. That is, what does it cost to regulate immigration under the Immigration and Nationality Act of 1952, as amended? This article will explore that question.

Properly viewed, immigration cost analysis is policy neutral. Our immigration system produces a variety of different outcomes: admissions and exclusions, benefit grants and denials, naturalizations and denaturalizations, expulsions, et cetera. Each such outcome has a cost, reflecting the systems and procedures we have adopted for the particular purpose in question. The issue at hand is not one of cost-benefit, but rather whether the way we choose to "do" immigration is cost-effective. The costs considered here are limited to direct costs; that is, charges to the public fisc. Immigration's indirect costs and consequences (*e.g.*, the revenue, productivity, wage, and social effects, et cetera) are not considered.

The discussion below reflects the expenditures made by the federal government as authorized by the appropriations enacted for Fiscal Year 2009. *See, e.g.*, Omnibus Appropriations Act, Pub. L. 111-8 (March 11, 2009). As indicated in

(Continued on page 2)

Calculating the costs of immigration

(Continued from page 1)

the citations, most of the figures used can be found in the materials accessible on the website for the Office of Management and Budget. *See* http://www.gpoaccess.gov/usbudget/fy. The figures reported below include the costs for both legal and illegal immigration.

Several important caveats are in order. The analysis here is crude and deeply flawed. First, it assumes fungibility of immigration outcomes. That is, the analysis assumes that it is reasonable to treat all DHS, EOIR, and federal court immigration cases and decisions as being essentially the same. Obviously, it costs more to try and to decide a complex asylum case or a detention class action than an expedited removal adjudication or a motion for summary affirmance. But, as shown below, the costs presented here are averaged for all administrative and judicial decisions, without regard to the substantive content of the particular matter.

Second, because the available budgetary data typically do not detail the portions of agency and court appropriations that are used for immigration as opposed to non-immigration activities, the appropriations are apportioned by the "educated guess" method. Readers are encouraged to reject any apportionments they find unreasonable and substitute their better judgments. Finally, budgetary analysis appears nowhere on my resume and readers should be forewarned that it was the math that drove me from economics to the law.

We will attempt to estimate the costs of the following: (1) the whole of our immigration system; (2) the average cost of several categories of immigration decisions; and (3) the cost of removing a typical alien from the United States.

Measurement One: The Cost of the Whole Immigration System

Our regulation of immigration under the Immigration and Nationality Act of 1952, as amended, involves a very long list of government entities and activities. As detailed below, the Departments of State, Justice, Homeland Security, Labor, and Health and Human Services have roles in immigration regulation, as do the federal courts. The list is actually longer than that presented here as some government immigration activity is just too difficult to tease from the available budget figures (*e.g.*, the cost of OMB review of proposed immigration regulations, or congressional consideration of immigration bills). Moreover, the analysis here is limited to the *federal* budget and does not include the immigration costs confronted by state and local governments. Accordingly, the conclusions reached likely understate the true and complete cost of our immigration system.

FY 2009 System Costs
(millions)

DOS:	$ 536.4
DHS:	$ 8,736.0
DOJ:	$ 2,937.1
DOL:	$ 68
HHS:	$ 633.4
Judiciary:	$ 1,294.4
TOTAL:	**14,205.3**

(1) The Department of State – $536.4 million

The Department of State has a substantial role in our immigration system, principally through the consular issuance of immigrant and nonimmigrant visas. *See generally* 8 U.S.C. §§ 1104, 1152-54; 22 C.F.R. Parts 40-42 (2010). In FY 2009, $5.364 billion was appropriated for the whole of our "diplomatic and consular programs." Pub. L. 111-8, *supra*, 123 Stat. 831. Our ambassadors and foreign service officers do far more than immigration and, significantly, much of the visa process is fee-based and thus not a net cost. See http://travel.state.gov/vis; 75 Fed. Reg. 36522-35 (June 28, 2010). Allocate 10% of the appropriated funds to immigration regulation, or $536.4 million. In FY 2009, the consular fees collected and expended on immigration-related matters (reported as "border security fees") totaled $2,124 million. U.S. Dept. of State, *FY 2009 Budget in Brief*, available at http://www.state.go, p. 13. Note, as well, that in FY 2009 Congress also appropriated $1,675 million for migration and refugee assistance. *See* http://www.gpoaccess.gov/usbudget/fy1, at p. 108.

(2) The Department of Homeland Security – $8,736.0 million

In 2003 the immigration responsibilities of the Immigration and Naturalization Service "migrated" to the Department of Homeland Security, where they were divided between three new agencies: Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement. *See* Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002). Each of these agencies has its own appropriations (and the figures used here are the re-vised FY 2009 expenditures,

(Continued on page 3)

Calculating costs of immigration

(Continued from page 2)
reported in the FY 2011 budget).

–*Customs and Border Protection*. Customs and Border Protection regulates the movement of people and goods across our borders, including both the inspection and admissions process and the traditional duties of the Border Patrol. See www.cbp.gov. Based on expenditures, CBP devotes 59% of its resources at ports of entry, and 37% to enforcement efforts between the ports of entry. *See* USCBP, *Performance and Accountability Report,* FY 2008, at p. 111. In FY 2009, CBP expenditures were $9,686 million. *See* http://www.gpoaccess.gov/usbudget/fy1, at pp. 83-84. Allocate 50% to immigration, or $4,843 million. Were the customs and inspection fees included, the total FY 2009 CBP expenditures would be $10,741 million. *Id*.

–*Citizenship and Immigration Services*. Citizenship and Immigration Services makes decisions regarding a broad variety of immigration benefits, including affirmative applications for asylum, adjustment, and naturalization as well as family and employment visa petitions. *See* www.uscis.go. While all of its activities are immigration related, about 90 percent of its costs are captured through fees ($2.8 billion in FY 2009). *See* Fact Sheet, *USCIS Announces Final Rule Adjusting Fees for Immigration Benefits,* at http://www.uscis.gov/portal (visited June 2, 2011); 75 Fed. Reg. 58962-91 (Sept. 24, 2010). *See also* 8 U.S.C. § 1356(m). The non-fee CIS expenditures for FY 2009 were $149 million, all of which is allocated to immigration. *See* http://www.gpoaccess.gov/usbudget/fy10, at p. 83. While CIS has not posted its FY 2009 report, in FY 2008 it adjudicated a total of 7.2 million applications for immigration benefits. *See USCIS Annual Report for Fiscal Year 2008*, at p.10 (reporting 6.5 adjudications through July 2008). Assuming a similar output in FY 2009, this works out to roughly $410 per adjudication ($2,800 million in fees, plus $149 million in appropriations, divided by 7.2 million adjudications).

–*Immigration and Customs Enforcement*. Immigration and Customs Enforcement is principally responsible for the prosecution of removal proceedings before the immigration courts, alien detention, and for the expulsion of aliens ordered removed from the United States. *See* www.ice.gov. In FY 2009, ICE appropriations were $4,992 million. *See* http://www.gpoaccess.gov.usbudget/fy10, at p. 83. Allocate 75% to immigration, or $3,744 million. ICE's FY 2009 appropriations included the following: $210,924,000 for "legal proceedings" (for almost 900 attorneys at headquarters and 26 chief counsel offices), $1,774,696,000 for "DRO, custody operations", and $255,773,000 for "DRO, transportation and removal program." *See Fiscal Year 2011 Overview, U.S. Immigration and Customs Enforcement* (ICE FOIA 10-2674.000632), at p. S&E 5.

Adding together the arbitrarily allocated portions of the component appropriations and expenditures for DHS's tripartite immigration system, the Department's total immigration costs for FY 2009 were $8,736.0 million.

(3) The Department of Justice – $2,937.1 million

Despite the departure of legacy INS to DHS, the Department of Justice retains substantial immigration responsibilities, including the adjudication of removal proceedings, the prosecution and defense of immigration cases before the federal courts, and various matters pertaining to criminal aliens.

FY 2009 USDOJ Costs
(millions)

EOIR:	**$ 267.6**
OIL:	**$ 83.7**
USAOs:	**$ 624.4**
BOP:	**$ 1,561.4**
SCAAP:	**$ 1,100**
TOTAL:	**$ 2,937.1**

–*Executive Office for Immigration Review*. The immigration courts and the Board of Immigration Appeals adjudicate many thousands of immigration matters each year. *See generally* 8 C.F.R. Parts 1001 *et seq*. (2010). In FY 2009, EOIR produced 352,233 immigration court completions, and 33,103 BIA completions (for a total of 385,336 dispositions). *See FY 2009 Statistical Year Book* (EOIR, March 2010), at pp. B2 and S2. In that year, EOIR was appropriated $267.6 million. DOJ *FY 2010 Budget and Performance Summary, Executive Office for Immigration Review*, at http://justice.gov/jmd/2010summary, at p. 36. Allocate 100% to immigration.

–*Office of Immigration Litigation*. The Civil Division's Office of Immigration Litigation is responsible for all civil immigration litigation before the federal district courts and circuit courts of appeals, defending EOIR's decisions and other immigration adjudications and programs. Approximately 84% of OIL's personnel are involved in appellate cases (in 2008, OIL was divided into district court and appellate sections). In FY 2009, OIL secured

(Continued on page 4)

Calculating costs of immigration

(Continued from page 3)

11,481 court dispositions in immigration cases (including 8,939 review petitions). Civil Division Office of Management Information, "cases" database. In FY 2009, OIL's budget (which is included within the Division's portion of the Department's General Legal Activities appropriation) was $83.7 million. *See Civil Division FY 2010 Budget Submission*, at p. 39. Allocate 100% to immigration.

– *United States Attorneys Offices*. Civil immigration cases that are not handled by OIL, most immigration detention habeas petitions, and criminal prosecutions of aliens are handled by the 94 United States Attorneys and their Assistants. *See* 28 U.S.C. § 547; *see generally* www.justice. gov.usa. One third of all federal criminal prosecutions involve aliens, and 1% of all federal court civil litigation other than review petitions and habeas petitions involves immigration matters. *See Judicial Business of the United States Courts, Annual Report of the Director, FY 2010*, at www.uscourts.gov/uscourts/statistic, at pp. 22, 83, 92, 149, 224. Accordingly, allocate 34% of the USAO's FY 2009 appropriation of $1,836.336 million to immigration, or $624.4 million. *See* Pub. L. 111-8, *supra*, 123 Stat. 571.

–*Bureau of Prisons.* The Bureau of Prisons incarcerates aliens who have been convicted of federal crimes (including immigration crimes). BOP's FY 2009 appropriation was $6,171.561 million (Pub. L. 111-8, *supra*, 123 Stat. 576), and the agency reported that 25.3% of its inmate population were noncitizens. *See* GAO 11-187, *Criminal Alien Statistics* (Washington, D.C., March 24, 2011)(noting that about 90% of aliens sentenced in federal court in FY 2009 were convicted of immigration and drug-related offenses), at pp. "highlights" and 7. A 25.3 percent allocation of BOP's FY 2009 appropriation would charge $1,561.4 million to immigration.

–*State Criminal Alien Assistance Program*. In FY 2009, $400 million was appropriated for distribution to the states to offset their costs arising from criminal aliens. Pub. L. 111-8, *supra*, 123 Stat. 580. Allocate 100% to immigration. (The FY 2009 state costs of incarcerating SCAAP criminal aliens – a subset of the whole criminal alien population – was $1.1 billion. *Criminal Alien Statistics*, *supra*, at p. 37.)

In FY 2009, OIL secured 11,481 court dispositions in immigration cases (including 8,939 review petitions). In FY 2009, OIL's budget was $83.7 million.

Adding together the arbitrarily allocated portions of the component appropriations and expenditures for DOJ's immigration-involved agencies, the Department's total immigration costs for FY 2009 were $2,937.1 million.

(4) The Department of Labor – $68.0 million

The Department of Labor is responsible for foreign labor certification and for the enforcement of statutes regulating migrant and agricultural workers. *See generally* 20 C.F.R. Part 655 (2010). In FY 2009, appropriations for DOL's "foreign labor certification" was $68 million. *See* http://www.gpoaccess.gov/usbudget/fy1, at p. 108; *see also* www.dol.gov.whd (visited May 27, 2011). Allocate 100% to immigration. The FY 2009 appropriations for DOL also included $82,620,000 for "migrant and seasonal farm worker programs." Pub. L. 111-8, *supra*, 123 Stat. 751.

(5) The Department of Health and Human Services – $633.4 million

The Department of Health and Human Services is responsible for refugee resettlement and for the supervision of unaccompanied alien children. *See generally* 45 C.F.R. Parts 400 and 401 (the latter pertaining to the Cuban/Haitian Entrant Program); *ORR Manual For The Administration Of Refugee Assistance and Services, 2010*, available at http://www.dcf.wi.gov/refugee. In FY 2009, the Office of Refugee Resettlement (within the Department's Administration for Children and Families) was appropriated $633.442 million. *See* Pub. L. 111-8, *supra*, 123 Stat. 773; www.acf.hhs.gov (visited May 27, 2011). Allocate 100% to immigration.

(6) The Judiciary – $1,294.4 million

Immigration cases and cases involving aliens represent a substantial portion of the federal court docket. The Administrative Office of United States Courts reports that such cases represent 20% of the matters before the Circuit Courts of Appeals, and 35% of the matters before the District Courts. *See Judicial Business of the United States Courts*, *supra*, at pp. 14, 22. In FY 2009, the appeals courts received 57,740 appeals, 13% (or 7,506) were from decisions by the Board of Immigration Appeals. *Id.*, at pp. 83, 96. The appeals courts that year disposed of 60,508 cases. *Id.,* at p. 83. The district courts disposed of 263,703 civil matters (1% of which involved immigration) and 75,077 criminal matters (34% of which involved immigration, and 86% of the criminal immigration cases were prosecutions for illegal entry or re-entry). *Id.,* at pp. 22, 92, 149, 224. In FY

(Continued on page 5)

Calculating costs of immigration

2009, $577 million was appropriated to the appellate courts, $2.303 billion was appropriated to the trial courts, and $1.097 billion was appropriated to the trial courts' probation and pretrial services. *See* http://www.gpoaccess.gov/usbudget/fy1, at p. 55. Allocate 20% of the first amount ($115.4 million), 35% of the second ($806.05 million), and 34% of the third ($372.98 million) to immigration, for a total of $1,294.4 million.

Adding the amounts listed above we find that the total FY 2009 immigration-related appropriations and expenditures for FY 2009 were $14.205 billion. As explained, this is a very crude estimate, and does not include either fee-offset immigration costs (reported above) or state and local expenditures. One additional caveat is in order. Several of the figures reported would be significantly reduced if criminal costs were limited to *immigration* crimes; that is, if the analysis excluded the costs associated with non-immigration crimes committed by aliens. Such an approach would affect the appropriation figures given for the United States Attorneys Offices, the Bureau of Prisons, the State Criminal Alien Assistance Program, and the Judiciary. If we use as an alternative benchmark the 11% figure reported as that portion of federal criminal prosecutions which involves immigration crimes (see testimony of BOP Director Harley G. Lappen before a subcommittee of the House Appropriations Committee, March 15, 2011, at p. 4), the immigration costs for United States Attorneys Offices would be $220.36 million (*i.e.*, 11% for the criminal docket and 1% civil, or 12% of $1,836.336 million), the costs for Bureau of Prisons would be $679 million (*i.e.*, 11% of $6,171.56 million), and the costs for our federal courts would be $374 million (*i.e.*, 11% of $2,303 million and $1,097 million, or $253.33 million and $120.67 million). There would be no chargeable costs for the State Criminal Alien Assistance Program (as states do not prosecute criminal immigration cases). So adjusted, the resulting total for the FY 2009 immigration expenditures would be $11.598 billion.

Whether the FY 2009 cost of our immigration system was 11.6 or 14.2 billion dollars, its output was substantial. In that year our agencies and courts produced, among other outcomes, 163 million non-immigrant admissions, 1,130,818 adjustments, 743,715 naturalizations, 385,336 immigration judge and BIA decisions, 40,628 Article III court immigration-related dispositions, and 395,165 removals (27% of which were expedited). *See* Monger and Barr, *Nonimmigrant Admissions to the United States: 2009* (DHS, Office of Immigration Statistics, April 2010), at p. 1; *Annual Report, Immigration Enforcement Actions: 2009* (DHS, Office of Immigration Statistics, August 2010), at p. 1; *2009 Yearbook of Immigration Statistics* (DHS, Office of Immigration Statistics), at pp. 5, 52.

For agencies that are fee-based , it is relatively easy to determine the costs of immigration decisions. With certain exceptions, the fees are supposed to capture the average cost for the agency's determinations.

Measurement Two: The Costs of Selected Immigration Decisions

Whether an alien ultimately will be removed from the United States or welcomed into our community, the path typically involves a number of administrative decisions and perhaps judicial decisions as well. The system that we have devised to determine who must go and who may stay is comprised of process components that present their own distinct costs. Examination of these costs allows one to price the various immigration outcomes.

Non-Removal Agency Adjudications

For agencies that are fee-based , it is relatively easy to determine the costs of immigration decisions. With certain exceptions, the fees are supposed to capture the average cost for the agency's determinations. *See* Independent Offices Appropriations Act, 1952, 31 U.S.C. § 9701(b). The Department of State, for example, has determined to charge $404 for the consular adjudication of a family-based immigrant visa petition, and $794 for adjudication of an employment-based immigrant visa. *See* 75 Fed. Reg. 36522, 36530 (June 28, 2010).

The analogous costs of CIS adjudication is $420 for a family-based I-130 visa petition is $420 and $580 for an employment-based I-140. 75 Fed. Reg. 58,962, 58964 (Sept. 24, 2010). CIS charges $985 to adjudicate an adjustment of status application and $595 for a naturalization application. *Id.* And CIS imposes a $620 for appeals to its Administrative Appeals Office. *Id.* But the published fee lists do not necessarily capture the whole of the costs (*e.g.*, CIS imposes no fee for affirmative asylum applications – adjudicated by approximately 275 asylum officers – and in FY 2009 received 24,550 and approved 9,614 such applications), or reflect a complete internalization of the process costs to the immigration applicant. *See*, *e.g.*, Wasem, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy* (Congressional Research Service, CRS 7-5700, April 6, 2011), at pp. 6-9. As reflected in the fee schedules, the costs of agency adjudication of immigration petitions and applications range for CIS, from $80 for biometric processing to $6,230 for regional in-

(Continued on page 6)

Calculating costs of immigration

vest-or visa centers, and for State, from $14 for certain Mexican border crossing cards to $720 for employment-based immigrant visas. *See* 75 Fed. Reg., *supra*, at 36566 and 58964.

Removal Proceedings

An alien placed in removal proceedings is not charged for the costs thereof. In such proceedings, the alien may obtain *de novo* consideration of a prior denial of asylum, adjustment of status, derivative citizenship, et cetera. The alien may appeal the immigration judge's decision to the Board of Immigration Appeals for a second, third, or fourth examination of the matter (*e.g.*, an adjustment application may be considered once or twice by DHS and then once or twice by EOIR). While such appeals generally require a $110 filing fee (which can be waived), the costs of the IJ and BIA adjudications are borne substantially by the public fisc. *See* 8 C.F.R. § 1003.8 (2010); *BIA Practice Manual,* § 3.4, at pp. 45-46, available at www.justice.gov/eoir. In FY 2009, when EOIR's budget was $ 267.6 million (DOJ *FY 2010 Budget and Performance Summary, supra*, p. 36) and there were 385,336 immigration court and Board dispositions (EOIR *FY 2009 Statistical Year Book*, *supra*, at pp. B2 and S2), the average cost per EOIR decision was roughly $695 (*i.e.*, $267.6 million divided by 385,336 dispositions). Thus, for those aliens who obtain their immigration outcome through both tiers of EOIR, the average per-alien costs were $1,390 (*i.e.*, 2 times $695).

To the costs of EOIR adjudication must be added the costs of the DHS (ICE) removal prosecution and response to the alien litigant's claims. While not every EOIR outcome involves DHS, during FY 2009 EOIR produced 385,336 case dispositions and ICE spent $210,924,000 for "legal proceedings", for an average ICE cost of about $545 per disposition (*i.e.*, $210,924,000 divided by 385,336), and $1,090 for those aliens whose cases are decided by both an immigration judge and the Board (*i.e.*, 2 times $545). Adding the EOIR and ICE costs, the average cost for a final administrative decision in removal proceedings would be $2,480 per case (*i.e.*, $1,390 plus $1,090).

Federal Court Review

Similarly, while the federal courts impose filing fees, such fees (which can be waived) do not cover the costs of the judicial process. The fee for filing a review petition is $450, and the fees for district court filings are $350 for a civil action (*e.g.*, a challenge to a CIS determination under the Administrative Procedure Act) and $5 for a habeas corpus petition. *See* 28 U.S.C. §§ 1913-14. The unsuccessful district court litigant can appeal for a fee of $ 455. *Id*. As indicated above, in FY 2009 the courts of appeals were appropriated $577 million and received 8,939 immigration appeals (including 7,506 review petitions) for an average cost of $12,910 (*i.e.*, 20% of $577 million, or $115,400,000 divided by 8,939). For review petitions, the average appeals court cost was $9,993 (*i.e.*, 13% of $577 million, or $75,010,000 divided by 7,506). On the district court side, in FY 2009 there were 2,637 civil immigration matters (*i.e.*, 1% of the entire docket) and the trial courts were appropriated $2,303 million, for an average cost of $8,733 (*i.e.*, 1% of $2,303 million, or $23,030,000 divided by 2,637).

Costs To Secure Removal Order

ICE prosecution	**$ 1,090**
EOIR:	**$ 1,390**
OIL	**$ 7,865**
Judicial review	**$ 9,993**
TOTAL:	**$ 20,338**
Cost per MTR	**$19,098**

To the costs of Article III adjudication must be added the expenditures for DOJ's response to the alien's claims. During FY 2009, when 84% of OIL's resources were devoted to appellate matters, OIL responded to 8,939 review petitions for an average cost of $7,865 per petition (*i.e.*, 84% of $83.7 million, or $70,308,000 divided by 8,939). On the district court side, there were 2,542 dispositions secured at an average cost of $5,268 per case (*i.e.*, 16% of $83.7 million, or $13.392 million divided by 2,542). Adding the costs for OIL and the courts, in FY 2009 the average cost for judicial review of a final BIA decision was $17,858 (*i.e.*, $9,993 plus $7,865). For district court matters, the average combined cost was $14,00l per disposition (*i.e.*, $8,733 plus $5,268).

Thus, setting aside any additional costs incurred by CBP, CIS, or other agencies, the average cost to secure a final, executable order of removal is $20,338 (*i.e.*, ICE prosecution at $1,090, EOIR adjudication at $1,390, OIL defense at $7,865, and judicial review at $9,993). Note that each time the alien files a motion to reopen that the Board denies and the courts review, the average cost is $19,098 (*i.e.*, ICE response at $545, Board adjudication at

(Continued on page 7)

Calculating costs of immigration

$695, OIL defense at $7,865, and court of appeals review at $9,993).

Assume two hypothetical aliens who enjoy opposite outcomes on their applications for adjustment of status: one is successful, the other is not. In the first case, the alien is the beneficiary of an approved I-130 family visa petition application (fee $420), submits a successful I-485 adjustment of status application (fee $985), and, in three or five years, submits a successful N-600 naturalization application (fee $595), for total costs of $2,000, all borne by the alien (now citizen) or his family. The unsuccessful applicant, on the other hand, if placed in proceedings, obtains *de novo* consideration of his adjustment of status by the immigration judge, review by the Board of Immigration Appeals, and review by the Circuit Court of Appeals, for which he may pay fees totalling $560, but the estimated true costs are $11,383 (*i.e.,* $1,390 plus $9,993), plus the cost of DHS and DOJ counsel (at $1,090 plus $7,865). And this assumes no habeas or collateral litigation and that the alien files no motion(s) to reopen. The way our immigration system is presently structured, it becomes more costly each time we say "no" to an alien applicant.

Measurement Three: The Cost of Alien Removal

In a previous administration, DOJ undertook to ascertain the average per-alien cost of removal, but after some initial planning the project was abandoned. In 2007, ICE estimated that it would cost $94 billion to remove the 12 million illegal aliens then believed to be in the United States. U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Hearing on the Nomination of Hon. Julie L. Myers, 110 Cong., 1st Sess. 11 (Sept. 12, 2007). *See also Bruno, Unauthorized Aliens In The United States* (Congressional Research Service 7-5700, R 41207, April 27, 2010), at p. 1 (reporting 10.8 to 11.9 million illegal aliens in 2008 and 2009). *Accord* Hoefer, Rytina, Baker, *Estimates of the Unauthorized Population Residing in the United States: January 2009* (DHS Office of Immigration Statistics, January 2010), at p. 1. ICE's estimate included detention, transportation, and personnel costs, but not apprehension or court costs. *See* http://articles,cnn.com/2007-09-12/us/deportation.cost (visited July 12, 2011). Ms. Myers' numbers suggest an average per-illegal cost of removal of $7,833 (*i.e.*, $94 billion divided by 12 million aliens). As shown below, however, it appears that in addition to being incomplete the estimated costs may be optimistic.

Removal Costs Per Alien

USCIS	**$ 985**
ICE prosecution	**$ 1,090**
EOIR:	**$ 1,390**
Judiciary	**$ 9,993**
OIL	**$ 7,865**
DHS Detention	**$ 4,230**

TOTAL: $ 25,553

Assume a hypothetical but typical alien who enters the United States without inspection, who applies affirmatively but unsuccessfully for asylum, who is placed in removal proceedings and has his case considered by first by an immigration judge and then by the Board of Immigration Appeals (which conclude that the alien is removable and has failed to establish a basis for asylum), who then petitions for review, and, upon decision by the circuit court of appeals denying the petition, is taken into custody by DHS and removed from the United States. What did the expulsion of this one alien cost?

Using the figures cited above for component budgets and outcomes, the removal cost for our hypothetical alien can be computed as follows:

(1) DHS, Customs and Border Protection – $0. Our alien who entered without inspection imposed no CBP costs (unless one allocates Border Patrol expenditures to <u>all</u> aliens who cross our borders, whether lawful or illegal and, among the latter, whether apprehended or not). Had our alien been apprehended or had presented for inspection (*e.g.*, was an overstay and not an EWI) his total cost of removal would be increased by the per-alien CBP costs. *Cf.* 8 U.S.C. § 1356(d) (imposing a $7 inspection fee).

(2) DHS, Citizenship and Immigration Service – $985. Our alien affirmatively applied for asylum and, while no asylum-specific CIS budget figures have been found, the per case asylum officer adjudication costs are here approximated by the average published fees for adjustment of status adjudications (which involve comparably detailed issues and agency interviews).

(3) *DHS, Immigration and Customs Enforcement, removal proceedings – $1,090* (two times $545). ICE trial attorneys must prosecute our alien's case before the Immigration Court and the Board of Immigration Appeals.

(Continued on page 8)

Calculating the costs of immigration

(Continued from page 7)

(5) DOJ, Executive Office for Immigration Review – $1,390 (two times $695). EOIR will adjudicate our alien's removal and renewed asylum case at the trial and appellate levels.

(5) Judiciary, Circuit Court of Appeals – $9,993. In accordance with 8 U.S.C. § 1252, the circuit court having venue will adjudicate our alien's petition for review of the Board's decision.

(6) DOJ, Office of Immigration Litigation – $7,865. OIL will respond to our alien's petition for review.

(7) DHS, Immigration and Customs Enforcement, detention and removal – $4,230. This number reflects the ICE computed average alien detention time of 30 days (at $141 per day). *See ICE Fact Sheet on FY 2009* (May 7, 2009), available at http://www.ice.gov/docket; Shriro, *Immigration Detention Overview and Recommendations* (DHS ICE, October 6, 2009), at p. 6. *But see* Kerwin and Lin*, Immigration Detention, Can ICE Meet Its Legal Imperatives and Case Management Responsibilities* (Migration Policy Institute, Sept. 2009), at p. 1 (finding 81 days as the average pre-order detention, and 72 days as the average post-order detention). However, some aliens are removed without detention (*e.g.*, those who voluntarily depart).

Moreover, both the duration of detention and the costs of securing repatriation will vary widely according to the alien's particular circumstances (*e.g.*, whether the removal will be effected by commercial carrier, require DHS escort, or involve charter of other non-commercial transportation) and the alien's nationality (*e.g.*, whether the removal will be to Mexico or to a country geographically distant and/or repatriation resistant). We will arbitrarily assume that the cost of the average detention period provides a reasonable approximation of the costs to execute our alien's removal order.

Thus, the total cost of removing our hypothetical alien is $25,553. Were our alien to file a motion to reopen, that would result in additional costs of $19,098 (assuming response by DHS, adjudication by EOIR, and a review petition with a response by OIL and decision by a court of appeals, *i.e.*, $545 + $695 + $7,865 + $9,993). At $25,553 per removal, the cost of expelling the DHS-estimated current illegal alien population of 12 million would be a staggering $306.6 billion (or roughly 20 times what our present immigration system costs each year).

Based on our hypothetical alien, under the present immigration system our enforcement "deficit" grows by $6.4 billion each year (i.e., $25,553 times 250,000), or by $1.96 billion a year using ICE's figures (i.e., $7,833 times 250,000).

Of course, this figure assumes that all illegal aliens would contest their expulsion, which is unlikely to be the case. *Compare* Fitz, Martinez, and Wijewardena, *The Costs Of Mass Deportation* (Center for American Progress, March 2010) (estimating the total cost of expelling 10.8 million illegal aliens to be $285 billion). Note that with the exception of the most recent recession-restricted years, the estimated annual increase in our illegal alien population is 250,000. *See Estimates of Unauthorized Population*, *supra*, at p. 2. Based on our hypothetical alien, under the present immigration system our enforcement "deficit" grows by $6.4 billion each year (*i.e.*, $25,553 times 250,000), or by $1.96 billion a year using ICE's figures (*i.e.*, $7,833 times 250,000).

Again, this analysis takes no position on whether our immigration expenditures are "worth it". But it does suggest some legitimate questions for any meaningful reform. For example, our choice to employ a multi-tiered administrative process for our immigration determinations in FY 2009 cost $478.5 million (*i.e.*, EOIR at $267.6 million plus ICE "legal proceedings" at $210.9 million).

Our choice to make immigration decisions through an adversarial process in FY 2009 cost $281.2 million (*i.e.*, ICE "legal proceedings" at $210.9 million plus OIL Appellate at 84% of $83.7 million). Our choice to permit judicial review of immigration decisions in FY 2009 cost $200.1 million (*i.e.*, 13% of the $577 million for the courts of appeals, plus 1% of the $2,303 million for the district courts, plus all of OIL at $83.7 million plus 1% of the $1,836.3 million for the United States Attorneys Offices).

However one wishes to reform our immigration system, it is both fair and appropriate to consider the costs and cost-effectiveness of how we choose to regulate immigration and the processes and procedures we adopt therefor.

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

FURTHER REVIEW PENDING: Update on Cases & Issues

212(c) - Comparability

On April 18, 2011, the Supreme Court granted certiorari in *Judulang v. Holder* (No. 10-694). The question presented is whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did not depart and reenter between his conviction and the commencement of proceedings categorically foreclosed from seeking discretionary 212(c) relief?

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

Aggravated Felony - Tax Fraud

On May 23, 2011, the Supreme Court granted certiorari in *Kawashima v. Holder* (No. 10-577). The question presented is whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under INA § 101(a)(43)(M)(i), and petitioners were therefore removable.

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

Cancellation - Imputation

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

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

Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit en banc heard oral arguments 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?

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

MTR - Post-Departure Bar

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

.

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

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 government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction.

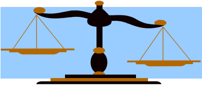
The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony 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.

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

Cancellation - Burden of Proof

On March 31, 2011, the government filed a petition for rehearing en banc in *Rosas-Castaneda,* 630 F.3d 881 (9th Cir. 2011). The issue raised in the petition is whether an alien can satisfy his burden of proving eligibility for cancellation by showing that his conviction was based on a divisible state offense, but refusing to provide the plea colloquy transcript so that the IJ could determine whether the conviction was an aggravated felony under the modified categorical approach. The Ninth Circuit has ordered petitioner to respond to the government's petition for rehearing.

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



Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

■ Second Circuit Denies Government's Motion To Dismiss On Basis Of Fugitive Disentitlement Doctrine

In *Wu v. Holder*, __F.3d__, 2011 WL 2803057 (2d Cir. July 19, 2011) (Calabresi, Pooler, Chin), the Second Circuit denied the government's motion to dismiss on the basis of the fugitive disentitlement doctrine. In a June 2, 2006, hearing before an IJ, petitioner conceded removability but sought asylum and withholding of removal based on religion and political opinion, as well as CAT protection. The IJ did not find petitioner credible and denied all requested reliefs. The BIA dismissed his appeal on June 1, 2009. Petitioner then filed a petition for review and a request for a stay of removal. Meanwhile, DHS sent petitioner a notice "bag and baggage" to report to an immigration office on October 13, 2009. Petitioner did not report. The government then sought to dismiss the case on the basis of the fugitive disentitlement doctrine. The court declined and granted a stay in *Di Wu v. Holder*, 617 F.3d 97, 98–99 (2d Cir. 2010). The government then issued another bag and baggage notice. Again, petitioner declined to appear.

The Second Circuit acknowledged that under the fugitive disentitlement doctrine, federal courts have the power to dismiss the appeal of a party who, during the course of the appeal's pendency, is a fugitive from justice. Although the court agreed that the petitioner's failure to report rendered him a fugitive, it noted that invocation of the doctrine is a discretionary matter, and determined that it was not appropriate under the circumstances. "We think that using the fugitive disentitlement doctrine as a sanction for his noncompliance in a case like this would conflate disobedience of an executive command with that of a court order. Doing that ultimately weakens rather than protects the court's unique dignity, which is, after all, the doctrine's focus" explained the court.

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

■ Second Circuit Denies Motion For Stay Of Removal Pending Transfer Of Case To Correct Venue

In *Maldonado-Padilla v. Holder*,__ F.3d __, 2011 WL 2508234 (2d Cir. June 24, 2011) (Jacobs), the Second Circuit denied the petitioner's motion for a stay of removal pending transfer of the petition for review to the proper venue. The court ruled that the motion failed to satisfy the requirements for a stay of removal identified in *Nken v. Holder*, 553 U.S.__, 129 S. Ct. 1749 (2009). Petitioner "has not sustained her burden of demonstrating why a stay should be granted: no showing of likely success on the merits has been made; no substantial legal question has been raised; and, '[a]lthough removal is a serious burden . . . it is not categorically irreparable,'" explained the court. The court further noted that even if it could not be conclusively shown that the petition for review had been intentionally filed in the wrong circuit in order to cause delay, "the venue error has had that effect."

Contact: Ted Durant, OIL
☎ 202-616-4872

■ Second Circuit Holds That Government's Position Was Not Substantially Justified For Purposes Of Equal Access To Justice Act

In *Gomez-Beleno v. Holder*, __ F.3d __, 2011 WL 2642374 (2d Cir. July 7, 2011) (Walker, *Calabresi*, Wesley), the Second Circuit held that the agency's decisions in the petitioner's case, along with the government's litigating position, did not satisfy the Equal Access to Justice Act's "substantial justification" requirement. The court concluded that the BIA made significant errors of law and fact by grounding its decision on a misquotation of the record and in not adequately considering the petitioner's request for relief under the CAT. The court also ruled that the government's defense of the agency decisions had no reasonable basis in law and fact. The petitioner was awarded fees and costs totaling $10,441.04. "It is true that the OIL chose not to defend certain aspects of the BIA's decisions. But we do not think that its requests for a remand on certain issues were sufficient to overcome, for "substantial justification" purposes, the significant administrative errors below," said the court.

"It is true that the OIL chose not to defend certain aspects of the BIA's decisions. But we do not think that its requests for a remand on certain issues were sufficient to overcome . . . the significant administrative errors below."

Contact: Walter Bocchini, OIL
☎ 202-514-0492

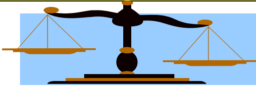
THIRD CIRCUIT

■ Third Circuit Holds That Petitioners' Break In Continuous Physical Presence For Purposes Of Cancellation Of Removal Was Not Excused For Humanitarian Reasons

In *Flores-Nova v. Att'y Gen. of the U.S.*,__ F.3d __, 2011 WL 2989709 (3d Cir. July 25, 2011) (Scirica, Fisher, Aldisert)(*per curiam*), the Third Circuit held that there is nothing impermissible about the BIA's application of the stop-time rule contained in INA § 240A(d)(2), and that the statute is not ambiguous regarding whether it provides for an exception to the 90/180-day stop-time rule for humanitarian reasons.

The petitioner and his wife, Mexican citizens, first entered the

(Continued on page 11)



Summaries Of Recent Federal Court Decisions

(Continued from page 10)

United States without a valid visa in June 1992 and August 1996, respectively. They subsequently had three American-born children (ages five, ten, and eleven). In September 1999, the petitioners travelled to Mexico to attend a funeral. Due to medical reasons - the wife became pregnant and could not travel - petitioners did not return to the United States until February 2000. When their religious worker visa applications were denied, DHS placed the couple in consolidated removal proceedings for being present without authorization. Petitioners sought cancellation of removal, but DHS argued that they were ineligible for cancellation due to their lengthy absence. Petitioners conceded that they left the country for 176 days, but argued that special circumstances occasioned by their medical needs warranted excusing, or equitably tolling, their absence of physical presence in the United States for humanitarian reasons. Agreeing with DHS, the IJ denied cancellation and BIA summarily dismissed their appeal.

The court affirmed, holding that the stop-time rule was plain on its face and that Congress had not provided any humanitarian exception to the rule. The court also held that the petitioners' equal protection claim was without merit because non-permanent resident petitioners and permanent resident petitioners seeking naturalization are not similarly situated. Finally, the court concluded that neither the decisions of the Inter-American Commission on Human Rights, nor Article 3 (1) of the United Nations Convention on the Rights of the Child were binding on the United States.

The court concluded that neither the decisions of the Inter-American Commission on Human Rights, nor Article 3 (1) of the United Nations Convention on the Rights of the Child were binding on the United States.

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

■ Third Circuit Holds That IJ Lacks Jurisdiction To Consider Request For Consent To Reapply For Admission

In *Sarango v. Holder*, __ F.3d __, 2011 WL 2573515 (3d Cir. June 30, 2011) (Barry, Ambro, *Van Antwerpen*), the Third Circuit, in an issue of first impression, held that the plain language of INA § 212(2)(9)(c)(ii) authorizes the Secretary of Homeland Security, rather than the Attorney General, to consider *nunc pro tunc* requests to reapply for admission.

The petitioner, a citizen of Ecuador, illegally entered the United States for the first time in June 1991. In 1994, she was placed in deportation proceedings and eventually granted voluntary departure on or before October 6, 1995. Nevertheless, petitioner remained in the United States for over three additional years before finally departing on February 25, 1999. In August 2000, petitioner illegally re-entered the United States and shortly thereafter married a United States citizen. Based on this marriage, petitioner applied—using a different alien registration number from her original registration number—for adjustment of status. While her status adjustment application was pending, on August 27, 2001 petitioner filed an application for consent to reapply for admission using her original alien registration number. On October 23, 2001, the INS conditionally granted petitioner LPR status for two years. On October 7, 2002, the INS denied petitioner's application for consent to reapply for admission. Petitioner then sought to change her conditional LPR status to unconditional LPR status, and the INS granted her request on June 2, 2004. However, when petitioner sought naturalization, DHS discovered that she had been previously deported and re-entered without being admitted. Petitioner was then placed in removal proceedings where an IJ determined that she was removable for having committed visa fraud, for lacking possession of a valid entry document, and for having re-entered without being admitted.

On appeal, the BIA affirmed the finding of removability but also determined that immigration judges lack jurisdiction to consider requests for *nunc pro tunc* consent to reapply for admission because Congress had delegated that authority to the Secretary of Homeland Security.

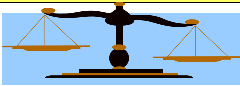
The Third Circuit affirmed the BIA's finding, holding that "the plain, unambiguous language" compelled the conclusion that Congress intended to vest exclusive authority to consider consent to reapply requests to the Secretary of Homeland Security. Accordingly, it declined to consider whether a decision by a single Board Memeber was due *Chevron* deference.

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

■ Third Circuit Affirms Dismissal Of Detained Petitioner's *Bivens* Complaint Requesting $10,000,000 For Insufficient Medical Care And Rights Violations

In *Adekoya v. Chertoff*, __ F.3d __, 2011 WL 2461343 (3d Cir. June 21, 2011) (Scirica, Hardiman, Vanaskie)(*per curiam*), the Third Circuit affirmed the district court's dismissal of petitioner's numerous *Bivens* claims against 21 defendants. The petitioner requested counseling, therapy, and $10,000,000 in damages for rights violations and the loss of the petitioner's right hand when he was detained, pending removal, for three weeks by ICE in the Bergen County Jail. The court affirmed that the petitioner failed to state a claim for which relief could be granted and dismissed the petitioner's claims that he was not provided sufficient access to a law library and was not served appropriate halal meals while detained. The court also

(Continued on page 12)



Summaries Of Recent Federal Court Decisions

(Continued from page 11)

affirmed the district court's conclusions that the petitioner was not deprived of necessary medical attention and not inappropriately denied therapy for his broken hand.

Contact: Troy D. Liggett, DCS
☎ 202-532-4765

■ **Third Circuit Construes Statute As Permitting Class Action Declaratory Judgment Challenge To Detention**

In *Alli v. Decker*,__ F.3d __, 2011 WL 2450967 (3d Cir. June 21, 2011) Chagares, *Pollak* (by designation) Fuentes (dissenting)), the Third Circuit construed the INA§ 242(f)(1) - which prohibits class actions that "enjoin or restrain" the operation of the mandatory detention provisions – as a violation of due process because it fails to allow a class action for a declaration of prolonged detention.

The plaintiffs, two LPRs allegedly removable because of criminal convictions, sought to represent a putative class of aliens who are detained, pursuant to INA § 236(c), pending their removal proceedings. They sought a declaratory judgment that the continued detention of the class members, without bond hearings, violated the INA and the Due Process Clause of the Fifth Amendment. The district court denied the class certification motion and dismissed the class complaint, finding that INA § 242(f)(1) deprived the court of subject matter jurisdiction to entertain an application for declaratory relief on behalf of the plaintiff class because it sought to enjoin or restrain mandatory continued detention under § 236(c).

The Third Circuit reversed the district court's order denying class certification. Although the Third Circuit agreed with the government that the INA prohibits class-wide claims for injunctive relief, it disagreed that class-wide declaratory relief is practically the same as a class-wide injunction. "Viewing the provision in context and then taking into consideration the heading of the provision, it is apparent that the jurisdictional limitations in § 242(f)(1) do not encompass declaratory relief. This moderate construction of 'restrain' is in keeping with the Supreme Court's instruction that statutes limiting equitable relief are to be construed narrowly," explained the court.

"Viewing the provision in context and then taking into consideration the heading of the provision, it is apparent that the jurisdictional limitations in § 242(f)(1) do not encompass declaratory relief."

Judge Fuentes, in his dissenting opinion, would have affirmed the district court because a "class action for declaratory relief has the effect of restraining the operation of laws, like INA 236(c), that regulate pre-removal detention in immigration proceedings—precisely what the plain text of § 242(f)(1) prohibits."

Contact: Theodore Atkinson, OIL DCS
☎ 202-532-4135

FOURTH CIRCUIT

■ **Fourth Circuit Holds It Lacks Jurisdiction To Review Discretionary Denial Of Cancellation of Removal**

In *Sorcia v. Holder*,643 F.3d 117 (4th Cir. 2011)(Motz, *Wynn*, Gilman), the Fourth Circuit held that it lacked jurisdiction to review the BIA's discretionary denial of cancellation and the denial of a motion to reopen likewise to pursue cancellation. The petitioner, a Mexican citizen, became a temporary resident in 1988 and an LPR on December 1, 1990. On February 5, 2007, DHS charged him with removability for having been convicted of a crime of domestic violence. Petitioner admitted that he had been convicted as charged but sought cancellation of removal. The IJ, after noting the significant equities in petitioner's case, found that the convictions demonstrated a propensity to resort to violence. Accordingly, the IJ denied cancellation as a matter of discretion. On appeal, the BIA affirmed the denial and also denied petitioner's subsequently filed motion to reopen for same reasons.

The Fourth Circuit preliminarily declined to grant the government's motion to dismiss pursuant to INA § 242(b)(2), noting that even if the petitioner had failed to file the petition in the appropriate judicial circuit, the statute's venue provision was non-jurisdictional. However, the court ultimately agreed that it lacked subject-matter jurisdiction because the petitioner sought review of the agency's discretionary denial of his application for cancellation of removal and motion to reopen, and failed to assert a constitutional claim or question of law.

Contact: Michael Heyse, OIL
☎ 202-305-7002

FIFTH CIRCUIT

■ **Fifth Circuit Holds That Delay In Adjudicating Naturalization Application Does Not Warrant Equitable Estoppel**

In *Robertson-Dewar v. Holder*, __ F.3d __, 2010 WL 2652442 (5th Cir. July 8, 2011 (Elrod, *Garwood*, Southwick), the Fifth Circuit held that the USCIS's lengthy delay in adjudicating petitioner's naturalization application, long after the petitioner had aged-out of eligibility, did not constitute affirmative government misconduct warranting equitable estoppel.

The petitioner, born in Jamaica on June 28, 1980, was admitted into the United States in February 1993 as a lawful permanent resident when he came to live with his father, a naturalized U.S. citizen. On January 10, 1996, petitioner's father submitted an application for a certificate of citizenship on his son's behalf using INS Form N-600. That application was still

(Continued on page 13)

(Continued from page 12)

unadjudicated when, in 2002, petitioner was convicted in Pennsylvania of, among other offenses, several counts of sexual abuse of children. On December 14, 2006, DHS instituted removal proceedings against the petitioner based on those convictions. Following a series of hearings, and a remand from the BIA, the IJ, on June 26, 2009, ordered petitioner removed, but specifically noted that the government's failure to timely adjudicate his citizenship application cost him his claim to citizenship. On appeal, the BIA held that the IJ correctly determined that petitioner was removable, but it did not rule on the issues of the government's delay in adjudicating his application or the government's interpretation of the applicable statutes because the BIA determined that it lacked jurisdiction over applications for naturalization.

In his petition for review, petitioner urged the court to equitably estop the government from deporting him arguing that he should have been granted citizenship based on the application his father filed years before his convictions. The court declined to estop the government explaining that "courts have been exceedingly reluctant to grant equitable estoppel against the government . . . [and] that the rarity of this remedy means that the burden that a petitioner must meet is very high." In petitioner's case, however, because he had "not shown affirmative misconduct by the government that goes beyond mere negligence or delay," the court found he had not met his burden.

"Courts have been exceedingly reluctant to grant equitable estoppel against the government . . . [and] that the rarity of this remedy means that the burden that a petitioner must meet is very high."

The court also rejected petitioner's contention that the BIA erred in holding that it lacked jurisdiction to terminate removal proceedings so that petitioner could pursue his citizenship claim *nunc pro tunc*. The court explained that under *Matter of Hidalgo*, 24 I&N Dec. 103 (BIA 2007), the only way an alien can establish prima facie eligibility is through an "affirmative communication regarding [the alien's] prima facie eligibility for naturalization from the DHS"—the agency with exclusive jurisdiction to make such determinations.

Blair O'Connor, OIL
☎ 202-616-4890

Summaries Of Recent Federal Court Decisions

SIXTH CIRCUIT

Sixth Circuit Affirms Agency Decision Denying Venue Transfer, Upholds Adverse Credibility Finding

In *Dugboe v. Holder*, __ F.3d __, 2011 WL 2621903 (6th Cir. July 6, 2011) (Cole, Clay, *Gilman*), the Sixth Circuit affirmed that after *Kucana*, it retained jurisdiction over discretionary venue issues as presented before the agency.

The petitioner, a citizen of Nigeria, entered the United States illegally in 1992. He married a U.S. citizen in 1995, and the couple had a daughter born in 1996. In Also in 1996, petitioner applied to adjust his status to that of a lawful permanent resident. On May 11, 1997, petitioner attempted to enter Canada near Port Huron, Michigan by falsely claiming to be Frank Nelson, Jr., a U.S. citizen. A search of the FBI database also revealed that he had used other alias and that he had an arrest record. Petitioner was placed in removal proceedings in Detroit on the basis of a false claim to U.S. citizenship. Petitioner sought to move the hearing to Chicago, but the IJ denied that request because petitioner contested his removability and the government's witness was based in the Detroit area. The IJ then found petitioner removable as charged, ineligible for adjustment of status, and denied asylum, withholding, and CAT protection because petitioner was not credible. The BIA affirmed and, on a subsequent remand from the Sixth Circuit, held that petitioner's claim to U.S. citizenship rendered him ineligible for adjustment.

The court, after holding that it had jurisdiction to review the venue issue, held that the IJ properly declined to transfer venue because the petitioner contested his removability, suffered no resulting prejudice, and, because the government had a legitimate interest in maintaining the existing venue based on the location of the witness.

The court also concluded that the BIA correctly denied the petitioner's remand motion because he was ineligible to adjust his status as a result of his false claim to U.S. citizenship. Lastly, the court held that the petitioner failed to demonstrate eligibility for withholding of removal or protection under the CAT because the agency concluded that the petitioner lacked credibility and the record did not support a contrary conclusion. The court explained that petitioner's "credibility problems indeed go to the heart of his claims for relief, and his various inconsistencies and refusals to answer provide substantial evidence supporting the IJ's decision."

Contact: Michael Heyse, OIL
☎ 202-305-7002

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

SEVENTH CIRCUIT

Seventh Circuit Holds Petitioner Received Fair Hearing And That Evidence Supported Agency's Finding That There Was "Serious Reason to Believe" Petitioner Engaged In Drug Trafficking

In *Pronsivakulchai v. Holder*,__ F.3d __, 2011 WL 2982197 (7th Cir. July 25, 2011) (*Bauer*, Kanne, Sykes), the Seventh Circuit held that the petitioner's hearing on remand complied with due process where she presented testimony and evidence, was able to cross-examine witnesses, and the IJ fully considered the evidence.

The petitioner, a citizen of Thailand, was arrested in Bangkok in October of 2000 based on a United States warrant for drug trafficking. She spent seven months in a Thai prison and was then extradited to the United States to face trial. Once in United States custody, the petitioner assisted the Drug Enforcement Administration in a criminal investigation. On the day she was to stand trial, March 15, 2004, the government moved to dismiss the charges against her. DHS then instated removal proceedings and petitioner sought asylum, withholding and CAT protection. DHS argued that petitioner was ineligible for asylum and withholding of removal because they had reason to believe she had committed a non-political crime in Thailand. The IJ agreed and the BIA affirmed that decision.

In *Pronsivakulchai v. Gonzales*, 461 F.3d 903 (7th Cir. 2006), the court held that the IJ violated petitioner's right to present evidence when the IJ refused to consider petitioner's testimony rebutting the government's claim that there was reason to believe petitioner had committed non-political crime in Thailand. Accordingly, the court granted the petition and remanded the case. On remand, the IJ again found petitioner removable and ineligible for asylum and withholding of removal, and the BIA dismissed his appeal.

The Seventh Circuit, in dismissing the due process challenge, noted that petitioner had been allowed to present evidence on her own behalf and to rebut the government's testimony that she was involved in drug trafficking in Thailand. "Both parties submitted additional documentary evidence in support of their respective positions and the IJ carefully weighed the evidence on both sides, as evidenced by her lengthy and comprehensive written decision. This is precisely what due process requires in such proceedings," explained the court. Finally, the court agreed with the IJ's determination that the "reasonable, substantial, and probative evidence presented" established there were serious reasons to believe the petitioner engaged in drug trafficking.

Contact: Corey Farrell, OIL
☎ 202-532-4230

Seventh Circuit Rules Immigration Border Encounter Broke Petitioner's Continuous Physical Presence For Purposes Of Cancellation Of Removal

In *Reyes-Sanchez v. Holder*,__ F.3d __, 2011 WL 2725813 (7th Cir. July 14, 2011) (Bauer, Posner, *Pallmeyer* (by designation)), the Seventh Circuit ruled that the BIA properly concluded there was sufficient evidence that the Mexican petitioner returned to her home country under threat of deportation or removal. The court determined that the evidence in the case, which included a form I-213, fingerprints, photographs, and a form I-826 in which the petitioner stated that she understood she was in the United States illegally and wished to return home, showed that the petitioner was subjected to a formalized and documented process of return. This broke her continuous physical presence, leaving her short of enough years to qualify for cancellation of removal.

Contact: Richard Zanfardino, OIL
☎ 202-305-0489

Seventh Circuit Holds That BIA Failed To Articulate The Requisite Amount Of Harm Necessary For Finding Persecution

In *Stanojkova v. Holder*,__F.3d__, 2011 WL 2725850 (7th Cir. July 14, 2011)(*Posner*, Rover, Wood) the Seventh Circuit held that the BIA failed to provide the court with sufficient guidance on the level of harm required for a finding of persecution.

The petitioner and his wife, are Macedonian Slavs. In 2001, petitioner was drafted into the Macedonian Army but refused to report for duty because he disapproved of the government's effort to suppress Albanian demands for greater rights. On July 2, 2002, three men broke into petitioner parents' home, held a gun to petitioner's head, and explained that he and his companions had broken into the their home because he and his wife were "against the Macedonians" and "betrayers of Macedonia" and he "did not participate in the war." Further, one of the men assaulted petitioner's wife and told her he could do to her whatever he wanted to do. When the attackers left, petitioners called the police. However, when the police arrived they told petitioner that they could not protect them because the assailants were fellow police who belonged to a paramilitary group. Subsequently, petitioners illegally entered the United States.

By the time DHS instituted removal proceedings, petitioners were no longer eligible for asylum. Instead, they applied for withholding and CAT protection. The IJ ruled that petitioners had not been persecuted, noting, among other matters, that

Summaries Of Recent Federal Court Decisions

(Continued from page 14)

the entire assault against the petitioners had lasted only 10 minutes. The BIA, through a single Board Member according to the court, affirmed, likewise finding that the "harm suffered during their home invasion does not rise to the level of persecution."

The court reversed, finding that "neither the Board member nor the immigration judge made any effort to specify the amount of harm required for the infliction of harm on members of an ethnic, political, religious, or other group to rise to the level of persecution. Nor can we find a useful definition in opinions by the Board (no regulation addresses the issue either) or by the courts, although the importance of distinguishing between harassment and persecution has been noted." Given this, the court concluded that the BIA had temporarily abandoned its role of defining persecution and proceeded to provide a definition of "persecution." The court determined that the requisite harm occurs where there is significant physical force, the infliction of comparable physical harm without direct application of force, or nonphysical harm of equal gravity. "The line between harassment and persecution is the line between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country," explained the court.

"The line between harassment and persecution is the line between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country."

Under its definitional standard, the court held that the harm the petitioners experienced constituted persecution and remanded their withholding of removal claim to the BIA for further proceedings.

The court also noted that it would continue to adhere to its newly-minted persecution standard until the BIA re-assumed its "responsibility -to try to create some minimum coherence in the adjudication of claims of persecution, as we have tried to do in this opinion."

Contact: Ann Varnon, OIL
☎ 202-616-6691

■ **Seventh Circuit Holds Petitioner Parents Of United States Citizen Children Have Standing To Challenge Constitutionality Of 8 U.S.C. § 1229b, But Rules In Government's Favor**

In *Marin-Garcia v. Holder*,__ F.3d __, 2011 WL 3130273 (7th Cir. July 22, 2011) (Bauer, *Flaum,* Evans), the Seventh Circuit held that the petitioner, as a parent of United States citizen children, had third-party standing to challenge the constitutionality of cancellation of removal because he met the three-part test found in *Powers v. Ohio*, 499 U.S. 400, 410-11, 415 (1991). Specifically, the court found that the petitioner suffered an injury-in-fact and has a close relation to the third party, and there exists a hindrance to the third party's ability to protect their own interests.

However, the court rejected the petitioner's argument – that the exceptional and extremely unusual hardship clause violates the equal protection component of the Fifth Amendment by comparing the hardship inflicted on citizen-relatives to the hardship inflicted on other petitioners – on the merits because his claims mischaracterized *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). "At no point in the decision did *Monreal* suggest that the hardship of citizen-relatives of aliens must or could be compared to the hardship endured by aliens themselves," said the court.

Contact: Leslie McKay, OIL
☎ 202-353-4424

NINTH CIRCUIT

■ **Ninth Circuit Holds That Attorney's Failure To File Motion To Reopen For Purpose Of Allowing Petitioner To Adjust Status Constituted Ineffective Assistance Of Counsel**

In *Singh v. Holder*,__ F.3d __, 2011 WL 2899607 (9th Cir. July 21, 2011) (*Fletcher*, Thomas, Gertner), the Ninth Circuit held that the BIA abused its discretion in denying the petitioner's motion to reopen due to ineffective assistance of counsel.

The petitioner, a citizen of India, married a U.S. citizen during the pendency of his appeal from the IJ's denial of his affirmative asylum application. As the beneficiary of an approved immediate relative visa, he sought to reopen so that he could apply for adjustment of status. The BIA concluded that petitioner's prior counsel did not render ineffective assistance because counsel made a "tactical" decision to forgo seeking a stay of voluntary departure in favor of filing a "motion to remand" with the Ninth Circuit. Moreover, the BIA held that petitioner was not prejudiced by prior counsel's failures, because he was ineligible for adjustment of status on account of his voluntary failure to comply with the BIA's order of voluntary departure.

The court ruled that the petitioner was prejudiced because his attorney's failings left the petitioner unable to reopen his case to apply for adjustment of status while petitioner's visa application was pending. The court explained that at any time after petitioner's marriage, his counsel could have filed a motion to remand the case to the IJ and then petitioned the IJ for a continuance of removal proceedings pending the

(Continued on page 16)

Summaries Of Recent Federal Court Decisions

(Continued from page 15)
adjudication of the visa petition. In addition, the court held that if the petitioner's failure to depart was not "voluntary" under *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), but rather the result of his attorney's failure to inform him that the clock on his departure time was running, the petitioner remained eligible for adjustment of status. The case was remanded to the BIA for further proceedings.

Contact: Jessica Segall, OIL
☎ 202-616-9428

■ Ninth Circuit Holds That California Conviction For Sale Of Counterfeit Trademark Is Aggravated Felony Counterfeiting Offense

In *Rodriguez-Valencia v. Holder*,__ F.3d __, 2011 WL 2899605 (9th Cir. July 21, 2011) (Noonan, Paez, Korman (by designation))(*per curiam*), the Ninth Circuit held that a conviction under California Penal Code § 350(a)(2), for sale of a counterfeit trademark, is an aggravated felony under INA § 101(a)(43)(R), as an offense relating to counterfeiting. Petitioner, a citizen of Mexico, had six convictions for "willfully manufacturing, intentionally selling, and knowingly possessing for sale more than 1,000 articles bearing a counterfeit trademark."

Noting that the statutory language "relating to" was to be construed broadly, the court rejected the petitioner's arguments that the generic offense of counterfeiting was limited to the imitation of currency or currency equivalents, and that a conviction under the statute in question was not related to counterfeiting because it did not require proof of a specific intent to defraud.

Contact: Blair O'Connor, OIL
☎ 202-616-4890

■ Ninth Circuit Overturns Order Of Removal Based On Petitioner's Second-Degree Attempted Burglary Convictions

In *Hernandez-Cruz v. Holder*, __ F.3d __, 2011 WL 2652461 (9th Cir. July 8, 2011) (Pregerson, Fisher, *Berzon*), the Ninth Circuit overturned the agency's finding that a Guatemalan citizen was removable by virtue of his two second-degree attempted burglary convictions. The court held that the BIA erred by concluding that the convictions were generic offenses that qualified as aggravated felonies because entering a commercial building is not, on its own, a "substantial step" in support of attempted theft. "Unlike breaking into a locked vehicle, there is no reason to suspect that someone intends to commit a theft offense from his mere entry into a commercial building, at least when he does so during normal business hours," as petitioner did, explained the court. The court further ruled that the BIA's alternative finding that the convictions were for crimes involving moral turpitude was also in error, because the BIA failed to identify the elements of the statute of conviction correctly or misapplied circuit case law. The court rejected the government's suggestion that it could examine the underlying facts showing that petitioner took a "substantial step" toward a generic attempted theft offense by walking out of the stores with carts containing items he had not purchased, and therefore, committed a generic attempted theft offense "We decline the Government's invitation to sacrifice the vital role in our criminal justice system that the plea bargaining process plays for the sake of more expeditious civil removal proceedings," said the court. The court noted *Matter of Silva-Trevino*, and its holding that agency can look beyond the record of conviction, but declined to address it because the BIA did not rely on it in reaching its decision.

"We decline the Government's invitation to sacrifice the vital role in our criminal justice system that the plea bargaining process plays for the sake of more expeditious civil removal proceedings."

Contact: Joseph D. Hardy, OIL
☎ 202-305-7972

■ Ninth Circuit Holds That Conviction For Carrying A Concealed Weapon In A Vehicle Constitutes A Removable "Firearms Offense"

In *Gil v. Holder*,__ F.3d __, 2011 WL 2464782 (9th Cir. June 22, 2011) (Rymer (concurring in part and dissenting in part), *Callahan*, Ikuta), the Ninth Circuit affirmed the BIA's determination that petitioner's conviction under California Penal Code § 12025(a) for carrying a weapon concealed within a vehicle categorically constitutes a removable "firearms offense" rendering the petitioner ineligible for cancellation of removal. The court further held that the availability of an affirmative defense under the generic statute, but not under the statute of conviction, is relevant to the categorical analysis. Finally, the court held that it lacked jurisdiction to consider the petitioner's challenge to the BIA's discretionary denial of voluntary departure.

Contact: Joseph D. Hardy, OIL
☎ 202-305-7972

■ Ninth Circuit Holds That Petitioner's Admission, Coupled With Reliable But Inconclusive Conviction Records, Sustains Finding Of Removability

In *Pagayon v. Holder*,642 F.3d 1226 (9th Cir. 2011) (Kozinski, N.R. Smith, Block (by designation))(*per curiam*), the Ninth Circuit held that petitioner's admission that he was

(Continued on page 17)

Summaries Of Recent Federal Court Decisions

(Continued from page 16)

convicted of the controlled substances offense listed in a charging document (possession of methamphetamine), was sufficient to render him removable. The court held that the admission provided the necessary connection between an inconclusive abstract of judgment and the charging document. The court also concluded that the petitioner failed to demonstrate a well-founded fear of persecution in the Philippines on account of a protected ground. Finally, the court denied the petitioner's due process claim on the ground that he was not prejudiced by the IJ's refusal to receive telephonic testimony and a written letter.

Contact: Michael Heyse, OIL
☎ 202-305-7002

■ Ninth Circuit Reverses Agency's Denial Of Relief, Holds That Petitioner Need Not Expose Government Corruption To Outside Agency To Qualify As a "Whistleblower"

In *Perez-Ramirez v. Holder*, 2011 WL 2652458 (9th Cir. July 8, 2011) (*Hug*, Schroeder, Rawlinson), the Ninth Circuit held that the BIA erred by finding that a petitioner and asylum applicant from Mexico did not qualify as a whistleblower because he had not exposed the government's corruption to an outside agency.

Petitioner, a Mexican citizen, claimed that as a purchasing agent and an accountant for a state agency, he had encountered accounting irregularities. After bringing these issues to his managers, the managers in turn sought to pressure him to engage in corrupt business practices. When he refused, he claimed that he was subject to abuse, harassment, arrest, and torture. Petitioner was also beaten and harassed to stop him from being interviewed by an insurance company that was investigating the nature of a fire that destroyed a warehouse where records of his agency work were housed. The IJ denied relief, holding that petitioner failed to establish persecution on account of a protected ground. Specifically, the IJ found that he did not qualify as a whistleblower. The BIA majority affirmed, holding that he was not a whistleblower because he did not expose the corruption to an outside agency. Following a remand from the Ninth Circuit, the BIA again affirmed that petitioner had failed to show a nexus to political opinion because he was not a whistleblower.

"Petitioner's exposure of the government corruption to his supervisor . . . and his refusal to accede to [his] corrupt demands, are acts which constitute political activity and qualify petitioner as a whistleblower of government corruption."

The Ninth Circuit reversed, holding that, it was enough that the petitioner repeatedly exposed the corruption to his supervisor to qualify as a whistleblower. "Petitioner's exposure of the government corruption to his supervisor . . . and his refusal to accede to [his] corrupt demands, are acts which constitute political activity and qualify petitioner as a whistleblower of government corruption," explained the court. Accordingly, the court also held that petitioner's claim also met the nexus requirement. The case was remanded for consideration of, among other things, whether the government had met its burden to rebut the presumption that the petitioner has a well-founded fear of future persecution on the basis of his whistleblowing activities. Regarding petitioner's CAT claim. the court further held that the BIA could not place burden on petitioner to show that he could not relocate within Mexico and not apply presumption of nationwide threat where BIA held that abuse suffered by petitioner constituted torture.

Contact: Eric W. Marsteller, OIL
☎ 228-563-7272

■ Ninth Circuit Holds That "Conviction" Requires Entry Of Formal Judgment Of Guilt, Confirms Fraud Crimes Are Categorically Crimes Involving Moral Turpitude

In *Planes v. Holder*, __ F.3d __, 2011 WL 2619105 (9th Cir. July 5, 2011) (Rymer, Callahan, *Ikuta*), the Ninth Circuit held that the first definition of "conviction," under INA § 101 (a)(48)(A), requires only that a trial court enter a "formal judgment of guilt," without any requirement that all direct appeals be exhausted or waived.

The petitioner, a citizen of the Philippines and an LPR, entered the U.S. in July 1981. In 1998, he pleaded guilty and was convicted of delivering or making a check with insufficient funds with intent to defraud, in violation of California Penal Code § 476a(a). In 2004, he pleaded guilty to and was convicted of possessing 15 or more "access devices," in violation of 18 U.S.C. § 1029(a)(3). Petitioner subsequently appealed the sentence imposed for the § 1029(a)(3) offense, but did not appeal the conviction itself. On the basis of those two convictions, an IJ ordered him removed pursuant to INA § 237(a)(2)(A)(ii) as an alien convicted of two or more crimes involving moral turpitude. The IJ also exercised his discretion to deny petitioner's request for cancellation of removal. The BIA affirmed, rejecting petitioner's contention that the convictions were not CIMTs. The BIA also ruled that § 1029(a)(3) conviction was "final" for immigration purposes even though the district court was considering whether his sentence should be modified.

In his petition for review, petitioner argued that an alien does not stand "convicted" for immigration

(Continued on page 18)

Summaries Of Recent Federal Court Decisions

(Continued from page 17)

purposes until any direct appeals as of right have been waived or exhausted and that to hold otherwise would lead to unfair results. The court rejected that contention, ruling that the statute was clear on its face and that a "conviction" under § 101(a)(48)(A)" requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived. The court noted that avenues of relief would remain available to a removed alien with an appeal pending. For example, explained the court, an alien's departure from the United States while in removal proceedings does not preclude the alien from filing a motion to reopen if the alien subsequently obtains reversal or vacatur of a conviction that formed a key part of the basis of the alien's removability.

The court also rejected petitioner's contention that the convictions were not categorically a CIMT. In particular, the court rejected any reliance on the concurring opinion in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007), citing the longstanding rule that crimes that have fraud as an element, such as the petitioner's convictions under California Penal Code § 476a(a) and 18 U.S.C. § 1029(a)(3), are crimes involving moral turpitude.

Contact: Liza S. Murcia, OIL
☎ 202-616-4879

■ Ninth Circuit Holds IJ Applied Incorrect "Reason To Believe" Standard

In *Gomez-Granillo v. Holder*,__ F.3d __, 2011 WL 2714163 (9th Cir. July 14, 2011)(*Wolfe*, Fisher, Tashima), the Ninth Circuit, held that the immigration judge applied an incorrect standard when he evaluated whether there was "reason to believe" the Mexican petitioner knew he was participating in illicit drug trafficking. Citing *Matter of Rocha*, 20 I&N Dec. 944 (BIA 1995), the immigration judge found that the standard hinges on the immigration officer's belief at the time the petitioner is encountered at the port of entry. The court, however, noted that *Matter of Rocha* was later superceded by caselaw and statute, and held that the proper question was whether the immigration judge, based on all the evidence known to him at the time of his decision, had reason to believe the petitioner knew he was engaged in drug trafficking.

Contact: John Hogan, OIL
☎ 202-305-0189

■ Ninth Circuit Holds Police Accusation Of "Anti-Party" Or "Anti-Government" Activities Indicates Imputed Political Opinion

In *Hu v. Holder*, __ F.3d __, 2011 WL 2714172 (9th Cir. July 14, 2011)(*Pregerson*, Fisher, Berzon), the Ninth Circuit held that where Chinese policemen detained the petitioner following an unauthorized, silent sit-in before a government office to protest an unpaid severance package, they imputed a political opinion to the petitioner when they stated that he was acting against the "party" and "government." The court also ruled that the petitioner's activities were "pro-labor," rather than economically motivated, and thus constituted an expression of political opinion. Finally the court held that the BIA's conclusion that the petitioner's mistreatment came as part of a legitimate response to his participation in an illegal gathering that was disturbing the peace failed to find substantial support in the record.

Contact: Channah Farber, OIL
☎ 202-532-4126

■ Ninth Circuit Holds That Petitioner's Whistleblowing Constitutes Political Opinion

In *Antonyan v. Holder*,642 F.3d 1250 (9th Cir. 2011) (*Thomas*, Fletcher, Rosenthal), the Ninth Circuitheld that the "whistleblowing doctrine" extends to an asylum applicant who faces retaliation from criminals protected by corrupt government officials.

The petitioner, an Armenian citizen, entered the United States on a non-immigrant visitor visa, while her husband and children remained in Armenia. When she overstayed the visa, DHS instituted removal proceedings against her. At her removal hearing, petitioner applied for asylum, withholding and CAT claiming that she had left her country for fear that a dangerous criminal, with corrupt ties to high levels of the Armenian government, would retaliate against her for seeking his prosecution. Both the petitioner and her husband were beaten by the drug dealer because they sought his prosecution by reporting him to the local police and then reporting the matter to a National Security investigator. The IJ found petitioner credible but denied the requested reliefs for lack of a nexus to a protected ground. On appeal the BIA affirmed, concluding that the actions by the drug dealer were not "inextricably intertwined with a government operation," but instead "simply were the actions of an angry criminal who sought revenge after [petitioner] reported him to the police."

> **The Ninth Circuit held that exposure of corruption at the government level is necessarily political, and thus falls within a protected ground.**

The Ninth Circuit reversed, holding that exposure of corruption at the government level is necessarily political, and thus falls within a protected ground. The court explained that the record showed that petitioner had

(Continued on page 19)

Summaries Of Recent Federal Court Decisions

(Continued from page 18)

inside information of the drug dealer's interactions with the police, the prosecutors and, the National Security agency, and that it was petitioner's "whistleblowing efforts" that fueled the drug dealer's retaliation.

Contact: Anna Nelson, OIL
☎ 202-532-4402

■ **Ninth Circuit Holds Agency Abused Its Discretion By Denying Petitioner's Untimely Motion To Reopen**

In *Avagyan v. Holder*, __ F.3d __, 2011 WL 2586275 (9th Cir. July 1, 2011) (*Fletcher*, Berzon, Callahan (dissenting)), the Ninth Circuit held that the BIA abused its discretion by denying as untimely the petitioner's motion to reopen. The petitioner claimed in her motion that she had received ineffective assistance in applying for adjustment of status.

The petitioner, a seventy-one year old native of Turkmenistan and a citizen of Armenia, entered the United States on a visitor's visa in March 2001. She overstayed her visa and filed an application for asylum and withholding of removal on October 16, 2001. The former INS referred the application and on January 2, 2002, placed her in removal proceedings. In April 2002, petitioner retained a notario and an attorney to represent her. Meanwhile, on March 28, 2003, petitioner's daughter, Naira, became a naturalized United States citizen. Apparently, neither petitioner's attorney nor the notario advised her about the implications that the removal hearing would have on an adjustment application based on her daughter's visa petition. In any event, on November 5, 2003, an IJ denied petitioner's application for asylum and withholding. Petitioner then retained another attorney who filed an immediate relative visa petition on her behalf. On February 11, 2005, the BIA denied petitioner's appeal. Petitioner found out about the decision months later when she retained new counsel who reviewed her immigration files. He informed her that she had received ineffective assistance of counsel and, on April 5, 2006, filed a motion to reopen the BIA's decision on that basis. The BIA denied the motion as untimely. It held that petitioner had complied with the requirements of *Matter of Lozada*, but "had not acted with due diligence."

> **"If the ineffective assistance of an alien's counsel prevents her from timely filing a motion to reopen, counsel has prevented the alien from reasonably presenting her case and denied him due process."**

The Ninth Circuit reversed the BIA. Initially the court rejected the government's contention that recent Supreme Court decisions had called into question the availability of equitable tolling for ineffective assistance of counsel claims due to lack of a constitutionally protected right to counsel. The court noted that it had long recognized that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case . . . If the ineffective assistance of an alien's counsel prevents her from timely filing a motion to reopen, counsel has prevented the alien from reasonably presenting he case and denied him due process." Thus, the court explained "equitable tolling is based on considerations of fundamental fairness that apply regardless of whether petitioner has a constitutional right to counsel."

Next, the court held that petitioner's prior counsel had given her incompetent advice on her adjustment of status claim and that, notwithstanding a ten-month delay, the petitioner had made diligent efforts to pursue her relief between the time prior counsel failed to give her competent advice and the time she learned of that failure. "Many, many immigrants fall victim to incompetent or fraudulent counsel who extract large sums of money but perform inadequately, or not at all," observed the court, and remanded the case to the agency to adjudicate the merits of petitioner's motion to reopen.

In a dissenting opinion, Judge Callahan would have found that the BIA had properly exercised its discretion. "There must be some outer limit on equitable tolling for filing motions to reopen; otherwise, such motions could be filed indefinitely," he noted.

Contact: Edward Duffy, OIL
☎ 202-353-7728

■ **Ninth Circuit Holds That An Alien Who Is Inadmissible Under INA § 212(a)(9)(C)(i)(I) May Not Adjust Status And Must Remain Outside United States For Ten Years Before Seeking A Waiver Of Inadmissibility**

In *Palacios v. Holder*, __ F.3d __, 2011 WL 2450985 (9th Cir. June 21, 2011) (Graber; *Smith, M*; Benitez), the Ninth Circuit held that petitioner, who was inadmissible pursuant to INA § 212(a)(9)(C)(i)(I) for illegally reentering the United States after accruing over one year of unlawful presence in the United States, was not eligible for adjustment of status.

The petitioner, a citizen of Mexico, was placed in removal proceedings in 2005, for allegedly entering the United States without being admitted or paroled. Petitioner conceded removability but sought to adjust her status to that of a lawful permanent resident under INA § 245(i). DHS opposed the adjustment-of-status application on the ground that she had been deported in December

(Continued on page 20)

Summaries Of Recent Federal Court Decisions

(Continued from page 19)

1984 and subsequently reentered the country without permission in 1992 and 1997. The IJ granted the adjustment of status application, concluding that cases such as *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), provided the judge authority to "cure the prior deportation and subsequent illegal return." The BIA in an unpublished decision disagreed, finding that because petitioner was inadmissible under INA § 212(a)(9)(C)(i), and did not qualify for the exception to inadmissibility under § 212(a)(9)(C)(ii), she was not eligible for adjustment of status.

The court affirmed the BIA's decision. The court explained that, "although ten years elapsed since she last departed the United States, she attempted to 'circumvent the statutory 10–year limitation . . . by simply reentering unlawfully' after spending only five years abroad. She did not satisfy the statutory requirement." Accordingly, the court agreed that petitioner was inadmissible under 212(a)(9)(C)(i). The court further held that this ground of inadmissibility, which was enacted by the IIRIRA, is not impermissibly retroactive as applied to petitioners who accrued unlawful presence before passage of the IIRIRA.

Contact: Channah M. Farber, OIL
☎ 202-532-4126

■ Ninth Circuit Dismisses Challenge To Denial Of Stay Motion For Lack Of Jurisdiction

In *Shaboyan v. Holder*,__ F.3d __, 2011 WL 2557658 (9th Cir. June 29, 2011)(Canby, Gould, Tallman) (*per curiam*), the Ninth Circuit held that the BIA's denial of a motion to stay removal pending disposition of a motion to reopen, without more, is not a "final order of removal" that subject to a petition for review.

The petitioner, a citizen of Armenia, sought review of a BIA order denying her motion for a stay of removal pending its consideration of her motion to reopen. The court dismissed the petition for review for lack of jurisdiction. The court explained that the BIA's denial does not "conclude that the alien is deportable," and does not "order deportation." However, the court added that the BIA's order would still be reviewable as part of a petition for review stemming from a final order of removal.

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

■ Ninth Circuit Grants Government's Rehearing Petition, Allows Agency To Decide If Immigration Consultant Fraud Excuses Late Asylum Application

In *Viridiana v. Holder*,__ F.3d __, 2011 WL 2803481 (9th Cir. July 19, 2011) (*Paez*, Fletcher, Walter) the Ninth Circuit granted the government's petition for panel rehearing. The petition argued that the court violated the "ordinary remand rule" in holding that the petitioner met the "extraordinary circumstances" exception for untimely asylum applications (630 F.3d 942 (9th Cir. 2011)). The amended decision removed this conclusion while preserving the underlying ruling that non-attorney immigration consultant fraud should not be considered a claim of "ineffective assistance of counsel" for purposes of the "extraordinary circumstances" exception, but instead constitutes an "unenumerated circumstance" to be considered apart from ineffective assistance of counsel.

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

TENTH CIRCUIT

■ Tenth Circuit Holds *Padilla* Does Not Require That Government Prove Petitioner's Conviction Comported With Sixth Amendment

In *Waugh v. Holder*, 642 F.3d 1279 (10th Cir. 2011) (Holmes, *McKay*, Portfilio), the Tenth Circuit concluded that *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473 (2010), does not require that the government prove, in removal proceedings, that a petitioner received constitutionally adequate advice about the immigration consequences of a plea made in criminal proceedings.

> **The court agreed with the BIA that petitioner's pursuit of a collateral attack on the state conviction, did not undermine the finality of his conviction for immigration purposes.**

The petitioner, a Jamaican citizen and an LPR, pled guilty in 2009, in Utah state court to one count of unlawful sexual contact with a minor, a third-degree felony under Utah law. Following his conviction, DHS instituted removal proceedings. Relying on *Padilla*, petitioner filed a motion to withdraw his guilty plea in state court, arguing he was not properly advised that pleading guilty to the charge of unlawful sexual contact with a minor would make him removable. He also sought to terminate or, alternatively, continue the removal proceedings. The IJ denied both requests and found petitioner removable for sexual abuse of a minor and for child abuse. The BIA affirmed, stating, among other matters that petitioner's pursuit of a collateral attack on the state conviction, did not undermine the finality of his conviction for immigration purposes.

The Tenth Circuit affirmed that *Padilla* had not altered the longstanding principle that a conviction is final for immigration purposes as soon as a formal judgment of guilty

(Continued on page 21)

Summaries Of Recent Federal Court Decisions

(Continued from page 20)

is entered by the trial court, regardless of any ongoing collateral proceedings. "While the alien may have the right to pursue appellate or collateral relief for an aggravated felony conviction under various provisions of state and federal law, the government need not wait until all these avenues are exhausted before deporting him," said the court, citing to *United States v. Adame–Orozco*, 607 F.3d 647, 653 (10th Cir. 2010).

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

ELEVENTH CIRCUIT

■ **Eleventh Circuit Upholds Agency's Denial Of Adjustment Of Status For Petitioner Who Failed To Apply Within One Year Of Date Immigrant Visa Number Became Available**

In *Tovar v. U.S. Att'y Gen.*,__ F.3d __, 2011 WL 2792470 (*Durbina*, Hill, Ebel) (11th Cir. July 19, 2011), the Eleventh Circuit affirmed the agency's decision to deny the petitioner's applications for adjustment of status because he had not maintained his child status under the Child Status Protection Act (CSPA).

The petitioner, a Mexican citizen, first entered the U.S. with a V-2 non-immigrant visa on June 8, 202. Petitioner subsequently returned to Mexico twice for brief period of time and last reentered the U.S. on June 16, 2004. When placed in removal proceedings on January 13, 2005, petitioner sought adjustment of status asserting classification as a child under the CSPA, and also applied for post-hearing voluntary departure. The IJ, and later the BIA, denied the application ruling that petitioner failed to maintain his child status because he did not apply for the visa within the one-year time limit and he did not satisfy the requirement of having "sought to acquire" LPR status.

Under the CSPA, an alien is eligible for an adjustment of status if he is a child "on the date on which an immigrant visa number becomes available for such alien . . . but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." INA § 203(h)(1)(A). The CSPA does not change the INA definition of child-an unmarried son or daughter under the age of 21, but instead, establishes a formula for determining age which is not based entirely on chronological calculation. Under this calculation, an alien's age is determined by subtracting the time an applicable petition is pending from the alien's age at the time the alien parent's visa number becomes available.

Congress's use of the term "sought to acquire" lawful permanent residence under the CSPA includes substantial steps taken toward the filing of the relevant application during the relevant time period.

The court, considering an issue of first impression, held that although petitioner met the age requirement, he had not "sought to acquire" adjustment of status within one year of the date his parents' visa approval number issued. The court found reasonable the BIA's interpretation set forth in several unpublished decisions where it had ruled that that Congress's use of the term "sought to acquire" lawful permanent residence under the CSPA includes substantial steps taken toward the filing of the relevant application during the relevant time period, but which fall short of the actual filing or submission to the appropriate agency. However, the court noted that this interpretation "does not require that the alien actually file or submit an application."

Here, the court found that petitioner did not request an adjustment of status, hire an attorney to prepare the necessary documentation, nor file the necessary documentation within one year of his visa number becoming available, August 1, 2004. Accordingly, petitioner failed to maintain his child status under the CSPA.

The court also upheld the denial of post-order voluntary departure based on the petitioner's failure to continuously reside in the United States for one year immediately preceding issuance of his notice to appear.

Contact: Laura Hickein, OIL
☎ 202-532-4514

DISTRICT COURTS

■ **District Of Connecticut District Court Grants Government's Motion For Summary Judgment In Suit Challenging Application Of Marriage Fraud Bar**

In *Koffi v. Holder*, No. 09-cv-2102 (D. Conn. July 18, 2011) (Bryant, J.), the District Court for the District of Connecticut granted the government's motion for summary judgment in a suit challenging the denial of plaintiffs' immediate relative visa petition. The petitioner's husband's file included a memorandum documenting a criminal investigation of his prior immigration attorney, which revealed that the husband's earlier marriage to a U.S. citizen was fraudulently arranged as part of a widespread immigration fraud scheme. Although plaintiffs argued that they were prejudiced by the fact that USCIS made the marriage fraud finding several years after the criminal investigation and never provided plaintiffs with a copy of the memorandum prior to the federal court litigation, the District Court was not persuaded, and concluded that the agency's marriage fraud

(Continued on page 22)

Summaries Of Recent Federal Court Decisions

(Continued from page 21)

determination was supported by substantial and probative evidence.

Contact: Neelam Ihsanullah, OIL DCS
☎ 202-532-4269

District Of Colorado Rules VAWA Time Limitation Is A Statute Of Limitations Subject To Equitable Tolling

In *Moreno-Gutierrez v. Napolitano*, No. 10-00605 (D. Colo. June 24, 2011) (Martinez, J.), the district court denied the government's motion to dismiss, holding that the two-year filing deadline for self-petitioning spouses of lawful permanent residents under the VAWA is a statute of limitations subject to equitable tolling, not a statute of repose. The court also determined that the USCIS' Administrative Appeals Office's interpretation of the time limitation as a statute of repose is not entitled to *Chevron* deference because whether the temporal deadline functions as a statute of limitations or a statute of repose does not fall within the agency's expertise and is purely a legal question, and because the agency's affirmance of the denial of the self-petition was not published.

Contact: Patricia Bruckner, OIL DCS
☎ 202-532-4325

District Of Columbia Determines No Fifth Amendment Due Process Violation In Denial Of Visa On Terrorism-Related Grounds

In ***Udugampola v. Jacobs***, __F.Supp.2d__, 2011WL 2652465 (D.D.C. July 8, 2011) (Howell, J.), the district court granted the government's motion to dismiss for lack of jurisdiction after determining that the denial of an immigrant visa to plaintiff's father under INA § 212(a)(3)(B), for allegedly participating in terrorism, did not infringe on any Fifth Amendment Due Process right of his adult daughter or spouse.

The plaintiff was a child when her mother was granted asylum in 1995. The mother then sought to bring her husband to the U.S. as derivative asylum beneficiary. That application was initially granted, but subsequently it was revoked and denied under 8 CFR § 208.19 (persecutor bar). In 2003, petitioner, as an adult daughter, filed an immigrant visa petition on behalf of her father. The petition was approved and forwarded to the U.S. Consulate for processing. When after four years, no decision was made on the visa application, plaintiff and her mother filed a complaint for mandamus. The Consulate then denied the visa under § 212(a)(3)(B).

The court concluded that the plaintiff, who is no longer a minor or dependent, did not have a recognized constitutional interest in maintaining a relationship with her father in the United States.

The court concluded that the plaintiff, who is no longer a minor or dependent, did not have a recognized constitutional interest in maintaining a relationship with her father in the United States. "Thus, lacking a liberty interest protected by the constitution, the applicant's daughter does not fall into the narrow exception carved by *Mandel* and the Court does not have subject matte jurisdiction to review her claim," explained the court.

The court also concluded that the plaintiff's mother likewise did not have a constitutional interest in having her husband reside in the United States. "Defendants' denial of the applicant's visa application does not infringe upon the applicant's wife's marital relationship with her husband because the defendants have "'done nothing more than to say that the residence of one of the marriage partners may not be in the United States,'" said the court. Lastly, the court dismissed the complaint for failure to state a claim, after determining that the government's terrorism-related reason for the visa denial was facially legitimate and bona fide. The court explained that "courts have held that where the consulate provides a statutory basis for denial, a legal challenge to the visa denial must be dismissed unless a plaintiff alleges that the consulate acted in bad faith."

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

D.C. District Court Denies Preliminary Injunction Motion, Dismisses Visa Lottery Complaint

In *Smirnov v. Clinton*, No. 11-cv-1126 (D.D.C. July 14, 2011)(Jackson, J.), the District Court for the District of Columbia dismissed a putative class action complaint against the State Department and USCIS stemming from the State Department's cancellation of the results of the 2012 diversity visa lottery program ("DV Lottery"). Due to a computer error, the State Department conducted the DV Lottery contrary to statute and the procedural regulations implementing the statute. The court found that plaintiffs possessed sufficient injury for standing and that the State Department had taken final agency action. However, it dismissed plaintiffs' APA and mandamus claims after finding the State Department did not act arbitrarily or capriciously by cancelling the first DV Lottery results or conducting a second lottery. The court's denial of plaintiffs' preliminary injunction motion freed the State Department to announce the results of the second lottery, as planned, on July 15, 2011.

Contact: Hans H. Chen, OIL DCS
☎ 202-307-4469

This Month's Topical Parentheticals

ASYLUM & CAT

■ *Perez-Ramirez v. Holder*, __F.3d__, 2011 WL 2652458 (9th Cir. July 8, 2011)(holding that Mexican whistleblower who did not expose corruption to an outside agency demonstrated, nonetheless, persecution on account of political opinion)

■ *Antonyan v. Holder*, __F.3d __, 2011 WL 2557643 (9th Cir. June 29, 2011)(extending whistleblowing doctrine to an asylum applicant who claimed retaliation from a notorious criminal who is protected by corrupt government officials)

■ *Viridiana v. Holder*, __F.3d__, 2011 WL 2803481 (9th Cir., July 19, 2011) (holding that fraudulent deceit by an immigration consultant can constitute "exceptional circumstances" that excuse the filing of an untimely asylum application)

■ *Garcia-Garcia v. Atty. Gen.*, __ F.3d __, 2011 WL 2713232 (3d Cir. July 13, 2011) (holding that petitioner was ineligible for CAT protection because he failed to show link between Mexican government and his kidnapping by drug dealers)

■ *Stanojkova v. Holder*, __ F.3d __, 2011 WL 2725850 (7th Cir. July 14, 2011) (holding that petitioners, husband and wife, suffered persecution when they were assaulted in their homes by three men because of husband's refusal to serve in the Macedonian military)

■ *Zhiqiang Hu v. Holder*, __ F.3d __, 2011 WL 2714172 (9th Cir. July 14, 2011)(holding that asylum applicant satisfied the nexus requirement where the Chinese government imputed to him an anti-government political opinion following a protest that he organized against his former employer)

ADJUSTMENT

■ *Tovar v. U.S. Atty. Gen.*, __F.3d__, 2011 WL 2792470 (11th Cir., July 19, 2011) (upholding denial of adjustment where alien failed to show that he sought to acquire legal permanent residency within one year of his parent's visa approval number)

CANCELLATION

■ *Matter of Bustamante*, 25 I&N Dec. 564 (BIA 2011)(holding that the bar to cancellation of removal in INA § 240A(b)(1)(C) which precludes an alien who has been convicted of an offense under § 212(a)(2) from establishing eligibility for relief, may not be overcome by a § 212(h) waiver)

■ *Reyes-Sanchez v. Holder*, __ F.3d __, 2011 WL 2725813 (7th Cir. July 14, 2011) (holding that petitioner's apprehension at the border and her admission of illegal presence in Form-826 and her voluntary return to Mexico broke her continuous physical presence tor purpose of cancellation)

CRIME

■ *Hernandez-Cruz v. Holder*, __F.3d__, 2011 WL 2652461 (9th Cir. July 8, 2011)(holding that petitioner's convictions for second-degree commercial burglary did not qualify as generic attempted theft offenses and therefore convictions were not aggravated felonies)

■ *Planes v. Holder*, __F.3d__, 2011 WL 2619105 (9th Cir. July 5, 2011) (holding that alien was convicted of two CIMTs even though his appeal as of right of those convictions was still pending)

■ *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011)(holding that the offense of driving a vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle in violation of section 46.61.024 of the Revised Code of Washington is a crime involving moral turpitude)

■ *Matter of Ramon Martinez*, 25 I&N Dec. 571 (BIA 2011) (holding that a violation of section 220 of the California Penal Code, assault with intent to commit a felony, is categorically a crime of violence under 18 U.S.C. §§ 16(a) and (b) (2006))

■ *Lawson v. U.S. Citizenship and Immigration Services*, __F.Supp.2d__ 2011 WL 2638533 (S.D.N.Y., July 7, 2011)(reversing denial of naturalization because petitioner, who had been convicted of manslaughter, had been a person of good moral character for the required period)

■ *United States v. Ramirez-Garcia*, __ F.3d __, 2011 WL 2684908 (11th Cir. July 12, 2011)(upholding determination that alien's conviction under North Carolina law, for taking indecent liberties with a child, constituted a conviction for sexual abuse of a minor and therefore was a crime of violence)

■ *Evans v. Zych*, __ F.3d __, 2011 WL 2685599 (6th Cir. July 12, 2011))(holding, in a case where federal prisoners challenged BOP programming and notification requirements, that convictions for unlawful receipt and possession of firearm and unlawful transfer of firearm were not "crimes of violence")

■ *United States v. Orocio*, __F.3d __, 2011 WL 2557232 (3d Cir. June 29, 2011)(holding that *Padilla* is retroactively applicable on collateral review)

■ *Nunez-Reyes v. Holder*, __ F.3d __, 2011 WL 2714159 (9th Cir. July 14, 2011)(en banc) (holding that for purposes of defining "conviction" under the INA, the Constitution does not require the equal treatment of expunged federal convictions and expunged state convictions)

This Month's Topical Parentheticals

■ *U.S. v. Sandoval Ramirez*, __F.3d__, 2011 WL 2864417 (7th Cir., July 20, 2011) (holding that prior conviction under Illinois law for aggravated criminal sexual abuse qualified as a conviction for a crime of violence)

■ *United States v. Bonilla-Siciliano*, __ F.3d __, 2011 WL 2610967 (8th Cir. July 5, 2011)(holding, in an illegal reentry prosecution case, that alien failed to make a prima facie showing for the defense of necessity)

■ *Rodriguez-Valencia v. Holder*, __F.3d__, 2011 WL 2899605 (9th Cir., July 21, 2011) (holding that convictions under California law for willfully manufacturing, intentionally selling, and knowingly possessing for sale articles bearing a counterfeit trademark constituted an aggravated felony)

■ *Gomez-Granillo v. Holder*, __ F.3d __, 2011 WL 2714163 (9th Cir. July 14, 2011) (holding that in determining whether there was "reason to believe" that alien seeking admission was a drug trafficker, IJ could consider alien's credibility)

■ *Robertson-DeWar v. Holder*, __F.3d__, 2011 WL 2652442 (5th Cir. July 8, 2011) (holding that government could not be equitably estopped for 11-year delay in adjudicating naturalization application because "the rarity of this remedy means that the burden that petitioner must meet is very high")

■ *United States v. Gonzalez-Melchor*, __F.3d__, 2011 WL 2652463 (9th Cir. July 8, 2011) (holding that appellate waiver negotiated by district court at sentencing in exchange for a reduced sentence was invalid and unenforceable)

EAJA

■ *Gomez-Beleno v. Holder*, __F.3d__, 2011 WL 2642374 (2d Cir. July 7, 2011)(awarding EAJA fees where court had twice remanded case to BIA and position of BIA together with OIL litigating position did not satisfy the "substantial justification" requirement)

■ *Vincent v. Commissioner of Social Sec.*, __F.3d__, 2011 WL 2652444 (2d Cir. July 8, 2011)(holding that failure of social security disability claimant's counsel to develop the administrative record as to issues collateral to the disability determination did not constitute a "special circumstance" warranting a fee reduction under EAJA)

FAIR HEARING – DUE PROCESS

■ *Avagyan v. Holder*, __F.3d__, 2011 WL 2586275 (9th Cir. July 1, 2011)(holding that equitable tolling applied, notwithstanding 10-month delay, where prior counsel gave petitioner incompetent advice on applying for adjustment of status)

■ *Singh v. Holder*, __F.3d__, 2011 WL 2899607 (9th Cir., July 21, 2011) (holding that counsel provided ineffective assistance where a presumption of prejudice arose on counsel's failure to preserve his client's eligibility to apply for adjustment of status, and failure to timely file motion to reopen after his marriage to United States citizen that was prerequisite for applying for adjustment of status)

■ *Jimenez-Guzman v. Holder*, __F.3d__, 2011 WL 2547562 (10th Cir. June 28, 2011)(holding that denial of continuance was not an abuse of discretion where alien sought continuance pending resolution of his motion to withdraw guilty plea on basis on ineffective assistance of counsel)

JURISDICTION

■ *Sorcia v. Holder*, __F.3d __, 2011 WL 2601572 (4th Cir. July 1, 2011) (holding that court lacks jurisdiction to review the discretionary denial of cancellation of removal and the discretionary denial of a motion to reopen)

■ *Dugboe v. Holder*, __F.3d__, 2011 WL 2621903 (6th Cir. July 6, 2011) (holding that court had jurisdiction to review discretionary denial of venue transfer)

■ *Shaboyan v. Holder*, __F.3d__, 2011 WL 2557658 (9th Cir. June 29, 2011)(holding that the BIA's denial of stay of removal based on a pending motion to reopen is not subject to judicial review)

■ *Marin-Garcia v. Holder*, __F.3d__, 2011 WL___ (7th Cir. July 22, 2011) (holding that petitioner had third-party standing on behalf of his U.S. citizen children to challenge denial of cancellation but finding that court lacked jurisdiction to review the merits of the denial)

■ *Sarango v. Att'y Gen. of U.S.*, __F.3d __, 2011 WL 2573515 (3d Cir. June 30, 2011)(holding that immigration judge lacks jurisdiction to consider a § 212(a)(9) request to reapply for admission)

■ *Nen Di Wu v. Holder*, __F.3d__, 2011 WL 2803057 (2d Cir., July 19, 2011) (holding that invocation of fugitive disentitlement doctrine to dismiss alien's petition was not warranted where alien failed to report for bag-and-baggage letters because authorities were aware of how to locate alien)

■ *Udugampola v. Jacobs*, __F.Supp.2d__, 2011 WL 2652465 (D.D.C., July 08, 2011)(holding that under the doctrine of consular nonreviewability court lacked jurisdiction to review denial of visa because plaintiff did not have a constitutionally protected liberty interest)

■ *Gul v. Obama*, __F.3d__, 2011 WL 2937166 (D.C. Cir., July 22, 2011) (holding that collateral consequences allegedly suffered by former detainees as result of their continued designation as "enemy combatants" were not subject to redress in federal habeas proceedings)

(Continued on page 25)

This Month's Topical Parentheticals

■ *Hassan v. Holder*, __F.Supp.2d __, 2011 WL 2531114 (D.D.C. June 27, 2011)(dismissing without prejudice claim to U.S. citizenship for lack of jurisdiction)

■ *Al Alwi v. Obama*, __F.3d__, 2011 WL 2937134 (D.C. Cir. Jul 22, 2011) (affirming denial of petition for a writ of habeas corpus to enemy combatant alien detained in Guantanamo Bay)

■ *Durso v. Napolitano*, __F.Supp.2d__, 2011 WL 2634183 (D.D.C., July 5, 2011)(holding that courts of appeals have exclusive jurisdiction over a TSA's "order" in challenge to advanced imaging technology (AIT) and aggressive pat-downs)

VISAS

■ *Li v. Renaud*, __F.3d__, 2011 WL 2567037 (2d Cir. June 30, 2011) (holding that § 203(h)(3) does not entitle an alien to retain the priority date of an aged-out family preference petition if the aged-out family preference petition cannot be "converted to [an] appropriate category")

■ *International Internships Programs v. Napolitano*, __F.Supp.2d__, 2011 WL 2880682 (D.D.C., July 20, 2011) (upholding USCIS denial of Q-1 visa petitions, where plaintiff, an international cultural exchange program, did not show that the participating exchange students would be receiving a livable wage)

Lujan-Armendariz overturned

(Continued from page 1)

In *Nunez–Reyes v. Holder*, 602 F.3d 1102 (9th Cir. 2010), the court granted the petition under *Lujan–Armendariz*, finding that equal protection required that the expungement of a state conviction for simple possession be treated in the same manner as the expungement of a federal conviction for simple possession.

The en banc court further held that its overruling of *Lujan-Armendariz* would apply prospectively only, *i.e.*, to petitioners who are convicted of a state controlled-substance possession offense subsequent to the publication date of the decision.

The Ninth Circuit nevertheless denied the petition for review, holding that using or being under the influence of methamphetamine is not a lesser crime than simple possession, but rather is qualitatively different from a possession offense, and thereby overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010), as well.

Three judges dissented from the majority's ruling to apply the ruling only prospectively noting that the decision "fails to heed the Supreme Court's warning that prospective decisionmaking is appropriate (if ever) only in certain circumstances that are not present here."

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

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Adekoya v. Chertoff **10**
Alli v. Decker **12**
Antonyan v. Holder **18**
Avagyan v. Holder **19**
Dugboe v. Holder **13**
Flores-Nova v. Att'y Gen **10**
Gil v. Holder **15**
Gomez-Beleno v. Holder **10**
Gomez-Granillo v. Holder **18**
Hernandez-Cruz v. Holder **15**
Hu v. Holder **18**
Koffi v. Holder **21**
Maldonado-Padilla v. Holder **10**
Marin-Garcia v. Holder **15**
Moreno-Gutierrez v. Napolitano **22**
Nunez-Reyes v. Holder **01**
Pagayon v. Holder **15**
Palacios v. Holder **19**
Perez-Ramirez v. Holder **17**
Planes v. Holder **17**
Pronsivakulchai v. Holder **14**
Reyes-Sanchez v. Holder **14**
Robertson-Dewar v. Holder **12**
Rodriguez-Valencia v. Holder **16**
Sarango v. Holder **11**
Shaboyan v. Holder **20**
Singh v. Holder **15**
Smirnov v. Clinton **22**
Sorcia v. Holder **12**
Stanojkova v. Holder **14**
Tovar v. U.S. Att'y Gen **21**
Udugampola v. Jacobs **22**
Viridiana v. Holder **20**
Waugh v. Holder **20**
Wu v. Holder **20**

OIL TRAINING CALENDAR

■ **October 3-7, 2011.** OIL's 17th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

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

INSIDE OIL

Professor *Susan F. Martin* was the special guest at the July 26th, OIL's Brown Bag Lunch & Learn. Prof. Martin spoke about her recent book, *A Nations of Immigrants*, where she provides an historical perspective on the current immigration debate. Prof. Martin researched the models of immigration policies as first implemented by American colonies and how they transformed over the course of more recent history. Prof. Martin the Donald G. Herzberg Associate Professor of International Migration at Georgetown University and serves as the Executive Director of the Institute for the Study of International Migration. She also served Executive Director of the U.S. Commission on Immigration Reform.

Francesco Isgrò, Susan Martin, David McConnell, Thomas Hussey

Wendy Kamenshine, Senior Ombudman and *Margaret Gleason*, Senior Advisor to DHS's Citizenship and Immigration Services Ombudsman's Office, spoke at the July 18th, OIL's Brown Bag Lunch & Learn. The Ombudsman at DHS helps individuals and employers who need to resolve a problem with USCIS. The office also makes recommendations to Congress on how to fix systemic problems.

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.

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

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

linda.purvin@usdoj.gov

Tony West
Assistant Attorney General

William H. Orrick, III
Deputy Assistant Attorney General
Civil Division

David M. McConnell, Director
Michelle Latour, Deputy Director
Donald E. Keener, Deputy Director
Office of Immigration Litigation

Francesco Isgrò, Senior Litigation Counsel
Editor

Tim Ramnitz, Trial Attorney
Assistant Editor

Linda Purvin
Circulation