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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Supreme Court to Consider Whether Convictions For Offenses Under Tax Laws Other Than Tax Evasion May Be Aggravated Felonies

The Supreme Court has granted certiorari in ***Kawashima v. Holder***, __ U.S. __, 2011 WL 1936082 (U.S. May 23, 2011), on the question whether tax crimes other than tax evasion – here, making false statements on a tax return (and aiding and abetting) in violation of 26 U.S.C. §§ 7206(1) and (2) -- are aggravated felony "offenses involving fraud and deceit" under INA § 101(a)(43)(M)(i).

"Aggravated felony" is defined in INA § 101(a)(43)(M) to include "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000."

The petitioners, a husband and wife, are natives and citizens of Japan who were admitted to the United States as lawful permanent resident aliens in 1984. In August 1997, petitioners pleaded guilty to charges of willfully making a false corporate tax return for the tax year ending October 31, 1991, by under-reporting income for one of their restaurants, in violation of 26 U.S.C. § 7206. In their plea agreements, petitioners acknowledged that the return was false as to a material matter; that the petitioners did not believe the return to be true

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The BIA Clear Error Standard of Review of IJ's Findings

The regulations revised in 2002 continue to be source of litigation

Before 2002, the BIA's standard of review of an immigration judge's decision was de novo as to all issues. In 2002, the regulations were revised to provide for "clear error" review of an immigration judge's findings of fact and de novo review of all other matters, including questions of law, judgment or discretion. The revised regulations also restricted BIA factfinding. The BIA has issued three precedential decisions (described below) interpreting and explaining the regulations.

The BIA's application of the new standard of review has been challenged in several cases before the courts of appeals, and they have shown varying degrees of deference to the BIA's interpretation of the regulations. This article looks at the subset of circuit court decisions that address whether the BIA erred by reviewing an issue de novo rather than treating it as a finding of fact subject only to clear error review, and provides some litigation tips.

The 2002 regulation provides:

(3) Scope of review.

(i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the

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The $10,000 tax fraud question

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and correct as to a material matter; and that the petitioners acted willfully. Each plea agreement also included a stipulation that the government could prove the "total actual tax loss" was $245,126.

Congress had reason to enact subparagraph (M)(ii) to ensure that all instances of tax evasion that cause a tax loss to the government exceeding $10,000 are characterized as aggravated felonies.

As a result of these convictions, petitioners were charged with having been convicted of an aggravated felony under INA § 101(a)(43)(M)(i) and (ii), and with being deportable based on those convictions. The IJ and later the BIA sustained the charge of deportability under §101(a)(43)(M)(i).

The case then took a tortuous road though the Ninth Circuit, with four opinions issued between 2007 and 2010. *See Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010) ("*Kawashima IV*"). The court held that petitioners' convictions were for "offense[s] that involve[] fraud or deceit," and rejected petitioners's claim that subparagraph (M)(i) does not encompass tax offenses, given subparagraph (M)(ii). The court acknowledged that a divided panel of the Third Circuit had ruled otherwise in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (2004), but it declined to follow that decision.

In their petition for certiorari, petitioners contend that felony tax offenses other than tax evasion cannot qualify as "aggravated felon [ies]" under INA § 101(a)(43)(M)(i), even if they involve fraud or deceit in which the loss to the victim exceeded $10,000. They claim that that the reference to tax evasion in Subparagraph (M)(ii) prevents tax offenses from being aggravated felonies under subparagraph (M)(i).

Petitioners also claim that the court should apply a rule of lenity and resolve the ambiguity in the statute in their favor.

In its brief in opposition to certiorari, the Acting Solicitor General stated that although there was a "narrow disagreement among three circuits," the Ninth Circuit decision was correct and the narrow circuit split did not warrant review at this time.

The Acting Solicitor General argued that Congress had reason to enact subparagraph (M)(ii) to ensure that all instances of tax evasion that cause a tax loss to the government exceeding $10,000 are characterized as aggravated felonies regardless of whether they "involve[] fraud or deceit." Thus he contended that subparagraph (M)(i) should be read to include tax offenses that do "involve[] fraud or deceit," such as petitioners' crimes. He also argued that the statute is not ambiguous on this issue, so no rule of lenity would apply, and in any event, any ambiguity is subject to resolution by the Attorney General in the first instance.

Petitioners also claimed that the court of appeals exceeded its authority when it amended its judgment relating to the wife, given the procedural posture of the case. The Supreme Court limited its grant of certiorari to the question regarding the interpretation of INA § 101(a)(43)(M), however, so that claim will not be considered.

By Francesco Isgro, OIL

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

Supreme Court Upholds Arizona's Licensing Law

In *Chamber of Commerce of U.S. v. Whiting*, __U.S.__, 2011 WL 2039365 (U.S. May 26, 2011), the Supreme Court held that the Legal Arizona Workers Act was not preempted, either expressly or impliedly by federal immigration laws, specifically the Immigration Reform and Control Act of 1986 (IRCA), which for the first time regulated the employment of aliens.

Generally, IRCA makes it unlawful to employ aliens who are not authorized to work and it imposes civil and criminal penalties upon employers who violated that prohibition. Employers are also required to verify electronically (E-verify) the authorization status of the employee.

The preemption provision of IRCA states that it "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." INA § 274A(h)(2).

The Arizona law enacted in 2007, generally provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. That law also requires that employers must use the E-verify system.

The lower courts found that neither the Arizona licensing law not the E-verify requirements were preempted by IRCA. The U.S. Chamber of Commerce and others, then sought and were granted certiorari.

The Supreme Court held that the Arizona State's licensing provision "falls well within the confined of the authority Congress chose to leave to the States and therefore is not expressly preempted." The Court also held that the Arizona law was not impliedly preempted because its "procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws."

The BIA's Clear Error Standard of Review

immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers de novo.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

8 C.F.R. § 1003.1(d)(3). The effective-date provision for 8 C.F.R. § 1003.1(d)(3)(i) is at 8 C.F.R. § 1003.3(f) (clear error standard of review does not apply in cases where notice of appeal to BIA was filed "before September 25, 2002").

BIA DECISIONS

The BIA has issued three precedent decisions interpreting its revised standard of review:

Matter of A-S-B-, 24 I. & N. Dec. 493 (BIA 2008). In a case where the immigration judge found the alien credible and granted asylum, the BIA accepted "what happened to him when he was in Guatemala" as true but reviewed de novo, as a legal issue, the issue of "whether these uncontested facts were sufficient to establish a well-founded fear of persecution." The BIA reversed the IJ's grant of asylum because it was based on "speculative findings about what may or may not occur to the [alien] in the future." The BIA held that "it is impossible to declare as 'fact' things that have not yet occurred." (The Third Circuit rejected this aspect of *Matter of A-S-B- in Huang v. Attorney General*, 620 F.3d 372 (3rd Cir. 2010)).

We should be especially careful to fully address claims that that the BIA violated the clear error standard of review where the immigration judge granted relief and the BIA reversed.

Matter of V-K-, 24 I. & N. Dec. 500 (BIA 2008). The immigration judge granted the alien deferral of removal, holding that he had shown a greater-than-50% probability of future torture. The BIA reviewed de novo whether the alien had shown the requisite probability of future torture, holding that this was not a factual finding reviewed for clear error. Instead, it was a mixed question of law and fact or a question of judgment reviewed de novo. (This part of *Matter of V-K-* was subsequently overruled by the Third Circuit in *Kaplun v. Attorney General*, 602 F.3d 260 (3rd Cir. 2010)).

Matter of H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209 (BIA 2010). The immigration judge in this case held that a Chinese alien had established a well-founded fear of persecution by proving that she would be forcibly sterilized and have to pay a significant fine if she returned to China. The BIA held that the question whether an alien has presented sufficient evidence to establish a well-founded fear of persecution is a legal determination that is reviewed de novo. The BIA also held that, in making a determination whether specific facts are sufficient to meet a legal standard, it may give different weight to the evidence from that given by the immigration judge. The BIA applied that principle by concluding that the alien's country condition evidence did not lead to the conclusion reached by the immigration judge and that letters from the alien's friends and relatives were from interested witnesses not subject to cross-examination, were out of date, and the authors were not similarly situated to the alien.

LITIGATION TIPS

As the case survey below shows, most of the cases so far where courts have found that the BIA violated the clear error standard of review have occurred where the immigration judge granted relief and the BIA reversed on de novo review. Thus, we should be especially careful to fully address any "clear error" challenge in such cases. As a starting point, the attorney should consider whether a *Brand X* or *Auer v. Robbins*, 519 U.S. 452, 461 (1997), deference argument can be made if the petitioner is relying on circuit case law that predates the BIA's decisions listed above. In looking at the merits of the cases, there are two areas where the courts have shown particular reluctance to go along with the BIA: (1) de novo review of an immigration judge's holding about the likelihood of a future event, and (2) the BIA assigning different weight to the evidence than the immigration judge did, without making any finding of clear error.

Immigration judges frequently make findings about the likelihood of future events, such as (for example) "the alien proved that he will be forcibly sterilized if he returns to China." The standard of review of

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such findings is a difficult question because such findings, taken in isolation, may not appear to have a legal component. An important point to argue to the court in this respect is that the probability of future harm is part of the legal determination for asylum, withholding of removal, and protection under the Convention Against Torture. In other words, a finding as to the likelihood of a certain occurrence in the future, which is something that would not ordinarily appear to have any legal component at all, does have a legal component in asylum, withholding of removal, and Convention Against Torture cases because it is expressly part of the legal analysis. In particular, courts have generally agreed that the BIA reviews the "well-founded fear" determination de novo, so our task is to point out that the well-founded fear determination necessarily includes future probabilities that might seem to be purely factual in other contexts.

As to the question of the BIA weighing the evidence differently on appeal from an immigration judge's grant of relief from removal, the cases we have lost on this issue have tended to be ones where the court felt that in the course of re-weighing the evidence the BIA in effect rejected factual findings on de novo review. For example, a court might be willing to accept the BIA reversing an immigration judge's grant of asylum where the BIA, on de novo review, weighed Department of State evidence more heavily than the immigration judge did while giving less weight to other evidence such as an expert witness or personal affidavits. The court might be less willing to accept re-weighing of the evidence if the BIA appears to completely discount or ignore the expert witness or the affidavits without making any finding of clear error. The courts appear to view re-weighing of the evidence as potentially violating the standard of review because, taken to its logical extreme, the BIA could discount any item of factual evidence simply by giving it zero weight. In defending cases where the BIA has weighed the evidence differently, then, one should attempt to show how the re-weighing was part of the BIA's analysis of the legal questions and was reasonable. In the rare cases where the BIA appears to have cited re-weighing as a reason to completely discount evidence that the immigration judge relied on, remand may need to be considered in circuits that have precedent on this issue.

The Second Ciruit held that where the immigration judge did not address the veracity of documents, the BIA had to remand to the immigration judge for factual findings.

CASE SURVEY

SECOND CIRCUIT

Chen v. ICE, 470 F.3d 509 (2d Cir. 2006). The immigration judge held that the alien was credible and granted asylum. The BIA held that the immigration judge's credibility holding was clearly erroneous and reversed the grant of asylum. The Second Circuit held: "Although the BIA used the phrase 'clearly erroneous' in its opinion, the review it conducted was in fact to independently assess Chen's credibility without giving deference to the findings of the IJ. This is de novo review and constitutes legal error by the BIA . . . ."

De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010). The immigration judge granted deferral of removal under the Convention Against Torture, and the BIA reversed, finding that the "weight of the evidence" did not support the immigration judge's conclusion. The Second Circuit held that the "BIA deviated from the IJ's factual findings when it determined that De La Rosa failed to establish that Brito's family would be able to identify De La Rosa or that such persons would even seek him out in the Dominican Republic." The court also held that "[t]he standard of review entailed by 'weight of the evidence' cannot be squared with review for clear error in this Circuit."

Padmore v. Holder, 609 F.3d 62 (2d Cir. 2010). The alien in this case was an LPR who had been placed into removal proceedings based on criminal convictions and was then granted cancellation of removal by the immigration judge. The BIA reversed, holding that the alien did not merit cancellation as a matter of discretion. The BIA cited, *inter alia*, an affidavit and arrest report in the record as grounds for the discretionary decision. The Second Circuit addressed BIA factfinding rather than the clear error standard of review, but it held that where the immigration judge did not address the veracity of documents, the BIA had to remand to the immigration judge for factual findings if the BIA believed that findings must be made as to the truth of the matters asserted in the documents. The court also held that it had jurisdiction in this removal case to reach the issue of whether the BIA had violated its regulations.

Noble v. Keisler, 505 F.3d 73 (2d Cir. 2007). The immigration judge held that the alien had been rehabilitated and granted a section 212(c) waiver after exercising discretion by balancing the equities. The BIA reversed, after weighing the equities differently and questioning the alien's rehabilitation, without finding any clear error in the immigration judge's factfinding. The alien argued that the immigration judge's finding as to rehabilitation was a fact that was reviewed for clear error. The Second Circuit held that the BIA had exercised its discretion by weighing the equities, which was properly done de novo. The court noted: "We do not discount the possibility, of course, that in

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another case, the BIA's declining properly to defer to factual findings by the IJ regarding rehabilitation as required by section 1003.1(d)(3)(i) will amount to an error of law."

THIRD CIRCUIT

Kaplun v. Attorney General, 602 F.3d 260 (3rd Cir. 2010). This decision overruled *Matter of V-K-*, 24 I. & N. Dec. 500 (BIA 2008), on the issue of whether the BIA reviews an immigration judge's decision as to the probability of future torture de novo. The Third Circuit concluded that there were two steps in deciding whether an applicant qualified for protection under the Convention Against Torture: (1) what is likely to happen to the applicant upon removal and, (2) whether what is likely to happen meets the legal definition of torture. The court held that, although the second question is a legal issue reviewed de novo, the probability of future torture was a factual finding reviewed for clear error. The court reasoned that inferring the likelihood of the occurrence of a future event was "not to say that the likely outcome will necessarily occur, but the likelihood itself remains a factual finding that can be made *ex ante* the actual outcome." The court analogized such findings to factual findings made by juries in malpractice cases as to the pain, suffering, and disability a plaintiff would experience in the future. The court noted that in *Matter of A-S-B-* and *Matter of H-L-H-,* both *supra*, the BIA had held that the issue of a well-founded fear in the asylum context was reviewed do novo, and stated "we do not purport to resolve that issue at this time."

Huang v. Attorney General, 620 F.3d 372 (3rd Cir. 2010). The immigration judge granted asylum to the applicant based on the likelihood of forced sterilization, and the BIA reviewed de novo and reversed. The Third Circuit addressed an issue that was left open in *Kaplun*, and concluded that an immigration judge's prediction of the likelihood of a future event in the asylum context was a fact and was reviewed for clear error. *Huang* expressly abrogates the holding in *Matter of A-S-B-*, *supra*, that an immigration judge's prediction of the likelihood of a future event is reviewed de novo. The Third Circuit held that deciding an asylum claim requires three steps: (1) "what may happen if the alien returns to his home country," (2) "whether those events meet the legal definition of persecution," and (3) "whether the possibility of those events occurring gives rise to a well-founded fear of persecution under the circumstances of the alien's case."

In *Kaplun*, the Third Circuit held that the probability of future torture was a factual finding reviewed for clear error.

The court held that the first question is factual, the second is legal, and the third, which it characterized as an evaluation of the objective reasonableness of an alien's fear, is a mixed question of law and fact. The court concluded that the BIA reviews the immigration judge's decision on the third question de novo, but because the issue is objective reasonableness the BIA "must provide sufficient analysis to demonstrate that it has truly performed a full review of the record, including the evidence that may support the alien's asylum claim."

FOURTH CIRCUIT

Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011). The immigration judge granted asylum and the BIA reversed on de novo review. The Fourth Circuit held that where the immigration judge's "nexus finding centered on its factual assessment of what happened to" the alien, the BIA must review the finding for clear error. The court characterized this "nexus" issue as "the [claimed persecutor's] motivations" without clarifying whether it was addressing nexus to a protected ground, persecutor's motive, or both. The court also held that the question whether a government was unable or unwilling to control private actors was, as a general matter, a factual question requiring clear error review. The court did not criticize the BIA's de novo review on the questions of what constitutes a particular social group and whether the alien showed a well-founded fear of persecution.

FIFTH CIRCUIT

Alvarado De Rodriguez, 585 F.3d 227 (5th Cir. 2009). The immigration judge granted a hardship waiver to an alien whose spouse had refused to file a joint petition to remove the condition on her marriage-based LPR status. The immigration judge held that the alien was credible and had proven that she had married in good faith. The BIA reversed on de novo review. The Fifth Circuit noted that the BIA had stated the correct "clear error" standard of review and had not purported to overturn any of the immigration judge's factfinding, but concluded that "[i]t is clear that the BIA did not accept most of the findings of fact; otherwise, it could not have reached the conclusion that it did." The court cited *Kabba*, *infra*, a Tenth Circuit decision, for the proposition that: "The BIA may not re-weigh the evidence submitted and substitute its own judgment for that of the IJ absent clear error."

EIGHTH CIRCUIT

Cubillos v. Holder, 565 F.3d 1054 (8th Cir. 2009). The immigration judge found past persecution and granted asylum. The BIA accepted the alien's claims about what had happened to him, as

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USCIS seek Enhancements in the Immigrant Investor Program

USCIS has proposed significant enhancements to the administration of the Immigrant Investor Program, commonly referred to as the EB-5 Program — transforming the intake and review process for immigrant investors as part of the Obama administration's continued commitment to improve the legal immigration system and meet our economic and national security needs for the 21st century.

The EB-5 Program makes 10,000 visas available annually to immigrant investors who invest in commercial enterprises that create at least 10 U.S. jobs. EB-5 investors may petition independently or as part of a USCIS-designated Regional Center.

"Congress created the EB-5 Program in 1990 to attract investors and entrepreneurs from around the globe to create jobs in America," said USCIS Director Alejandro Mayorkas. "We are dedicated to enhancing this program to ensure that it achieves that goal to the fullest extent possible."

USCIS is proposing three fundamental changes to the way it processes EB-5 Regional Center filings. First, USCIS proposes to accelerate its processing of applications for job-creating projects that are fully developed and ready to be implemented. USCIS will also give these EB-5 applicants and petitioners the option to request Premium Processing Service, which guarantees processing within 15 calendar days for an additional fee.

Second, USCIS proposes the creation of new specialized intake teams with expertise in economic analysis and the EB-5 Program requirements. EB-5 Regional Center applicants will be able to communicate directly with the specialized intake teams via e-mail to streamline the resolution of issues and quickly address questions or needs related to their applications.

Third, USCIS proposes to convene an expert Decision Board to render decisions regarding EB-5 Regional Center applications. The Decision Board will be composed of an economist and adjudicators and will be supported by legal counsel.

This proposal will be the USCIS website until June 17, 2011, for public comment — providing stakeholders an opportunity to offer feedback on the proposed changes to the administration of the EB-5 program.

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found by the immigration judge, but concluded that those incidents did not rise to the level of past persecution and the alien had not otherwise demonstrated a well-founded fear of future persecution. The alien argued that the BIA had engaged in fact-finding by setting aside the immigration judge's conclusion as to past persecution. The court disagreed, holding that "the BIA accepted the IJ's findings of fact but held that these findings did not amount to persecution," which was "a legal conclusion as to whether the record facts established persecution."

NINTH CIRCUIT

Brezilien v. Holder, 569 F.3d 403 (9th Cir. 2009). In this case, the immigration judge granted asylum and protection under the Convention Against Torture, and the BIA reversed. The Ninth Circuit held that the BIA improperly made its own factual findings, and moreover: "The BIA . . . reversed the IJ's factual findings with regard to Brezilien's and his family's persecution for political opinion, without determining whether the IJ's finding were clearly erroneous."

TENTH CIRCUIT

Kabba v. Mukasey, 530 F.3d 1239 (10th Cir. 2008). The immigration judge granted asylum, finding that the alien was credible. The BIA held that the credibility finding was clearly erroneous and that the applicant did not qualify for asylum. The Tenth Circuit held that the fact that there were two permissible views of the evidence did not justify a finding that the immigration judge's decision was clearly erroneous. The court concluded that although the BIA had cited the correct standard of review, it had not applied that standard. In discussing the BIA's conclusion based on the alien's testimony about his documents, the court held "that the BIA actually reweighed the evidence submitted, which it is not permitted to do on clear error review . . . ."

Contact: Susan Houser, OIL
☎ 202-616-9320

TPS Extended for Haitians

DHS has announced the extension of TPS for eligible Haitians for 18 months from July 23, 2011 through January 22, 2013. Under the redesignation, individuals who currently do not have TPS may apply for TPS from May 19, 2011 through November 15, 2011. 76 *Fed. Reg.* 29000 (May 19, 2011).

FURTHER REVIEW PENDING: Update on Cases & Issues

Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court heard argument in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court is considering the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 U.S.C. § 1326. The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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

Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit en banc heard oral arguments in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the BIA determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

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

Convictions - State Expungements

On December 16, 2010, the Ninth Circuit en banc heard arguments in ***Nunez-Reyes v. Holder***, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel had applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of congressionally-created immigration law.

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

Asylum - Corroboration

On December 15, 2010, the Ninth Circuit en banc heard oral argument in ***Nirmal Singh v. Holder*** (08-70434) to address whether 8 U.S.C. § 1158(b)(1)(B)(ii) requires an immigration judge to take the following steps sequentially: (1) determine whether an asylum applicant has met his burden of proof; (2) notify the applicant that specific elements of his case require corroboration; and (3) provide the applicant an opportunity to explain why any evidence is unavailable. Although the issue was neither raised to the agency below, nor argued in the opening brief to the panel, in her dissent to the unpublished decision, Judge Berzon argued forcefully for such a process. The panel majority held that the plain language of the statute did not require a sequential process, and even if the statute had been ambiguous, the majority would defer to the agency's reasonable interpretation of the INA.

Contact: John Blakeley
☎ 202-514-1679

Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009). The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction.

The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101 (a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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

Cancellation - Burden of Proof

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

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

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that the Record Failed to Compel the Conclusion that Past Persecution Was Politically Motivated

In ***Pheng v. Holder***, __ F.3d __, 2011 WL 1797293 (1st Cir. May 12, 2011) (*Lynch*, Torruella, and Thompson), the First Circuit held that while petitioner credibly testified that she was raped by a policeman in Cambodia, no evidence compelled the agency to conclude that there was any nexus between the rape and a statutory ground, including political opinion. Rather, the court agreed with the IJ that the evidence suggested that petitioner's rapist took advantage of information that petitioner was vulnerable in her husband's absence. Accordingly, the court affirmed the finding of no past persecution. Moreover, the court rejected petitioner's reliance on past rapes to establish that she fears future persecution of the same type.

Contact: Kristin A. Moresi, OIL
☎ 202-305-7195

SECOND CIRCUIT

Second Circuit Holds that "Conditional Parole" Does Not Satisfy Parole Requirement for Pruposes of Seeking Adjustment of Status

In ***Cruz-Miguel v. Holder***, __ F.3d __, 2011 WL 1565847 (2d Cir. April 27, 2011) (*Raggi*, Lohier, Preska), a consolidated appeal, the Second Circuit held that the requirement an alien be "paroled into the United States" to be eligible for adjustment of status is not satisfied by the alien's release on "conditional parole" under INA § 236(a)(2)(B), 8 U.S.C. § 1226(a)(2)(B).

The petitioners, three citizens of Mexico and one citizen of Guatemala, all entered the United Sates without inspection and subsequently were individually charged with removability as "[a]n alien present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(6)(A)(i). Each petitioner was taken into DHS custody, but later released on their "own recognizance" pursuant to INA § 236, 8 U.S.C. § 1226, pending a final determination of removability. At their removal hearings, petitioners admitted that they had entered illegally but sought to terminate the proceedings contending that they were eligible for adjustment of status under INA § 245. The IJ concluded otherwise, finding that they were statutorily ineligible for adjustment. On appeal, the BIA ruled in separate decisions, that petitioners were not eligible for adjustment because release on "conditional parole" was not the same as having been "paroled into the united States" within the meaning of the adjustment provision.

"The statutory text unambiguously manifests Congress's intent that the phrase 'paroled into the United States' in § 1255(a) does not reference aliens released on 'conditional parole' under § 1226(a)(2)."

The Second Circuit determined that "the statutory text unambiguously manifests Congress's intent that the phrase 'paroled into the United States' in § 1255(a) does not reference aliens released on 'conditional parole' under § 1226(a)(2)." The court rejected petitioner's suggestion that two internal memorandum from the former INS suggested otherwise. The court explained that because there was no statutory ambiguity, there was not need to reach beyond the text to decide the case. Even it there were ambiguity, the court further noted that the memorandum were not binding and unworthy of *Chevron* deference and it nonetheless would defer to the BIA's reasonable construction of the statute in *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010).

Contact: Remi Adalemo, OIL DCS
☎ 202-305-7386

THIRD CIRCUIT

Third Circuit Holds that Knowing Withdrawal of Application for Admission Terminates Continuous Physical Presence

In ***Demandstein v. Holder***, __ F.3d __, 2011 WL 652751 (3d Cir. May 10, 2011) (Fuentes, Vanaskie, Nygaard), the Third Circuit granted the Respondent's motion to publish a *per curiam* decision that originally issued on February 24, 2011. The court held that an alien who returns from a brief trip abroad, signs a Form I-275 (thereby withdrawing a request for admission in lieu of a formal determination of admissibility), and subsequently reenters the United States without inspection is statutorily ineligible for cancellation of removal. The court rejected the alien's argument that he was merely "turned back" at the border, holding that absent any evidence that the alien "failed to appreciate the language of Form I-275," his signature on it was "sufficient to establish that he voluntarily requested permission to withdraw his application and return abroad, and that he did so in lieu of a proceeding," and thus terminated his continuous physical presence.

Contact: Don G. Scroggin, OIL
☎ 202-305-2024

Third Circuit Holds Notice Given To Alien's Attorney Of Record Was Sufficient To Justify *In Absentia* Deportation Order

In ***Patel v. Attorney General***, __ F.3d __, 2011 WL 652749 (3d Cir. April 25, 2011) (Barry, Hardiman, Stapleton) (*per curiam*), the Third

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Circuit held that the BIA did not abuse its discretion by denying a motion to reopen to rescind a thirteen-year-old *in absentia* deportation order where notice of the hearing was sent by certified mail to petitioner's attorney of record.

The petitioner, a citizen of India, entered the United States without inspection in January 1996. The former INS took him into custody and ordered him to show cause why he should not be removed. On April 5, 1996, petitioner was released on bond. An attorney in New York then entered an appearance in his case but, several months later, sought to withdraw because he had not "seen or heard from the respondent since the respondent was released from detention. . . ." The IJ denied the motion to withdraw on September 6, 1996, and when petitioner did not appear at the September 13, 1996, hearing, he was ordered deported in absentia. A copy of the decision was mailed to petitioner's attorney.

Thirteen years later, in September 2009, petitioner filed a motion to reopen the proceedings on the ground that he had not received proper notice of the hearing. The IJ denied the motion and the BIA affirmed finding that petitioner had received proper notice under the statutory requirements in effect in 1996.

The court held that for purposes of rescinding an *in absentia* removal order under INA § 242B(c)(3), petitioner had failed to demonstrate that he "did not receive notice" of the hearing. The court explained that the record reflected that petitioner's attorney had been notified of the September 13, 1996 hearing. The court also pointed to petitioner's lack of diligence in concluding that he failed to demonstrate that he did not receive notice of his hearing. The court rejected the argument that an alien must receive actual notice from his attorney, and noted that the alien contributed to his lack of notice by failing to contact his attorney or keep himself apprised of his immigration proceedings.

Contact: Matthew B. George, OIL
☎ 202-532-4496

FIFTH CIRCUIT

■ **Fifth Circuit Holds that DHS Procedure Requiring No Further Action to Notify Obligors of Immigration Bonds of Bond Demand After Notice Is Returned as Undeliverable Violates Due Process**

The Supreme Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006), requires that DHS take additional reasonable steps to deliver notice when it is aware that its initial attempt at notice failed.

In *Echavarria v. Pitts*, __ F.3d __, 2011 WL 1792101 (5th Cir. May 11, 2011) (DeMoss, Jr., Smith, Owen, JJ.), the Fifth Circuit affirmed the Southern District of Texas's order granting summary judgment in favor of plaintiffs in a class action relating to the government's efforts to locate bond obligors when delivering notices of breach. The Fifth Circuit found that the DHS's longstanding procedural framework, in which the obligor has the responsibility of informing DHS of an address change and in which DHS does not take additional steps to locate the obligor if she has not sent DHS a change-of-address notice after a demand on a bond is returned as undeliverable, violates the plaintiffs' due process rights. Specifically, the court determined that the Supreme Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006), requires that DHS take additional reasonable steps to deliver notice when it is aware that its initial attempt at notice failed. Despite applying *Jones*, the Court declined to "establish any specific finding as to what constitutes additional reasonable steps," other than to suggest that because DHS has access to the alien's A-file, "it is incumbent on the government" to refer to it when trying to ascertain the obligor's current address.

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

SIXTH CIRCUIT

■ **Sixth Circuit Remands Case, Orders Agency To Address Whether Revocation Of Citizenship Constitutes Harm Rising To Level Of Persecution**

In *Stserba v. Holder*, __ F.3d __, 2011 WL 1901546 (*Moore*, White, Varlan) (6th Cir. May 20, 2011), the Sixth Circuit reversed the BIA's denial of asylum and withholding because the agency failed to consider whether lead petitioner's revocation of citizenship on account of ethnicity was persecution, and erroneously concluded that petitioner had not suffered economic persecution.

The lead petitioner and her son, Estonian citizens who are ethnically Russian, and her husband, a Russian citizen, sought asylum and withholding of removal. They alleged persecution on account of their Russian ethnicity based on four particular incidents: (1) revocation of lead petitioner's Estonian citizenship after Estonia regained independence from the USSR; (2) Estonia's invalidation of Russian medical degrees and attendant job limitations for petitioner; (3) delayed diagnosis of the son's medical condition and inferior health care that he received on account of his ethnicity; and (4) and maltreatment of lead petitioner's older son who continues to resides in Estonia.

The IJ denied the requested relief finding that petitioners had not suffered past persecution. The IJ noted that lead petitioner had regained citizenship quickly and did not suffer "any adverse consequences" from the years

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that she spent stateless. The IJ also fnoted that that voiding diplomas from Russian universities affected Estonian citizens of all ethnic backgrounds and noted that petitioner can still obtain work as a babysitter or as a pediatrician at a private Russian school. Finally, the IJ agreed that petitioner's son "is more likely to get the best medical treatment for his condition in the United States," but that past treatment evidences that treatment options exist in Estonia. On appeal the BIA affirmed the IJ's decision.

"Although not every revocation of citizenship is persecution, ethnically targeted denationalization of people who do not have dual citizenship may be persecution."

The Sixth Circuit reversed. Regarding the revocation of the lead petitioner's citizenship, the court said that "although not every revocation of citizenship is persecution, ethnically targeted denationalization of people who do not have dual citizenship may be persecution." The court found that neither the IJ nor the BIA considered whether "Estonia's citizenship law amounted to ethnically targeted denationalization, but there is reason to suspect that it did." Lead petitioner "may have suffered past persecution simply because she became stateless due to her ethnicity," said the court. Accordingly, it remanded the case to the BIA to determine (1) whether ethnically motivated revocation of citizenship that leaves a petitioner stateless qualifies as "persecution" within the meaning of 8 U.S.C. § 1101(a)(42)(A), and if the answer to that legal question is yes, (2) whether Estonia denationalized petitioner on account of her ethnicity, and if so, (3) whether reinstatement of petitioner's citizenship is a changed circumstance that rebuts the presumption that petitioner fears future persecution.

Regarding the invalidation of petitioner's medical degree on account of her ethnicity, the court noted that babysitting was not petitioner's established profession and that, "even if jobs in other fields are available, a petitioner has been persecuted if he or she has been subject to 'sweeping limitations' on his or her chosen profession, particularly if that profession is a highly skilled one in which the person invested education or training." The court further disagreed with the IJ's reasoning that Estonia's policy was not based on ethnicity because the policy invalidated diplomas that anyone, regardless of ethnicity, earned at Russian schools. "This conclusion fails to take into account that it seems inevitable that the policy disproportionately impacted ethnic Russians, who are more likely than other Estonians to have the language skills to attend and the interest in attending a Russian school," explained the court.

Accordingly, the court remanded the case in order for the BIA to determine whether ethnically motivated citizenship revocation that results in statelessness is persecution, whether petitioner and her son and husband are entitled to a discretionary grant of asylum given the finding of past persecution when Estonia refused to recognize her medical degree, and whether the petitioners are entitled to withholding of removal.

Contact: Stefanie Svoren, OIL
☎ 202-532-4683

■ **Sixth Circuit Holds that Aliens Diligently Pursued Ineffective Assistance of Counsel Claim, Remands for Further Inquiry**

In ***Gordillo v. Holder***, __ F.3d __, 2011 WL 1812213 (Boggs, Moore, *Kethledge*) (6th Cir. May 13, 2011), the Sixth Circuit held that the aliens had diligently pursued their ineffective assistance of counsel claim where they consulted with several attorneys upon discovering their own counsel's misconduct but were told no remedy was available to them. The court remanded with instructions that the BIA reconsider whether due diligence requires an alien to make "reasonable inquiries" regarding the status of an appeal to learn of attorney misconduct.

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

SEVENTH CIRCUIT

■ **Seventh Circuit Upholds BIA's Broad Authority to Deny A Motion to Reopen**

In ***Moosa v. Holder***, __ F.3d __, 2011 WL 1675943 (7th Cir. May 5, 2011) (Cudahy, Flaum, *Wood*), the Seventh Circuit upheld the decision of the BIA denying the alien's motion to reopen claiming changed country conditions in Pakistan established that she would be persecuted as a Westernized woman. The court ruled that: (1) the BIA did not abuse its discretion when it decided that she had not established a *prima facie* case for asylum; (2) the BIA did not violate her due process rights because aliens have no liberty or property interest in obtaining discretionary relief; and (3) the BIA was reasonable in requiring corroborating evidence about conditions in Pakistan.

Contact: Aimee Frederickson, OIL
☎ 202-305-7203

■ **Seventh Circuit Rules that Commission of Aggravated Felony Involving Sexual Abuse of a Minor Rendered Alien Ineligible for Waiver of Removal Under former INA § 212(c)**

In ***Frederick v. Holder***, __ F.3d __, 2011 WL 1642811 (7th Cir. May 3, 2011) (Bauer, Posner, *Sykes*), the Seventh Circuit held that petitioner's request for a § 212(c) waiver was properly denied because the crimes that led to the charge of removability – two aggravated felonies involving sexual

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abuse of a minor – have no statutory counterpart or comparable ground for inadmissibility under INA § 212 (a).

The petitioner, a German citizen, came to the United States in 1961, at age four with his mother and sister, and were admitted as LPRs. In 1990 petitioner pleaded guilty in Illinois state court to two counts of aggravated sexual abuse of a minor. The charges involved two victims and were issued in separate cases. Petitioner was sentenced to concurrent four-year prison terms in each case, and after serving these sentences, he was discharged from parole in 1993. Fourteen years later, the DHS charged him with removability as an alien convicted of an aggravated felony relating to sexual abuse of a minor. INA § 101(a)(43)(A). Petitioner applied for a waiver of removal under § 212(c) but the IJ found him ineligible because the crime that made him removable — an aggravated felony involving sexual abuse of a minor — has no statutory counterpart or comparable ground for inadmissibility under § 212(a). The BIA dismissed petitioner's appeal.

In denying the petition, the Seventh Circuit noted that the "statutory counterpart" rule for relief under § 212(c) is well established in the precedent of the both the BIA and the circuit courts. "Cases from this circuit have agreed with and adopted the BIA's holding in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), that aliens who are removable for sexually abusing a minor are not eligible for § 212 (c) relief because that offense has no comparable ground of inadmissibility in § 212(a)," said the court.

The court also rejected petitioner's argument that he was eligible for § 212(c) because DHS could have charged him with removability for having been convicted of two or more crimes involving moral turpitude. "As we have explained, under our caselaw, what [the Government] *could* have charged as grounds for removal is irrelevant," stated the court.

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

EIGHTH CIRCUIT

■ **Eighth Circuit Orders Remand For Agency To Consider Whether Equitable Tolling Excused Alien's Failure To File Motion To Reopen Within Ninety Day Deadline**

"To fall within the scope of the motion-to-reopen statute, [petitioner] must show that the filing deadline is subject to equitable tolling."

In ***Ortega-Marroquin v. Holder***, __ F.3d __, 2011 WL 1938306 (8th Cir. May 23, 2011) (Smith, Gruender, *Benton*), the Eighth Circuit held that it could not consider whether 8 C.F.R. § 1003.2(d), the regulation stating that an alien's departure serves to withdraw any pending motion to reopen, conflicts with an alien's statutory right to file one motion to reopen under 8 U.S.C. § 1229a(c)(7)(A) because the BIA failed to address the timeliness of petitioner's motion.

The petitioner, a native of Guatemala, petitioned for review of BIA's decision following the denial of his requests for asylum, withholding of removal, and cancellation of removal. While his petition was pending, petitioner's request for a stay of removal was denied and he was taken into custody. Following denial of his emergency motion for stay of removal, he filed an untimely motion to reopen based on ineffectiveness of prior counsel, but he was removed to Guatemala during pendency of the motion. Thereafter the BIA, unaware that petitioner had been removed, exercised its *sua sponte* authority and granted the untimely motion to reopen. However, when DHS moved for reconsideration on basis that petitioner had been removed, the BIA, pursuant to the regulatory departure bar, granted DHS's motion, vacated its prior decision to sua sponte reopen the case, and denied the motion to reopen. Petitioner challenged the BIA's application of the departure bar in his petition for review.

In granting the petition, the court explained that the statutory right to file a motion to reopen applies only to timely motions to reopen and the BIA did not address whether the alien's motion was rendered timely by the principle of equitable tolling. "To fall within the scope of the motion-to-reopen statute, [petitioner] must show that the filing deadline is subject to equitable tolling, thereby excusing its lateness," explained the court. Accordingly, the court remanded with instructions for the BIA to (1) address whether the motion to reopen was timely filed under the doctrine of equitable tolling, and, if so, (2) rule on the motion "whether on the basis of the departure bar or other grounds."

Contact: Christopher C. Fuller, OIL
☎ 202-616-9308

NINTH CIRCUIT

■ **Ninth Circuit Affirms Adverse Credibility Finding, Upholds Denial of Asylum and Withholding Removal**

In ***Zamanov v. Holder***, __ F.3d __, 2011 WL (9th Cir. April 29, 2011) (Wallace, Fernandez, *Clifton*), the Ninth Circuit affirmed the agency's determination that the Azerbaijani alien was not credible "due to inconsistencies between his testimony before an asylum officer

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and his subsequent written statements and testimony, which described additional incidents of persecution." The court explained that the additional incidents went to the core of the alien's alleged fear of future persecution and "materially altered [his] account of persecution in a way that cast doubt on his credibility."

Contact: John Inkeles, OIL
☎ 202-532-4309

■ **Ninth Circuit Orders Publication of Its Previously Unpublished Decision Regarding Retention of Jurisdiction Over PFR After Case is Transferred to District Court**

In ***Demirchyan v. Holder***, __ F.3d __, 2011 WL 1757153 (9th Cir. May 8, 2011) (Noonan, Fletcher, Gould) (*per curiam*), the Ninth Circuit ordered publication of the unpublished decision it issued on April 19, 2011, in which it held that the alien was not required to file a notice of appeal of the district court's denial of his derivative citizenship claim, because the court retained jurisdiction over his petition for review after transferring the case to district court under 8 U.S.C. § 1252(b)(5)(B) to consider his nationality claim.

Contac: Jeffrey Meyer, OIL
☎ 202-514-6054

■ **Ninth Circuit Holds that Drug Trafficking Activities Bar Asylum, Alien Unlikely to Be Tortured In Prison**

In ***Go v. Holder***, __ F.3d __, 2011 WL 1704469 (9th Cir. May 5, 2011) (*Wallace*, Graber, Mills), the Ninth Circuit agreed with the agency that the alien's drug trafficking activities prior to entering the United States – presumptively a particularly serious crime pursuant to 8 U.S.C. §§ 1158(b)(2)(A)(iii) and 1231(b)(3)(B)(iii) barred him from seeking asylum or withholding of removal. The court also concluded that the weight of the evidence did not compel the conclusion that the alien, who was implicated in a kidnapping, would likely be tortured in prison in the Philippines.

Contact: Don Scroggins, OIL
☎ 202-305-2024

■ **Ninth Circuit Holds that District Court § 212(c) Order is Res Judicata Against the Government**

In ***Paulo v. Holder***, __ F.3d __, 2011 WL 1663572 (9th Cir. May 4, 2011) (Proctor, *Fletcher*, Smith), the Ninth Circuit reversed the BIA's finding that petitioner was ineligible for § 212(c) relief because the principles of *res judicata* precluded relitigating a district court's finding that petitioner, in fact, was eligible for such relief.

"There is no good reason for lower standards in Immigration Court" than in small claims court, where "[e]ven pro se litigants . . . typically bring . . . documents for which the need and probative value is apparent."

The petitioner was found removable based on two convictions for crimes involving moral turpitude. After the time to reopen had expired, one of his convictions was vacated. The district court granted the alien's habeas petition, which claimed he was eligible for § 212(c) relief under *St. Cyr*, and ordered the government to allow the petitioner to apply for § 212(c) relief before an immigration judge. Before the IJ, DHS moved to pretermit the § 212(c) application based on the BIA's intervening *Blake* and *Brieva* decisions and the comparable ground theory. The immigration judge agreed with DHS , and rejected petitioner's contention that *res judicata* precluded relitigating his eligibility for §212(c) because the BIA's *Blake* and *Brieva* decisions constituted a change in the law.

The court disagreed, concluding that the agency was bound by the district court's order that the petitioner was entitled to apply for § 212 (c) relief. The court held that none of the exceptions to the res judicata doctrine applied in this case, because *Blake*, *Brieva*, and the comparable ground theory were not a change in the law.

Contact: Daniel Goldman, OIL
☎ 202-353-7743

■ **Ninth Circuit Holds that Past Perjury, Past Fraud, and Failure to Corroborate Support an Adverse Credibility Asylum Finding**

In ***Singh v. Holder***, __ F.3d __, 2011 WL 1643244 (9th Cir. May 3, 2011) (*Kleinfeld*, O'Scannlain, Wallace), the Ninth Circuit held that "[f]raud in the asylum application . . . with past perjury and the absence of reasonably available corroboration" supported the IJ's adverse credibility finding. The court reasoned that "[t]here is no good reason for lower standards in Immigration Court" than in small claims court, where "[e]ven pro se litigants . . . typically bring . . . documents for which the need and probative value is apparent."

Contact: Jason Patil, Environmental Torts
☎ 202-616-3852

■ **Ninth Circuit Holds No Nexus Between Social Group And Criminals' Retribution Against Arresting Officer**

In ***Ayala v. Holder***, __ F.3d __, 2011 WL 1886391 (9th Cir. May 19, 2011) (Fisher, Tallman, Tarnow) (*per curiam*), the Ninth Circuit upheld the agency's denial of asylum, withholding of removal, and CAT protection in the case of a Salvadoran asylum applicant who alleged that during his past service as a military officer he investigated drug crimes, and that after he was discharged he was at-

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tacked and threatened by drug dealers he had personally arrested.

First, the court assumed, *arguendo*, that "former military officers who suffer reprisals based on their prior prosecution of wrongdoers" qualified as a particular social group. The court said that it would defer to the BIA's interpretation in *Matter of C–A–*, 23 I&N Dec. 951 (BIA 2006), "that a particular social group of former officers is conceivable." According to C–A–, the court explained, "[w]ere a situation to develop in which former police officers were targeted for persecution because of the fact of having served as police officers, a former police officer could conceivably demonstrate persecution based upon membership in a particular social group of former police officers."

However, even assuming that petitioner belonged to a particular social group explained the court, he failed to "establish that any persecution was or will be on account of his membership in such group." The court affirmed the BIA's alternate holding that the attacks and threats petitioner experienced were on account of his investigation and arrest of a particular drug dealer and not his status as a former military officer. "Though disturbing, this type of persecution is not cognizable under the INA," concluded the court.

Contact: Susan Bennett Green, OIL
☎ 202-532-4333

■ **Ninth Circuit Instructs Agency to Reconsider Whether State Law Conviction for Failure to Register as Sex Offender Constitutes A CIMT**

In ***Pannu v. Holder***, __ F.3d __, 2011 WL 1782959 (9th Cir. May 11, 2011) (Reinhardt, *Hawkins*, Gould), the Ninth Circuit granted the government's request for remand so that the BIA could revisit whether the alien's state law conviction for failure to register as a sex offender constituted a CIMT. The BIA had previously found the alien's conviction to be a CIMT under *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), but the reasoning of *Tobar-Lobo* conflicted with the more recent decisions in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), and *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009), holding that some form of scienter is an essential element of a CIMT.

Contact: John Holt, OIL
☎ 202-616-8971

■ **Ninth Circuit Holds That Obstruction Of Justice Statute Must Criminalize Interfering With Official Proceedings To Qualify As Aggravated Felony**

"While we defer to the BIA's definitions of ambiguous terms in the INA, we do not defer to the BIA's every conclusion that a particular crime is a removable Offense."

In ***Hoang v. Holder***, __ F.3d __, 2011 WL 1885989 (9th Cir. May 17, 2011) (*B. Fletcher*, Fernandez, Bybee (dissenting)), the Ninth Circuit held that under the BIA's decision in *Matter of Espinoza-Gonzales*, 22 I&N Dec. 889 (BIA 1999), a state statute against "rendering criminal interference" must criminalize interference with a pending or prospective official proceeding in order for the offense to qualify as a crime "relating to the obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S).

The court declined to defer to the BIA's decision in *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997), which holds that the federal crime of accessory after the fact is a crime relating to the obstruction of justice and an aggravated felony. "While we defer to the BIA's definitions of ambiguous terms in the INA, we do not defer to the BIA's every conclusion that a particular crime is a removable offense," said the court. The court explained that *Batista–Hernandez* concluded that "violation of 18 U.S.C. § 3 is obstruction of justice without defining the ambiguous term, identifying the elements of the statute of conviction, or applying a definition of obstruction of justice to the statute." Therefore, the court owed no deference to *Batista–Hernandez.*

In his dissent, Judge Bybee, said that "the majority misidentifies the question before us, fails to give the BIA the deference it is due, and contradicts our previous decisions." "The majority's refusal to defer to the BIA without concluding that its interpretation is either contrary to congressional intent or unreasonable is inexplicable," he wrote.

Contact: Zoe Heller, OIL
☎ 202-305-7057

■ **Ninth Circuit Holds that the BIA Failed to Consider All Factors in Denying Alien § 212(c) Relief as a Matter of Discretion**

In ***Zheng v. Holder***, __ F.3d __, 2011 WL 1709849 (9th Cir. May 6, 2011) (*Schroeder*, Thomas, Gould), the Ninth Circuit held that the BIA should have explicitly considered the Chinese citizen's value and service to his community in making its assessment of all the relevant factors bearing on whether petitioner warranted a favorable exercise of discretion under § 212(c). The court accordingly remanded for reconsideration of the alien's § 212(c) application.

The court then held that both petitioner's claims of possible torture and his expert's testimony were based on unsupported assumptions, and affirmed denial of his request for CAT protection.

Contact: Sarah Maloney, OIL
☎ 202-305-4193

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TENTH CIRCUIT

Tenth Circuit Holds that Failure to Register as a Sex Offender Is Not Categorically a Crime Involving Moral Turpitude

In ***Efagene v. Holder***, __ F.3d __, 2011 WL 1614299 (10th Cir. April 29, 2011) (*Murphy*, Hartz, O'Brien), the Tenth Circuit held that the BIA erred when it determined that the petitioner's failure to register as a sex offender, as required by Colorado law, categorically constituted a crime involving moral turpitude.

"The BIA is owed no deference to its interpretation of the substance of the state-law offense at issue, as Congress has not charged it with the task of interpreting a state criminal code."

The petitioner, a citizen of Nigeria, was admitted to the United States as an LPR in 1991. In 2005, he pleaded guilty to a Colorado state misdemeanor offense of sexual conduct-no consent, in violation of Colo.Rev.Stat. § 18–3–404. He was sentenced to 364 days' imprisonment, which was satisfied with time served, and ordered to register as a sex offender for the next ten years. In 2007, petitioner failed to meet a registration deadline and was arrested. He pleaded guilty to a misdemeanor failure-to-register offense, in violation of Colo.Rev.Stat. § 18–3–412.5(1)(a), (3), and was sentenced to thirty days' imprisonment and a $100 fine. DHS charged petitioner as being removable under INA § 237(a)(2)(A)(ii) for having been convicted of two crimes involving moral turpitude. Petitioner argued that failure to register does not constitute a crime involving moral turpitude. The IJ disagreed and ordered petitioner removed.

The BIA subsequently affirmed the IJ's decision relying on *Matter of Tobar–Lobo*, 24 I&N Dec. 143 (BIA 2007). In that case, the BIA had considered a conviction under California's similar statute, and had concluded that the California failure-to-register offense is a crime involving moral turpitude. The BIA relied heavily on the principal purpose of the statute, which it described as "safeguard[ing] children and other citizens from exposure to danger from convicted sex offenders." Although the BIA recognized regulatory offenses typically do not involve moral turpitude, the BIA concluded in *Tobar–Lobo* that failure to register as a sex offender fell within an exception to that rule because "some obligations . . . are simply too important not to heed," and failing to register as a sex offender breached a duty to society that rendered it a "despicable" act.

In reversing the BIA, the court adopted the Ninth Circuit's reasoning in *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (*en banc*), and held that "the BIA is owed no deference to its interpretation of the substance of the state-law offense at issue, as Congress has not charged it with the task of interpreting a state criminal code." But, even if *Chevron* deference applied, said the court, "the BIA's interpretation of moral turpitude to reach so far as to encompass the Colorado misdemeanor offense of failure to register is not a 'reasonable policy choice for the agency to make.'"

The court also found that the BIA's conclusion that failing to register is one of the exceptional regulatory offenses classified as crimes involving moral turpitude was not supported by the cases cited by the BIA in *Tobar–Lobo*. There the BIA identified the crimes of statutory rape, child abuse, and spousal abuse as being crimes involving moral turpitude. "Those crimes, however, are inherently different from failing to register because in each of those instances, the crime necessarily involves an actual injured victim," said the court. Moreover, the court found *Tobar–Lobo*'s interpretation of moral turpitude at odds with the BIA's own longstanding precedent in *Matter of H-*, 1 I&N Dec. 394, 395 (BIA 1943), a 1943 decision where the BIA held that a violation of a statute requiring liquor retailers to pay a tax was "merely a revenue or licensing statute," and not a CIMT.

Contact: Lauren Fascett, OIL
☎ 202-616-3466

Tenth Circuit Holds that Alien's Conviction for Identity Fraud Categorically Constitutes a Crime Involving Moral Turpitude

In ***Rodriguez-Heredia v. Holder***, __ F.3d __, 2011 WL 1447615 (10th Cir. May 10, 2011) (*Porfilio*, Holmes, McKay), the Tenth Circuit granted the government's motion to publish the court's April 15, 2011 decision. The court dismissed as moot the alien's first petition for review challenging his custody because the alien had been released from detention and removed.

The court also held that the alien's conviction for identity fraud under Utah law is categorically a crime involving moral turpitude because it requires proof of a specific intent to defraud in all circumstances. Finally, the court rejected the alien's argument that a complete lack of value in the thing obtained by fraud precludes a finding that the crime is a crime involving moral turpitude.

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

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DISTRICT COURTS

■ **Western District of Washington Grants Summary Judgment in Favor of United States in a Religious Freedom Restoration Act Case**

In *Ruiz-Diaz v. United States of America*, No. 08-1881 (W.D. Wash. May 11, 2011) (Lasnik, J.), the District Court granted summary judgment in favor of the United States. The court upheld the DHS's regulation which prohibits applicants for religious worker visas from filing adjustment of status applications until after USCIS grants their underlying visa petitions. The court further held that the regulation does not violate the Religious Freedom Restoration Act, or the Due Process Clause, Equal Protection Clause, or the First Amendment.

Contact: Melissa Leibman, OIL DCS
☎ 202-305-7016

■ **Western District of Washington Dismisses Sex Offender's Challenge to Denial of Alien Fiancee's Visa Petition**

In *Beeman v. Napolitan.*, No. 10-803 (W.D. Wash. May 17, 2011) (Jones, J.), the District Court dismissed a U.S. citizen's challenge to the denial of a visa petition filed on behalf of his alien fiancee. Plaintiff, a registered sex offender, alleged USCIS exceeded its statutory authority and violated his right to due process and equal protection when it applied the immigration provisions of the Adam Walsh Act to his adult fiancee. The court held that USCIS's statutory grant of "sole and unreviewable discretion" to determine whether a sex offender poses "no risk" to an intended beneficiary "could not be more specific or direct," and granted the government's motion to dismiss the case.

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

■ **Eastern District of California Holds that 212(c) Waiver Does Not Limit Government's Ability to Consider Underlying Aggravated Felony in Naturalization Challenge**

In *Alocozy v. USCIS, et al.*, 10-cv-1597 (E.D. Cal. April 27, 2011) (Mendez, J.) the district court granted summary judgment in favor of the government in an 8 U.S.C. § 1421(c) *de novo* challenge of the USCIS' decision to deny petitioner's naturalization application for lack of good moral character because he is subject to the aggravated felony bar.

The court determined that the earlier grant of a former section 212(c) waiver did not stop the government from considering the underlying aggravated felony.

The court determined that the earlier grant of a former section 212(c) waiver did not stop the government from considering the underlying aggravated felony (California conviction of assault with the intent to commit rape) in adjudicating the alien's naturalization application. The court further concluded that petitioner could not have had a settled expectation at the time of his conviction that a potential discretionary grant of section 212(c) relief would also render him eligible to naturalize, and thus *INS v. St Cyr*, 533 U.S. 289 (2001), did not require that such a waiver be honored in the naturalization context.

Contact: Aram A. Gavoor, OIL DCS
☎ 202-305-8014

■ **Central District of California Holds That Consular Nonreviewability Doctrine Precludes Judicial Review of Consular Officer's Decision to Deny Plaintiff's Request for Immigrant Visa**

In *Carandang v. Mayorkas*, No. 11-1300 (C.D. Cal. May 9, 2011) (Nguyen, J.), the Central District of California granted the government's motion to dismiss plaintiff's complaint. Plaintiff, a citizen and current resident of the Philippines, claimed that he was entitled to an immigrant visa and a permanent resident card under the Child Status Protection Act (CSPA) as either: (1) the derivative beneficiary of a visa petition filed on his mother's behalf; or (2) the direct beneficiary of a visa petition filed on his behalf by his lawful permanent resident mother. Plaintiff challenged a consular officer's decision to deny his request for an immigrant visa. The court held, however, that the doctrine of consular nonreviewability barred plaintiff's claim, and no exceptions to the doctrine applied because the consular officer's decision was "grounded on established and reasonable interpretations of the CSPA."

Contact: Craig Defoe, OIL-DCS
☎ 202-532-4114

■ **Eastern District of Pennsylvania Dismisses Challenge to Computerized Appointment System**

In *Hammond & Knoble v. USCIS*, No. 09-5071 (E.D. Pa. April 29, 2011) (Kelly, J.), the district court dismissed plaintiffs' challenge to USCIS use of the computerized appointment system known as "InfoPass." The court first found that plaintiffs had not sufficiently alleged an injury-in-fact; rather, they baldly asserted that the system cost them extra time and money. Second, the court held that such programmatic attacks are not justiciable cases or controversies. The court stated that the appropriate place to address such concerns is within "the offices of the Department or the halls of Congress."

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

This Month's Topical Parentheticals

ADMISSION

■ *United States of America v. Li,* __ F. 3d __, 2011 WL 1632087 (9th Cir. May 2, 2011) (holding that an alien does not "enter[ ] or attempt[ ] to enter the United States" for purposes of 8 U.S.C. § 1325(a)(1) when traveling by boat from the CNMI to Guam because both territories are part of the US)

ASYLUM

■ *Pheng v. Holder*, __ F.3d __, 2011 WL 1797293 (1st Cir. May 12, 2011) (holding there is no compelling evidence that policeman's rapes of a Cambodian woman were on account of her missing husband's political opinions, or that government knew about or authorized the rapes, because "[r]ape as repugnant as it is, is committed for many reasons, even when committed by government officials;" policeman made no statements that rapes were politically motivated; and policeman simply took personal advantage of information that the woman was vulnerable because her politically active husband was missing)

■ *Moosa v. Holder*, __ F.3d __, 2011 WL 1675943 (7th Cir. May 5, 2011) (holding that Board acted within its discretion in denying untimely motion to reopen by Pakistani woman to apply for asylum based on claim of future persecution on account of membership in a PSG of "single Westernized women," where motion failed to show changed country conditions as required by INA, and also failed to make prima facie showing of eligibility for relief as permitted by S. Ct. case law and regulations)

■ *Go v. Holder,* __ F. 3d __, 2011 WL 1678196 (9th Cir. May 5, 2011) (holding that applicant is statutorily barred from asylum and withholding because of "serious reasons" to believe he "committed a serious nonpolitical crime" where applicant admitted under oath at removal hearing that he participated in drug trafficking activities prior to coming to US; further holding that substantial evidence supports denial of CAT claim for failure to show future torture is more likely than not upon return to Philippines and possible jailing, where evidence cuts both ways and BIA may give specific evidence showing no risk of future torture for this particular applicant greater weight than general country conditions)

■ *Stserba v. Holder,* __ F.3d __, 2011 WL 1901546 (6th Cir. May 20, 2011) ([1] remanding to BIA to consider in the first instance whether Estonia's citizenship revocation for ethnic Russians upon independence from Russia resulting in statelessness for Stserba a few years was "persecution;" [2] holding that the evidence compelled the conclusion that Estonia's national policy of refusing to recognize medical degrees from Russian schools was "persecution" of Stserba, because she was temporarily unable to practice her chosen medical profession and had to babysit for a time before working as a doctor in a private clinic; and [3] holding that the evidence compelled the conclusion that Estonia's policy of rejecting degrees from Russian schools was in part "on account of" Russian ethnicity even though the policy applied to persons of all ethnicities with Russian diplomas, because the court assumed that "it seems inevitable that the policy disproportionately impacted ethnic Russians who are more likely than other Estonians to have the language skills to attend Russian schools," and the IJ found that degree invalidation was probably the result of "pent-up frustration resulting from years of Soviet rule.")

■ *Kukalo v. Holder*, __ F.3d __, 2011 WL 1405169 (6th Cir. Apr. 13, 2011) (designated as a published decision on May 16, 2011) (holding that: [1] substantial evidence supports the BIA's finding that Ukrainian man failed to establish past or future persecution on account of a qualifying ground, where past threats and requests for money by KGB worker or mafia were random criminal acts, and feared future harm was little more than general crime and lawlessness; and [2] BIA did not abuse its discretion in denying a 2009 motion to reopen to apply for adjustment of status to lawful permanent resident under INA § 245 (a), where Kukalo failed to meet the statutory requirement of continuous lawful status since arriving in February 1994 on a nonimmigrant visitor's visa; and a 10-year delay by DHS (Oct 1994-July 2004) in processing Kukalo's asylum application did not explain or excuse his failure to maintain lawful status, since his visitor's visa expired almost two months before he filed for asylum with DHS)

■ *Ayala v. Holder,* __ F.3d __, 2011 WL 1886391 (9th Cir. May 19, 2011) (court assumes that "former military officers" meets the "social visibility" and "particularity" requirements for a "particular social group" and holds that past or future reprisals for arresting a drug dealer while applicant was formerly a military officer do not qualify for asylum, because this is not persecution "on account of" membership in the assumed social group of "former military officers," but reprisals for the applicant's role in disrupting criminal activity)

CANCELLATION

■ *Demandstein v. Holder,* __ F.3d __, 2011 WL 652751 (3d Cir. Feb. 24, 2011) (designated for publication on May 10, 2011) (holding that petitioner's trip to Canada interrupted his continuous physical presence time when he was stopped at the Canadian border upon his return and knowingly withdrew his application for admission to the United States by signing a form)

Matter of A-G-G-, 25 I&N 486 (BIA May 12, 2011) (holding that DHS has the initial burden to make a prima facie showing of an offer of firm resettlement by presenting direct evidence of an alien's ability to

This Month's Topical Parentheticals

stay in a country indefinitely; when direct evidence is unavailable, indirect evidence may be used if it has a sufficient level of clarity and force to establish that the alien is able to permanently reside in the country; an asylum applicant can rebut the evidence of a firm resettlement offer by showing by a preponderance of the evidence that such an offer has not been made or that the applicant's circumstances would render him or her ineligible for such an offer of permanent residence; evidence that permanent resident status is available to an alien under the law of the country of proposed resettlement may be sufficient to establish a *prima facie* showing of an offer of firm resettlement, and a determination of firm resettlement is not contingent on whether the alien applies for that status).

■ *Salem v. Holder*, __F.3d__, 2011 WL 1998330 (4th Cir. May 24, 2011) (upholding denial of cancellation to LPR where alien failed to establish that he had not been convicted on an aggravated felony)

CITIZENSHIP

■ *Johnson v. Whitehead*, __F.3d__, 2011 WL 1998333 (4th Cir. May 24, 2011) (holding that alien did not qualify for citizenship under plain meaning of former INA § 321 because his father, who had sole custody of him when he became a USC, did not meet the "legal separation" requirement because his parents were never married, and that DHS was not precluded from relitigating issue of his alienage even though govt had failed to prove alienage in 1998 proceeding)

CREDIBILITY

■ *Harminder Singh v. Holder,* __ F.3d __, 2011 WL 1643244 (9th Cir. May 3, 2011) (pre-REAL ID Act case affirming adverse credibility finding against male Indian asylum applicant where he admitted submitting false asylum claim and fraudulent documents and lying to AO during 2 interviews and failed to reasonably corroborate his changed story before the IJ by producing sisters living in U.S.; rejecting that Ninth Circuit case law requires testimony to be deemed credible if it is internally consistent and consistent with asylum application, or that in such circumstances corroboration cannot be required)

■ *Dehonzai v. Holder*, __F.3d__, 2011 WL 1988206 (1st Cir. May 23, 2011)((holding that substantial evidence supports IJ's and BIA's post-REAL ID Act adverse credibility finding regarding asylum claim by man from the Ivory Coast, based on: [1] similarity of applicant's description of alleged mistreatment upon arrest and virtually identical description of mistreatment of a noted journalist in an Amnesty International Report; [2] failure to adequately explain the similarity despite opportunity provided by cross-examination; [3] implausibility of the timing of a second alleged arrest; and [4] failure to corroborate key aspects of the claim despite explicit requests by IJ and opportunity to obtain corroboration)

CRIME

■ *Rodriguez-Heredia v. Holder,* __ F.3d __, 2011 WL __ (10th Cir. May 10, 2011) (holding that petitioner's conviction for identity fraud under Utah law categorically constitutes a crime involving moral turpitude because it requires proof of a specific intent to defraud in all circumstances; rejecting argument that a complete lack of value in the thing obtained by fraud precludes CIMT finding)

■ *Pannu v. Holder,* __ F. 3d __, 2011 WL 1782959 (9th Cir. May 11, 2011) (remanding for BIA to reconsider, in light of significant intervening developments, whether petitioner's conviction for failure to register as a sex offender constitutes a CIMT)

■ *United States v. Aslan*, __ F.3d __, 2011 WL 1793759 (7th Cir. May 12, 2011) (holding in a criminal prosecution that defendant was not entitled to credit for time served in immigration detention prior to criminal charge because he was not "under a federal sentence" during that time)

■ *Matter of Strydom,* 25 I&N Dec. 507 (BIA 2011)(holding that a conviction under section 21-3843(a)(1) of the Kansas Statutes Annotated for violation of the no-contact provision of a protection order issued pursuant to section 60-3106 of the Kansas Protection from Abuse Act constitutes a deportable offense under INA § 237 (a)(2)(E)(ii))

■ *Hoang v. Holder,* __ F.3d __, 2011 WL 1885989 (9th Cir. May 17, 2011) (holding that a misdemeanor conviction for rendering criminal assistance is not categorically a crime related to obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) because it does not require a defendant to commit an act involving either active interference with the "proceedings of a tribunal or investigation," or action or threat of action against those who cooperate with the process of justice) (Judge Bybee dissented)

DOMA

■ *Matter of Dorman*, 25 I.&N. 485 (AG May 5, 2011) (ordering that BIA's decision in DOMA case be vacated and referred to the AG for review; further remanding case to the BIA and directing it to "make such findings as may be necessary to determine whether and how the constitutionality of DOMA is presented in this case")

DUE PROCESS – FAIR HEARING

U.S. v. Diaz-Ramirez, __F.3d__, 2011 WL 1947226 (9th Cir. May 23, 2011) (holding that defendants' claim that a large-group plea proceeding did not violate defendants' Fifth Amendment right to due process)

■ *Gordillo v. Holder,* __ F.3d __, 2011 WL 1812213 (6th Cir. May 13,

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2011) (remanding ineffective assistance claim for BIA to determine whether due diligence required petitioner to make "reasonable inquiries" regarding the status of her appeal to discover the ineffectiveness; holding that upon discovering ineffectiveness petitioner acted diligently by consulting several attorneys about her situation but was told she had no remedy)

■ ***Freire v. Holder***, __F.3d __, 2011 WL 2090820 (2d Cir. May 27, 2011) (holding that BIA abused its discretion in denying alien's request for continuance of removal proceedings)

■ ***Echavarria v. Pitts***, __ F.3d __, 2011 WL 1792101 (5th Cir. May 11, 2011) (holding that, in order to satisfy due process, the government must take additional reasonable steps to notify a bond obligor that the bond has been breached when the government has knowledge that the initial attempt at notice failed)

■ ***Matter of M-A-M-***, 25 I.&N. 474 (BIA May 4, 2011) (holding that aliens in immigration proceedings are presumed to be competent; if there are indicia of incompetency, an IJ must determine whether the alien is competent; if the alien lacks sufficient competency to proceed, the IJ will evaluate and apply appropriate safeguards)

JURISDICTION

■ ***Leonardo v. Crawford***, __ F.3d __, 2011 WL 1814706 (9th Cir. May 13, 2011) (holding that petitioner was required to exhaust his administrative remedies by appealing the IJ's custody determination to BIA prior to filing habeas challenge based on prolonged immigration detention)

■ ***Demirchyan v. Holder,*** __ F.3d __, 2011 WL __ (9th Cir. Apr. 19, 2011) (holding that petitioner was not required to file a notice of appeal of the district court's finding that he is not a citizen because court of appeals retains jurisdiction over PFR after transferring case to district court under 8 U.S.C. § 1252(b)(5)(B) to consider nationality claim)

MOTION TO REOPEN

■ ***Ortega-Marroquin v. Holder,*** __F.3d__, 2011 WL 1938306 (8th Cir. May 23, 2011)(holding that remand was required to allow BIA to consider alien's claim that he was entitled to equitable tolling, where BIA had *sua sponte* reopened case but when government moved for reconsideration on basis that alien had been removed, BIA, pursuant to the regulatory departure bar, granted motion, vacated its prior decision, and denied alien's motion to reopen)

■ ***Ortega-Marroquin v. Holder,*** __ F. 3d __, 2011 WL 1938306 (8th Cir. May 23, 2011) (remanding case to BIA to consider petitioner's equitable tolling claim where BIA previously failed to consider that claim in denying the MTR, but subsequently reopened the proceedings *sua sponte*, only to later reconsider and deny reopening pursuant to the departure bar because petitioner had been removed from the country)

STATES

■ ***Chamber of Commerce of U.S. v. Whiting***, 2011 WL 2039365 (U.S. May 26, 2011) (holding that the Legal Arizona Workers Act -- which provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked -- did not preempt Arizona State's licensing provisions because it falls squarely within the federal statute's savings clause and that the Arizona regulation does not otherwise conflict with federal law)

WAIVER

■ ***Zheng v. Holder,*** __ F. 3d __, 2011 WL 1709849 (9th Cir. May 6, 2011) (holding that the BIA erred in failing to consider petitioner's "value and service to the community" in adjudicating his 212(c) application)

■ ***Paulo v. Holder,*** __ F.3d __, 2011 WL 1663572 (9th Cir. May 4, 2011) (holding that res judicata binds the BIA and IJ to the district court's non-appealed holding that petitioner is eligible for section 212(c) relief, and the BIA's intervening decisions in *Blake* and *Brieva* do not constitute a change-of-law exception to res judicata)

■ ***Frederick v. Holder,*** __ F.3d __, 2011 WL __ (7th Cir. May 3, 2011) (holding that petitioner was ineligible for section 212(c) relief because his conviction for an aggravated felony involving sexual abuse of a minor has no statutory counterpart or comparable ground of inadmissibility) (noting that the Supreme Court has granted certiorari to resolve the "lopsided circuit split")

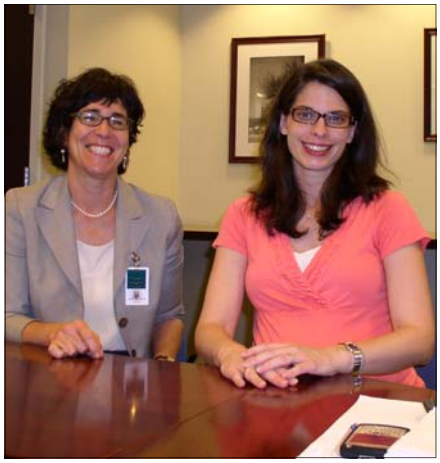
NOTED

DHS has ended the ***National Security Entry-Exit Registration System*** (NSEERS) registration process — a critical step forward in the Department's ongoing efforts to eliminate redundancies; streamline the collection of data for individuals entering or exiting the United States, regardless of nationality; and enhance the capabilities of our security personnel working every day to secure our nation from the threats we face.

In a notice published in the Federal Register (82 Fed. Reg. 23830), DHS removed the list of countries whose nationals have been subject to NSEERS registration — effectively ending a registration process that has become redundant as we have strengthened security across the board, while at the same time improving and expanding existing systems to automatically and more effectively capture the same information that was being manually collected via NSEERS.

Inside OIL

Claudia Bernard, the Chief Mediator for the Ninth Circuit Court of Appeals, joined OIL attorneys at a Brown Bag Luncheon to discuss the status of mediation of immigration cases in the Ninth Circuit.



Claudia Bernard, Melissa Neiman-Kelting

OIL's softall team, **the OILers**, is once again playing in two leagues this year. The first league is on Tuesdays against our immigration colleagues over at DHS. The games will take place at Fort McNair in SE, at 7:00pm. The second DOJ league games take place Wednesdays on the National Mall, with the field location to be determined the day of, and start around 6:00pm. If you have any questions, are interested in playing, or just generally bored, please contact **James Lindahl** for further details.

Juan Osuna New Director of EOIR

Attorney General Eric Holder has announced the appointment of Juan Osuna as the permanent Director for the Executive Office for Immigration Review (EOIR) at the Department of Justice.

"Having served with the department for over a decade, Juan has developed an extensive knowledge of immigration litigation and issues, and demonstrated himself to be a diligent and thoughtful advocate and manager," said Attorney General Holder. "I am confident he will lead this office with the highest standards of professionalism, integrity and dedication."

EOIR is headed by a director who is responsible for the supervision of the Chairman of BIA, the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel. EOIR has more than 1,300 employees in its 59 immigration courts nationwide, at the BIA, and at EOIR headquarters in Falls Church, Va.

Osuna has served as Acting Director of EOIR since December 2010. Prior to that, he worked as an Associate Deputy Attorney General focusing on immigration policy, Indian country matters, pardons and commutations, and other issues. Before joining the DAG's Office, he worked as a Deputy Assistant Attorney General in the Civil Division, where, in addition to handling immigration policy, he also oversaw the Office of Immigration Litigation. Previously he served as chairman of the BIA. He was first appointed to the BIA in 2000 and became chairman in 2008.

While at the BIA, Osuna put in place a number of reforms and oversaw the attorney general's 2006 reform plan, which increased the quality and transparency of the Board's decisions, and he adjudicated hundreds of appeals from decisions of immigration judges made in removal proceedings.

Osuna also teaches immigration policy at George Mason University School of Law in Arlington, Va.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

■ **June 13-14, 2011.** *Criminal Aliens:* This training will focus on criminal grounds of removability and will provide guidance on a variety of related issues. CLEs available.

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

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

INSIDE OIL: 2011 SUMMER ASSOCIATES

Front: Tori Roth (University of Michigan Law School), Teresa Forbes (University of Alabama School of Law), Sarah Pergolizzi, (University of Virginia School of Law), Amanda Boozer (Harvard Law School), Sitara Kadalbal (American University, Washington College of Law), Sarone Solomon (American University, Washington College of Law), Vanessa Molina (American University, Washington College of Law). Back: Brad Hopkins (Drake University), Andrea Shuford (Catholic University of America Columbus School of Law), Brian Itami (Harvard Law School), Hunter Bridges (American University, Washington College of Law), Anna Kristina Fox (American University, Washington College of Law), Geoffrey Mitchell (American University, Washington College of Law), Anna Taylor (American University, Washington College of Law).

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