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

Immigration Litigation Bulletin

Vol. 18, No. 6 June 2014

LITIGATION HIGHLIGHTS

■ **ASYLUM**

►Punishment for violating a country's conscription laws does not constitute persecution on account of political opinion (5th Cir.) **7**

►Incremental change in country conditions can constitute "changed circumstances" for excusing late filing of asylum application (6th Cir.) **8**

►Asylum applicant failed to establish a pattern or practice of persecution against Chinese Christians in Indonesia (7th Cir.) **8**

■ **CRIME**

►Pardon for statutory rape conviction did not constitute a "full" pardon for immigration purposes (11th Cir.) **10**

►Conviction for engaging in the unlicensed business of firearms is not a CIMT (3d Cir.) **6**

►Auto-burglary conviction constitutes an aggravated felony as an attempted theft offense (5th Cir.) **7**

►Conviction for carnal knowledge of a child by an adult constitutes a "sexual abuse of a minor" aggravated felony (5th Cir.) **7**

■ **WAIVER**

►Limits on § 212(c) waiver of deportation are not impermissibly retroactive (2d Cir.) **6**

Inside

5. Further Review Pending
6. Summaries of Court Decisions
12. Inside OIL

Supreme Court Defers to BIA's Interpretation That Under The CSPA, Aged-Out Derivative Beneficiaries Do Not Retain Priority Date Unless Petition Can Be Automatically Converted

In ***Scialabba v. Osorio***, __U.S.__, 134 S. Ct. 2191 (U.S. 2014), the Supreme Court deferred to the BIA's interpretation that under the Child Status Protection Act, (CSPA), Pub. L. No. 107-208 (Aug. 6, 2002), a derivative beneficiary of a family-based immigrant visa who has aged-out, retains his original priority date only when the visa petition can be "automatically converted" under INA § 203(h)(3) from one family preference to another without changing the original petitioner.

Writing the plurality opinion, Justice Kagan, concluded that this was "the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 203(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board."

(Continued on page 2)

DHS May Use a Post-Parole Conviction to Treat a Returning LPR as an Alien Seeking Admission

In ***Munoz v. Holder***, __ F.3d __, 2014 WL 2782233 (5th Cir. June 19, 2014) (*Elrod*, Davis, Barksdale), the Fifth Circuit held that the government may rely on a conviction rendered after an LPR returning to the United States is paroled into the country to subsequently establish in removal proceedings that the alien was applying for admission and thus subject to grounds of inadmissibility.

The petitioner, an LPR since 1996, was indicted in November 2010 by a Texas grand jury for assault and aggravated assault with a deadly weapon. With the warrant outstanding, petitioner left the United States in December 2010 to undergo surgery in Mexico. Upon her return to the United States a few weeks later, in January 2011, border patrol agents in Laredo, Texas, discovered that she had an outstanding arrest warrant for assault and aggravated assault with a deadly weapon and arrested her, and then paroled her into the U.S. for prosecution of the warrant.

In February 2011, petitioner pleaded guilty to the charge of aggravated assault with a deadly weapon and no contest to the assault charge. In September 2011, the DHS charged petitioner with inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(I) as an alien

(Continued on page 4)

Child Status Protection Act

(Continued from page 1)

To better understand the background that landed this issue before the Supreme Court, allow me to give you, with all deference to the Beatles, a *Magical Mystery Tour* of the INA family-based immigration scheme.

Family-Based Immigration

The cornerstone of U.S. immigration policy has been the reunification of families. The INA allocates annually 480,000 family-sponsored immigrant visas, but this number as we note below, has *de-facto* become a minimum. The U.S. citizen or lawful permanent resident (LPR) who sponsors a relative by the filing a visa petition (I-130), is known as the petitioner, while the relative is referred to as the principal beneficiary. The relatives of a principal beneficiary who might also be eligible for a visa, *i.e.* children, are known as derivative beneficiaries.

Under the INA, certain family relationships are more valuable than others. Children, spouses, and parents of U.S. citizens (who are over 21), who are defined under the INA as "immediate relatives," are the most preferred relatives for purpose of immigrating to the United States. Unlike other family-based visas, these "immediate relatives" visas are not subject to the 480,000 numerical limitations and a visa number is always available to them. Although the first 254,000 immediate relative visas are subtracted from the 480,000 number, any additional visas are automatically allocated. In FY 2013, for example, 439,460 immediate relatives received immigrant visas or adjusted their status.

Non-immediate relatives, on the other hand, are subject to a preference system which subjects them to the 480,000 visa number. This family-preference (FP) category is guaranteed a minimum number of 226,000 visas if more than 254,000 immediate relative visas are used in a particular fiscal year. For many years, however, the non-immediate relatives have been allocated the minimum number of visas because the numbers of immediate relative visas have been steadily increasing hovering around 450,000. As a result, most FP visas have resulted in back logs, and these relatives have to wait in line, often for many years, to await the availability of a visa number.

"Every day the alien stands in that line is a day he grows older, under the immigration laws no less than in life."

The FP visas consist of: F1 (the unmarried, adult (21 or over) sons and daughters of U.S. citizens); F2A (the spouses and unmarried, minor (under 21) children of LPRs); F2B (the unmarried, adult (21 or over) sons and daughters of LPRs); F3 (the married sons and daughters of U.S. citizens); and F4 (the brothers and sisters of U.S. citizens).

Because family based visas are allocated on a first-come first-served basis, the priority date, or the date when a visa petition is filed becomes important to the FP category. These "priority dates" for the various FP visas are managed by the Department of State and published in the Visa Bulletin. For example, the July 2014 Visa Bulletin indicates that the priority date for the F1 visa for unmarried sons and daughters of U.S. citizens is April 1, 2007. This generally means that a visa is available to them if the U.S. citizens filed a visa petition before April 1, 2007. However, because countries are also subject to visa quotas, citizens of certain countries, such as Mexico or India, may have to wait longer in line.

Children and the CSPA

Children of U.S. citizens and LPRs play a particular significant role in the allocation of immigrant visas. The term "child" is exhaustively defined under INA § 101(b). Suffice to say that to be a child under the INA, one has to be unmarried and under twenty-one years of age. Thus children who are under 21 and unmarried are in the preferred immediate relatives category, but if they grow a year older (or day depending on the birth day) they become "sons or daughters" and move to the FP-1 visa. Similarly, children of LPR who become adults, move from F2A to F2B visa. Unlike other factors that may be controlled in obtaining an immigrant visa, *i.e.* people can get married or divorced, one cannot stop "children" from becoming "sons and daughters" under the INA. "Every day the alien stands in that line is a day he grows older, under the immigration laws no less than in life," observed Justice Kagan.

The Child Status Protection Act of 2002 was enacted principally to remedy the "aging out" of children immigrating to the U.S. as "immediate relatives." Thus when a U.S. citizen files a visa petition for his non-citizen spouse, and the spouse's child is 20-years old, under INA § 203 (f)(1) the child's age is frozen "as of the date of the initial application." Thus, statutorily, the "child" remains a child for purpose of immigrating to the U.S.

The CSPA also sought to protect the aging-out of children of other family-based visa beneficiaries. However, as to this group, the protection

(Continued on page 3)

Child Status Protection Act

(Continued from page 2)

scheme is altogether different and more complex. Here, Congress intended to protect children from "aging out" due to government delays in processing the immigrant visa application. Because these family-based visa preferences are subject to numerical limitation, children may "age out" simply by waiting in line with their parents for the availability of a visa number.

However, if a visa number becomes available before the child ages out, the CSPA uses a formula, taking into account, among other factors, the child's age and the length of government delays to mitigate the "aging out" problem. See § 203(h)(1).

Automatic Conversion & Retention of Priority Date

The issue before the Court concerned the treatment of children (derivative beneficiaries) of the principal beneficiary who turn into adults during the visa processing and whose aging out is not protected under the CSPA. Section 203(h)(3) provides that these children's petitions "shall *automatically be converted* to the appropriate category and the [children] shall retain the *original priority date* issued upon receipt of the original petition." (Emphasis added)

In Matter of Wang, 25 I&N Dec. 28 (BIA 2009), the BIA interpreted § 203(h)(3) in a case where a U.S. citizen had filed an F4 visa petition for her brother Wang, who had a child (the derivative beneficiary). Following the approval of the petition, Wang waited a decade for a visa number to be available. By that time, Wang's child was no longer a "child" under the INA and therefore did not qualify as a derivative beneficiary. Wang then entered the United States and, as an LPR, filed an F2B visa petition for his daughter. USCIS approved the petition and assigned the priority date of when the petition was filed. Wang, however, wanted the USCIS to retain the priority date of the petition that had been filed by his sister a decade earlier.

The BIA found § 203(h)(3) ambiguous as to which petitions qualify for automatic conversion and priority date. The BIA explained that historically, and as reflected in the regulations, "automatic conversion" includes a requirement that the petitioner be the same before and after the conversion. Similarly, the "retention" of priority dates has been limited to visa petition filed by the same family members. Congress, concluded the BIA, had enacted the CSPA consistent with this understanding and there was no legislative history indicating that special priority status be given to children who age out as a consequence of statutory limits on the annual visa numbers as opposed to administrative delays. Therefore, the BIA concluded that Wang's petition could not be automatically converted because there was no visa category for nephew and nieces of U.S. citizens. Indeed, a new petition had to be filed on her behalf by her father. Moreover, Wang's daughter could not retain the priority date of the petition that her aunt had filed for her father. Essentially, she had to wait in line for a visa number like all the other sons and daughters of LPRs and U.S. citizens.

The Supreme Court Decision

The case involved two separate lawsuits, one of which was a class-action, by separate individuals who were the principal beneficiaries of F3 and F4 visa petitions. During the pendency of the visa petitions, their children, the derivative beneficiaries, turned 21 and thus aged-out of their visa category. The district court granted summary judgment in both cases, deferring to the BIA's interpretation in *Matter of Wang*. On appeal the cases were consolidated and a Ninth Circuit panel initially affirmed the judgments below reasoning that § 203(h)(3) was ambiguous and that *Chevron* deference was due to the BIA's interpretation. However, the court granted rehearing *en banc* and in a 6-5 decision it vacated the panel decision and reversed and remanded. The majority concluded that the "plain language" of the CSPA "unambiguously grants automatic conversion and priority rate retention to all visa petitions identified in § 203(h)(2)", namely F2A and aged out derivative beneficiaries of F3 and F4.

Writing the plurality opinion, Justice Kagan first explained that principles of *Chevron* deference apply when the BIA interprets the immigration laws. Considering next the statutory language in § 203(h)(3), she called the provision "Janus-faced" because it addressed the issue in divergent way. Namely, the first half of the language looked at one direction, reaching all aged-out beneficiaries, while the second half looks "toward a remedy than can apply to only a subset of those beneficiaries." Consequently, Justice Kagan determined that this "internal tension makes possible alternative reasonable constructions . . . . Were there an interpretation that gave each clause full effect, the Board would have been required to adopt it. But the ambiguity those ill-fitting clauses create instead left the Board with a choice – essentially of how to reconcile the statute's different commands." The Court determined that that the BIA had offered a "reasoned view" of the statute and "a cogent argument, reflecting statutory purposes, for distinguishing between aged-out beneficiaries of F2A petitions and the respondents' sons and daughters."

The court rejected the respondents' argument that the statute retains the "the original priority date" wholly independent of the automatic

(Continued on page 4)

Paroled LPR subject to inadmissibility ground

(Continued from page 1)
who had been convicted of a crime involving moral turpitude. The notice to appear alleged that petitioner was a parolee "appl[ying] for admission" to the United States pursuant to §101(a)(13)(C)(v).

Petitioner denied that she had applied for admission to the United States in January 2011 and denied that she was paroled into the United States for criminal prosecution. To rebut petitioner's denial, the government submitted a copy of petitioner's Form I–94 showing that she had been paroled into the United States. Following a hearing, the IJ found petitioner removable as charged and ineligible for cancellation of removal based on an adverse credibility determination.

On appeal, the BIA affirmed the IJ's decision and held that the government had met its burden of proving, by clear and convincing evidence, that petitioner was properly regarded as seeking admission into the United States based on the government's evidence that petitioner pleaded guilty in February 2011 to having committed assault with a deadly weapon, a CIMT. The BIA further concluded that the IJ's finding that petitioner had been paroled into the United States was not clearly erroneous.

The parole statute, INA § 212(d)(5)(A), provides that "[t]he Attorney General may . . . parole into the United States . . . any alien applying for admission to the United States." Ordinarily this provision does not apply to lawful permanent residents, because under § 101(a)(13)(C), they are not "regarded as seeking an admission into the United States for purposes of the immigration laws." The statute provides, however, six exceptions in which an LPR is considered an applicant for admission to the United States. One such exception applies when an alien "has committed an offense identified in section 212(a)(2) including "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude."

The question before the Fifth Circuit was whether petitioner's subsequent conviction of this crime involving moral turpitude can be used to determine whether she was an applicant for admission when she reentered the United States. Petitioner argued that the determination that she was an applicant for admission had to be made based on clear and convincing evidence at the time of her reentry, and contended that because she had not yet been convicted, the government could not meet its evidentiary burden.

The court agreed with the BIA's order reasoning that petitioner's subsequent guilty plea can be used as evidence that she committed a crime involving moral turpitude, and that she was therefore applying for admission to the United States when she sought reentry.

The court explained that the plain language pf §§ 101(a)(13)(C)(v) and 212(a)(2)(A)(i)(I) did not limit the timing of such determinations and agreed with the reasoning in *Matter of Valenzuela-Felix*, 26 I&N Dec. 3 (BIA 2012), that an admission "is continuing, rather than an act limited to the exact time that the alien

(Continued on page 11)

CSPA provides limited automatic conversion

(Continued from page 3)
conversion. "Were their theory correct, an aged-out alien could hold on to a priority date for years or even decades wile waiting for a relative to file a petition . . . as far as we know, immigration law nowhere else allows an alien to keep in his pocket a priority date untethered to any existing valid petition," said the Court.

Justice Roberts wrote a concurring opinion joined by Justice Scalia, agreeing with the plurality's conclusion that the BIA reasonably interpreted § 203(h)(3). However, they disagreed to the extent that that opinion could be read "to suggest that deference is warranted because of a direct conflict between these clauses . . . Direct conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense." Justice Roberts did not see a conflict between the clauses in § 203(h)(3).

Justice Alito dissenting, agreed with much of Sotomayor's criticisms of the plurality opinion, and Chief Justice Roberts critique that "direct conflict is not ambiguity." He would have affirmed the ruling below, finding that "the agency should have converted respondents' children's petitions and allowed them to retain their original priority dates."

Justice Sotomayor, wrote a dissenting opinion, joined by Justices Breyer and Thomas. She would have applied the plain meaning of § 203(h)(3) that "[a]ged-out children may retain their priority dates so long as they meet a single condition — they must be 'determined . . . to be 21 years of age or older for purposes of' derivative beneficiary status. Because all five categories of aged-out children satisfy this condition, all are entitled to relief."

By Francesco Isgrò, OIL

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

FURTHER REVIEW PENDING: Update on Cases & Issues

Conviction - Possessing Illegal Drug Paraphernalia

On June 30, 2014, the United States Supreme Court granted the alien's petition for *certiorari* in ***Mellouli v. Holder***, No. 13-1034 (U.S.) to review an Eighth Circuit decision (published at 719 F.3d 995) holding him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on a drug paraphernalia conviction. The Eighth Circuit ruled that the BIA precedent *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (2009), is entitled to deference regarding drug paraphernalia offenses under the laws of States that have enacted the Uniform Controlled Substances Act. The petitioner's merits brief is presently due on August 14, 2014.

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

Consular Non-Reviewability

On May 23, 2014, the Solicitor General filed a petition for a writ of *certiorari* in ***Kerry v. Din***, from the Ninth Circuit's published decision, 718 F.3d 856. The government presented the questions: 1) whether a consular officer's denial of a visa to a U.S citizen's alien spouse impinges upon a fundamental liberty interest of the citizen that is protected under the Due Process Clause; and 2) whether a U.S. citizen whose constitutional rights have been affected by denial of a visa to an alien is entitled to challenge the denial in court and to require the government, in order to sustain the denial, to allege what it believes the alien did that would render him ineligible for a visa.

Contact: Stacey Young, OIL-DCS
☎ 202-305-7171

Standard of Review Nationality Rulings

The Ninth Circuit granted *en banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder,*** 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same. On March 17, 2014, an *en banc* panel heard oral argument.

Contact: Katherine Goettel, OIL-DCS
☎ 202-532-4115

Torture– Internal Relocation

In ***Maldonado v. Holder***, No. 09-71491, the Ninth Circuit has ordered the parties to file supplemental briefs on whether case should be heard *en banc* in the first instance to consider: (1) whether there is a conflict in our case law between *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011), and *Hasan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004), regarding which party bears the burden of proof on internal relocation; and (2) whether *Hasan* and *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008), improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible." Simultaneous briefs by the parties were filed June 16, 2014.

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

Jurisdiction – Final Order

On May 7, 2014, the Ninth Circuit granted *en banc* rehearing, with government acquiescence, and vacated its published panel decision in ***Abdisalan v. Holder***, 728 F.3d 1122, which held that an unsuccessful asylum claim was necessarily final at time of remand of the successful withholding of removal claim to update her background checks, but ruled that it lacked jurisdiction to review the alien's challenge to the agency's ruling that the asylum application was untimely. The government response defended the judgment, but conceded that the court's precedents on finality are inconsistent and in need of correction *en banc*. Oral arguments before an *en banc* panel were heard on June 16, 2014.

Contact: Jesi Carlson, OIL
☎ 202-305-7037

BIA Standard of Review

Oral argument on rehearing was heard before a panel of the Ninth Circuit on September 9, 2013, in ***Izquierdo v. Holder,*** 06-74629, addressing the question of whether the Board the engaged in impermissible fact-finding when it ruled that the alien witnessed a human rights crime and made no effort to prevent it.

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

Asylum – State Dept Investigations

The Ninth Circuit requested a government response to the alien's petition for *en banc* or panel rehearing challenging the Court's published decision in ***Angov v. Holder***, 736 F.3d 1263, which held that the alien has the right to obtain documents, identities of investigators and witnesses, and testimony of the State employees involved in the investigation of his asylum claims by the Consulate in Romania. The government opposed rehearing on May 9, 2014.

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

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

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Remands Asylum Case for Further Analysis of a Particular Social Group Claim Based on Family

In ***Aldana-Ramos v. Holder***, __ F.3d __, 2014 WL 2915920 (1st Cir. June 27, 2014) (*Lynch*, Torruela, Thompson), the First Circuit remanded the case, holding that the BIA neglected record evidence that gang members targets aliens because of their family ties and committed legal error by not allowing for the possibility of mixed motives. The court also determined that the BIA erroneously concluded that a family cannot qualify as a particular social group unless a family member can also claim another protected ground.

Contact: Sunah Lee, OIL
☎ 202-305-1950

On Government's Rehearing Petition, Fourth Circuit Amends Opinion to Correct *Ventura* Violation

In ***Chen v. Holder***, No. 12-2279 (4th Cir. May 30, 2014) (*Traxler*, Motz, Keenan), the Fourth Circuit issued an amended opinion and denied the government's petition for panel rehearing of its February 5, 2014 published decision (742 F.3d 171). That decision, which granted the petition for review in part, included a footnote stating that the IJ had erred in finding that the petitioners' asylum claim was time-barred. Because the BIA had not addressed that issue, the government petitioned for rehearing, asserting that the language in the footnote violated the "ordinary remand rule" set forth in *INS v. Ventura*, 537 U.S. 12 (2002). By deleting part of the footnote, the court rectified the *Ventura* violation.

Contact: Christina J. Martin, OIL
☎ 202-532-4602

SECOND CIRCUIT

Second Circuit Holds Limits on Waiver of Deportation Are Not Impermissibly Retroactive

In ***Centurion v. Holder***, __ F.3d __, 2014 WL 2722571 (2d Cir. June 17, 2014) (Katzman, C.J., *Jacobs*, Carney), the Second Circuit held that the petitioner was ineligible for a waiver of deportation under former INA § 212(c) because his 2007 controlled substance conviction occurred after the 1996 repeal of § 212(c), even though the crime took place before the repeal.

"The legal regime in force at the time of an alien's conviction determines whether an alien is entitled to seek § 212(c) relief."

The petitioner, a citizen of Peru, became a LPR in 1989. In 1990, he was arrested in Texas and charged with conspiracy to possess cocaine in an amount exceeding four hundred grams. He posted bail and fled Texas. In 2005, Centurion was arrested in Puerto Rico on the outstanding Texas warrant. On April 10, 2007, pursuant to a deferred prosecution agreement, petitioner pled *nolo contendere* to conspiracy to possess a controlled substance to wit: cocaine.

On September 25, 2007, as petitioner was returning to the United States from the Dominican Republic, he was stopped by Customs Officers. On January 18, 2008, he was placed in removal proceedings and charged with inadmissibility as an alien convicted of a controlled substance violation, under INA § 212(a)(2)(A)(i)(II). The IJ pretermitted petitioner's application for § 212(c) relief and ordered him removed. The BIA affirmed, finding that petitioner was convicted of a controlled substance violation and that he was ineligible for § 212(c) relief because his 2007 plea followed the repeal of that dispensation.

The Second Circuit adhered to its prior decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), where it held that "the legal regime in force at the time of an alien's conviction determines whether an alien is entitled to seek § 212(c) relief." The court rejected petitioner's contention that after *Vartelas v. Holder*, __ U.S. __, 132 S. Ct. 1479 (2012), where the Supreme Court held it impermissible to retroactively apply an IIRIRA provision, § 101(a)(13)(C)(v), to an LPR who was convicted before IIRIRA was enacted, *Domond* was no longer sound. The court explained that *Vartelas* did not turn on a distinction between the date of the offense and the date of conviction.

Contact: Sabatino F. Leo, OIL
☎ 202-514-8599

THIRD CIRCUIT

Third Circuit Finds Justiciability Over Alien's Case and Holds That a Conviction for Engaging in the Unlicensed Business of Firearms is Not a Crime Involving Moral Turpitude

In ***Mayoraga v. Att'y Gen. of the U.S.***, __ F.3d __, 2014 WL 2898528 (3rd Cir. June 27, 2014) (*Sloviter*, Barry, Hardiman (*dissenting*)), the Third Circuit rejected the Government's argument that it need not decide whether the alien's conviction involved moral turpitude because he was found removable and ineligible for relief on a separate ground. The court found that the crime involving moral turpitude issue was justiciable

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)
because there were collateral consequences arising from the IJ's moral turpitude finding, even though it did not affect the alien's removability or eligibility for relief. Finding justiciability, the court ruled that the alien's conviction for engaging in the unlicensed business of firearms was not a crime involving moral turpitude.

Contact: Anthony P. Nicastro, OIL
☎ 202-616-9358

FIFTH CIRCUIT

■ **Conviction for Carnal Knowledge Of A Child By An Adult Constitutes A "Sexual Abuse of a Minor" Aggravated Felony**

In ***Contreras v. Holder***, __ F.3d __, 2014 WL 2565670 (5th Cir., June 6, 2014) (*Higginbotham*, Clement, Higginson), the Fifth Circuit held that the petitioner, a citizen of El Salvador, was ineligible for special rule cancellation of removal under NACARA because his conviction for carnal knowledge of a child, in violation of Virginia Code § 18.2-63.3, constituted "sexual abuse of a minor."

The court declined to decide whether to accord *Chevron* deference to the BIA's construction of "sexual abuse of a minor" in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), because, under a modified categorical analysis, the offense is an aggravated felony under the court's "plain meaning" approach as set forth in *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (*en banc*).

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

■ **Fifth Circuit Holds that New Mexico Auto-Burglary Conviction Constitutes an Aggravated Felony as an Attempted Theft Offense**

In ***Garcia v. Holder***, __ F.3d __, 2014 WL 2937020 (5th Cir. June 30, 2014) (Davis, Dennis, Garza (concurring)), the Fifth Circuit held that the petitioner's conviction for auto-burglary in violation of New Mexico law constituted an aggravated felony as an attempted theft offense under INA § 101(a)(43)(G)-(U). The *per curiam* majority reasoned that the conviction records, which reflected that petitioner pled guilty as charged to entering a vehicle "without authorization or permission, with intent to commit a theft therein," established that the conviction was for taking a substantial step toward committing a "theft offense."

Specially concurring, Judge Garza reasoned that that the conviction is a "crime of violence" aggravated felony under circuit precedent and that petitioner was required to prove that most of the acts criminalized by the statute do not constitute aggravated felonies to establish eligibility for relief from removal, but he failed to do so.

"Punishment for violation of conscription laws of general applicability does not in itself constitute persecution on account of political opinion.

Contact: Jesse M. Bless, OIL
☎ 202-305-2028

■ **Fifth Circuit Holds That Punishment for Violating a Country's Conscription Laws Does Not Constitute Persecution on Account of Political Opinion**

In ***Milat v. Holder***, __ F.3d __ 2014 WL 2782229 (5th Cir. June 19, 2014) (Reavley, *Prado*, Elrod), the Fifth Circuit held that petitioner failed to establish eligibility for asylum based on his evasion of the Eritrean government's national service requirement.

The petitioner claimed that he fled Eritrea to escape an assignment within Eritrea's National Service program, which he asserts is a program of human trafficking and not a legitimate program of military conscription. The IJ denied petitioner's applications for asylum and withholding but granted his application for CAT protection based on the Eritrean government's practices and its appalling human rights record.

The court held "that punishment for violation of conscription laws of general applicability does not in itself constitute persecution on account of political opinion."

The court explained that "prosecution for avoiding military conscription may constitute persecution only if the applicant shows either (1) the penalty imposed would be disproportionately severe on account of a protected ground, or (2) the applicant would be required to engage in inhumane conduct as part of military service."

Here the court found that, although the evidence was conflicting, "the State Department report suggests that evasion of Eritrean National Service obligations generally results in brief detentions." Moreover, petitioner did "not point to any direct evidence that he would be singled out and disproportionately punished for evading conscription on account of his political views," said the court. Accordingly, it found that the record did not compel a finding that petitioner "either was persecuted on account of his political opinion, or that he has a well-founded fear that he would be persecuted on account of his political beliefs were he to return to Eritrea."

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

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

SIXTH CIRCUIT

■ **Sixth Circuit Adopts Ninth Circuit's Construction of the Changed Circumstances Exception to the Asylum Statute's One-Year Bar**

In ***Mandebvu v. Holder***, __ F.3d __, 2014 WL 2743608 (6th Cir. June 18, 2014) (Merritt, *Moore*, McKeague), the Sixth Circuit adopted the Ninth Circuit's construction of the asylum statute's "changed circumstances" exception to the requirement that asylum applications be filed within one year of an applicant's arrival in the United States. The court held that the BIA erred by determining that an "incremental change" in country conditions in Zimbabwe was necessarily insufficient to meet the exception.

The petitioners, two school teachers from Zimbabwe, and their children, came to the United States separately in 1999 and 2000. From 1999 to 2006, the husband attended two universities in Ohio, earning a Masters in Marketing and Communication and an MBA in Entrepreneurship. The couple were critical of Robert Mugabe's Zimbabwe African National Union–Patriotic Front ("ZANU–PF") party, which apparently has maintained control of the political process through violence and corruption. When petitioners were placed in removal proceedings, they applied for asylum and withholding of removal on September 12, 2008. At a hearing regarding their applications, the couple testified about the abuses perpetrated against family members who had remained in Zimbabwe. The husband explained that he feared for his own safety and his family's if he were forced to return to Zimbabwe after so many years.

The IJ determined that the asylum application was time-barred and that country conditions had not materially changed in a manner sufficient to excuse late filing. He also concluded that it was not probable that petitioners would be persecuted or tortured if forced to return to Zimbabwe. The BIA affirmed.

While the case was pending before the Sixth Circuit, petitioners' daughters were granted prosecutorial discretion. On January 7, 2014, the government offered a grant of prosecutorial discretion to the petitioner subject to certain employment restrictions, but they declined.

Petitioner argued that the uptick in violence during the 2008 Zimbabwean elections constituted "changed circumstances" that excused noncompliance with the one-year deadline. The court disagreed with the BIA's statutory construction that an "incremental change" in country conditions was necessarily insufficient to meet the exception, rejecting it as being an "unduly narrow legal standard." The court found persuasive the Ninth Circuit's formulation in *Singh v. Holder*, 656 F.3d 1047 (9th Cir. 2011), that an asylum applicant might still qualify for the changed circumstances exception "even if the relevant circumstances do not create a new basis of persecution but simply provide further evidence of the type of persecution already suffered." Accordingly, it remanded the issue to the BIA to apply the correct legal standard.

An asylum applicant might still qualify for the changed circumstances exception "even if the relevant circumstances do not create a new basis of persecution."

The court also ordered the BIA to grant restriction on removal (withholding) and to consider the aliens' CAT claims in the first instance.

Judge McKeague dissented. He would have found that the court lacked jurisdiction to review the untimely asylum application under § 208(a)(3) noting that the existence of "changed circumstances" that materially affect eligibility for asylum is a predominantly factual determination.

Contact: Dan Smulow, OIL
☎ 202-532-4412

SEVENTH CIRCUIT

■ **Seventh Circuit Upholds Ruling that Asylum Applicant Failed to Establish a Pattern or Practice of Persecution Against Chinese Christians in Indonesia**

In ***Halim v. Holder***, __ F.3d __, 2014 WL 2724652 (7th Cir. June 17, 2014) (*Bauer*, Easterbrook, St. Eve (by designation)), the Seventh Circuit upheld the BIA's finding that petitioner failed to establish a pattern or practice of persecution of ethnic Chinese in Indonesia to support a claim of withholding.

The petitioner, an Indonesian citizen, came to the United States in 2000 and overstayed his temporary visa. He filed for asylum, withholding of removal, and CAT protection stating that he feared he would be persecuted if he were sent back to Indonesia due to his status as a Chinese Christian.

The IJ dismissed petitioner's application for asylum because he failed to apply within the one-year statutory limit, and denied his other requests for relief because he failed to show past persecution or a well-founded fear of future persecution. The BIA affirmed.

The Seventh Circuit explained that to establish a country's pattern or practice of persecution, an applicant must prove the existence of a "systematic, pervasive, or organized effort to kill, imprison, or severely

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)
injure members of the protected group, and this effort must be perpetuated or tolerated by state actors. Pattern or practice cases require an extreme level of persecution because "once the court finds that a group was subject to a pattern or practice of persecution, every member of the group is eligible."

The court then determined that the evidence in petitioner's case indicated that the Indonesian government neither implemented nor permitted others to systematically and pervasively persecute Christians. "To the contrary, the evidence shows that local and national government took actions to improve religious freedoms for Christians and other faiths," said the court. The court also determined that petitioner failed to show an individualized risk of persecution due to his proximity to the riots in the 1990s because he and his family were not harmed during that time. "Belonging to a disfavored group does not entitle [petitioner] to a lower standard of evidence to prove his individualized fear of persecution," noted the court.

Contact: Annette Wietecha, OIL
☎ 202-353-3901

EIGHTH CIRCUIT

■ **Eighth Circuit Holds That *Res Judicata* Does Not Bar Alien's Removal Proceeding**

In ***Cabrera Cardona v. Holder***, __ F.3d __, 2014 WL 2535292 (8th Cir. June 6, 2014) (Riley, Gruender, *Shepherd*), the Eight Circuit held that *res judicata* did not bar the DHS from bringing new removal proceedings against an alien whose prior proceedings had been terminated.

The petitioner, an LPR since 1989, pled no contest to manslaughter and tampering with evidence in 2002 and was found guilty in a Nebraska state court. These two crimes were charged in the same charging document, and the two convictions arose from petitioner's actions on the same day. In 2003, DHS sought petitioner's removal based only on the manslaughter conviction, charging him as an alien convicted of an aggravated felony, specifically, a "crime of violence," as defined by INA § 101(a)(43)(F). The IJ ordered him removed, but the BIA terminated the removal proceedings, finding that manslaughter did not constitute a "crime of violence."

In 2011, DHS again began removal proceedings against petitioner, this time based on petitioner's tampering with evidence conviction, charging him as an alien convicted of an aggravated felony, namely, "an offense relating to obstruction of justice," as defined by INA § 101(a)(43)(S). Petitioner admitted that the tampering with evidence conviction constituted an aggravated felony. However, he argued that *res judicata* barred DHS from bringing the removal proceedings against him because the tampering with evidence conviction arose from the same nucleus of operative facts as the manslaughter conviction.

The termination of a removal proceeding that was based on the alien's manslaughter conviction did not bar DHS from seeking his removal based on his conviction for tampering with evidence.

The IJ found *res judicata* inapplicable. The BIA agreed, explaining that preclusion principles are applied more flexibly in the administrative context as compared to the judicial context.

The court assumed, without deciding, that *res judicata* principles apply to immigration proceedings, and ruled that the termination of a removal proceeding that was based on the alien's manslaughter conviction did not bar DHS from seeking his removal based on his conviction for tampering with evidence because the two offenses relied on different factual predicates.

Contact: Eric Marsteller, OIL
☎ 202-353-3375

■ **Eighth Circuit Affirms Entry of Summary Judgment in Favor of USCIS in Case Involving Delay in Adjudication of Application for Adjustment of Status Pending Since 1999**

In ***Irshad v. Johnson***, __ F.3d __, 2014 WL 2598741 (8th Cir. June 11, 2014) (Wollman, *Colloton*, Gruender, J.), the Eighth Circuit affirmed the entry of summary judgment in an action challenging the delay by USCIS in adjudicating an application for adjustment of status placed on adjudicatory hold for terrorism-related inadmissibility grounds. The court concluded that the relevant period of delay ran from 2008, when the application was reopened. Applying the *TRAC* factors, the court held that, under the facts of the case, the period of delay was not unreasonable.

Contact: Aaron S. Goldsmith, OIL-DCS
☎ 202-532-4107

■ **Eighth Circuit Rejects Alien's Due Process Claim Where No Prejudice Was Shown**

In ***Njoroge v. Holder***, __ F.3d __, 2014 WL 2459683 (8th Cir. June 3, 2014) (*Smith*, Beam, Benton), the Eighth Circuit held that the petitioner failed to establish that the IJ violated her due process rights by denying a continuance and proceeding with her hearing without her attorney present.

The petitioner, a citizen of Kenya, had initially applied for asylum, withholding of removal, and CAT protection in 2002. She asserted that

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

she feared the forced female genital mutilation (FGM). The IJ and BIA denied her claim on basis of reports indicating a recent partial ban on FGM practices in Kenya. Following the filing of a petition for review, petitioner's case was remanded so that the BIA could take into into account the effectiveness of the FGM ban in Kenya.

At a February 2009 hearing in Minnesota, Njoroge appeared *pro se*, and informed the IJ that she had moved to North Carolina. The IJ advised the parties that the "final hearing" would be held in Minnesota on May 5, 2010. Petitioner then obtained counsel who sought a continuance. The IJ denied the continuance. On May 5 petitioner appeared *pro se*. The IJ noted at the hearing she had afforded petitioner 14 months to find an attorney and prepare her case and characterized petitioner's counsel's failure to appear as a delay tactic.

Petitioner had failed to demonstrate prejudice because she did not set forth what evidence she would have submitted to show entitlement to relief from removal.

The court assumed, without deciding, that the IJ violated petitioner's statutory right to counsel by not at least calling petitioner's counsel. However, the court determined that petitioner had failed to demonstrate prejudice because she did not set forth what evidence she would have submitted to show entitlement to relief from removal. "Neither [petitioner] nor her counsel has set forth, either before the IJ or on appeal, what evidence affirmatively proves that she is entitled to the relief that she seeks. As a result, she has not proven prejudice," concluded the court.

Contact: Meadow W. Platt, OIL
☎ 202-305-1540

NINTH CIRCUIT

■ **Divided Ninth Circuit Defers to Agency's Adverse Credibility Finding and Rules That Immigration Judge's Questioning Did Not Violate Due Process**

In ***Jiang v. Holder***, __ F.3d __, 2014 WL 2609914 (9th Cir. June 12, 2014) (Scannlain, Bea, *Navarro*), the Ninth Circuit held that substantial evidence supported the agency's adverse credibility determination, based on the IJ's finding that the petitioner did not testify she had been abused during her detention until prompted by her attorney. The court also held that the IJ's questioning regarding the alien's relationship with her witness did not violate due process as she failed to show that she was prevented from presenting evidence or that she was prejudiced.

Judge Bea separately concurred in the due process ruling but dissented from the majority's adverse credibility ruling and would remand with instructions to find the petitioner credible.

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

TENTH CIRCUIT

■ **Tenth Circuit Holds That *Nunc Pro Tunc* Sentence Modification Did Not Change Length of Alien's Confinement To Defeat Good Moral Character Per Se Rule**

In ***Garcia Mendoza v. Holder***, __ F.3d __, 2014 WL 2443003 (10th Cir. June 2, 2014) (*Briscoe*, Porfilio, O'Brien), the Tenth Circuit held that a state court's *nunc pro tunc* sentence modification had no impact for purposes of determining whether the alien had been confined for 180 days under the good moral character provision in 8 U.S.C. § 1101(f)(7), because the alien had been physically confined for over 180 days as a result his conviction prior to the modification. The court ruled that the statutory language is clear and that it did not need to proceed to step two of *Chevron*. The court also deferred to the BIA's determination that an alien's period of pretrial confinement could count towards the 180-day calculation.

Contact: Julie Saltman, OIL
☎ 202-532-4252

ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds that Alien's Pardon For His Statutory Rape conviction Did Not Constitute A "Full" Pardon for Immigration Purposes**

In ***Castillo v. Holder***, __ Ff.3d __, 2014 WL 2915918 (11th Cir. June 27, 2014) (*Marcus*, Edmondson, Treadwell), the Eleventh Circuit held that a pardon is "full" under 8 U.S.C. § 1227(a)(2)(A)(vi) only when it removes all future disabilities from the underlying conviction. Because the pardon granted to the alien by Georgia authorities did not reinstate his rights to receive, possess, or transport a firearm in commerce under Georgia law that he lost because of his conviction for statutory rape, the court ruled his conviction still constituted a removable offense.

Contact: Jesse M. Bless, OIL
☎ 202-305-2028

(Continued on page 11)

Recent Federal Courts Decisions

(Continued from page 10)

DISTRICT COURTS

■ **District of Massachusetts Grants Government's Motion for Summary Judgment Seeking to Revoke and Set Aside Defendants' Certificates of Naturalization**

In ***U.S. v. Pilika,*** No. 13-cv-10107 (D. Mass., June 23, 2014) (Gorton, J.), the court denied defendants motion for summary judgment and granted summary judgment for plaintiff, the United States. The court found that defendants illegally procured their certificates of naturalization within the meaning of 8 U.S.C. § 1451(a) because they had failed to disclose that they were subject to *in absentia* removal orders stemming from their fraudulent asylum applications.

Contact: Sarah Vuong, OIL-DCS
☎ 202-532-4281

■ **Southern District of Florida Upholds USCIS's Determination that Alien Beneficiary's Prior Marriage Was Not *Bona Fide* Despite Confession Recantation**

In ***Kazinetz v. USCIS***, No. 12-cv-81078 (S.D. Fla., June 13, 2014) (Marra, K.), the District Court for the Southern District of Florida granted summary judgment to the government, upholding the denial by USCIS of an immediate-relative visa petition filed by petitioner's fourth wife. A prior wife had confessed to marrying to help the petitioner obtain a green card and withdrew the visa petition that she had filed, though she later recanted during the pendency of this petition. The court found inadequate documentation that the prior marriage was *bona fide*, where the record demonstrated that the couple had maintained separate residences, spent birthdays apart, shared bank accounts with minimal balances, did not visit or see each other often, and submitted conclusory affidavits lacking verifiable details indicating a shared life.

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

■ **Western District of Washington Determines That Grant of Temporary Protected Status Constitutes An "Admission" For Purposes Of Adjustment of Status**

In ***Ramirez v. Dougherty***, No. 13-cv-1236 (W.D. Wash. May 30, 2014) (Zilly, J.), the District Court granted summary judgment in the plaintiffs' favor, holding that a Salvadoran petitioner's grant of TPS rendered him "admitted" for purposes of adjustment of status under 8 U.S.C. § 1255(a). The court followed *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), reasoning that § 1254a(f)(4)'s provision that TPS beneficiaries are "in, and maintaining, lawful status as a nonimmigrant"— by its plain language — "applies to the entirety of § 1255."

Contact: Ashley Martin, OIL-DCS
☎ 202-514-0575

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Aldana-Ramos v. Holder	**06**
Cabrera Cardona v. Holder	**09**
Castillo v. Holder	**10**
Centurion v. Holder	**06**
Chen v. Holder,	**10**
Contreras v. Holder	**07**
Garcia v. Holder	**07**
Garcia Mendoza v. Holder	**10**
Halim v. Holder	**08**
Irshad v. Johnson	**09**
Jiang v. Holder	**10**
Kazinetz v. USCIS	**11**
Mandebvu v. Holder	**08**
Mayoraga v. Att'y Gen.	**06**
Milat v. Holder	**07**
Munoz v. Holder	**01**
Njoroge v. Holder	**09**
Ramirez v. Dougherty	**11**
Scialabba v. Osorio	**01**
U.S. v. Pilika	**11**

LPR subject to "admission"

(Continued from page 4)

reenters the United States." The court further noted that both history and practice demonstrate that the primary purpose of these statutory provisions was to enable parole of aliens for the purpose of prosecution.

The court disagreed with the Third Circuit's interpretation in *Doe v. Attorney General of the United States,* 659 F.3d 266, 272–73 (3d Cir. 2011), where that court read the statute to mean the DHS must prove that the alien "has committed" rather than was "convicted" of a crime involving moral turpitude because § 101(a)(13)(C)(v) uses the words "has committed." That reading "ignores the fact that § 101(a)(13)(C)(v) refers to § 212(a)(2)(A)(i)(I), which clearly states that the alien had to have been 'convicted of, or who admits having committed, or who admits committing acts' of a crime involving moral turpitude," explained the court.

Accordingly, the court denied the petition because the government had provided evidence that petitioner had been convicted of a crime involving moral turpitude for an act that she committed prior to her application for admission.

By Francesco Isgrò, OIL

Contact: Tim Ramnitz, OIL
☎ 202-616-2686

INSIDE OIL

Congratulations to OIL's Secretary **Nannette Anderson**. At the First Annual Paul Laurence Dunbar Awards Luncheon held on June 28, 2014 at The Bolling Club, Bolling Air Force Base in Washington, D.C. , Ms. Anderson was presented an award by the Dunbar Alumni Federation (DAF) for writing an essay on "My Dunbar Story." Ms. Anderson is a former alumni of Dunbar Senior High School here in Washington, D.C. The award was presented by D.C. Mayor, Vincent C. Gray, who is also a alumnus of Dunbar.

Congratulations to the following OIL attorneys who have been promoted to Senior Litigation Counsel: ***Julie Iverson, Kiley Kane, Katharine Clark, Kelly Walls, Justin Markel, Claire Workman, Kohsei Ugumoi, Brianne Cophen, Yamileth Davila, Lindsay Glauner,*** and ***Margaret Taylor.***

Mayor Vincent C. Gray, Nannette Anderson

IJ Positions

The Executive Office for Immigration Review has published in the Federal Register an interim rule allowing for the designation of temporary immigration judges. This rule amends EOIR regulations to allow the Director of EOIR to designate or select, with the approval of the Attorney General, temporary immigration judges. 79 *Fed. Reg.* 39953 (July 11, 2014).

USCIS

On July 9, 2014, ***Leon Rodriguez*** was sworn as the director of the USCIS. He previously served as the director of the Office for Civil Rights at the Department of Health and Human Services, a position he held from 2011 to 2014. From 2010 to 2011, he served as chief of staff and deputy assistant attorney general for civil rights at the U.S. Department of Justice.

OIL TRAINING CALENDAR

TBA September 2014. Brown Bag Lunch & Learn with **Alvaro Vargas Llosa**, author of *Global Crossings: Immigration, Civilization, and America* (Independent Institute, 2013).

September 10-11. Faculty Development Workshop & Symposium for OIL attorneys who will be teaching the Immigration Law Seminar.

November 3-7, 2014. OIL 20th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington, DC. Attorneys from our client agencies and Assistant United States Attorneys are invited to attend.

Contact: Francesco.Isgro@usdoj.gov

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

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

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

Office of Immigration Litigation

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

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

linda.purvin@usdoj.gov

Stuart F. Delery
Assistant Attorney General

August Flentje
Senior Counsel for Immigration
Civil Division

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

Francesco Isgrò, Editor
Tim Ramnitz, Assistant Editor
Kimberly W. Shi, Intern

Linda Purvin
Circulation