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

Immigration Litigation Bulletin

Vol. 15, No. 11 November 2011

LITIGATION HIGHLIGHTS

Inside

Third Circuit Rejects BIA's "Social Visibility" And "Particularity" Requirements To Establish PSG for Asylum

In *Valdiviezo-Galdamez v. Atty. Gen. of the U.S.*, __ F.3d __, 2011 WL 5345436 (3d Cir. November 8, 2011) (*McKee*, Hardiman, Davis), the Third Circuit determined that the BIA's "particularity" and "social visibility" requirements for purposes of establishing a particular social group under the asylum statute were inconsistent with its prior precedents, and therefore not entitled to *Chevron* deference in the absence of a principled reason for their adoption.

The petitioner, an Honduran citizen, entered the United States unlawfully in 2004. When DHS instituted removal proceedings in January 2005, petitioner applied for asylum, withholding and CAT protection. Petitioner claimed that he had fled Honduras because members of a gang called "Mara Salvatrucha," a/k/a "MS–13," had threatened to kill him if he did not join their gang. On one occasion, in March 2003, he was robbed by six men who told him that he would have to join their gang to get his money and jewelry back. When he refused, the men hit him and told him that he better think about their "proposal." Petitioner said these were MS-13 members because they had tattoos that were characteristic of gang membership. Petitioner reported this incident and others to the police, but claimed he received no response from them. In September, 2004, while traveling to Guatemala to visit his sister's hus-

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Murky Right to Family Unity Does Not Trump Alien Parent's Removal Order

It has been a well-settled question for decades that the United States citizen children of illegal aliens do not have a constitutional right to remain in this country to keep their family intact. *See Rubio de Cachu v. INS*, 568 F.2d 625, 627 (9th Cir. 1977). Yet, this argument has seen a recent resurgence in both aliens' briefs as well as circuit judge dissents. *See, e.g.*, *Fuentes Aguilar v. Holder*, 389 F. App'x 697, 698 (9th Cir. 2010) (Pregerson, dissenting) (arguing that removal of a United States citizen child's parents forces that child "to suffer de facto expulsion . . . or forego their constitutionally protected right to remain in this country with their family intact"). This brief article addresses the policy behind the requirement that a child turn 21 before he is eligible to file an immigrant visa petition for his parent and explains why the Constitution does not protect the rights of U.S. citizen children to have their non-citizen parents remain in the United States.

Section 201(b)(2)(A)(i) of the Immigration and Nationality Act allows a U.S. citizen child to petition for a visa on his or her parent's behalf if the child is "at least 21 years of age." That requirement was added to the Act in 1952. Pub. L. 82-414, 66 Stat. 163, 178 (1952). It

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PSG's requirements of "social visibility" and "particularity" rejected

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band, petitioner was kidnapped by MS-13 members who thought he was trying to escape recruitment into their gang. Petitioner testified that they told him they were no longer offering him the option of joining their gang, and had decided to kill him instead. They then tied petitioner up and beat him for five hours. He was eventually freed by the Guatemalan police. Petitioner remained in Guatemala briefly with his sister's husband, and then decided to come to the United States to escape the gang.

The IJ denied asylum and withholding finding, *inter alia*, a lack of persecution on account of a protected ground. On appeal to the BIA, petitioner claimed that he had been persecuted on account that he belonged to the "particular social group" of "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs." The BIA rejected the argument and affirmed the IJ's decision. Subsequently, the Third Circuit remanded the case to the BIA to address the threshold question of whether "young men who have been actively recruited by gangs and who have refused to join the gangs" is a "particular social group" within the meaning of the INA — an issue that neither the IJ nor the BIA had decided. *Valdiviezo-Galdamez v. Attorney General*, 502 F.3d 285 (3d Cir. 2007).

On remand, the BIA again rejected petitioner's claims. It found that the proposed "particular social group" lacked "particularity" because it was a "potentially large and diffuse segment of society" and "too broad and inchoate" to qualify for relief under the INA. The BIA noted that in an analogous case, *Matter of S-E-G,* 24 I&N Dec. 579 (BIA 2008), it had held that Salvadoran youth who were subjected to recruitment efforts by the M-13, and who resisted gang membership "based on their own personal, moral and religious opposition to the gang's values and activities," did not constitute a "particular social group." The BIA also found that the proposed social group lacked "social visibility" as required under, *Matter of E-A-G*, 24 I&N Dec. 591 (BIA 2008), because persons who resist gangs were not shown to be socially visible or a recognizable group or segment of Honduran society, and the risk of harm petitioner feared was actually an individualized gang reaction to his specific behavior. The BIA also concluded that petitioner's claim of persecution on account of political opinion was foreclosed by *INS v. Elias-Zacarias*, because he "failed to show a political motive in resisting gang recruitment or a well-founded fear of future persecution on account of his political opinion."

The requirements of "social visibility" and "particularity" were "inconsistent with many of the BIA's prior decisions."

Preliminarily, the Third Circuit declined the government's suggestion that it lacked jurisdiction to consider the challenge to the BIA's requirements that a group must have "particularity" and "social visibility," because petitioner had failed to exhaust his administrative remedies with respect to that issue. The court held that the BIA's consideration of an issue was sufficient to provide the court with jurisdiction.

On the merits, the court declined to give *Chevron* deference to the BIA's interpretation that the requirements for establishing a "particular social group" include the elements of "social visibility" and "particularity." The court explained that the imposition of these requirements, which the court found to be "different articulations of the same concept," was unreasonable because it was "inconsistent with many of the BIA's prior decisions." For example, the court looked to BIA decisions such as *Kasinga (*women subject to FGM), *Toboso-Alfanso* (homosexuals in Cuba) and *Matter of Fuentes (former taxi drivers)*, where the identified particular social group was not "socially visible" but it was recognized by the BIA.

In declining to defer to the BIA's interpretation, the court further explained that it did "not suggest that the BIA cannot add new requirements to, or even change, its definition of 'particular social group.' Clearly, an agency can change or adopt its policies. However, an agency acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision." The court said that the BIA had not announced a "principled reason" for its adoption of those inconsistent requirements. Accordingly, the court granted the petition for review and remanded to the BIA for further proceedings.

In a concurrence, Judge Hardiman stated that the BIA upon remand was free to adopt the "additional requirements of 'particularity" and "social visibility,' exactly as the Board has defined and rationalized them over the last five years." He explained that the problem with the BIA's evolving approach to "particular social group" cases is that the "BIA has failed to acknowledge a change in course and forthrightly address how that change affects the continued validity of conflicting precedent." Therefore on remand, the BIA "can either choose between its reasonable new requirements and its older but equally reasonable precedents, or reconcile the two interpretations in a coherent way."

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Family unity vs. removal

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took its current form in 1965, when Congress enacted major immigration reform and overturned the national origins system of visa distribution. Pub. L. 89-236, 79 Stat. 911 (1965); *see* S. REP. NO. 89-748, at 10-14 (1965); H.R. REP. NO. 89-745, at 8-13 (1965). The national origins system, intended to "maintain, to some degree, the ethnic composition of the American people," was based upon an alien's country of nationality, and not any other factor. H.R. REP. NO. 89-745, at 9 (1965); *see* S. REP. NO. 89-748, at 10, 12-13 (1965). That controversial policy was thought to be a "clumsy instrument of selection based on discrimination against nations instead of the personal qualifications of the immigrants." H.R. REP. NO. 89-745, at 9 (1965).

Congress slowly chipped away at the national origins policy to "reunit[e] families . . . [and] to relieve pressures created by quota restrictions" and, in 1965, overturned it. In its place, Congress instituted a "system of selection designed to be fair, rational, humane, and in the national interest." H.R. REP. NO. 89-745, at 9, 12 (1965); *see* S. REP. NO. 89-748, at 13 (1965). The new system, while limited by an "annual numerical ceiling," was "based upon the existence of a close family relationship to U.S. citizens or permanent resident aliens and not on . . . birthplace or ancestry." H.R. REP. NO. 89-745, at 12 (1965); *see* S. REP. NO. 89-748, at 13-14 (1965). Congress emphasized that "[r]eunification of families . . . [is] the foremost consideration," and that "the closer the family relation the higher the [visa] preference." H.R. REP. NO. 89-745, at 12 (1965); *see* S. REP. NO. 89-748, at 13-14 (1965). Immediate relatives – children, spouses, and parents of citizens – were afforded the highest preference and not subject to numerical limitation. H.R. REP. NO. 89-745, at 12 (1965).

Section 201(b)(2)(A) of the Act fulfills the purpose of family unity but, at the same time, imposes limits to prevent the unlawful immigration of aliens who otherwise are not immediately eligible for permanent residence in the United States. The purpose of this section is self-evident and reasonable as the age requirement prevents the "wholesale circumvention of the immigration laws by persons who enter the country illegally and promptly have children to avoid deportation." *Hernandez Rivera v. INS*, 630 F.2d 1352, 1356 (9th Cir. 1980).

The Supreme Court has not found that the Due Process liberties of freedom of personal choice in matters of marriage and family life are implicated by the removal of an alien parent from the United States.

There has never been any question that Congress can set limits on immigration to the United States, as there is "no conceivable subject [over which] the legislative power of Congress is more complete than it is over the admission of aliens." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *see also Fiallo v. Bell*, 430 U.S. 787, 794 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). A necessary corollary of Congress's gate-keeping power is the authority to remove someone who has unlawfully entered. *Fiallo*, 430 U.S. at 792. Although equal protection requires "that all persons similarly circumstanced shall be treated alike," *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (punctuation omitted), the Constitution "does not require things which are different in fact . . . to be treated in law as though they were the same," *id*. (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *Mathews*, 426 U.S. at 78 ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.").

In response to these limits, petitioners may assert that their removal violates their minor U.S. citizen child's Fifth Amendment due process and equal protection rights. Often, a claim involves an argument regarding the right to family unity. Initially, it is questionable whether such a right exists. While Judge Pregerson has argued in dissenting opinions that the right does exist, *see, e.g.*, *Fuentes Aguilar*, 389 F. App'x at 698, in 2009 the Ninth Circuit described the murky fundamental right to family unity as implausible. *De Mercado v. Mukasey*, 566 F.3d 810, 816 n.5 (9th Cir. 2009). The *De Mercado* court noted that while the Supreme Court has consistently defined "the freedom of personal choice in matters of marriage and family life [a]s one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *see Roe v. Wade*, 410 U.S. 113 (1973) (freedom of choice with respect to childbearing); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (decision-making authority in matters of child rearing and education); *Stanley v. Illinois*, 405 U.S. 645 (1972) (custody of biological children), it did not find that those rights are implicated by the removal of an alien parent from the United States.

Even were a court to recognize a right to family unity, the argument that such a right superceded Congress's ability to remove illegal aliens was cast aside in various cases in the 1970's and early 1980s. *See, e.g.*, *Ayala-Flores v. INS*, 662 F.2d 444

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Family Unity

(6th Cir. 1981) (*per curiam*); *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222 (5th Cir. 1975); *Encicso-Cardozo v. INS*, 504 F.2d 1252 (2d Cir. 1974); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965). Indeed, "a minor child who is fortuitously born here due to his parents' decision to reside in this country, has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents." *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969). Moreover, family unity is not necessarily violated as nothing prevents an alien from taking his child with him to his home country. *See Ayala-Flores*, 662 F.2d at 445-46.

Despite these older cases, the issue has been raised, and disposed of, recently in the First, Seventh, and Ninth Circuits. *Marin-Garcia v. Holder*, 647 F.3d 666, 673 (7th Cir. 2011); *Morales-Izquierdo v. DHS*, 600 F.3d 1076 (9th Cir. 2010); *Payne-Barahona v. Gonzales*, 474 F.3d 1 (1st Cir. 2007). In succinctly rejecting the argument that a U.S. citizen child's purported due process right trumped his parent's removal, the Ninth Circuit concluded that "[t]o hold otherwise would create a barrier to removing an illegal alien in any case where that alien has married a United States citizen wife or fathered United States citizen children." *Morales-Izquierdo*, 600 F.3d at 1091. The Ninth Circuit emphasized that to "indulge [in that] theory is to hold that an illegal alien with United States citizen family members cannot be removed, regardless of the illegality of that alien's entry into the United States or conduct while within its borders." *Id.*; *see also Marin-Garcia*, 647 F.3d at 673 (Allowing the contrary result would permit an alien to "avoid the consequences of unlawful entry into the United States by having a child, [and] would create perverse incentives and undermine Congress's authority over immigration matters."); *Payne-Barahona*, 474 F.3d at 3 ("[D]eportations of parents are routine and do not of themselves dictate family separation. If there were such a right, it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service."). These recent cases demonstrate that courts are as resolute now as they were forty years ago in denying U.S. citizens any constitutional avenue to circumvent the immigration laws.

Arguments resorting to state law also fail. Some petitioners attempt to use the family law standard of "the best interest of the child" to establish that a parent should be permitted to remain in the United States. State law, however, cannot supercede Congress's policy choices regarding the admission and removal of aliens. *Fiallo*, 430 U.S. at 792; *see also Mathews*, 426 U.S. at 78-80 (distinguishing between the reach of constitutional protection of citizens and aliens). Again, courts are unsympathetic to the idea of a child returning to the parent's home country, therefore, the ability to maintain the family unit cuts against any argument regarding the "best interest of the child."

International covenants are also often cited as evidence of prevailing norms of customary international law requiring that the family should be protected. It is important to look at the treaty and determine the United States' stance. Indeed, "public international law is controlling only 'where there is no treaty and no controlling executive or legislative act or judicial decision . . . .'" *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). For example, although Judge Pregerson cites the Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, to support his belief that family unity is the overarching concern of this country's immigration policies, *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1013-14 (9th Cir. 2005) (Pregerson, dissenting), that treaty has not been ratified by the United States.

Other examples of treaties and conventions often cited include the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), and the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 A (XXI) (1966). Despite language that would suggest an international norm of family unity, these documents are unhelpful to an alien hoping to avoid removal. Indeed, the Supreme Court has rejected the proposition that Universal Declaration of Human Rights is an authoritative source of customary international law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004), while Congress deemed the International Covenant on Economic, Social, and Cultural Rights to be a non-self-executing instrument. 138 Cong. Rec. S4781-01 (1992); *see Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) ("a 'non-self-executing' agreement will not be given effect as law").

Although the preference category of immediate relative was created to encourage family unity, the purported right to family unity does not prevent the removal of a minor U.S. citizen child's parents. Indeed, due process and equal protection arguments challenging the removal of a minor U.S. citizen's parents and the requirement that such a child be at least 21 years old to file a visa petition on his parents behalf have been rejected by various circuit courts of appeal. The courts have also found the claim that state law and international treaties and conventions prevents an alien's removal equally unpersuasive. Thus, while there has been a resurgence of such arguments, they remain unavailing.

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FURTHER REVIEW PENDING: Update on Cases & Issues

212(c) - Comparability

On December 12, 2011, the Supreme Court in ***Judulang v. Holder*** (No. 10-694), reversed the BIA's comparable ground rule which had made an LPR ineligible for § 212(c) relief if the LPR had been convicted by guilty plea of an offense that renders him deportable under differently phrased statutory subsections, but who did not depart and reenter between his conviction and the commencement of proceedings.

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Aggravated Felony - Tax Fraud

On November 7, 2011, the Supreme Court heard oral argument in ***Kawashima v. Holder*** (No. 10-577). The question presented is whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under INA § 101(a)(43)(M)(i), and petitioners were therefore removable.

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MTR - Post-Departure Bar

Oral argument was heard on November 15, 2011, by the Tenth Circuit on *en banc rehearing* in ***Contreras-Bocanegra v. Holder***, 629 F.3d 1170 (10th Cir. 2010). A panel of the court had held that the BIA appropriately applied the post-departure bar codified at 8 C.F.R. § 1003.2(d) when it determined it lacked jurisdiction to consider a motion to reopen filed by an alien who had already been removed. In upholding the BIA's determination, the court relied on its precedential decisions in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), and *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009), both of which affirmed the validity of the post-departure bar.

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Cancellation - Imputation

The Supreme Court has scheduled oral argument for January 18, 2012 in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543). These two cases raise the question of whether the parent's time of legal residence be imputed to the child so that the child can satisfy the 7 years continuous residence requirement for cancellation.

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Retroactivity – "admission" definition

The Supreme Court has scheduled oral argument for January 18, 2012 in ***Vartelas v. Holder*** (S. Ct. 10-1211). The question presented is whether the 1996 amended definition of "admission," which eliminated the right of a lawful permanent resident to make "innocent, casual, and brief" trips abroad without being treated as seeking admission upon his return, is impermissibly retroactive when applied to an alien who pled guilty prior to the effective date of the 1996 statute.

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Aggravated Felony — Missing Element

In ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the Ninth Circuit has withdrawn its decision and received supplemental briefing on the effect of its en banc decision in ***U.S. v. Aguila-Montes de Oca***, __F.3d__, 2011 WL 3506442 (Aug. 11, 2011). The government petition for rehearing en banc challenged the court's use of the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), and the *Aguila-Montes de Oca en banc* decision overruling *Navarro-Lopez*.

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Conviction – Conjunctive Plea

The week of December 12, 2011, an *en banc* panel of the Ninth Circuit will hear oral argument on rehearing in ***Young v. Holder***, originally published at 634 F.3d 1014 (2011). Where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. The government argues that the panel's opinion is contrary to the court's *en banc* decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

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Child Status Protection Act

On November 14, 2011, the government filed petitions for panel rehearing and *rehearing en banc* challenging the Fifth Circuit's decision in ***Khalid v. Holder***, 655 F.3d 363. The court ruled that the decision of the BIA in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), holding that derivative beneficiaries of third- and fourth-preference category visas were not entitled to conversion and retention under section 203(h)(3) of the INA, was not entitled to deference on review because it conflicted with the plain, unambiguous language of the statute.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds "Wealthy Individuals Returning To Guatemala After A Lengthy Stay In The United States" Do Not Comprise a Particular Social Group

In *Sicaju-Diaz v. Holder*, __ F.3d __, 2011 WL 5429564 (1st Cir. November 10, 2011) (*Boudin*, Selya, Lipez), the First Circuit held that "wealthy individuals returning to Guatemala after a lengthy stay in the United States" do not comprise a social group for asylum purposes.

The petitioner was apprehended near Brownsville, Texas in June 1991, and was placed in deportation proceedings where he filed for asylum. However, he failed to appear for a hearing scheduled for October 1991, and the IJ issued a deportation order in absentia. Some ten years later, in December 2001, petitioner filed an application for suspension of deportation. He then moved to reopen his deportation proceedings, saying that he had never received notice of the 1991 hearing or the resulting decision. An IJ agreed to reopen and a series of hearings ensued between 2004 and 2008. In June 2006, the IJ ruled that petitioner was ineligible for suspension of deportation. The IJ also ruled that petitioner was ineligible under NACARA because he had been apprehended at the time of entry.

In November 2008, the IJ resolved the asylum claim ruling that petitioner was "a member of a particular social group composed of family returning to Guatemala after lengthy residence in the United States perceived as wealthy and, therefore, particularly susceptible to extortionate and/or kidnapping demands." In November 2010, the BIA overturned the IJ's decision on asylum, ruling that "family returning to Guatemala after a lengthy residence in the United States" was not a social group protected under the asylum statute. The BIA also rejected an alternative ground for asylum urged by petitioner based on a threat against him 20 years before and sustained the IJ's finding that petitioner had been apprehended at the time of entry and thus, did not qualify under NACARA for suspension relief.

In affirming the BIA's rejection of the claimed particular social group, the court explained that there was nothing in the record that indicated "that in Guatemala individuals perceived to be wealthy are persecuted because they belong to a social class or group. In a poorly policed country, rich and poor are all prey to criminals who care about nothing more than taking it for themselves. Indeed, wealth likely provides some extra protection against crime: the poor and near poor in such countries have less but it can more easily be taken from them."

There was nothing in the record that indicated "that in Guatemala individuals perceived to be wealthy are persecuted because they belong to a social class or group."

The court further held that a two-decade old threat by a single individual fails to satisfy the objective fear requirement for asylum. Further, the court held it that under NACARA it lacked jurisdiction to review the determination that an alien was apprehended "at the time of entry" for purposes of suspension of deportation relief.

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First Circuit Holds It Lacks Jurisdiction To Review Denial Of Reopening Based On *Padilla* Argument

In *Matos-Santana v. Holder*, 660 F.3d 91 (1st Cir. 2011) (Howard, Ripple, *Selya*), the First Circuit held that the BIA did not abuse its discretion by denying petitioner's untimely motion to reopen.

The petitioner, a citizen of the Dominican Republic, entered the U.S. in 1982 and thereafter became a lawful permanent resident. About a decade after his arrival, local authorities charged him with robbery in the second degree and, after pleading guilty to the charge, he served eleven months in prison. A few years later, local authorities charged the petitioner with another crime — this time, auto stripping in the third degree. He once again entered a guilty plea, and the court sentenced him to a three-year probationary term. In 2003, following petitioner's travel abroad, he was denied readmission on account of, among other things, his conviction for robbery, a CIMT.

Petitioner was paroled and on August 20, 2003, an IJ ruled that the petitioner was not entitled to either a section § 212(c) waiver or cancellation of removal. In so ruling, the IJ concluded that auto stripping was a CIMT and that, therefore, the petitioner's earlier conviction for a CIMT — second-degree robbery — could not be overlooked. The BIA affirmed that decision and on February 11, 2004, the petitioner was returned to his homeland.

On June 24, 2010, the petitioner filed a motion before the BIA to reopen his removal proceedings so that he could attack his auto-stripping conviction under *Padilla v. Kentuck,* claiming that his defense counsel in the auto-stripping prosecution had erroneously advised him that a guilty plea would carry no adverse deportation consequences. The BIA denied the motion for lack jurisdiction under 8 C.F.R. § 1003.2(d) and, alternatively because it had been filed more than ninety days after the final order of removal. Relatedly, the BIA observed that, in the first instance, the criminal

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court was the appropriate venue for the petitioner's *Padilla* claim.

The court held that it lacked jurisdiction to review the BIA's denial of its *sua sponte* authority to reopen proceedings because petitioner collaterally attacked his conviction based on *Padilla v. Kentucky*, alleging ineffective assistance, but made no effort to overturn his conviction in the New York courts.

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■ **First Circuit Holds That It Lacks Jurisdiction To Review Discretionary Denial Of NACARA Cancellation Of Removal**

In *Gonzalez-Ruano v. Holder*, __ F.3d __, 2011 WL 5120696 (1st Cir. October 31, 2011) (Lipez, Rippel, *Howard)*, the First Circuit held that 8 U.S.C. § 1252(a)(2)(B)(i) divested the court of jurisdiction to review the BIA's discretionary decision to deny the alien's request for special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act.

The IJ denied cancellation because petitioner had been convicted for malicious destruction of property, a CIMT, and for failure to establish the good moral character and hardship. Alternatively, the IJ found that petitioner did not warrant a favorable exercise of discretion, citing his "long and troubling criminal history, marked by his repeated and continuous mistreatment of his spouses."

In declining to assert jurisdiction, the court explained that petitioner had failed to demonstrate that the BIA's discretionary decision was tainted by constitutional or legal error.

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SECOND CIRCUIT

■ **Second Circuit Denies Petition For Rehearing And Rehearing En Banc In CSPA Case**

In *Li v. Novak*, No. 10-2560 (2d Cir. Oct. 26, 2011) the Second Circuit denied rehearing where, in its earlier decision in *Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011), the panel had determined that although 8 U.S.C. § 1153(h)(3) is not ambiguous, the BIA's decision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), otherwise correctly articulates the meaning of this provision of the Child Status Protection Act.

Date that petitioner joined a criminal conspiracy rather than the date of her arrest stops residency time for purpose of cancellation.

In *Matter of Wang*, the BIA determined that Section 1153(h)(3) does not allow an aged-out derivative beneficiary of a family third-preference petition to apply the priority date from that third-preference petition to a family second-preference petition filed by his or her parent after the parent gains lawful permanent resident status under the third-preference petition. The BIA limited the "automatic conversion" and "priority date retention" benefits of Section 1153(h)(3) to primary and derivative beneficiaries of petitions filed under Section 1153(a)(2)(A) (classifying spouses and children of lawful permanent residents).

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■ **Stop-Time Rule For Continuous Residency Requirement Is Triggered By Alien's Criminal Conduct**

In *Santos-Reyes v. Att'y Gen. of the U.S.*, 660 F.3d 196 (3d Cir. 2011) (Sloviter, Smith, *Nygaard*), the Third Circuit held that the BIA did not err in holding that the plain language of the "stop-time" rule in 8 U.S.C. § 1229b(d)(1) specifies that the date the petitioner ceased accruing time toward satisfying the continuous-residency requirement is the date that petitioner joined a criminal conspiracy rather than the date of her arrest.

The petitioner, a citizen of the Dominican Republic and an LPR, was charged with inadmissibility as an alien convicted of a CIMT, arising from her June 9, 1999 conviction for receiving stolen property, criminal conspiracy, and criminal solicitation. She sought cancellation of removal based upon seven years of continuous residence. The IJ denied relief based on the stop-time rule. The BIA upheld the IJ decision ruling that a conviction record showing August 18, 1998 as the incident date established that petitioner's criminal conduct occurred before seven years of continuous residency had elapsed.

The court ruled that it lacked jurisdiction to review the BIA's finding regarding the date that petitioner committed the crime because its jurisdiction was restricted by 8 U.S.C. § 1252(a)(2)(C).

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THIRD CIRCUIT

■ **Adverse Credibility Determination was not Supported by Substantial Evidence and IJ Violated Alien's Right to Due Process by Taking Over Cross-Examination**

In *Abulashvili v. Holder*, __ F.3d __, 2011 WL 5529827 (3d Cir. November 15, 2011) (*McKee*, Ambro, Chagares), the Third Circuit held, in a pre-REAL ID Act case, that the IJ's adverse credibility determination was not supported by substantial evidence, concluding that the IJ ignored or misread crucial parts of the alien's testi-

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mony and application in finding omissions and inconsistencies that did not exist.

The petitioners, husband and wife, are citizens of Georgia. They entered the United States on visitor visas in 1999 and remained longer than authorized. On December 20, 2004, the principal petitioner filed an affirmative application for asylum, withholding of removal, and protection under the CAT and included his wife in the application as a derivative beneficiary. The asylum application was not granted by the Asylum Officer and they were placed in removal proceedings. Before the IJ, petitioner claimed he would be persecuted if he returned to Georgia because he was a member of the LPG opposition party and knew about government corruption as evidenced by the September 1998 events. Specifically, petitioner claimed that he witnessed a government official's potential collusion with a Chechen insurgent and the killing of an innocent bystander. He claimed that the Georgian government used its powers of persuasion — including threats of death, beatings, and torture — to discourage him from revealing information about these incidents to fellow LPG party members, who could use that information to their political advantage.

"The linguistic and cultural difficulties endemic in immigration hearings may frequently result in statements that appear to be inconsistent, but in reality arise from a lack of proficiency in English or cultural differences rather than attempts to deceive."

The IJ denied asylum because the application was untimely and, alternatively, because his claims were not credible. The IJ also explained her decision to cross-examine the petitioner, noting that the government's attorney had not been prepared and that petitioner had been given an opportunity to explain why his testimony at the hearing was different from his written application. On appeal to the BIA, petitioner challenged the adverse credibility finding and contended that the IJ's role in questioning him violated his due process right to a neutral arbiter. The BIA dismissed the appeal noting that it was troubled that petitioner's asylum application did not claim the root of his problems in Georgia could have been due to his father's political activism, and rejected petitioner's claim that his due process rights had been violated. The BIA explained that the IJ was simply" ferreting out . . . the facts" and "acquiring clarity in [petitioner's] testimony."

In reversing the adverse credibility finding, the Third Circuit explained that "some the of the purported contradictions that the IJ relied upon are not contradictions at all, but resulted from misreading [petitioner's] application, reading only part of it, or ignoring it." The court further explained that "asylum applicants are not required to list every incident of persecution on their I–589 statements," and that "the linguistic and cultural difficulties endemic in immigration hearings may frequently result in statements that appear to be inconsistent, but in reality arise from a lack of proficiency in English or cultural differences rather than attempts to deceive."

The court also held that the IJ violated the alien's right to due process by taking over cross-examination for the government, concluding that the IJ abandoned the role of a neutral arbiter because she "stepp[ed] into" and "supplant[ed]" the role of the government attorney. "The Due Process Clause cannot tolerate a situation where a supposedly neutral fact finder interjects herself into the proceedings to the extent of assuming the role of opposing counsel and taking over cross-examination for the government. In doing so here, this IJ asked [petitioner] a total of 87 questions," said the court. "[E]ven if she could somehow remain neutral in fact, the appearance was clearly to the contrary. It is not the IJ's function to protect the government by becoming its counsel when its own counsel is not prepared," added the court.

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■ Asylum Claim remanded to the BIA After a Change of Government Control in Guinea

In ***Nbaye v. Att'y Gen. of the U.S.***, __ F.3d __, 2011 WL 5829786 (3d Cir. November 21, 2011) (McKee, Fuentes, *Greenberg*), the Third Circuit remanded proceedings to the BIA to consider, in the first instance, the effect of a change in power in Guinea on the petitioner's asylum claim based on political persecution. Following the BIA's denial of petitioner's motion to reopen based on changed country conditions, the political party with which petitioner claimed to be associated, the Rally of Guinean People Party ("RPG"), assumed control of the government. The court found that although the evidence of the change in the government in Guinea was outside of the administrative record, it had discretion to take judicial notice of the political situation.

In remanding the case to the BIA to consider the changed country conditions, the court explained that "it would be myopic to ignore the circumstance that the RPG has come to power in Guinea inasmuch as [petitioner] attributes his persecution to membership in that party."

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FOURTH CIRCUIT

■ **Fourth Circuit Holds That Alien Parents Who Sent Their Children Thousands Of Dollars In Mexico Knowingly Assisted The Children To Enter The United States Illegally**

In *Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011) (*Wilkinson*, Wynn, Floyd), the Fourth Circuit held that substantial evidence supported the BIA' finding that Guatemalan parents knowingly facilitated the illegal entry of their children to the United States by sending them large sums of money in Mexico, and, accordingly, lacked the requisite good moral character to be eligible for cancellation of removal.

"We have no cause to insert arbitrary limits into a statute, especially one that Congress 'intended . . . to apply to a broad range of conduct."

The principal petitioner entered the United States illegally from Guatemala in 1989, and his wife and their four children followed. Each child's arrival in the United States involved a similar sequence of events — petitioners sent several thousand dollars to the child at a hotel in Mexico, who arrived illegally in the United States promptly thereafter. The IJ and the BIA both determined that petitioners' monetary assistance amounted to "alien smuggling" pursuant to section 212(a)(6)(E) of the INA, and that they thus lacked the "good moral character" necessary for cancellation of removal.

In affirming the BIA's application of the "alien smuggling" provision, the court explained that the "statute's language does not set forth a set of conditions to knowing assistance, such as presence at the border, compensation for assistance, or illicit activity. We have no cause to insert arbitrary limits into a statute, especially one that Congress 'intended . . . to apply to a broad range of conduct."

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■ **Fourth Circuit Reverses Adverse Credibility Finding, Holding That Immigration Judge Failed To Consider Independent Corroborative Evidence**

In *Tassi v. Holder*, __ F.3d __, 2011 WL 5318077 (4th Cir. November 7, 2011) (Neimeyer, *King*, Hamilton), the Fourth Circuit vacated the BIA's decision affirming the IJ's adverse credibility finding. The court held that the IJ indulged in speculation, failed to properly consider the corroborative evidence, improperly applied the Federal Rules of Evidence and rules of authentication, and incorrectly implied corroborative evidence could also require corroboration. The court remanded the case to the BIA to consider the corroborative evidence.

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FIFTH CIRCUIT

■ **Alien's Georgia Conviction For Possession Of Marijuana With Intent To Distribute Is A Federal Felony Under 21 U.S.C. § 841**

In *Moncrieffe v. Holder*, __ F.3d __, 2011 WL 5343694 (5th Cir. November 8, 2011) (*Jones*, Haynes, Crone), the Fifth Circuit joined the First and Sixth Circuits in holding that possession with intent to distribute marijuana is a felony under the Controlled Substances Act, despite 21 U.S.C. § 841(b)(4), which treats the distribution of a small amount of marijuana for no remuneration as a misdemeanor.

The petitioner, a citizen of Jamaica, entered the United States as a permanent resident in 1984 at the age of three. In 2008 he pled guilty to "Possession of Marijuana With Intent to Distribute" under Georgia law and was sentenced to five years probation. Because of his guilty plea, DHS charged petitioner with being removable under both INA § 237(a)(2)(B) relating to controlled substances offenses, and under § 2377(a)(2) "as an aggravated felon" because the conviction was for a "drug trafficking crime." The IJ ruled that the state conviction was analogous to a federal felony. The BIA affirmed holding that a state conviction for possessing an indeterminate amount of marijuana with intent to distribute is considered an aggravated felony under the CSA.

The Fifth Circuit held that the default sentencing range for a marijuana distribution offense is the CSA's felony provision, § 841(b)(1)(D), rather than the misdemeanor provision. "Even if that section of the Georgia code could cover conduct that would be considered a misdemeanor under § 841(b)(4), [petitioner] bore the burden to prove that he was convicted of only misdemeanor conduct," said the court.

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SIXTH CIRCUIT

■ **Sixth Circuit Stays Its Own Proceedings To Allow Alien To Present Translation Error To The BIA In The First Instance**

In *Sea v. Holder*, __ F.3d __, 2011 WL 5386297 (6th Cir. November 8, 2011) (*Martin*, Griffin, Anderson), the Sixth Circuit held that be-

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cause a translation error appeared to have contributed substantially and directly to the agency's adverse credibility determination, and because the error was not discovered until after the petitioner filed the petition for review, the appeal would be stayed so that the translation error could be presented to the BIA in the first instance in a motion to reopen.

The petitioner, a citizen of Cote d'Ivoire, was denied asylum based on an adverse credibility finding which principally rested on the translation of a medical record. Petitioner's new counsel discovered that the medical record had been translated incorrectly and sought to stay judicial proceedings pending the BIA's ruling on a motion to reopen.

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■ **Sixth Circuit Affirms Ruling That USCIS Did Not Abuse Its Discretion By Denying An I-140 Petition Based On Restaurant's Failure To Demonstrate That It Could Pay The Proffered Wage**

In *Taco Especial v. Napolitano*, No. 10-1517 (6th Cir.) (unpublished) (Daughtrey, Clay, Stranch), Taco Especial, a Mexican restaurant, filed an I-140 Petition on behalf of Prospero Galeana, seeking to employ him as a chef. USCIS determined that the restaurant had not provided sufficient evidence that it could pay the proffered wage and, accordingly, denied the petition. Taco Especial and Galeana filed a lawsuit in the Eastern District of Michigan, arguing that USCIS had failed to consider the restaurant's gross income in its ability to pay decision. The district court granted USCIS's motion for summary judgment, finding that USCIS's decision was not arbitrary or capricious. On appeal, the Sixth Circuit affirmed in an unpublished *per curiam* order, holding that USCIS's decision was not arbitrary and capricious because USCIS had not considered only the restaurant's income tax returns – as the restaurant alleged – but had instead considered several additional factors in determining that restaurant did not have the ability to pay the proffered wage.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds Conviction For Conspiracy To Commit Fraud Rendered Alien Removable**

In *Gourche v. Holder*, __ F.3d __, 2011 WL 5443657 (7th Cir. November 9, 2011) (Easterbrook, Tinder, *Hamilton*), the Seventh Circuit upheld the agency's decision ordering the alien removed under INA § 237(a)(3)(B)(iii) based on his conviction for conspiracy to violate 18 U.S.C. § 1546 (fraud in immigration documents). The court rejected the alien's argument that the parenthetical following 18 U.S.C. § 1546 in § 237(a)(3)(B)(iii) limited the statute's coverage to fraud involving immigration entry documents. The court also concluded the INA § 237 (a)(1)(H) waiver applied only to § 237(a)(1) removal charges and could not be used to waive the charge under § 237(a)(3).

"Why lawyers in immigration cases continue to be fascinated by the due process clause bewilders us — for it is appropriate to consider the Constitution only if the statute and regulations are deficient."

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■ **Seventh Circuit Holds It Lacks Jurisdiction Over The Agency's Discretionary Good Moral Character Determination**

In *Portillo-Rendon v. Holder*, __F.3d __, 2011 WL 5319855 (7th Cir. August 7, 2011) (*Easterbrook*, Hamilton, Myerscough), the Seventh Circuit held it lacked jurisdiction to review the agency's discretionary determination that petitioner lacked good moral character for cancellation of removal.

Rejecting the alien's vague due process challenges, the court cautioned that aliens who have procedural objections to the handling of their cases should rely on the statute and the regulations rather than intoning "due process." "Why lawyers in immigration cases continue to be fascinated by the due process clause bewilders us — for it is appropriate to consider the Constitution only if the statute and regulations are deficient. Congress has given aliens significant procedural entitlements. *See* 8 U.S.C. § 1229a. Regulations have added more," said the court.

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EIGHTH CIRCUIT

■ **Eight Circuit Holds That Exclusionary Rule Does Not Require Suppression Of Evidence In Removal Proceedings After Unlawful Arrest By Local Police**

In *Garcia-Torres v. Holder*, __ F.3d __, 2011 WL 5105808 (8th Cir. October 28, 2011) (Loken, Colloton, *Nelson*), the Eighth Circuit held that the exclusionary rule did not require suppression in a removal proceeding of an alien's statements made to USCIS agents after he was unlawfully arrested by local police and then transferred to ICE custody.

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The case arose when, on August 25, 2007, at about 4:00 a.m., St. Charles, Missouri police officers, acting on a tip that alcohol was being consumed in violation of a local ordinance prohibiting drinking after 1:30 a.m., entered, without a warrant, a restaurant named "Mexico on Main." Inside they arrested several individuals, including petitioner, a co-owner of the restaurant, and another individual. But the local prosecutor later found no probable cause for the arrest and charges were never filed against them. Nevertheless, in the interim, they were transferred to the custody of ICE where an officer interviewed petitioner and the other individual and determined that they appeared to be in the U.S. illegally. ICE issued immigration detainers and Notices to Appear in removal proceedings.

The court held that "even assuming that the search and seizure here constituted a violation of the Fourth Amendment, any such violation is not 'egregious.'" The court noted that it was declining "to adopt the Ninth Circuit's standard that petitioner advocates, that is, that an 'egregious violation' is nothing more than a 'bad faith' violation, and that such bad faith exists simply where 'a reasonable officer should have known that the conduct at issue violated the Constitution.'" Such a standard, said the court, "would likely eviscerate *Lopez–Mendoza* insofar as the Fourth Amendment prohibits only 'unreasonable' searches and seizures and the Ninth Circuit's standard applies whenever 'a reasonable officer should have known' his conduct was illegal."

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NINTH CIRCUIT

■ **Filing Of An Application For Special Immigrant Juvenile Status ("SIJS") Constitutes An "Admission In Any Status" For Purposes Of Cancellation Of Removal**

In ***Garcia v. Holder***, __ F.3d __, 2011 WL 5176790 (Schroeder, *Gould*, Seeborg) (9th Cir. November 2, 2011), the Ninth Circuit held that an applicant for SIJS is "admitted in any status" on the date he files his I-360 application, and thus begins to accrue continuous physical presence for purposes of satisfying the seven-year requirement for cancellation of removal from that date. In reaching its decision, the court relied upon its earlier decision in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), to find that, despite the SIJS statute's explicit statement that an SIJS beneficiary shall be deemed "paroled," the benefits that SIJS recipients receive are akin to those received by Family Unity Program recipients, whom the *Cuevas-Gaspar* court declared were "admitted in any status" for purposes of determining continuous physical presence for cancellation of removal.

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■ **Ninth Circuit Holds Burglary is a Crime of Violence and A Particularly Serious Crime**

In ***Lopez-Cardona v. Holder***, __ F.3d __, 2011 WL 5607634 (9th Cir. November 18, 2011) (Graber, Callahan, *Bea*), the Ninth Circuit held that an alien's burglary conviction, in violation of California Penal Code § 459, constitutes a crime of violence as defined in 18 U.S.C. § 16 (b).

The petitioner, a citizen of El Salvador conceded that he had been convicted of an aggravated felony because of his conviction for burglary and that he had been convicted of an offense involving a controlled substance. Petitioner contended that he was not barred from eligibility for withholding, however, because his crime was not a "particularly serious crime." 8 C.F.R. § 1208 .16(d)(2). The IJ and the BIA determined that the burglary conviction constituted a particularly serious crime because it is a crime of violence as defined in 18 U.S.C. § 16(b).

The Ninth Circuit explained that a California first-degree burglary under California Penal Code § 459 is categorically a "crime of violence" under 18 U.S.C. § 16(b) because the crime inherently involves a substantial risk of physical force. Accordingly, the court found petitioner ineligible for withholding of removal under either the INA § 241(b)(3)(B), or CAT, 8 C.F.R. § 1208.16(d)(2).

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■ **Ninth Circuit Holds It Lacks Jurisdiction To Review Discretionary Decision To Deny Registry Under INA § 249**

In ***Gutierrez v. Holder***, __ F.3d __, 2011 WL 5304084 (Thomas, Ikuta, *Restani*) (9th Cir. November 7, 2011), the Ninth Circuit held that it lacked jurisdiction to review challenges to discretionary determinations about registry.

The petitioner, a seventy year-old native and citizen of Mexico, entered the United States sometime between 1969 and 1971. He was not married and had no children. Petitioner's mother and brother were United States citizens, and his sister and other brother were LPRs. In October 2001, petitioner was charged with being removable as an alien who was present in the United States without being admitted or paroled. Petitioner then requested registry, cancellation of removal, and voluntary departure. At the hearing, petitioner admitted that he had been arrested and pled guilty approxi-

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mately seven or eight times between 1978 and 2001 for driving under the influence offenses and arrested for driving without a license at least once. He served eight months in prison as a result of these arrests. The IJ denied his applications for cancellation of removal, voluntary departure, and registry because the IJ found that petitioner lacked good moral character and had not demonstrated "exceptional and extremely unusual hardship." With regard to the application for relief for registry, the IJ determined that "there is no requisite time period for good moral character for registry" and that because of petitioner's "numerous criminal convictions for driving under the influence" and the fact that "the respondent is currently still driving even on a suspended driver's license . . . this Court does not believe that in its discretion it [is] appropriate to grant the respondent registry." The BIA dismissed the appeal.

The immigration judge was permitted to draw an adverse inference when petitioner invoked the privilege against self-incrimination when he refused to answer questions about driving on a suspended license.

While deciding that it lacked jurisdiction to review the discretionary denial of registry, the Ninth Circuit, determined that it retained jurisdiction to review the BIA's general finding that petitioner lacked good moral character for registry because it is a statutory criteria not committed to the Attorney General's discretion in INA § 249. In this regard, the court also held the immigration judge was permitted to draw an adverse inference when petitioner invoked the privilege against self-incrimination when he refused to answer questions about driving on a suspended license.

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■ **Ninth Circuit Determines That Its Prior Holding in *Duran Gonzales* — That Class Members Are Not Eligible For Permission To Reapply For Admission After Their Illegal Post-Removal Reentries — Applies Retroactively**

In *Duran Gonzales v. DHS*, __ F.3d __, 2011 WL 5041784 (Canby, Silverman, *Callahan*) (9th Cir. October 25, 2011) the Ninth Circuit determined that on remand, the district court properly denied amendment of the complaint and class claims, finding that the Ninth Circuit's decision in *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), was properly retroactive as applied to the class representatives and the class they represented. On November 13, 2006, the Western District of Washington certified a class of individuals who had been found inadmissible because they had re-entered the United States without permission after they had been removed, and whose applications for permission to reapply for admission would be or had been denied because they had not resided outside the United States for at least ten years before those applications. The district court enjoined any denials of those applications, and the government filed an interlocutory appeal of the injunction.

In 2009, the Ninth Circuit held class representatives *per se* ineligible to make such applications, vacated the injunction, and remanded to the district court for further proceedings. This time, the Ninth Circuit upheld the district court's decision denying amendment, and held, as its prior decision was applied to the plaintiff class, that prospective-only application was precluded.

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■ **Eleventh Circuit Holds That Five-Year Limitation On Rescission of Adjustments Of Status Does Not Bar Removal Proceedings**

In *Alhuay v. U.S. Att'y Gen.*, __ F.3d __, 2011 WL 5061386 (11th Cir. October 26, 2011) (Hull, Anderson, Vinson), the Eleventh Circuit, in a *per curiam* decision, held, in agreement with the Fourth, Sixth, Eighth and Ninth Circuits, that the plain language of 8 U.S.C. § 1256(a) limiting the authority of the Attorney General and Secretary of Homeland Security to rescind an erroneous adjustment of status to the five-year period following the adjustment does not apply to bar the commencement of removal proceedings. The court also upheld the IJ's finding that the alien is removable as an alien who procured an immigration benefit through fraud or willful misrepresentation, rejected the alien's due process claims based on the lack of an interpreter and alleged bias on the part of the IJ, and ruled that it lacked jurisdiction to review the denial of the alien's applications for discretionary relief.

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DISTRICT COURTS

■ **California District Court Awards Attorneys' Fees for Motion to Enforce Settlement Agreement**

In *Catholic Social Svc. v. DHS*, (E.D. Cal. November 15, 2011) (*Karlton*), the United States District Court for the Eastern District of California awarded plaintiffs' class counsel $143,625.00 in attorneys' fees, including enhanced hourly rates, and $2,033.27 in costs and expenses, for their work on a motion to enforce

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the settlement agreement in this long-running class action under the Immigration Reform and Control Act of 1986. The court had earlier decided that the USCIS violated the settlement agreement when it applied the new "abandonment regulation" to class members' legalization applications, and when it denied class membership applications filed from abroad.

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■ **Southern District Of Florida Finds USCIS's Application Of Cuban Adjustment Act Rollback Provision To Non-Cuban Spouses Is Entitled To *Skidmore* Deference**

In ***Hernandez v. Swacina,*** No. 11-cv-21262 (*Huck, J.*) (S.D. Fla. November 4, 2011), the District Court for the Southern District of Florida granted the government's motion for summary judgment, concluding that USCIS assignment of plaintiff's record date for permanent residence was not arbitrary, capricious, or contrary to law. Plaintiff asserted that USCIS's policy of not applying the Cuban Adjustment Act's rollback provision to non-Cuban spouses in the same manner as it does to Cuban-native spouses violates the plain language of the Act. The court held that USCIS's policy is based on a permissible construction of the Cuban Adjustment Act in light of its statutory language and legislative intent, and thus USCIS's interpretation is entitled to *Skidmore* deference as a permissible interpretative rule.

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■ **USCIS Processing of Incarcerated Potential Renunciant's Renunciation Request Complies with Prior Court Order and APA.**

In ***Kaufman v. Holder***, No. 05-01631 (D.D.C. November 18, 2011)., (Rothstein), the United States District Court for the District of Columbia denied plaintiff's motion for contempt and enforcement of judgment, and held United States Citizenship and Immigration Services' (USCIS) decision requiring plaintiff to appear at USCIS for an in-person interview complies with the court's previous order requiring further processing of plaintiff's application for renunciation.

The court concluded that under the APA and the renunciation statute, the court is authorized to compel the agency to consider plaintiff's application, but not to direct the agency's administration of the statute. Accordingly, the court concluded that USCIS's decision to require an in-person interview at a USCIS field office is within the agency's discretion and not subject to the court's review.

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■ **District Of New Jersey Dismisses Habeas Petition For Alien With Pending Petition For Review In The Second Circuit**

In ***Persaud v. Holder***, No. 10-cv-5992 (D.N.J. October 26, 2011) (Hochberg, J.), the District Court for the District of New Jersey dismissed a habeas petition filed by an alien with a petition for review pending in the Court of Appeals for the Second Circuit. The District Court found that the alien was in post-order removal under 8 U.S.C. § 1231(a), but the petition was premature because the alien had filed the petition within the presumptively-reasonable 180 days of mandatory detention allowed under *Zadvydas.* The court also concluded that the petition was premature because the alien's filing of the petition for review tolled the removal period under 8 U.S.C. § 1131(a)(1)(B)(ii) and *Zadvydas*. Nonetheless, the court also found that the alien had presented no information that there is no significant likelihood of his removal in the reasonably foreseeable future, so the petition was without merit.

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■ **District of Nevada Refuses To Dismiss Suit For Order Requiring USCIS To Accept 2003 Life Act And Family Unity Applications**

In ***Torres-Chavez v. DHS***, No. 08-cv-00873 (D. Nev. November 3, 2011)(George, J.), the District Court for the District of Nevada denied the government's motion to dismiss a suit alleging that U.S. Citizenship and Immigration Services ("USCIS") improperly rejected an application for adjustment of status under the Legal Immigration Family Equity Act ("Life Act"), as well as applications for Family Unity Life Act benefits in 2003. According to the complaint, USCIS refused to accept the filings in 2003, even though the family filed them timely at the time. The court rejected the government's argument that neither the Mandamus Act nor the Administrative Procedure Act afforded subject matter jurisdiction for review of a request to accept a late-filed application. Instead, the court held that it had jurisdiction to review USCIS's decision not to accept the applications when the aliens filed them.

The court further rejected the government's argument that the adult children seeking Family Unity relief had failed to state a valid claim where they were statutorily ineligible for such relief. In denying that aspect of the motion to dismiss, the court held that the adult children only request adjudication of their applications for Family Unity – and not an order requiring USCIS to grant the applications – in their complaint.

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This Month's Topical Parentheticals

ADJUSTMENT

■ *Alhuay v. United States Att'y Gen.*, __ F.3d __, 2011 WL 5061386 (11th Cir. Oct. 26, 2011) (agreeing with four other circuits that the five-year statute of limitations period in 8 U.S.C. § 1256(a) limits, if anything, DHS's power to rescind an erroneous adjustment of status more than five years after adjustment is granted, and does not apply to limit DHS's ability to initiate removal proceedings)

■ *Lezama-Garcia v. Holder*, __ F.3d __, 2011 WL __ (9th Cir. Nov. 30, 2011) (holding that the IJ erred in determining that, pursuant to 8 C.F.R. § 245.13(k)(1), petitioner abandoned his pending NACARA application for adjustment of status at the moment he drove from the United States into Mexico - even if his unplanned departure was not desired and he immediately turned around and attempted to return; reasoning that deeming petitioner's NACARA application abandoned was contrary to the regulation, and ordering removal conflicted with NACARA itself) (Judge Rawlinson dissented)

ADMISSION

■ *Garcia v. Holder*, __ F.3d __, 2011 WL 5176790 (9th Cir. Nov. 2, 2011) (disagreeing with BIA and holding that petitioner's parole as a Special Immigrant Juvenile (SIJ) under 8 U.S.C. § 1255(h) qualifies as an admission "in any status" for purposes of the continuous physical presence requirement for LPR cancellation of removal; reasoning that SIJs' special eligibility requirements and benefits "show a congressional intent to assist a limited group of abused children to remain safely in the country with a means to apply for LPR status")

ASYLUM

■ *Stanciu v. Holder*, __ F.3d __, 2011 WL 5041748 (1st Cir. Oct. 25, 2011) (affirming IJ's REAL ID Act adverse credibility finding as to Romanian Gypsy's plausible claim of past and future police persecution, given aggregate effect of inconsistencies between petitioner's testimony and wife's testimony and documents about dates, duration, and severity of police beatings and number of departures from the country; failure to apply for asylum in several prior visits to US; and petitioner's post-hearing affidavit that did not squarely explain the inconsistencies and claimed lack of memory or scam by American attorney)

■ *Bueso-Avila v. Holder*, __ F.3d __, 2011 WL 5927504 (7th Cir. Nov. 29, 2011) (in post-REAL ID Act case, holding that substantial evidence supports BIA's conclusion that Honduran asylum applicant failed to establish that his evangelical religion or church youth group membership were motives for harm suffered by MS-13 gang, because there was no direct, circumstantial, or country-condition evidence compelling this conclusion, and evidence showed he was harmed solely because he was a youth who refused to join the street gang, regardless of his religious activities; further holding that BIA correctly rejected claims of IAC because applicant failed to show prejudice)

■ *Garcia v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 5903780 (3d Cir. Nov. 28, 2011) (holding that substantial evidence does not support Board's conclusion that applicant failed to show Guatemalan government is unwilling to protect her against future persecution by member of Valle del Sol criminal gang because government relocated applicant to Mexico and sponsored her for refugee status which is "tantamount to an admission" government could not protect her; further holding in the first instance without prior decision by the Board, that testifying against gang member makes applicant a member of a multi-national PSG of "civilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Central America")

■ *Nbaye v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 5829786 (3d Cir. Oct. 20, 2011) (redesignated as a published decision) (holding that court has authority to take judicial notice of change of government in asylum applicant's home country of Guinea which occurred after BIA's decision and which indicates fear of political persecution is not well-founded; remanding case to the agency to consider the effect of the changed conditions on applicant's asylum, withholding, and CAT applications; rejecting government's argument that remand would be futile and that court should simply deny the review petition, and reasoning that on remand agency may conclude that changed conditions preclude relief and thus are outcome determinative)

■ *Tassi v. Holder*, __ F.3d __, 2011 WL 5318077 (4th Cir. Nov. 7, 2011) (reversing IJ's pre-REAL ID Act adverse credibility finding on grounds that IJ: i) misapplied rules of evidence by discounting portions of expert testimony that were based on hearsay; ii) incorrectly discounted corroborating documents for failure to show source of information reported therein; iii) erroneously rejected documents as unauthenticated without opportunity to authenticate by other means; and iv) under Fourth Circuit's 'totality of circumstances' approach, failed to consider whether independent documentary and expert evidence were sufficient to prove past or WFF future persecution even assuming alien was not credible)

■ *Abulashvili v. Att'y Gen. of United States*, __ F.3d __, 2011 WL

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This Month's Topical Parentheticals

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5529827 (3d Cir. Nov. 15, 2011) (reversing IJ's adverse credibility finding and remanding credibility issue for further decision-making because purported contradictions were not contradictions but incorrect reading of the asylum application; court was unsure if unexplained inconsistencies were fairly evaluated; and IJ exceeded her role as neutral arbiter with discretion to question the alien by completely taking over cross-examination from government counsel and asking a total of 87 questions)

■ *Valdiviezo-Galdamez v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 5345436 (3d Cir. Nov. 8, 2011) (joining Seventh Circuit in rejecting Board's "social visibility" and "particularity" requirements for a "particular social group" (PSG) by reading them to require literal visibility, and as having no principled basis; holding that criminal gang recruitment qualifies for asylum as persecution on account of membership in a PSG of "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs") (Judge Hardiman concurred)

■ *Sicaju-Diaz v. Holder*, __ F.3d __, 2011 WL 5429564 (1st Cir. Nov. 10, 2011) (observing that the Board's immutability, "visibility or recognition of the group," and "concrete" group requirements are entitled to deference, but then conflating separate PSG and "on account of" elements by holding that "family returning to Guatemala after lengthy residence in the United States who are perceived as wealthy and . . . susceptible to extortionate and/or kidnapping demands" is not a PSG because there is no evidence the persecution is on account of group or social class)

BIVENS

■ *Mirmehdi v. United States of America*, __ F.3d __, 2011 WL 5222884 (9th Cir. Nov. 3, 2011) (declining to extend *Bivens* to allow the petitioners to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them, and the unique foreign policy considerations implicated in the immigration context)

■ *Keil v. Triveline*, __ F.3d __, 2011 WL 5829082 (8th Cir. Nov. 21, 2011) (rejecting citizen's *Bivens* claim based on alleged unlawful arrest, and holding that mere possession of a US passport does not preclude prosecution for making a false claim of citizenship; finding probable cause to arrest petitioner where USCIS had concluded that he was not a citizen, petitioner stated that his parents were born outside US, and he had twice unsuccessfully applied for a certificate of citizenship)

CANCELLATION

■ *Santos-Reyes v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 5068089 (3d Cir. Oct. 26, 2011) (rejecting petitioner's contention that the BIA erred in applying the stop-time rule by failing to use her arrest date rather than the date that she began to participate in the criminal conspiracy to determine when her period of continuous residency ended for purposes of cancellation eligibility)

CRIMES

■ *Ramos v. Holder*, __ F.3d __, 2011 WL 5101510 (4th Cir. Oct. 27, 2011) (deferring to agency's "reasoned conclusion" that petitioners' successful efforts to financially facilitate their children's illegal entry into the United States satisfied both the assistance and knowledge requirements of the "alien smuggling" provision, and rendering petitioners ineligible for cancellation of removal)

■ *Ufele v. United States*, __ F. Supp.2d __, 2011 WL 5830608 (D.D.C. Nov. 18, 2011) (concluding that the Supreme Court's holding in *Padilla* does not apply retroactively because it represents a "new rule" that rests on a "novel analysis of the status of deportation as a consequence of a conviction")

■ *Matter of Islam*, 25 I.&N. Dec. 637 (BIA Nov. 18, 2011) (holding that in determining whether an alien's convictions for two or more CIMTs arose out of a "single scheme of criminal misconduct," the BIA will uniformly apply its interpretation of that phrase (as set forth in *Matter of Adetiba*) in all circuits in light of *Brand X* deference due to agencies; further finding that where the alien was convicted in two counties of forgery and possession of stolen property based on his use of multiple stolen credit or debit cards to obtain items of value from several retail outlets on five separate occasions over the course of a day, his crimes did not arise out of a "single scheme of criminal misconduct")

■ *Aguilar v. Att'y Gen. of United States* , __ F.3d __, 2011 WL __ (3d Cir. Nov. 29, 2011) (holding that sexual assault, as defined by 18 Pa. Cons. Stat. § 3124.1, which has a minimum *mens rea* of recklessness, constitutes a crime of violence under 18 U.S.C. § 16(b); reasoning that such crimes raise a substantial risk that the perpetrator will intentionally use force in the course of committing the crime)

■ *Matos-Santana v. Holder*, __ F.3d __, 2011 WL 5176795 (1st Cir. Nov. 2, 2011) (holding that court lacked jurisdiction over BIA's refusal to sua sponte reopen proceedings based on alleged *Padilla* violation, and noting, as an aside, that "[t]he BIA's refusal to allow the petitioner to mount a collateral challenge" to his conviction in removal proceedings "seems eminently reasonable")

■ *Lopez-Cardona v. Holder*, __ F.3d __, 2011 WL 5607634 (9th Cir. Nov. 18, 2011) (holding that a conviction

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for residential burglary under Cal. Pen. Code § 459 constitutes a crime of violence because it is a felony that, by its nature, involves a substantial risk that the burglar will use force against the victim in completing the crime)

■ *Moncrieffe v. Holder*, __ F.3d __, 2011 WL 5343694 (5th Cir. Nov. 8, 2011) (joining the First and Sixth Circuits in holding that a state conviction for possessing marijuana with intent to distribute is an aggravated felony, and that petitioner bears the burden of proving that he falls within mitigating sentencing provision for distribution of "small amount[s] of marijuana for no remuneration")

■ *Gourche v. Holder*, __ F.3d __, 2011 WL 5443657 (7th Cir. Nov. 9, 2011) (rejecting petitioner's argument that the ground of removability at 8 U.S.C. § 1227(a)(3)(B)(iii) covered only fraud involving immigration *entry* documents and not fraud involving other immigration documents; further holding that a waiver of inadmissibility at 8 U.S.C. § 1227 (a)(1)(H) does not waive removability based on § 1227(a)(3)(B)(iii))

■ *Matter of Guerrero*, 25 I.&N. Dec. 631 (BIA Nov. 9, 2011) (holding that because solicitation to commit a "crime of violence" is itself a crime of violence under 18 U.S.C. § 16(b), a felony conviction for solicitation to commit assault with a dangerous weapon in violation of Rhode Island law is a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F)).

DUE PROCESS – FAIR HEARING

■ *Calla-Collado v. Att'y Gen. of United States*, __ F.3d __, 2011 WL __ (3d Cir. Oct. 12, 2011) (redesignated as a published decision) (rejecting ineffective assistance claim where counsel's concession of allegations in NTA was not prejudicial; affirming BIA's determination that DHS did not violate petitioner's rights by transferring him from a detention facility in New Jersey to one in Louisiana because DHS has the discretion to do so, and the transfer did not affect petitioner's ability to present his case)

■ *Garcia-Torres v. Holder*, __ F.3d __, 2011 WL 5105808 (8th Cir. Oct. 28, 2011) (refusing to apply exclusionary rule to exclude evidence of alienage and removability where petitioner points to "nothing more than a warrantless entry of business premises and arrest, mere garden-variety error," rather than "egregious conduct")

FOURTH AMENDMENT

■ *United States v. Guijon-Ortiz*, __ F.3d __, 2011 WL 5438974 (4th Cir. Nov. 10, 2011) (concluding that, under the totality of the circumstances, and despite the police officer's brief phone call to ICE to verify the validity of the LPR card the defendant/passenger had provided after the officer stopped the vehicle, the officer diligently pursued the investigation into the driver's perceived impairment; thus, it was not necessary for the court to decide whether the officer had reasonable suspicion to believe illegal activity was afoot at the time he called ICE)

JURISDICTION

■ *Gonzalez-Ruano v. Holder*, __ F.3d __, 2011 WL 5120696 (1st Cir. Oct. 31, 2011) (finding court lacked jurisdiction to review BIA's discretionary denial of special rule cancellation of removal, and rejecting petitioner's contention that the exercise of discretion was "tainted by errors of law")

■ *Portillo-Rendon v. Holder*, __ F.3d __, 2011 WL 5319855 (7th Cir. Nov. 7, 2011) (holding that court lacked jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(i) to review BIA's discretionary finding that alien lacked good moral character for purposes of cancellation eligibility)

■ *Qureshi v. Holder*, __ F.3d __, 2011 WL 5903789 (5th Cir. Nov. 28, 2011) (holding that the district court lacked jurisdiction over USCIS's termination of asylum because such termination was not a final agency action under the APA but only an intermediate step prior to removal proceedings where an alien can renew the asylum application)

REGISTRY

■ *Gutierrez v. Holder*, __ F.3d __, 2011 WL 5304084 (9th Cir. Nov. 7, 2011) (holding that the IJ "looked back to a permissible period of time [5 years] in determining that [petitioner] lacked good moral character" for purposes of eligibility for the relief of registry; further holding that the IJ properly drew an adverse inference when petitioner invoked the privilege against self-incrimination and refused to answer questions about whether he was driving on a suspended license)

STAYS

■ *Sea v. Holder*, __ F.3d __, 2011 WL 5386297 (6th Cir. Nov. 8, 2011) (staying appeal to allow petitioner to file motion to reopen with the BIA where, after the PFR was filed, petitioner's counsel discovered that one of the principal documents relied on by the IJ in support of his adverse credibility finding was improperly translated)

We encourage contributions to the Immigration Litigation Bulletin from Assistant United States Attorneys

Contact: Francesco Isgro

Ana Landazabal Mann, New Board Member EOIR Swears in Three New Immigration Judges

On November 15, 2011, EOIR) announced that Attorney General Eric Holder has appointed *Ana Landazabal Mann* to the BIA.

Since 1996, Ms. Mann served as a senior legal advisor to the Chairman of the BIA, during which time she also served as a temporary Board member. From 1986 to 1996, Ms. Mann was an attorney advisor for the BIA. Ms. Mann joined the Department of Justice through the Attorney General's Honors Program when she clerked at the Drug Enforcement Administration from 1985 until 1986. She received a bachelor of arts degree from Rutgers University in 1982 and a juris doctorate from George Washington University in 1985. .

On November 21, 2011, the Executive Office for Immigration Review (EOIR) announced the investiture of three new immigration judges who will join the immigration judge corps in East Mesa, Calif., Lumpkin, Ga., and Dallas, Texas. Chief Immigration Judge Brian M. O'Leary presided over the investiture during a ceremony which was held at EOIR's headquarters. The new Immigration Judges appointed by Attorney General Eric Holder are: *Barry S. Chait*, *Robert W. Kimball* and *Robert B. C. McSeveney.* "We are pleased to welcome Immigration Judges Chait, Kimball and McSeveney to our immigration judge corps," said O'Leary. "EOIR is dedicated to maintaining and, when possible, bolstering the immigration judge corps. The investiture of these three immigration judges is an example of our continuing efforts."

Judge Chait received a bachelor of arts degree in 1984 from The George Washington University; a master of social work degree in 1996 from Rutgers, the State University of New Jersey, School of Social Work; and his JD in 1987 from the University of Miami School of Law. Judge Chait started his career with the federal government in 1993, as an Asylum Officer with the former INS. He later became an Assistant District Counsel and in 2005 was selected as the Chief of Training for OPLA, ICE. Prior to his appointment, Judge Chait was Chief Counsel in the St. Paul OPLA's office.

From 1990 to 1993, Judge Chait was an attorney for the U.S. Catholic Conference, Catholic Legal Immigration Network Inc. From 1989 to 1990, Judge Chait was a judicial law clerk for Judge Lawrence D. Smith, Superior Court of New Jersey. He has served as an adjunct professor at the Graduate School of Social Work at Rutgers, the State University of New Jersey. Judge Chait is a member of the New Jersey State Bar.

Judge Kimball received a bachelor of arts degree in 1983 and a master of arts degree in 1984, both from Johns Hopkins University. He received his JD in 1988 from Georgetown University Law Center. From August 2001 to November 2011, Judge Kimball served as an administrative judge for the EEOC in Dallas. From April 1994 to August 2001, he served as deputy district counsel for the former INS in New York. From 1988 to 1994, Judge Kimball was a trial attorney for INS in Dallas. From 1987 to 1988, he served as a law clerk, Office of the Chief Immigration Judge, EOIR, for the immigration courts in Phoenix and Falls Church, Va. During this time, he was the administrative editor of the Georgetown Immigration Law Journal. Judge Kimball is a member of the State Bar of Texas.

Judge McSeveney received a bachelor of arts degree in 1980 and his JD in 1984, both from Seattle University. From 1991 to November 2011, he served in various public capacities, including hearing examiner from 1991 to 2011; King County superior court portability judge from 2002 to 2011; and municipal court judge for the City of Kent from 1994 to 2011. Also during this time, from 1988 to 1994, Judge McSeveney was in private practice in Bellevue, Wash., during which time he served as a public defender from 1990 to 1992. From 1987 to 1988, he served as an assistant city attorney in Bellevue. From 1985 to 1987, Judge McSeveney was deputy prosecuting attorney in Bellevue. From 1973 to 1981, he served as a police officer in Bellevue. Judge McSeveney is a member of the Washington State Bar.

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INSIDE OIL

Nader Baroukh, DHS Associate General counsel and Mayor of the City of Falls Church

Nader Baroukh, the Associate General Counsel for Immigration in DHS's Office of the General Counsel, was OIL's guest at the monthly Lunch & Learn Brown Bag. Mr. Baroukh began his legal career through the Department of Justice's Honors Program, where he served as an attorney with the Immigration and Naturalization Service (INS) in the Los Angeles District Counsel's office. While at INS, Mr. Baroukh worked on a number of national security and complex fraud-related cases.

Mr. Baroukh who was born in Iran, received his J.D. from the University of Virginia School of Law in 1999, where he was Manuscript Editor of the Virginia Journal of Social Policy and the Law, and his B.A. in Legal Studies and Psychology from Chapman University. He is a Harry S. Truman Scholar and was selected as a Coro Fellow. Prior to law school, Mr. Baroukh worked as a Policy Analyst in the Department of Justice, Criminal Division, Office of Policy and Legislation.

David M. McConnell, Nader Baroukh

In addition to his federal role in serving as the point-person in immigration legal matters at DHS, Mr. Baroukh is a committed civic leader, currently serving as the Mayor of the City of Falls Church in Virginia.

During the Q&As following his presentation, Mr. Baroukh elaborated on his role at DHS, discussed the status of pending regulatory reform, and gave his personal views on the prospect for immigration reform.

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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