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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Supreme Court Holds That *Fleuti* Doctrine Applies to Returning LPRs Whose Convictions Predate IIRIRA

In ***Vartelas v. Holder***, 2012 WL 1029971 (U.S. March 28, 2012), the Supreme Court, applying the "anti-retroactivity principle," held that a returning lawful permanent resident alien (LPR) cannot be treated as seeking admission under INA § 101(a)(13) if his conviction of an offense under INA § 212(a) predates the effective date of the Illegal Immigration Reform and Immigrant Responsibility Control Act of 1996 (IIRIRA). Instead, the LPR's application for admission must be evaluated under the *Fleuti* doctrine.

Historical Background

Prior to 1996 an alien seeking admission or "entry" into the United States for the first time or as a returning LPR was subject to the grounds of exclusion or inadmissibility. Aliens who had "entered" the United States legally or surreptitiously were subject to grounds of deportability. The definition of "entry" under former § 101(a)(13), which became known as the "entry doctrine," provided an exception for LPRs whose departure from the United States "was not intended" or " was not voluntary."

In *Rosenberg v. Fleuti*, 374 U.S. 462 (1963), the Court held that an LPR who had taken a voluntary but "brief, casual, and innocent," trip abroad, namely a two-hour excursion to Mexico, could not be treated under former § 101(a)(13), as an alien

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BIA Remands For Consideration Of Voluntary Departure: Are They Final Orders Of Removal?

Since April 1996, the Immigration and Nationality Act (INA) has defined an "order of deportation" as an "order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." INA § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A). Such an order becomes final upon the earlier of "(i) a determination by the Board of Immigration Appeals affirming such order;" or (2) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47(B).

The definition remained following further amendments to the INA the same year, when Congress, *inter alia*, substituted "removal proceedings" for formerly separate exclusion and deportation hearings, limited the duration of voluntary departure, codified motions to reopen, and amended procedures governing judicial review. Over the next several years, the circuits split in litigation involving two issues related to voluntary departure: whether a timely motion to reopen or reconsider automatically tolled the period of voluntary departure, and whether the

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Fleuti is back!

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seeking "entry" and subject to an exclusion hearing because his continuous residence in the United States had not been meaningfully interrupted. Therefore, the Court held that Fleuti could not be excluded on the basis that he was an alien "afflicted with a psychopathic personality" under former § 212(a)(4). Because there was no comparable deportation ground, Fleuti could neither be deported nor removed from the United States. The *Fleuti* ruling, which became known as the *Fleuti* doctrine, precipitated years of extensive litigation as to the meaning of "brief, casual, and innocent" absences.

In 1996, the IIRIRA, in pertinent part, eliminated the distinction between an exclusion and deportation hearing, established a unitary removal hearing, and amended § 101 (a)(13), by eliminating the concept of "entry" and replacing it with the new definition of "admission." Under this new scheme, an alien "admitted" to the United States would be subject to the grounds of deportability while an alien seeking "admission" or one who entered surreptitiously would be subject to the grounds of inadmissibility. A favorable exception was made for returning LPRs. An LPR would not be treated as an applicant for admission unless, among other exceptions, he had traveled abroad for more than 180 days. An LPR, however, would be treated as an applicant for admission if he or she had "committed an offense identified in section 212(a)(2)" unless that offense had been waived under § 212(h). In 1998, the BIA declared that the amendments to § 101(a)(13) had superseded the *Fleuti* doctrine. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998)(*en banc*).

Facts in Vartelas

Panagis Vartelas, has been an LPR since 1989. In 1994 he pled guilty to conspiring to make a counterfeit security, an offense that carried a maximum penalty of five years. Vartelas served a four-month sentence. Notwithstanding that conviction, Vartelas apparently traveled regularly to Greece to visit his aging parents. However, in 2003, upon his return from a week-long trip to Greece, an immigration officer determined that Vartelas was an alien who was seeking "admission" based on his 1994 conviction which rendered him inadmissible under 212(a)(2) as an alien who had committed a crime involving moral turpitude.

The *Fleuti* ruling, which became known as the *Fleuti* doctrine, precipitated years of extensive litigation as to the meaning of "brief, casual, and innocent" absences.

At the removal hearing, Vartela's attorneys conceded removability, and requested relief under former § 212 (c). The IJ denied the requested relief. The IJ found that Vartelas had made frequent trips to Greece and remained there for long periods of time; had not paid his United States income taxes; had not shown hardship to himself, his estranged wife, or his United States citizen children who resided in Chicago with their mother; and had not shown that he supported the children. On appeal the BIA affirmed. Vartelas then retained a new attorney who timely filed with the BIA a motion to reopen his removal proceedings on the basis that his prior counsels were ineffective because among other reasons they had conceded removablity. In particular, Vartelas now argued that the IIRIRA admission provision should not be applied retroactively to treat him as alien seeking "admission." The BIA denied the motion to reopen and also rejected the contention that the IIRIRA definition of "admission" was impermissibly retroactive.

Second Circuit Decision

In *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010), the Second Circuit rejected all of Vartelas's contentions as being without merit. In particular, the court rejected his contention that because his plea of guilty had preceded IIRIRA, the application to him of the new definition of "admission" was impermissibly retroactive. Applying the two-step retroactivity analysis in *Ladndgraf v. USI Film Products*, 511 U.S. 244 (1994), the court first found that Congress had not expressly prescribed the temporal reach of the amended § 101(a)(13) provision. Second, the court determined that the application of the amended provision did not have a genuinely 'retroactive' effect." The court rejected Vartelas' argument that the triggering retroactivity event was his reliance on the *Fleuti* doctrine because, unlike the alien in *INS v. St. Cyr,* 533 U.S. 289 (2001), the application of 212(a)(2) to Vartelas did not hinge on a "conviction" or a "plea of guilty" but rather on whether the he had "committed" an offense. "It would border on the absurd to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws," explained the court.

Supreme Court Decision

The Supreme Court preliminarily noted that the presumption against retroactive legislation recalled in *Landgraf* embodied legal doctrine centuries older "than our Republic." Several provisions of the Constitution, such as the Ex Post Facto clause embrace the doctrine said the Court. "A retrospective application of a law would collide" with this doctrine if, recalling Justice Story's formulation, the application of a law "would take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty or at-

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courts of appeals could stay a voluntary departure order pending judicial review. *See Dada v. Mukasey*, 554 U.S. 1, 7, 10-11 (2008). *Dada* addressed the first issue, in the course of which the Supreme Court held that the 1996 amendments limiting the duration of voluntary departure were unambiguous and found no statutory authority for automatically tolling that period, yet it concluded that a mechanism was needed to allow an alien to withdraw his request for voluntary departure in order to preserve both his right to seek reopening and the government's "interest in the *quid pro quo* of the voluntary departure agreement." *Id*. at 9, 15, 19-20.

The current regulations follow the same rationale in resolving both issues. *See* 73 Fed. Reg. 76927 (Dec. 18, 2008). Certain cases, however, sometimes implicate a third issue that arises when the Board of Immigration Appeals (BIA) affirms the determination that the alien is removable, or denies applications for relief from removal, but remands the case to the immigration judge (IJ) to, *for example,* receive background checks, designate the country of removal, or consider voluntary departure in lieu of involuntary removal.

Several courts have found that such orders are final orders as defined in 8 U.S.C. § 1101(a)(47)(B), and thus subject to judicial review under section 242 of the INA, 8 U.S.C. § 1252. That result appears to conflict with BIA precedent, and notwithstanding the similarity between the statutory definition in 8 U.S.C. § 1101(a)(47)(B) and 8 C.F.R. § 1241.1, which defines a "final order of removal," an order remanding a case to an IJ is not an "administratively final" order of removal that can be executed under section 241(a)(1) of the INA, 8 U.S.C. § 1231(a)(1). More recent litigation has sought to resolve the tension between judicial review and the voluntary departure regulations.

Background

There has been a fair amount of litigation on the issue of whether a BIA decision denying relief from removal but remanding for consideration of voluntary departure constitutes a judicially reviewable, final order of removal. Where BIA decisions affirmed the IJ's finding of removability but remanded for consideration of voluntary departure, several circuits held that the BIA's decision was a final order of removal within the court's jurisdiction. *See, e.g.*, *Alibasic v. Mukasey*, 547 F.3d 78, 83-84 (2d Cir. 2008) (holding that "BIA order denying relief from removal and remanding for the sole purpose of considering voluntary departure is a final order of removal that this Court has jurisdiction to review"); *Saldarriaga v. Gonzales*, 402 F.3d 461, 465 n.2 (4th Cir. 2005) (concluding that a BIA order denying relief from removal, but remanding case for voluntary departure proceedings, or other subsidiary determinations, is immediately appealable); *Del Pilar v. U.S. Att'y Gen.*, 326 F.3d 1154, 1157 (11th Cir. 2003)(same); *see also Castrejon-Garcia v. INS*, 60 F.3d 1359, 1361-62 (9th Cir. 1995) (holding that the BIA's order reversing the grant of suspension of deportation and remanding to the IJ for a determination of voluntary departure was a final order of deportation); *Perkovic v. INS*, 33 F.3d 615, 618-19 (6th Cir. 1994) (BIA order reversing an IJ's grant of asylum and remanding the case was a final order of deportation).

There has been a fair amount of litigation on the issue of whether a BIA decision denying relief from removal but remanding for consideration of voluntary departure constitutes a judicially reviewable final order of removal.

However, the law governing voluntary departure has changed in recent years in light of the Supreme Court's decision in *Dada v. Mukasey*, 554 U.S. 1 (2008), and changes to the voluntary departure regulations in 2009.

In *Dada*, the Supreme Court addressed the interplay between the motion to reopen statute, 8 U.S.C. § 1229a(c)(7), and the penalties for failing to depart voluntarily, 8 U.S.C. § 1229c(d)(1), if an alien had been granted voluntary departure. *Dada*, 554 U.S. at 4-5. The Court ultimately held that an alien, who files a motion to reopen before expiration of the prescribed departure period, can be permitted to withdraw his request for voluntary departure without suffering the statutory penalties otherwise associated with a failure to depart voluntarily. *Id.* at 20-22. Before reaching this conclusion, the Court described voluntary departure as "an agreed-upon exchange of benefits, much like a settlement agreement. In return for anticipated benefits, including the possibility of readmission, an alien who requests voluntary departure" must both arrange for departure and promptly depart. *Id.* at 19. "If the alien is permitted to stay in the United States past the departure date to wait out the adjudication of the motion to reopen, he or she cannot demand the full benefits of voluntary departure; for the benefit to the Government – a prompt and costless departure– would be lost." *Id.* at 19-20.

The new voluntary departure regulations, which took effect on January 20, 2009, and apply to voluntary departure orders entered on or after that date, addressed the Supreme Court's concerns in *Dada* by automatically terminating a grant of voluntary departure if a motion to reopen or reconsider is filed during

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the voluntary departure period. *See* 8 C.F.R. § 1240.26(e)(1); 73 Fed. Reg. 76,927 (Dec. 18, 2008). Furthermore, the filing of a petition for review "or any other judicial challenge to the administrative final order" results in the automatic termination of the grant of voluntary departure and "the alternate order of removal . . . shall immediately take effect." 8 C.F.R. § 1240.26(i). Thus, if an alien pursues voluntary departure before the IJ at the same time he is also seeking judicial review in the court of appeals, he gets exactly what *Dada* and the new regulation forbids: the alien has the dual benefits of judicial review and voluntary departure, while depriving the government of the benefit of a prompt and costless departure. It is only after the IJ decides voluntary departure that the alien should be able to choose whether he will petition for review and allow his voluntary departure period to automatically terminate, unless he voluntarily departs prior to filing the petition, or elects the equivalent option the regulation affords him of departing within 30 days following the date he files his petition. *See* 8 C.F.R. § 1240.26(I).

BIA Precedent And Prudential Jurisdiction

Four courts have recently considered their jurisdiction in light of these developments, and either assumed that they have jurisdiction over the BIA's decision denying relief from removal but remanding for consideration of voluntary departure, or held that the BIA's decision was a judicially reviewable, final order of removal. *See Qingyun Li v. Holder*, 666 F.3d 147, 151-54 (4th Cir. 2011) (holding that BIA decision denying adjustment of status application but remanding to IJ for voluntary departure advisals and a new period of voluntary departure was a final order of removal conferring jurisdiction, but declining review for prudential reasons); *Giraldo v. Holder*, 654 F.3d 609, 616-18 (6th Cir. 2011) (holding that BIA decision reversing IJ's grant of withholding of removal and remanding for consideration of voluntary departure was a final order of removal conferring jurisdiction, but declining review for prudential reasons); *Pinto v. Holder*, 648 F.3d 976, 986 (9th Cir. 2011) (holding that BIA decision denying asylum-related relief but remanding to the IJ for consideration of voluntary departure was a final order of removal, and reviewing that order on the merits); *Hakim v. Holder*, 611 F.3d 73, 79 (1st Cir. 2010) (assuming that BIA's decision was a judicially reviewable final order of removal, but declining review for prudential reasons). Notably, three of the courts declined to exercise their jurisdiction at that time for prudential reasons, instead instructing the petitioner to file a petition for review after the IJ resolved the petitioner's voluntary departure claim, if the petitioner so chooses. *See Qingyun Li*, 666 F.3d at 153-54; *Giraldo*, 654 F.3d at 618; *Hakim*, 611 F.3d at 79. These prudential reasons were based on the Supreme Court's decision in *Dada* and the fact that the 2009 voluntary departure regulations applied to all the petitioners in those cases. The courts did not want the petitioners to be able to circumvent the regulations by receiving voluntary departure and pursuing a petition for review at the same time. *See id.* Only the Ninth Circuit declined to delay its review for prudential reasons, finding that the 2009 regulations were not applicable to the petitioner in that case, whose petition for review pre-dated the 2009 regulations, and the new regulations only addressed cases in which an alien files a petition for review *after* the alien has been granted voluntary departure. *Pinto*, 648 F.3d at 984. The court was also concerned that if the petitioner waited until voluntary departure was resolved by the IJ, he would lose the ability to petition for review from the BIA's final order of removal because the 30-day deadline would have passed. *Id.* at 985. Basically, the court saw the BIA's decision denying asylum-related relief and remanding for consideration of voluntary departure as a final order of removal completely separate from the IJ's eventual decision on voluntary departure. This view assumes that the IJ will take no other action on remand besides granting or denying voluntary departure. In fact, all three courts which specifically addressed their jurisdiction over BIA remands for consideration of voluntary departure assumed that on remand the IJ would only address how the alien would leave the country, by removal or through voluntary departure. *See Pinto*, 648 F.3d at 986 (noting that the only lingering question on remand is how petitioner will leave: by removal or through voluntary departure); *Giraldo*, 654 F.3d at 615 (holding that because all the orders that would foreclose removal have been presented to the BIA, and all that is remaining is the discretionary issue of voluntary departure, there is no bar to the court's jurisdiction at this time); *Qingyun Li*, 666 F.3d at 151 (noting that a final order of removal, or its functional equivalent, such as the denial of adjustment at stake in that case, is an appealable order, even if the details of a voluntary departure remain to be worked out).

Four courts have recently either assumed that they have jurisdiction over the BIA's decision denying relief from removal but remanding for consideration of voluntary departure, or held that the BIA's decision was a judicially reviewable, final order of removal.

One problem with this approach is that it ignores the fact that an IJ may consider more than just voluntary departure on remand, and his ability to do so is governed by BIA precedent. In *Matter of Patel*, the BIA held that where the BIA remands

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony - Drug Trafficking

On April 2, 2012, the Supreme Court granted a writ of certiorari over government opposition in *Moncrieffe v. Holder* on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana. In a published decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not prove that a marijuana distribution-type conviction involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4), before the conviction qualifies as a drug trafficking aggravated felony. These circuits hold that 21 U.S.C. § 841(b)(4) does not define elements of a crime, and therefore is not relevant to proving an aggravated felony under the "categorical approach." The Second and Third Circuits, however, require that the government make these showings because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution.

Contact: Manning Evans
☎ 202-616-2186

Cancellation - Imputation

The Supreme Court heard oral argument on January 18, 2012 in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543). These two cases raise 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.

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

Asylum—Particular Social Group

During the March 20, 2012, en banc argument in ***Henriquez-Rivas v. Holder***, the *en banc* panel requested that the government determine whether the Board of Immigration Appeals would make a precedent decision on remand in *Valdiviezo–Galdamez v. Attorney General*, 663 F.3d 582 (3d Cir. 2011). The Board declined to comment on its pending case. The now-withdrawn unpublished *Henriquez-Rivas* decision, 2011 WL 3915529, upheld the agency's ruling that El Salvadorans who testify against gang members does not constitute a particular social group for asylum. Concurring judges on the panel, and the subsequent petition for rehearing, suggested *en banc* rehearing to consider whether the court's social group precedents, especially regarding "visibility" and "particularity," are consistent with each other and with Board precedent.

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

Conviction – Conjunctive Plea

An *en banc* panel of the Ninth Circuit, following December 12, 2011, oral argument on rehearing in ***Young v. Holder***, has requested supplemental briefing on whether it should overrule *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007). The panel decision, originally published at 634 F.3d 1014 (2011), ruled that where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. In its *en banc* petition, the government argued that the panel's opinion is contrary to the court's *en banc* decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

Contact: Bryan Beier
☎ 202-514-4115

Retroactivity - Judicial Decisions

The Ninth Circuit granted rehearing *en banc*, vacating its prior opinion, ***Garfias-Rodriguez v. Holder***, 649 F.3d 942 (9th Cir. 2011), in which the court had held that an alien inadmissible for reentering after accruing unlawful presence may not adjust his status under 8 U.S.C. § 1245(i). The court permitted supplemental briefing for the parties to address whether the court's decision, deferring to an agency precedent decision rejecting a prior circuit precedent, should be applied retroactively to cases pending at the time of the agency decision. The court also invited the parties to discuss whether the *en banc* court should overrule *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010). Oral argument is scheduled for the week of June 18, 2012.

John W. Blakeley
☎ 202-514-1679

Aggravated Felony — Missing Element

On March 21, 2012, a panel of the Ninth Circuit heard argument on rehearing in ***Aguilar-Turcios v. Holder.*** The panel had withdrawn its prior opinion, published at 582 F.3d 1093, and received supplemental briefing on the effect of its *en banc* decision in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (2011), which overruled the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). The government *en banc* petition challenged the missing element rule.

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

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

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **Alien Crewman is Statutorily Ineligible for Special Rule Cancellation of Removal Under NACARA**

In ***Gonzalez v. Holder***, __F.3d __, 2012 WL 833156 (1st Cir. March 14, 2012) (Lynch, Souter, *Stahl*), the First Circuit affirmed the agency's denial of the alien's application for special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA). The petitioner, a Guatemalan citizen, had last entered the U.S. as a member of a cruise ship in 1997, with a D-1 visa. The IJ and subsequently the BIA held that he was statutorily ineligible for NACARA.

On appeal petitioner claimed that he did not meet the statutory definition of a crewman and that the agency did not give him proper notice or opportunity to respond to the crewman allegations. He also contended that barring him from NACARA relief contravened congressional intent. The court found that the evidence reflected he last entered under a D-1 visa as a crewman, DHS's failure to amend the NTA to add additional charges did not deprive the alien of notice, and the plain face of the statute created no exception for crewman. Therefore, the court, citing INA § 240A(c), agreed with the IJ and the BIA that the alien was statutorily ineligible for NACARA relief because he last entered the United States as a crewman.

Contact: Carmel Morgan, OIL
☎ 202-305-0016

■ **First Circuit Dismisses Appeal of Cancellation Denial and Affirms Denial of Asylum Claim where DHS Rebutted Presumption of Well-Founded Fear**

In ***Hasan v. Holder***, __ F.3d __, 2012 WL 762961 (1st Cir. March 12, 2012) (*Torruella*, Boudin, Lipez, JJ.), the First Circuit held that it lacked jurisdiction over the agency's denial of cancellation of removal because the aliens' attack on the hardship determination had no constitutional or legal underpinning, and was essentially a challenge to the BIA's factual and evidentiary findings.

The petitioners, Bangladeshi natives, applied affirmatively for asylum, were later placed in removal proceedings, and renewed their claims for asylum, withholding, and CAT, and additionally applied for cancellation. The court affirmed the agency's finding that, while petitioners had established past persecution based on political opinion but, the presumption of a well-founded fear of future persecution was rebutted by evidence of changed circumstances in the seventeen years since petitioners had fled Bangladesh. Accordingly their applications were denied.

A group of "young men who resist gang recruitment and whose parents are unavailable to protect them," is not a particular social group because the group is amorphous and boundless.

Contact: Julia Tyler, OIL
☎ 202-353-1762

■ **First Circuit Rejects Particular Social Group and Political Opinion Claims Based on Gang Resistance**

In ***Mayorga-Vidal v. Holder***, __ F.3d __ 2012 WL 883193 (1st Cir. March 16, 2012) (Lipez, Souter, *Howard*), the First Circuit gave deference to the agency's interpretation of the term particular social group and held that a proposed group of young Salvadoran men who have resisted gang recruitment and whose parents are unavailable to protect them was not cognizable. The applicant attempted to enter without authorization and was detained and placed in removal proceedings where he applied for asylum, withholding, and CAT protection. The applicant argued that his social group "young men who resist gang recruitment and whose parents are unavailable to protect them" was not based upon recruitment but rather retribution for refusing to be recruited. The court rejected this formulation under precedent finding resistance to gang recruitment is not a particular social group.

The court then considered the second part of the applicant's social group "young men without parental protection" and rejected it as amorphous and boundless. The court rejected the political opinion claim on the grounds that the applicant did not present evidence that had told the gang of his anti-gang opinion and his opinion was not publicly known. Lastly, the denial of CAT protection was upheld for failure to establish acquiescence by the government.

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

■ **First Circuit Remands for BIA to Apply a Presumption of Credibility**

In ***Guta-Tolossa v. Holder***, __ F.3d __, 2012 WL 883469 (1st Cir. March 16, 2012) (Lynch, *Stahl*, Lipez), the First Circuit held that the BIA did not apply the required presumption of credibility, and remanded for the BIA to determine whether the IJ properly concluded that the alien failed to meet his burden of proof. The court directed that, if the BIA so concluded, it should address whether the IJ found that the alien's testimony was "otherwise credible" as that term is used in INA § 208 (b)(1)(B)(ii), and if so whether that provision required the IJ to provide the alien with notice that he needed to supply corroborating evidence, as well as an opportunity to provide that evidence, or explain why he could not.

Contact: Stefanie Hennes, OIL
☎ 202-532-4175

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First Circuit Holds that Immigration Judge's Adverse Credibility Determination Was not Supported by Substantial Evidence

In ***Jabri v. Holder***, __F.3d __, 2012 WL 883271 (1st Cir. March 16, 2012) (Lynch, Torruella, *Howard*), the First Circuit held that the IJ's adverse credibility determination was not supported by substantial evidence. The court determined that the IJ failed to present a reasoned analysis of the evidence as a whole, relying on the aggregate of incorrectly perceived testimonial inconsistencies to dismiss the alien's remaining supporting evidence. Therefore, the court found that the record did not adequately support the IJ's reliance on two of the three primary perceived inconsistencies and remanded for further proceedings to decide whether the remaining inconsistencies are sufficient to discredit the petitioner's claim in its entirety.

Contact: Charles Greene, OIL
☎ 202-307-9987

SECOND CIRCUIT

Second Circuit Holds Alien Who Made a False Claim of Citizenship on an I-9 Employment Eligibility Verification Form Is Inadmissible

In ***Crocock v. Holder***, 671 F.3d 400, (2d Cir. 2012) (Wesley, Lohier, Mauskopf), the Second Circuit concluded that an alien did not meet his burden to demonstrate that he did not represent himself to be a United States citizen when he checked the "citizen or national" box on an I-9 Employment Eligibility Verification form. The court found that the burden of proof rested solely on the alien to demonstrate he was not inadmissible to the United States for making a false claim of citizenship.

Contact: Brooke Maurer, OIL
☎ 202-305-8291

Service of a Notice to Appear, Followed By a Separate Notice of the Place and Time of the Hearing, Satisfies Service Requirements and Triggers the Stop-Time Rule

In ***Guamanrrigra v. Holder***, 670 F.3d 404 (2d Cir. February 24, 2012) (McLaughlin, Cabranes, Wesley), the Second Circuit held that service of a Notice to Appear (NTA) followed by service of a separate notice indicating the precise date and time of a hearing before the immigration court, satisfies all notice requirements.

Service of NTA indicating that date and time of hearing will be set at later date, followed by service of a separate notice indicating precise date and time satisfies notice requirement under INA § 239(a)(1).

The petitioner entered the United States "without inspection" in 1995. Eventually, following a series of notices, a hearing was scheduled for August 31, 2000. When petitioner did not appear, the IJ conducted an in *absentia* hearing and ordered him removed to Ecuador.

On January 2, 2009, petitioner was stopped for speeding in Springfield, Vermont, and subsequently detained by DHS. Petitioner then filed a motion to reopen his removal proceeding and to rescind the August 2000 *in absentia* order of removal, claiming that he had never received a Notice to Appear or a hearing notice relating to the August 31, 2000 proceeding. The IJ granted the motion. At a subsequent hearing held on June 2009, he confirmed that he had received the April 2000 NTA and the May 2000 Notice of Hearing, admitted the allegations contained therein, and conceded removability. He then sought relief in the form of cancellation of removal. DHS moved to "pretermit" the application for cancellation of removal arguing that petitioner had not been physically present in the United States for a continuous period of ten years immediately prior to his January 2009 application for relief, because the service of the April 2000 NTA had stopped the accrual of time of continuous presence in accordance with the stop-time rule of § 240A(d)(1)(A). In response, petitioner's counsel argued that DHS's failure to include the date and time of the projected hearing in the April 2000 NTA, as required under § 239(a)(1)(G)(i), rendered the document fatally defective, and therefore service of the April 2000 NTA had not terminated petitioner's accrual of time of "continuous" presence. The IJ rejected petitioner's argument and denied cancellation.

On appeal, the BIA affirmed the IJ's finding that the NTAs triggered the stop-time rule so as to cut off petitioner's accrual of continuous presence in the United States.

The Second Circuit, in an issue of first impression, held that service of a Notice to Appear that indicates that the date and time of a hearing is forthcoming, followed by service of a separate notice specifying the precise date and time of the hearing, satisfies the notice requirements of § 239(a)(1). Accordingly, because service of the May 2000 notice of hearing perfected the notice required by § 239(a)(1), the court held that petitioner's accrual of time of continuous presence in the United States was terminated, pursuant to the stop-time rule of § 240A(d)(1), on May 1, 2000, more than five years before he would have been eligible for cancellation of removal under § 240A(b)(1). "The fact that service of the subsequent August 2000 Notice of Hearing may have been inadequate has no bearing on the triggering of the stop-time rule," said the court.

Contact: David Wetmore, OIL
☎ 202-532-4650

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THIRD CIRCUIT

■ Third Circuit Determines that District Courts Have Jurisdiction to Review a Merits Denial of a Naturalization Application While Removal Proceedings Are Pending

In *Gonzalez v. Secretary of Dep't of Homeland Security*, __F.3d __, 2012 WL 898609 (3d Cir. March 19, 2011) (*Pogue*, Fuentes, Chagares), the Third Circuit determined that district courts have jurisdiction to review a merits denial of a naturalization application during the pendency of removal proceedings, and may issue a declaratory judgment regarding the lawfulness thereof.

The USCIS had denied Gonzalez application for naturalization on good moral character grounds for giving false testimony in an immigration proceeding after he affirmed during his I–751 interview that he had no children, but later held out two children from an extramarital relationship as his own after the conditions on his lawful permanent resident status were removed. The district court held that because uncontradicted evidence indicated that Gonzalez had lied in his I–751 interview, there was no genuine issue of material fact for trial.

On appeal, the Third Circuit preliminarily determined, on an issue of first impression, that INA § 1429(c) does not foreclose district court review under § 1421 whenever a removal proceeding is pending. The court, agreeing with the Ninth Circuit's analysis in *De Lara Bellajaro v. Schiltgen*, 378 F.3d 1042 (9th Cir. 2004), determined that there was no textual basis for concluding that the district court had been divested of jurisdiction by 1429. But the court held that a district court "cannot order the Attorney General to naturalize any alien who is subject to pendent removal proceedings." Instead, the relief that the court could grant would be declaratory relief. "Declaratory relief strikes a balance between the petitioner's right to full judicial review as preserved by § 1421(c) and the priority of removal proceedings enshrined in § 1429," said the court.

On the merits, the court held that the district court had properly granted summary judgment concerning Gonzalez's subjective intent to lie, because the alien's bare, self-serving statements were impeached, undermined, and outweighed by the government's well-supported showing to the contrary.

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

■ Third Circuit Holds that a Visa Waiver Program Admittee is Presumed to Have Executed a Waiver of Rights, and Her Status as a Minor Failed to Invalidate the Removal Order

In *Vera v. Att'y Gen. of the U.S.*, 672 F.3d 187 (3d Cir. March 1, 2012) (Slovitor, Vanaskie, *Greenberg*), the Third Circuit held that DHS is entitled to a presumption that an alien admitted under the Visa Waiver Program (VWP) has executed a VWP waiver (Form I-791).

The petitioner, a citizen from Argentina, entered the United States on September 8, 2000, when she was 12 years old. On July 22, 2011, during the execution of a warrant of arrest of petitioner's brother, ICE discovered that petitioner was also unlawfully in the United States. In a Record of Sworn Statement, petitioner admitted that she had entered the United States under the VWP. That same day, ICE issued a Notice of Intent to Deport for violation of terms of admission under INA 217. ICE scheduled her removal for August 4, 2011. Apparently, on that date she refused to board the aircraft and did not depart. On August 8, 2011, she filed her petition for review.

Petitioner who conceded being admitted under the VWP "is an alien and thus her request to enter the United States was statutorily based as it was without any constitutionally protected or even favored basis."

Preliminarily, the court determined that it had jurisdiction to review the petition, because ICE's "Notice of Intent to Deport" was, in effect, a final order of removal. The court then rejected petitioner's contention that DHS' inability to produce the signed VWP waiver (Form I-94W), created a presumption that she did not execute such a waiver. Instead, the court held that DHS was entitled to a rebuttable presumption that petitioner had executed the waiver. The court explained that DHS was entitled to a presumption of regularity, namely that petitioner was only admitted after executing the waiver, and that she had not submitted any evidence to rebut that presumption.

The court noted that its holding was contrary to the Second Circuit's opinion in *Galluzzo v. Holder* 633 F.3d 111 (2d Cir. 2011), where under similar factual circumstances that court refused to find that Galluzzo had executed a VWP waiver. The court said that despite the exacting standard against which a claimed waiver of constitutional rights must be judged, the controlling statute and regulations are clear. Petitioner who conceded being admitted under the VWP "is an alien and thus her request to enter the United States was statutorily based as it was without any constitutionally protected or even favored basis."

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Additionally, the court also held that even if petitioner had not signed the waiver, or if the waiver was invalid because she was a minor when she had signed it, she had suffered no prejudice. The court observed that if a minor could not execute a valid waiver, the government could be forced to adopt a policy not to allow minors under the VWP.

In conclusion, the court said that "though some people might regard the outcome of this case to be harsh the fact remains that if people in other countries object to the conditions of their admission into the United States they are free not to come here. In short, aliens either must accept the conditions of their admission or not enter this country.

"Though some people might regard the outcome of this case to be harsh the fact remains that if people in other countries object to the conditions of their admission into the United States they are free not to come here."

Contact: Sharon Clay, OIL
☎ 202-616-4283

■ **Third Circuit Finds Four-Year Detention During Pendency of Petition for Review and BIA Appeals Unreasonable, Orders Bond Hearing**

In **Leslie v. Holder**, __ F.3d__, 2012 WL 898614 (3d Cir. March 19, 2012) (Sloviter, Vanaskie, *Garth*), the Third Circuit reversed the district court's denial of the alien's habeas petition and remanded with instructions that the government provide an individualized custody hearing in accordance with *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011). The alien, initially detained under the mandatory detention statute, had remained in custody for four years without a bond hearing. The panel held that two years of detention pending a stay of removal by the Third Circuit were governed by 8 U.S.C. § 1226, and not § 1231. Examining the reasonableness of his detention under *Diop,* the panel concluded that the alien's four years without a bond hearing were unreasonable in light of his "individual circumstances," which included a successful Third Circuit petition for review, a remand by the BIA, and otherwise expeditious immigration court proceedings.

Contact: Flor Suarez, OIL-DCS
☎ 202-305-1062

SEVENTH CIRCUIT

■ **Seventh Circuit Holds It Has Jurisdiction to Review Claim that BIA Ignored Evidence, but Finds No Merit to Claim**

In *Munoz-Pacheco v. Holder*, __ F.3d __, 2012 WL 843561 (7th Cir. March 14, 2011) (Bauer, *Posner*, Rovner), the Seventh Circuit held that that a claim that the BIA failed to consider material factors or ignored relevant evidence raises a question of law for purposes of 8 U.S.C. § 1252(a)(2)(D). The court concluded that the IJ and BIA did not ignore evidence that the alien's family members would not be able to visit Mexico because of safety concerns.

Contact: Papu Sandhu, OIL

EIGHTH CIRCUIT

☎ 202-616-9357

■ **Eighth Circuit Remands for Explicit Consideration of Transcription Issue**

In **Omondi v. Holder**, __ F.3d__, 2012 WL 851111 (8th Cir. March 15, 2012) (Riley, Melloy, *Shepard*), the Eighth Circuit held the BIA properly required the alien, though credible, to corroborate his claims, but concluded the record was unclear as to whether the BIA had considered a transcription issue relevant to whether corroboration was reasonably available.

Contact: Ada Bosque, OIL
☎ 202-514-0179

■ **Eighth Circuit Upholds "Particularity" and "Social Visibility" Criteria for Assessing Particular Social Group Claims**

In **Gaitan v. Holder**, 671 F.3d 678 (8th Cir. 2012) (Wollman, Bye, *Shepherd*), the Eighth Circuit held that it was bound by circuit precedents recognizing the particularity and social visibility requirements adopted by the BIA for assessing particular social group claims.

The applicant, a native of El Salvador, was placed in removal proceedings after entering without inspection and applied for asylum, withholding, and CAT. He applied for asylum on the ground of a particular social group comprised of "young males who have been previously recruited by MS-13 and are opposed to the nature of gangs." The applicant unsuccessfully argued that precedent did not mandate that the Eighth Circuit follow the BIA's decision in *Matter of S-E-G-*. The court reasoned it was bound by the BIA's precedent and its own precedent in *Constanza v. Holder,* 647 F3d 749 (8th Cir. 2011). Therefore, the court declined to disturb the BIA's determination that the asylum applicant failed to establish membership in a cognizable social group comprised of young male Salvadorans who resist gang recruitment based upon a lack of particularity and social visibility.

Contact: James A. Hunolt, OIL
☎ 202-616-4876

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NINTH CIRCUIT

■ **Ninth Circuit Concludes that Individual Removed from the United States as an Alien Convicted of a Drug Trafficking Aggravated Felony is a United States Citizen**

In *Anderson v. Holder*,__ F.3d__, 2012 WL 762980 (9th Cir. March 12, 2012) (Fletcher, *Reinhardt*, Tashima, JJ.), the Ninth Circuit held that although the alien's biological father had no contact with him for more than forty years after his birth, "legitimation" in Arizona does not require an affirmative act under former 8 U.S.C. § 1409(a).

The petitioner was born in England to an English mother and U.S. citizen father. In 1996 he was placed in proceedings on the basis of a controlled substance offense and an aggravated felony offense of drug trafficking. An IJ terminated the proceedings finding that petitioner had acquired U.S. citizenship through his natural father. The BIA reversed and petitioner was removed to England. Eventually, following the dismissal of a petition for a writ of habeas corpus, the BIA's denial motion to reopen, a remand by the Ninth Circuit to the district court, and a finding that petitioner had not met his burden of showing that he was a U.S. citizen, the case returned to the Ninth circuit.

The Ninth Circuit determined that it had jurisdiction, even though the BIA's decision was *ultra vires* because the case should have been remanded to the IJ for a determination of removability. However, because petitioner had been removed, the court treated the BIA's decision as a "final order of removal."

On the merits, the court explained that in determining "legitimation" the federal courts must apply the state's definition. The alien's paternity was "established" under Arizona law, one of the states in which he lived before reaching the age of twenty-one. The court remanded with instructions for the agency to vacate the removal order.

Contact: Kirsten Daeubler, OIL-DCS
☎ 202-616-4458

■ **Ninth Circuit Holds that Collateral Estoppel Applies to Prior Findings Granting CAT Deferral**

In *Oyeniran v. Holder*, 672 F.3d 800 (9th Cir. 2012) (McKeown, M. Smith Jr., *Brewster*, JJ.), the Ninth Circuit held that collateral estoppel applied to the factual and legal findings made by the BIA in the alien's prior deferral of removal proceeding where the government had a fair opportunity to address the evidence. The court remanded the case for the BIA to consider the merits of the alien's CAT application in relation to new evidence that was not considered in the prior proceeding.

Contact: Frank Fraser, OIL
☎ 202-305-0193

ELEVENTH CIRCUIT

■ **Ninth Circuit Holds that Disorderly Conduct Involving Prostitution in Violation of California Penal Code § 647(b) is Categorically a Crime Involving Moral Turpitude**

In ***Rohit v. Holder,*** __F.3d__ 2012 WL 639296 (9th Cir. February 29, 2012) (Wallace, Smith, Rakoff), the Ninth Circuit held that a conviction under California Penal Code § 647(b) is categorically a crime involving moral turpitude where solicitation of prostitution is "base, vile, and depraved," and where the statute does not prohibit any conduct that does not also satisfy the generic definition of conduct involving moral turpitude.

Contact: Nancy K. Canter, OIL-DCS
☎ 202-616-9132

Solicitation of prostitution is categorically a crime involving moral turpitude because it is "base, vile, and depraved."

■ **Eleventh Circuit Upholds the Board of Immigration Appeal's Interpretation Barring *Nunc Pro Tunc* Amendments to Adoption Decrees from Establishing Eligibility for Immigrant Visa Classification as a Child**

In ***Mathews v. USCIS***, No. 11-11126 -DD (11th Cir. February 21, 2012) (Carnes, Barkett, Anderson) (unpublished), the Eleventh Circuit reversed the district court's grant of summary judgment to the alien, and remanded with instructions for the district court to grant the government's motion for summary judgment.

The court held that the BIA reasonably interpreted 8 U.S.C. § 1101 (b)(1)(E)(i) to require an alien's actual adoption to have occurred before her sixteenth birthday regardless of the *nunc pro tunc* amendment of her adoption date. In so holding, the Eleventh Circuit concluded that the BIA's decisions in *Matter of Drigo*, 18 I. & N. Dec. 223 (BIA 1982), and *Matter of Cariaga*, 15 I. & N. Dec. 716 (BIA 1976), were reasonable and entitled to deference.

Contact: Alex Goring, OIL
☎ 202-353-3375

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DISTRICT COURTS

Northern District of New York Rejects Derivative Citizenship Claim

In *Morales v Holder*, No. 10-cv-662 (N.D.N.Y. February 28, 2012) (Suddaby, J.), the Northern District of New York granted the government's motion to dismiss a convicted felon's derivative citizenship complaint. The alien claimed he derived citizenship through his United States citizen father, who left Puerto Rico for the Dominican Republic in 1919 and did not return to the United States until after the alien's birth. Noting that the alien failed to raise his citizenship claims as a defense to his removal, despite challenging the removal in the Second Circuit (where the claim could have been raised), the government argued that the doctrine of *res judicata* barred the alien from raising those claims before the district court. The government further argued that the complaint failed to assert a valid waiver of sovereign immunity, and that it improperly asked the court to declare unconstitutional some or all of § 301 of the Immigration and Nationality Act of 1952, and to issue an injunction ordering Congress to redesign the statute. The court found for the government on all three grounds. The court also rejected the alien's request for leave to amend the complaint.

Contact: Max Weintraub, OIL-DCS
☎ 202-305-7557

Western District of North Carolina Dismisses APA Challenge to U-Visa Denial for Lack of Jurisdiction

In *Mondragon v. United States*, No. 11-cv-89 (W.D.N.C. March 2, 2012) (Mullen, J.), the Western District of North Carolina dismissed an Administrative Procedure Act (APA) challenge to a denial of a U-visa, which is reserved for victims of crime cooperating in the investigation or prosecution of that crime. Citing regulations, the court found that U.S. Citizenship and Immigration Services decides U-visa applications entirely and solely on its own discretion. The court held that when agencies possess sole discretion over an issue, courts lack judicially manageable standards to determine abuse of discretion. As such, the court concluded that it lacked subject matter jurisdiction under the APA to review this U-visa denial.

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

S.D. Texas Grants Motion to Dismiss APA and FTCA Complaint Alleging USCIS Failed to Prevent the Unlawful Practice of Immigration Law in USCIS Proceedings

In *Aguirre v. Garza*, No. 11-cv-81 (S.D. Tex. March 14, 2012) (Tagle, J.), the District Court for the Southern District of Texas granted the government's motion to dismiss, holding that plaintiffs lacked standing to seek a declaration under the APA that USCIS violated a duty to ensure that only individuals authorized to practice immigration law appear before USCIS. The court reasoned that even if such a duty existed, an order requiring USCIS to fulfill that duty prospectively – the relief sought by plaintiffs – would not redress the particular injuries alleged by the plaintiffs. The court also rejected plaintiffs' claim under the Federal Tort Claims Act (FTCA), reasoning that plaintiffs failed to assert any state tort duty USCIS owed them.

Contact: Erez Reuveni, OIL-DCS
☎ 202-307-4293

D.C. District Court Holds that an Alien Beneficiary Lacks Standing to Challenge Denial of an Employer's I-140 Petition

In *Vemuri v. Napolitano*, __F.Supp.2d __, 2012 WL 604160 (D.D.C. February 27, 2012) (Kollar-Kotelly, J.), the United States District Court for the District of Columbia dismissed for lack of standing an alien beneficiary's challenge to United States Citizenship and Immigration Services' denial of an employer's I-140 petition. The court held that the alien lacked prudential standing to challenge USCIS's denial of the employer's I-140 petition because the alien's interests in working in the United States and obtaining permanent residence run contrary to the congressional purposes of the labor certification and employment-based visa process. The court also held that because the alien lacked standing to challenge USCIS's denial of the I-140 petition, he consequently lacked standing to challenge USCIS's denial of his accompanying I-485 adjustment of status and I-765 employment authorization applications.

Contact: Glenn Girdharry, OIL-DCS
☎ 202-532-4807

Central District of California Grants Motion to Dismiss Adam Walsh Act Case for Lack of Subject Matter Jurisdiction

In *Reynolds v. Napolitano*, No. 11-cv-0936 (C.D. Cal. February 17, 2012) (Carney, J.), the United States District Court for the Central District of California granted the government's motion to dismiss plaintiffs' complaint. The complaint alleged violations of the Administrative Procedure Act and various constitutional violations arising from defendants' application of section 204 of the Immigration and Nationality Act, as amended by Title IV of the Adam Walsh Child Protection and Safety Act of 2006, to the adjudication of the lead plaintiff's I-130 petition, filed on behalf of his wife. The court dismissed the case, concluding that a determination as to whether a petitioner is entitled to a visa despite having been convicted of a "specified offense against a minor" is in the "sole and unreviewable discretion" of USCIS.

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

This Month's Topical Parentheticals

ADJUSTMENT

■ ***Matter of Ilic***, 25 I.&N. 705 (BIA Mar. 8, 2012) (holding that for an alien to independently qualify for adjustment of status under section 245(i) of the INA, as a derivative grandfathered alien, the principal beneficiary of the qualifying visa petition must satisfy the requirements for grandfathering, including the physical presence requirement of section 245(i)(1)(C) of the Act, if applicable)

■ ***Matter of Lemus***, 25 I.&N. 734 (BIA Mar. 19, 2012) (holding that adjustment of status under section 245(i) of the INA is unavailable to an alien who is inadmissible under section 212(a)(9)(B)(i)(II) absent a waiver) (clarifying *Matter of Lemus*, 24 I.&.N Dec. 373 (BIA 2007))

ASYLUM

■ ***Mayorga-Vidal v. Holder***, __ F.3d __, 2012 WL 883193 (1st Cir. Mar. 16, 2012) (affirming BIA's determination that "young Salvadoran men who have already resisted gang recruitment and whose parents are unavailable to protect them" is not a "particular social group" relying on *Matter of S-E-G-*; rejecting argument that evidence that youths without parents are more vulnerable to gangs makes such youths a social group, and holding that the characteristic of lack or unavailability of parental protection is too subjective and amorphous to meet the particularity requirement)

■ ***Omondi v. Holder***, __ F.3d __, 2012 WL 851111 (8th Cir. Mar. 15, 2012) (pre-REAL ID Act case: i) reaffirming the BIA's corroboration rule in *S-M-J-*; ii) affirming that IJ reasonably concluded that a credible Kenyan asylum applicant failed to corroborate his claim that he and another man were beaten and forced to perform sex acts by police, where the other man's affidavit did not mention any police mistreatment; iii) remanding the issue of whether other corroborative evidence was reasonably available because BIA failed to address applicant's claim that 236 "indiscernibles" in the transcript masked his explanation for why other corroboration was unavailable)

■ ***Bouchikhi v. Holder***, __ F.3d __, 2012 WL 955297 (5th Cir. Mar. 8, 2012) (affirming BIA's construction that 8 C.F.R. § 1208.4(a)(2)(ii), providing that the one-year filing deadline for asylum begins on the date of "last arrival in the United States," refers to date of the alien's most recent arrival from abroad, even if returning pursuant to a grant of advance parole, and not to date on which advance parole ends; further holding that IJ did not abuse his discretion in declining to treat witness as an expert on religious extremism in Middle East given his publications and qualifications)

■ ***Gaitan v. Holder***, __ F.3d __, 2012 WL 653042 (8th Cir. Mar. 1, 2012) (split decision relying on prior circuit precedent to hold that "young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang" is a not a "particular social group," reasoning that the proposed group does not meet the "social visibility" and "particularity" criteria because it is "not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society")

■ ***Jabri v. Holder***, __ F.3d __, 2012 WL 883271 (1st Cir. Mar. 16, 2012) (post REAL ID Act adverse credibility case reaffirming that IJ and BIA may find an asylum applicant not credible based on minor inconsistencies that do not go to the "heart of the claim;" but vacating and remanding the adverse credibility finding because two of the three inconsistencies were not direct inconsistencies, and directing the agency to decide if any remaining inconsistencies are sufficient to discredit the applicant given the "totality of circumstances" including evidence in the applicant's favor)

■ ***Chen v. Holder***, __ F.3d __, 2011 WL 7424150 (11th Cir. Dec. 27, 2012) (re-designated as published decision) (holding that the government may rely on changed personal circumstances to rebut the presumption of a well-founded fear of future persecution; further holding that the presumption was rebutted by evidence that Chinese male asylum applicant remained in China for nearly 20 years without incident before coming to U.S.)

■ ***Guta-Tolossa v. Holder***, __ F.3d __, 2012 WL 883469 (1st Cir. Mar. 16, 2012) (affirming that under the REAL ID Act an adverse credibility finding is not a prerequisite for requiring corroboration; but vacating and remanding IJ and BIA decisions that an Ethiopian asylum applicant failed to reasonably corroborate his claim because: i) the BIA failed to apply the REAL ID Act's presumption of credibility where an IJ makes no explicit credibility finding, or to explain why that presumption was not applied; and ii) the BIA should decide in first instance if the REAL ID Act requires an IJ to give specific notice of the need for corroboration and an opportunity to provide it, noting circuit split)

CANCELLATION

■ ***Gonzalez v. Holder***, __ F.3d __, 2012 WL 833156 (1st Cir. Mar. 14, 2012) (affirming agency's denial of alien's application for special rule cancellation of removal under NACARA and reasoning that the alien is ineligible for such relief because he last entered the United States as a crewman)

CRIMES

■ ***Idy v. Holder***, __ F.3d __, 2012 WL 975567 (1st Cir. Mar. 23, 2012)

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(deferring to the BIA and holding that a conviction for reckless conduct under New Hampshire law is inherently a CIMT because its definition includes an aggravated factor – "serious bodily injury" – and satisfies the scienter requirement)

■ *Matter of Lanferman*, 25 I.&N. 721 (BIA Mar. 9, 2012) (holding that a criminal statute is divisible, regardless of its structure, if, based on the elements of the offense, some but not all violations of the statute give rise to grounds for removal or ineligibility for relief)

CRIMINAL PROSECUTIONS

■ *United States v. Miszczuk*, __ F. Supp.2d __, 2012 WL 695993 (D. Mass. Mar. 6, 2012) (dismissing indictment in criminal prosecution under 8 U.S.C. § 1253(a)(1)(B) for refusal to make a timely application in good faith for travel documents, and finding the underlying removal order defective because the IJ failed to adequately explain his findings of removability)

DETENTION

■ *Leslie v. Att'y Gen. of United States*, __ F.3d __, 2012 WL 898614 (3d Cir. Mar. 19, 2012) (reversing district court and holding that the two years petitioner was detained while the court of appeals stayed his removal was governed by the pre-removal order statute (8 U.S.C. § 1226); that petitioner's continued detention for four years was "unreasonably long;" and that petitioner was constitutionally entitled to an individualized bond hearing)

DUE PROCESS — FAIR HEARING

■ *Delgado v. Holder*, __ F.3d __, 2012 WL 954106 (7th Cir. Mar. 22, 2012) (holding that IJ's interruptions and questioning did not establish bias where IJ asked "clearly relevant" questions which did not affect petitioner's ability to present his case; further holding that IJ's refusal to allow one of petitioner's daughters to testify was not improper because it was intended to "focus the testimony" and exclude "cumulative" or "unnecessary" evidence)

ESTOPPEL

■ *Oyeniran v. Holder*, __ F.3d __, 2012 WL 695646 (9th Cir. Mar. 6, 2012) (holding that collateral estoppel applies to 2005 IJ and BIA findings of past "torture" of a CAT applicant's family members and the agency may not re-litigate those findings in a second removal proceeding in 2008 following the applicant's departure and illegal return to the U.S.; further holding that a prior grant of CAT deferral does not prevent the IJ or BIA from evaluating the applicant's present likelihood of future torture based on facts occurring since 2005)

FINAL ORDER

■ *Anderson v. Holder*, __ F.3d __, 2012 WL 762980 (9th Cir. Mar. 12, 2012) (holding that the removal order executed against petitioner is a "final order of removal" within the meaning of 8 U.S.C. § 1252(a)(1), even though under circuit law removal orders entered by the BIA in the first instance are not considered "final orders of removal"; holding on the merits that petitioner is a U.S. citizen because his U.S. citizen father's paternity was established by legitimation under Arizona law before he turned 21)

JURISDICTION

■ *Hasan v. Holder*, __ F.3d __, 2012 WL 762961 (1st Cir. Mar. 12, 2012) (holding that court lacked jurisdiction to consider claim that BIA did not adequately address for purposes of cancellation the potential harm to daughter if family returned to Bangladesh; affirming IJ's denial of asylum because, among other things, the government rebutted the presumption of a well-founded fear based on changes in the Bangladesh government)

■ *Munoz-Pacheco v. Holder*, __ F.3d __, 2012 WL 843561 (7th Cir. Mar. 14, 2012) (stating that the failure to "consider material factors" or ignoring relevant evidence raises a question of law for purposes of 8 U.S.C. § 1252(a)(2)(D); holding that the IJ and BIA did not ignore evidence that petitioner's family members would not be able to visit Mexico because of safety concerns)

■ *Gonzalez v. Secretary of DHS*, __ F.3d __, 2012 WL 898609 (3d Cir. Mar. 19, 2012) (holding that the district court had jurisdiction to review USCIS's denial of naturalization despite the commencement of removal proceedings against petitioner, and could issue declaratory relief; affirming district court's holding that because uncontradicted evidence indicated petitioner lied at his I-751 interview [to remove the conditions of his residence status] there was no genuine issue of material fact at trial)

PREEMPTION

■ *Villas at Parkside Partners v. City of Farmers Branch, Texas* __ F.3d __, 2012 WL 952252 (5th Cir. Mar. 21, 2012) (finding unconstitutional a local housing ordinance that requires all adults living in rental housing within the city to obtain an occupancy license conditioned upon the occupant's citizenship or LPR status, because the sole purpose of the law was to exclude undocumented aliens, and was therefore an impermissible regulation of immigration authority reserved to the federal government) (Judge Elrod concurred in part and dissented in part)

PASSPORTS

■ *Zivotofsky v. Clinton*, __ U.S. __, 2012 WL 986813 (Mar. 26, 2012) (rejecting argument that political question doctrine barred review of

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claim that the State Department failed to follow a statute providing that Americans born in Jerusalem may elect to have "Israel" listed as their place of birth on their passports; reasoning that review of this claim would not require courts to address the political status of Jerusalem, but to determine whether Congress's statute is unconstitutional in light of the foreign powers committed to the Executive) (Justice Breyer dissented).

VISAS

■ *Iyabaev v. Kane*, __ F. Supp.2d __, 2012 WL 957493 (D. Ariz. Mar. 22, 2012) (finding jurisdiction to review petitioners' challenge to USCIS's revocation of I-140 petition which alleged that USCIS violated a regulation; remanding to give petitioners an opportunity to be heard before USCIS revokes the petition)

VISA WAIVER PROGRAM

■ *Vera v. Att'y Gen. of United States*, __ F.3d __, 2012 WL 661779 (3d Cir. Mar. 1, 2012) (holding that government is entitled to presumption that petitioner executed VWP waiver because she was admitted under the VWP program; further holding that even if petitioner, as a minor, did not knowingly and voluntarily sign the waiver, she suffered no prejudice because if she had knowingly signed the wavier, she would be in the same position)

WAIVERS

■ *Peng v. Holder*, __ F.3d __, 2012 WL 954649 (9th Cir. Mar. 22, 2012) (holding that under *St. Cyr*, IIRIRA's repeal of 212(c) relief did not apply retroactively to an alien who was convicted by jury trial of a CIMT prior to IIRIRA because she reasonably relied on the availability of such relief in going to trial; also holding that petitioner was ineligible for 212(h) relief for failing to meet the 7-year residency requirement for LPRs, and that such result did not violate equal protection)

BIA VD Remands: Are They Final Orders Of Removal?

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a case to an IJ for further proceedings, it divests itself of jurisdiction of that case unless jurisdiction is expressly retained. 16 I & N Dec. 600, 601 (BIA 1978). Thus, a remand, "unless the Board qualifies or limits it for a specific purpose . . . is effective for the stated purpose *and* for consideration of any and all matters which the [IJ] deems appropriate in the exercise of his administrative discretion or which are brought to his attention in compliance with the appropriate regulations." *Id.* (emphasis added). In a case addressing the IJ's jurisdiction during a background check remand, the BIA held that although an IJ may not reconsider the prior decision of the BIA, the IJ reacquires jurisdiction of the proceedings and may consider additional evidence regarding new or previously considered relief if it meets the requirements for reopening of the proceedings. *Matter of M-D-*, 24 I & N Dec. 138, 141 (BIA 2008). "In other words, the IJ has authority to consider new evidence if it would support a motion to reopen the proceedings." *Id.* at 142. Since a final order of removal has not yet been entered, neither the time and number limitations of a motion to reopen, nor the requirement to show changed country conditions if any asylum or withholding application is involved would apply. *Id.* at 142 n.3. The Fourth, Sixth, and Ninth Circuit's interpretation of BIA remands for consideration of voluntary departure as final, judicially reviewable, orders of removal fails to address this BIA precedent. Unless the BIA retains jurisdiction over the proceedings, which rarely happens, limiting the remand for the "sole purpose" of voluntary departure is not sufficient to prevent the IJ from considering other evidence on remand, if it was material, was not previously available, and could not have been discovered or presented at the former hearing. *See Matter of M-D-*, 24 I & N Dec. at 141. Therefore, unless the circuit court declines review for prudential reasons or dismisses the petition for review for lack of jurisdiction, the alien could potentially have two parallel proceedings in the immigration court and in the circuit court, and the circuit court could be reviewing a BIA decision that is not the final order of removal.

Conclusion

In sum, the courts' decisions in *Hakim*, *Giraldo*, and *Qingyun Li*, dismissing the petitions on prudential grounds without prejudice to re-filing upon issuance of an administratively final order of removal that completes the adjudication of voluntary departure, are the better result, as they avoid an outcome "that is inconsistent with both *Dada* and the new regulation," *Qingyun Li*, 666 F.3d at 152-53, and also avoid piecemeal litigation in parallel proceedings. It is also important to note that a motion to stay removal should be denied pending adjudication of an alien's request for voluntary departure, or withdrawal of that request. *See* INA § 240B(f), 8 U.S.C. § 1229c (f) ("nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure").

By Dawn Conrad, OIL
☎ 202-532-4540

Fleuti Doctrine Lives On!

tach a new disability, in respect to a transactions or considerations already past." *Society for Propagation of Gospel v. Wheeler*, 22 F.Cas. 756 (No. 13, 156) (CCNH 1814).

Here, said the Court, Vartelas contended that applying the new definition of admission, rather than the law that existed at the time of his conviction would attach a new disability effectively a ban on travel outside the United States in respect to events already past. This, said the Court "presents a firm case for application of the "anti-retroactivity principle." The Court explained that "neither his sentence, nor the immigration law in effect when he was convicted and sentenced, blocked him from occasional visits to his parents in Greece. Current § 1101(a)(13)(C)(v), if applied to him, would thus attach 'a new disability' to conduct over and done well before the provision's enactment . . . Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment. We have several times recognized the severity of that sanction."

The Court rejected the government's contention that Vartelas could have avoided any adverse consequences by refraining from traveling abroad. "[L]oss of the ability to travel abroad is itself a harsh penalty," said the Court.

The Court found "disingenuous" the government's contention that the new definition of "admission" did not attach any disability to past conduct but rather made the relevant event the alien's act of returning to the United States. "Past misconduct . . . not present travel, is the wrongful activity Congress targeted in 101(a)(13)(C)(v)," said the Court. The Court explained that Vartelas' brief trip abroad involved no criminal infraction. "IIRIRA disabled him from leaving the United States and returning as a lawful permanent resident. That new disability rested not on any continuing criminal activity, but on a single crime committed years before IIRIRA's enactment."

The Court found the Second Circuit reasoning flawed. The essential inquiry in *Landgraf*, said the Court is "whether the new provision attaches new legal consequences to events completed before the enactment." That is what happened to Vartelas. The Court further explained that the "likelihood of reliance" is "not a necessary predicate for invoking the anti-retroactivity principle." In any event, the Court said that Vartelas likely relied on then-existing immigration law.

The essential inquiry in *Landgraf*, said the Court is "whether the new provision attaches new legal consequences to events completed before the enactment."

The Court said in its conclusion, that as to retroactivity Vartelas' case was easier than that in *St. Cyr* because the availability of 212(c) relief was discretionary, but "Vartelas under *Fleuti* was free, without seeking an official's permission, to make trips of short duration to see and assist his parents in Greece."

Dissenting Opinion

In a dissenting opinion, Justice Scalia, joined by Justices Thomas and Alito, would have found that the statute had no retroactive effect on Vartelas. The dissent explained that in determining whether a statute applies retroactively, a reference point has to be identified, namely "the moment at which the party does what the statute forbids or fails to do what it requires." To the dissenters, the amended definition of "admission" regulates "reentry into the United States." Therefore, the provision has no retroactive effect on Vartelas because his readmission into the United States occurred after IIRIRA. Vartelas could have avoided the consequences of the new definition "by simply remaining in the United States." The dissenters disagreed with the majority's view that Congress by amending § 101(a)(13) had targeted "past misconduct." The dissenters characterized the majority's opinion as being driven by concerns about "fairness and rationality," and its belief that "reentry after a brief trip abroad should be lawful." "What is unfair or irrational (and hence should be forbidden) has nothing to do with whether applying a statute to a particular act is prospective (and thus presumptively intended) or retroactive (and thus presumptively unintended)."

By Francesco Isgro, OIL

NOTED

"The refusal to sanction IIRIRA retroactivity in *Vartelas v. Holder* provides the kind of predictability that LPRs need and deserve before they leave the USA and seek to return. This, after all, is why retroactivity is disfavored. This is precisely why a piepowder court is not allowed; an LPR should know what this status means, what his or her rights are and should be able to leave the US with the confidence that an uneventful return is not only possible but entirely to be expected. In this sense, the refusal to embrace IIRIRA retroactivity and the caution against a piepowder court spring from the same place and say the same."
http://ncimmigrationlawyer.net/

Fifth Circuit Strikes Down Local Ordinance

In **Villas at Parkside Partners v. City of Farmers Branch, Texas**, __F.3d__, 2012 WL 952252 (5th Cir. May 21, 2012), the Fifth Circuit held that a local housing ordinance requiring all adults living in rental housing within the city to obtain an occupancy license conditioned upon the occupant's lawful immigration status was unconstitutional because the sole purpose of the law was to exclude undocumented aliens, and therefore an impermissible regulation of immigration authority reserved to the federal government. The court found the problem of a locality trying to enforce immigration laws entailed "a national problem, needing a national solution."

This case involved Ordinance Number 2925, adopted by the City of Farmers Branch, Texas on January 22, 2008. The Ordinance required every adult person in rental housing to apply for a residential occupancy license conditioned on lawful status. The Ordinance also made it a criminal offense to occupy or lease rental housing without a valid occupancy license. The Ordinance was a product of two failed attempts of limiting housing based on immigration status. Two groups of plaintiffs representing lessors and lessees brought a pre-enforcement action in which the district court permanently enjoined the Ordinance on three grounds, concluding that the Ordinance was a "regulation of immigration" entrusted by the Constitution to Congress and was therefore preempted under the Supremacy Clause.

On appeal the City argued that the district court erred by declining to afford the Ordinance a presumption against preemption, and argued that the Ordinance was a valid exercise of state police power to enact housing regulations. However, the Fifth Circuit held that the text and circumstances surrounding the ordinance showed its purpose and effect was to regulate immigration, an area of federal concern. In particular the court noted that the preamble to the Ordinance stated that it was "intended to aid the enforcement of "federal *immigration* law," not housing law." Moreover, the Ordinance tied criminal offenses to immigration grounds rather than violation of a housing code, and a license revocation was conditioned on immigration status. Due to its conclusion that the Ordinance regulated immigration, the court found that it infringed on Congress's exclusive authority to regulate immigration and treaded on foreign relations. Specifically, the Ordinance implicated foreign relations because "the treatment of aliens entails issues of national concern that reach beyond parochial concerns of individual states and includes matters such as trade, treaty obligations, and reciprocal rights agreements. It is imperative that the nation act singularly in conducting matters of foreign relations, particularly the treatment of noncitizens, because the burdening of another country's citizens will undoubtedly affect how this nation's citizens are in turn treated abroad." Therefore, the court held the Ordinance unconstitutional as it is preempted by Congress's exclusive authority to regulate immigration law.

Judge Elrod concurred and dissented in part from the majority's decision. In her view the majority opinion "conflate[d] the distinct doctrines of regulation of immigration and conflict preemption." She would have deferred to the definition of "regulation of immigration" found in *DeCanas v. Bicas* and held that the Ordinance was not preempted by the Constitution. *Id*. However, Judge Elrod concurred and agreed with the majority's finding that the "judicial review provision" of the Ordinance was conflict preempted.

By: Jasmin Tohidi, OIL

TPS Designated for the Syrian Arab Republic

Due to the violent upheaval and deteriorating situation in the Syrian Arab Republic (Syria), USCIS announced on March 29, that eligible Syrian nationals (and persons without nationality who last habitually resided in Syria) in the United States may apply for TPS. Details and procedures for applying for TPS were published at 77 *Fed. Reg* 19026 (March 29, 2012).

On March 23, 2012, Secretary of Homeland Security Janet Napolitano announced her intent to designate Syria for TPS for eighteen months. The TPS designation for Syria became effective on May 29 and will remain in effect through September 30, 2013. The designation means that eligible Syrian nationals will not be removed from the United States, and may request employment authorization. The 180-day TPS registration period began On May 29 and ends on September 25, 2012. Although the Federal Register notice erroneously states that TPS applications must be filed March 29, 2012 through September 30, 2013, USCIS will only accept applications filed through September 25, 2012.

To be eligible for TPS, Syrians must meet all individual requirements for TPS, including demonstrating that they have continually resided and been continually physically present in the United States since March 29, 2012. All individuals who apply for TPS will undergo a thorough security check. Individuals with criminal records or who pose a threat to national security are not eligible for TPS and their applications will be denied. The eligibility requirements are fully described in the Federal Register notice and on the TPS webpage at www.uscis.gov.

INSIDE EOIR

David Neal, New Chairman Board of Immigration Appeals

The Attorney General has appointed David L. Neal as the new BIA Chairman effective March 26, 2012. Mr. Neal has been the Acting Chairman of the BIA since June 2009.

"David has served EOIR in varying capacities over the course of 14 years," said Director Juan P. Osuna. "I am confident that he will continue to employ his strong integrity, formidable judgment, and thorough understanding of immigration law to benefit the BIA, EOIR, and the Nation."

Mr. Neal received a bachelor of arts degree in 1981 from Wabash College, a master's degree in 1984 from Harvard Divinity School, and a juris doctorate in 1989 from Columbia Law School. Before joining the BIA as Vice Chairman in 2009, Mr. Neal served as Chief Immigration Judge. From 2005 to 2006, Mr. Neal served as an Assistant Chief Immigration Judge. From 2004 to 2005, he served as an Immigration Judge at the Headquarters Immigration Court. He was also special counsel to the Director of EOIR and an attorney advisor at the BIA. From 2001 to 2003, he served as chief counsel for the Senate Immigration Subcommittee. From 1993 to 1996, he practiced immigration law in Los Angeles. Previously, he was the director of policy analysis for the American Immigration Lawyers Association.

EOIR Announces New Chief Administrative Hearing Officer

EOIR Director Juan P. Osuna has appointed **Robin M. Stutman** as the new Chief Administrative Hearing Officer (CAHO), effective Mar. 26, 2012. Ms. Stutman has served as EOIR's General Counsel since August 2009. **JuanCarlos M. Hunt**, Deputy General Counsel, will serve as the agency's Acting General Counsel.

"Robin's unique legal experience in employment law as it relates to immigration will be a tremendous benefit to the Office of the CAHO," said Director Osuna. "She has worked in this specific and nuanced area of law for 22 years."

Ms. Stutman was appointed as General Counsel in August 2009. From 1987 to August 2009, Ms. Stutman served in the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, Department of Justice (DOJ), as a special litigation counsel, supervisory attorney, and senior trial attorney. From 1986 to 1987, she was in private practice. From 1982 to 1986, Ms. Stutman worked as a trial attorney in the Federal Programs Branch, Civil Division, DOJ, entering on duty through the Attorney General's Honors Program.

Christopher A. Santoro, New Assistant Chief Immigration Judge

The Attorney General Eric Holder, appointed Christopher A. Santoro as an ACIJ in March 2012. Judge Santoro received a bachelor of arts degree in 1991 from Tufts University and a juris doctorate in 1994 from the Boston University School of Law. In 2011, Judge Santoro served as an Air Force Reserve trial judge, and, in 2012, he was appointed to be the Air Force Reserve's deputy chief trial judge, a position he still holds. From 2009 to 2011, he served as special advisor, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security (DHS). From 2005 to 2009, Judge Santoro served in leadership roles including counsel, deputy director, and senior advisor within the Office of Inspection, Transportation Security Administration, DHS. Also during this time, Judge Santoro served as a military trial judge. From 2001 to 2005, Judge Santoro was a trial attorney in the Criminal Section, Civil Rights Division, U.S. Department of Justice. He entered active duty with the U.S. Air Force in 1995 and served as a senior regional prosecutor and appellate attorney until 2001. From 1988 to 1995, Judge Santoro was a patrol officer with the Wolfeboro, New Hampshire Police Department.

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We encourage contributions to the Immigration Litigation Bulletin

Contact: Francesco Isgro

INSIDE OIL

Congratulations to the following OIL Trial Attorneys who have been promoted to Senior Litigation Counsel: **Manning Evans**, **Andrew MacLachlan**, **Patrick Glen**, **Edward Duffy**, and **Ted Hirt**.

Acting Assistant Attorney General Stuart F. Delery, recently visited OIL. Pictured above L to R: Thomas Hussey, David McConnell, Donald Keener, Stuart Delery, Michelle Latour, William Orrick.

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

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

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

Office of Immigration Litigation

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

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linda.purvin@usdoj.gov