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Immigration Litigation Bulletin

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Supreme Court To Consider Whether "Admission" Applies Retroactively

On September 26, 2011, the Supreme Court granted certiorari in ***Vartelas v. Holder*** (S.Ct. No. 10-1211). The Second Circuit, in the decision below, held that the 1996 amendment to the definition of the term "admission" was not impermissibly retroactive as applied to a lawful permanent resident who was convicted of multiple counterfeiting offenses, thereafter departed the United States, and was treated as an applicant for admission upon his return. *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010) The Second Circuit reasoned that the dispositive act to assess the retroactivity of the 1996 statute, 8 U.S.C. 1101(a)(13)(C)(v), is the alien's decision to commit an offense, rather than his decision to plead guilty to or admit to the commission of an offense.

The INA provides generally that an alien who is ineligible for admission at the time of entry, under "the law existing at such time" is removable. 8 U.S.C. 1227(a)(1)(A). Classes of aliens ineligible for admission include aliens convicted of, or admitting that they have committed, non-petty crimes involving moral turpitude. 8 U.S.C. 1182(a)(2)(A)(I). At the time Mr. Vartelas committed the counterfeiting offenses, and at the time he was convicted of a crime involving moral turpitude, the INA defined "entry" to mean any coming of an al-

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Child Status Protection Act's Automatic Conversion and Priority Date Retention Provision Expanded

In ***Khalid v. Holder***,__ F.3d __, 2011 WL 3925337(5th Cir. September 8, 2011) (Davis, Clement, *Elrod*), the court held that the Child Status Protection Act's automatic conversion and retention of priority dates, INA § 203(h)(3), apply broadly to all "aged out" derivative beneficiaries.

The petitioner, a citizen of Pakistan, entered the United States in 1996 pursuant to a visitor's visa. Earlier that year, his aunt, a United States citizen, had filed a fourth-preference visa petition for the benefit of petitioner's mother. The petition had a January 12, 1996, priority date and, at that time, petitioner was eleven years old. Had his mother's priority date become current—that is, reached the "front of the line"—within approximately ten years, petitioner, as his mother's "child," would have been eligible to become a Lawful Permanent Resident at the same time as his mother as a derivative beneficiary on his aunt's petition for her. Unfortunately, his mother's January 1996 priority date did not become current until February 2007, just over eleven years later, when petitioner was twenty-two years old. Thus, when he applied to adjust his status to that of an LPR as a derivative beneficiary of his aunt's petition, DHS denied his application because he was

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Supreme Court to consider "admission" definition

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ien into the United States, except that an alien having a lawful permanent residence in the United States should not be regarded as making an entry for the purposes of the immigration laws if the alien proves that his departure was not intended or reasonably to be expected by him or was not voluntary. 8 U.S.C. 1101 (a)(13) (1994).

The Supreme Court, in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), interpreted this provision, concluding that Congress had not meant its definition of "entry" to encompass a resident alien's return from a brief, innocent, casual foreign excursion that was not intended to disrupt his resident alien status. 374 U.S. at 462. Effective April 1, 1997, Congress deleted this definition of "entry" from the statute, and substituted section 101(a)(13), which in relevant part provided that an alien lawfully admitted for permanent residence should not be regarded as seeking an admission unless, among other requirements, he has committed an offense identified in section 1182(a)(2).

Because Mr. Vartelas committed his crimes in 1992 and plead guilty in 1994, the change in that statute has raised the question of whether the statute is impermissibly retroactive. In similar circumstances the Courts of Appeals for the Fourth and Ninth Circuits have held that the statute is impermissibly retroactive. *See Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007); *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). Both cases examined the retroactive effect of the statutory amendments given the alien's decision to plead guilty. In contrast, the Second Circuit, in *Vartelas*, examined the effect those same amendments had given the alien's decision to commit his crimes. The Second Circuit observed that the statute defining entry explicitly applies to an alien who has "committed" a crime, and that it would be absurd to conclude that he acquired a reliance interest because he thought, at the time he committed a crime, that committing the crime would not jeopardize his ability to travel abroad and return without incident. It was significant to the Second Circuit that neither of the courts previously addressing the issue had recognized the distinction between committing the crime and being convicted of that crime.

The Second Circuit observed that the statute defining entry explicitly applies to an alien who has "committed" a crime.

Over the government's objection, the Supreme Court granted certiorari in *Vartelas* to address the circuit conflict. The government will now attempt to persuade the Supreme Court to adopt the Second Circuit's position that 8 U.S.C § 1101(a)(13)(C)(v) is not impermissibly retroactive.

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Child Status Protection Act—Derivative Beneficiaries

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no longer a "child" under the immigration law.

Several months later, on November 23, 2007, petitioner's mother, by then an LPR, filed a second-preference visa petition on his behalf. Based on that filing's priority date, a visa would not become available to petitioner until around 2015.

In removal proceedings, however, petitioner maintained that he was eligible to adjust status under the new second-preference petition his mother had filed for him because he could retain the January 1996 priority date of the original fourth-preference petition filed by his aunt. Using that priority date, a visa was immediately available. Based on the BIA's recent decision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), however, the IJ rejected petitioner's argument that he could retain the earlier priority date. The BIA dismissed the appeal.

In *Matter of Wang*, the BIA held that Wang's daughter could not avail herself of automatic conversion or priority date retention. The BIA determined that § 203(h)(3) is ambiguous because it does not expressly state which petitions qualify for automatic conversion and retention of priority dates. The BIA concluded that Wang's daughter was not entitled to automatic conversion because, when she "aged out from her status as a derivative beneficiary on a fourth-preference petition, there was no other category to which her visa could convert because no category exists for the niece of a United States citizen." As for priority date retention, the BIA determined that she could not keep her priority date because the new petition was filed by a different petitioner—her father, rather than her aunt. The BIA concluded that Congress did not intend these benefits to apply to derivative beneficiaries of fourth-preference visa petitions, like

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FURTHER REVIEW PENDING: Update on Cases & Issues

212(c) - Comparability

Oral argument was heard October 12, 2011, before the Supreme Court in ***Judulang v. Holder*** (No. 10-694). The question presented is whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable under differently phrased statutory subsections, but who did not depart and reenter between his conviction and the commencement of proceedings is categorically foreclosed from seeking discretionary § 212(c) relief?

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Aggravated Felony - Tax Fraud

Oral argument has been scheduled for November 7, 2011, before the Supreme Court 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

On November 15, 2011, the Tenth Circuit will hear oral argument 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 postdeparture 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

On September 27, 2011, the Supreme Court granted the government's petition for certiorari in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543), two cases raising the question of whether the parent's time of legal residence be imputed to the child so that the child can satisfy the 7 years continuous residence requirement for cancellation.

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Retroactivity – "admission" definition

On September 26, 2011, the Supreme Court granted the alien's petition for certiorari 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 overruled *Navarro-Lopez*.

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Cancellation - Burden of Proof

On March 31, 2011, the government filed a petition for rehearing en banc in ***Rosas-Castaneda v. Holder,*** 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.

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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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Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

Second Circuit Affirms that Firm Resettlement Is Determined from Totality of Circumstances, Including Third Country Ties Formed Prior to Flight

In *Tchitchui v. Holder*,__ F.3d __, 2011 WL 4347961 (2d Cir. September 19, 2011) (Cabranes, Raggi, Restani (sitting by designation)), the Second Circuit considered whether the government's firm resettlement may be rebutted by a demonstration that an asylum applicant's ties to the third country into which he fled before coming to the United States were formed before his last flight from persecution.

The petitioner, a citizen of Cameroon, and a member of the Social Democratic Front ("SDF"), the main opposition to the ruling party, left his country in 1999, and went to Chile, where he resided for a year and a half while studying Spanish. In 2001, he traveled directly from Chile to Guatemala and opened an internet café. He remained in Guatemala for approximately a year before returning to Cameroon, so that he could support the SDF's efforts in the upcoming 2002 elections. He arrived in Cameroon in May 2002, but within four months, his family convinced him to leave.

In September 2002, petitioner returned to Guatemala, where he remained for nearly three years. During this time, he sold his internet café for a profit, opened a restaurant, and obtained permanent resident status. He took two more trips to Cameroon and was detained by the Cameroonian police during his last trip in January 2006. Upon release petitioner returned to Guatemala, where he remained for approximately eight weeks. During this time, he sold his restaurant business and applied to a culinary program in the United States.

On March 25, 2006, petitioner entered the United States as a non-immigrant visitor. Because he overstayed his visa, DHS sought his removal. In response, Petitioner applied for asylum and withholding. The IJ denied asylum, concluding that petitioner was mandatorily barred as he had firmly resettled in Guatemala prior to arriving in the United States, but granted him withholding of removal to Cameroon. The BIA affirmed the IJ's decision.

The Second Circuit, in affirming the BIA's decision, explained that the government bears the initial burden of establishing a prima facie case of firm resettlement by a totality of the circumstances. However, once the government has established a prima facie case, the burden shifts to the applicant to show that he or she qualifies for one of the two enumerated exceptions.

The government bears the initial burden of establishing a prima facie case of firm resettlement by a totality of the circumstances.

The exception applicable in petitioner's case required him to establish (1) "[t]hat his or her entry into that country was a necessary consequence of his or her flight from persecution," (2) "that he or she remained in that country only as long as was necessary to arrange onward travel," and (3) "that he or she did not establish significant ties in that country." 8 C.F.R. § 208.15(a). The court found without merit petitioner's contention that his ties to Guatemala prior to his departure from Cameroon on January 19, 2006, were irrelevant because he was not persecuted in Cameroon until January 13, 2006. The court explained that firm resettlement is determined from the totality of the circumstances.

Here, petitioner while in Guatemala, had ongoing business activities, could work and travel at will, and had permanent residency status. "These circumstances demonstrate that petitioner established significant ties to Guatemala, a country that afforded him a safe haven from his persecution in Cameroon, and that the petitioner had failed to rebut that determination," concluded the court.

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THIRD CIRCUIT

Third Circuit Holds It May Review Determination that Returning Lawful Permanent Resident May Be Treated as Applicant for Admission

In *Doe v. Holder*,__ F.3d __, 2011 WL 3930281 (3d Cir. September 8, 2011) (Rendell, *Smith*, Fisher), the Third Circuit held, in an issue of first impression, that when a lawful permanent resident alien seeks to reenter the United States, the government has the burden to show that there is probable cause that the alien is seeking admission.

The term admission is defined under INA § 101(a)(13) "as the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." However, § 101(a)(13)(C) further provides that "[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless" the alien, *inter alia*, "has committed an offense identified in § 212(a)(2)."

The petitioner, who became an LPR in 2001, sought to reenter the United States in 2007, following a trip abroad. However, because he was subject to an arrest warrant aris-

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ing out of his association with a wire fraud scheme, DHS did not formally "admit" him, instead he was paroled into the country under INA § 212(a)(d)(5)(A). By its plain terms, the court noted, that the parole provision grants the "Attorney General the authority to parole only an 'alien applying for admission to the United States."

On February 29, 2008, petitioner pled guilty to aiding and abetting wire fraud and was sentenced to 12 months' incarceration, three years' of supervised release, and ordered to pay $208,214 in restitution. DHS thereafter instituted removal proceedings alleging that petitioner, as an alien seeking admission into the United States, was inadmissible because he had been convicted of a "crime involving moral turpitude." *See* INA § 101(a)(13)(i)(I). Petitioner responded by asserting that he was not, in fact, an applicant for admission because as a lawful permanent resident he was entitled to admission. He also sought cancellation of his removal and protection under CAT claiming that he would be tortured if returned to Belarus.

The court held that in determining whether an LPR is applicant for admission, that DHS has burden to show that "there is probable cause to believe that the alien has committed one of the crimes identified in INA § 212(a)(2)."

An IJ determined that petitioner was an arriving alien, had not been convicted of an aggravated felony, and granted cancellation. On appeal, the BIA reversed. The BIA held that petitioner had caused a loss of more than $10,000 as reflected in the Stipulation of Offense order, and therefore had been convicted of an aggravated felony, and was statutorily ineligible for cancellation and asylum. The BIA also found that petitioner had not identified any error in the IJ's denial of CAT protection.

The Third Circuit first held that the government had the burden to show that petitioner, as a reentering LPR, was an applicant for admission. "A party is not ordinarily required to prove a negative," said the court. The court found, however "a black hole in the INA" because the statute omits any mention of how the immigration officer was going to make that determination. Accordingly, the court said that it was "necessary to prescribe as a matter of federal common law" the officer's burden of proof. The court then held, after discussing the various standards, that "the proper standard to employ here is probable cause to believe that the alien has committed one of the crimes identified in INA§ 212(a)(2)." Consequently, because the government knew that at the time petitioner sought to reenter the United States a warrant for his arrest had had been issued, the immigration officer properly treated petitioner as an applicant for admission, and parole was properly exercised. The court rejected the government's position that the discretionary decision was not subject to review. "If this were true, counsel's infelicitous description of parole as a legal black hole from which there is no prospect of escape except through an act of executive grace would be fairly accurate—though it might also be subject to a serious due process challenge," said the court

The court agreed, however, petitioner had been convicted of an aggravated felony and thus was ineligible for cancellation and asylum. The court, applying a modified categorical approach, rejected petitioner's contention that because the stipulation indicated only a single specific transaction of $6,447, the relevant loss had not met the $10,00 threshold. The court explained that unlike the facts in *Alaka v. Att'y Gen*., 456 F.3d 88 (3d Cir. 2006), a case relied upon by petitioner, where the guilty plea identified only a single act with respect to which the loss was $4,716.68, even though the overall scheme loss was more than $47,000, here the stipulation also indicated that petitioner was responsible for causing a loss of more than $120,000. However, the court remanded the case to the BIAto decide petitioner's eligibility for protection under the CAT because that issue had not been decided by the IJ.

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SIXTH CIRCUIT

■ Sixth Circuit Holds that Agency's Interpretation of 8 C.F.R. § 1239.2(f) Warrants Deference

In ***Shewchun v. Holder***, __ F.3d __, 2011 WL 3926378 (6th Cir. September 8, 2011) (Boggs, *Gilman*, Cook), the Sixth Circuit deferred to the agency's reasoning, as articulated in *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007), that to terminate a removal proceeding pursuant to 8 C.F.R. § 1239.2(f), an alien must adduce an affirmative communication from DHS that he is prima facie eligible for naturalization.

The petitioner, a citizen of Canada, was admitted to the United States in 1963 as a lawful permanent resident. He is a scientist in the field of alternative energy and has held academic positions at various universities in the United States. In 1983, the petitioner was convicted in Rhode Island of larceny and of taking money under false pretenses. He served four concurrent one-year suspended sentences for his four counts of conviction. A year after his Rhode Island conviction, in 1984, he was convicted in Florida on federal charges of mail and wire fraud. Both the Rhode Island and the Florida convictions arose out of his financial transactions with the universities that he was working for at the time. Petitioner was sentenced to 14 years in

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prison on the latter conviction, but he was released on parole in 1987 after serving approximately 3 years of his sentence. He was imprisoned for more than 2 additional years, from late 1992 to early 1995, for violating his parole.

In 1990, the former INS charged petitioner with deportability under former INA § 241(a)(4) based on his having been convicted of two crimes involving moral turpitude not arising out of a single scheme. Then, in 1997, the INS added the following two additional grounds supporting his deportability under then INA § 241(a)(2)(A)(iii): his having been convicted of (1) an aggravated-felony theft offense, and (2) an aggravated-felony fraud offense involving losses exceeding $10,000.

An alien in removal proceedings with a pending application for naturalization may obtain a prima facie determination from DHS even though the merits of the application cannot be reached until the removal proceedings are concluded.

The first IJ assigned to the case recused herself because she had discussed the case when she was an employee of the INS. In 1997, the new IJ found petitioner deportable on the CIMT charge, and that his theft conviction constituted an aggravated felony, but she determined that he was not deportable based on the charge that he was convicted of a fraud offense involving over $10,000 in losses. On appeal, the BIA remanded the case to determine whether petitioner was eligible for a waiver from deportation under the former § 212(c), or for any other applicable relief.

On remand petitioner sought unsuccessfully to recuse the second IJ claiming that she too had knowledge of his case when she had been employed by the INS. Petitioner also sought 212(c) relief and moved to terminate the proceedings under 8 C.F.R. § 1239.2(f), based on his pending application for naturalization. In December 2007, the IJ denied all of petitioner's claims for relief and concluded that, in addition to the already determined reasons for his removability, he was removable based on DHS's new aggravated-felony charge. According to the IJ, petitioner was statutorily ineligible for a waiver of removability under either INA § 212(c) or § 212(h) because of his prior aggravated-felony convictions. The BIA agreed with the IJ's waiver-of-removability conclusions in July 2009, and petitioner did not challenge those findings.

The court, after considering the case law from the various circuits, opted to adopt the Fourth Circuit's approach in *Barnes v. Holder*, 625 F.3d 801, 807 (4th Cir.2010), where that court recognized the possibility that an alien in removal proceedings with a pending application for naturalization may obtain a prima facie determination from DHS even though the merits of the application cannot be reached until the removal proceedings are concluded. Here, the court found that petitioner's evidence that DHS had received his application for naturalization and that he had been requested to provide biometric information was not an affirmative showing from DHS of prima facie eligibility for naturalization.

Finally the court dismissed petitioner's claims of due process violations with respect to the IJ's refusal to recuse herself and the failure to receive a corrected transcript. The court, however was critical "of failures to timely supply petitioners with such corrected transcripts, although we note that the parties in the present case dispute whether such a failure occurred here."

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Former Truckers Who Resisted FARC and Collaborated with Authorities Can Constitute A PSG**

In ***Escobar v. Holder***,__ F.3d __, 2011 WL 4349403 (7th Cir. September 7, 2011) (Easterbrook, *Wood*, Tinder) the Seventh Circuit held that an asylum applicant identified a valid social group because he could not shed his status as a former trucker who refused to cooperate with the FARC and collaborated with authorities.

The petitioner claimed that he fled Colombia after the Revolutionary Armed Forces of Colombia (FARC) pursued him relentlessly, subjecting him to multiple hijackings at gunpoint, directing death threats at him and his family, and burning his trucks. Petitioner, who was also an active member in Colombia's Liberal Party, one of the two parties that dominate the Colombian political establishment, began driving its members to rallies and meetings. Through his friends in the Liberal Party he then obtained a trucking contract.

At some point petitioner came to the attention of the FARC, and after one of his Party meetings, five or six FARC members stopped him at an improvised roadblock and threatened him at gunpoint that they would kill him if he did not transport their cargo. From that point forward he was to serve FARC's transportation needs and was warned that he would be killed if he refused to comply or reported the encounter to the authorities. Petitioner sought to avoid the FARC but he was again forced to transport goods for them. He filed a complaint with the local Police Department but nothing came of it. A few months later, petitioner learned that members of a paramilitary group that opposed FARC came to his place of business in his absence, suspected him of collaborat-

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ing with FARC, and threatened to kill him. Caught in the middle of these rival forces, petitioner went into hiding. The FARC looked for him and when they could not locate him, burned his trucks. At this point petitioner traveled to Panama and in early June 2000, he entered the United States in Miami on a tourist visa. While there, he spoke to a reporter about his interactions with FARC. The reporter put him in touch with agents of the DEA who were interested in FARC's involvement with drug trafficking. Petitioner thought that his cooperation with the feds would allow him to remain in the United States as a legal resident, but receiving no further contact from the DEA, in mid-May 2002, filed an asylum application. In early August 2002, the former INS instituted removal proceedings.

The court found that the petitioner's group of former truckers who resisted FARC and collaborated with the authorities can be a particular social group.

Escobar renewed his application for asylum, asserting that the Colombian government sat by and allowed FARC to persecute him because of his affiliation with the Liberal Party and his status as a pro-government trucker who refused to cooperate with FARC. On May 11, 2009, the IJ granted Petitioner's asylum application. Though petitioner failed to file his application within one year of arriving in the United States, the IJ held that his asylum application could be processed because of changed circumstances. On the merits, the IJ found petitioner credible and concluded that he had been persecuted on account of two protected grounds: his political beliefs as a member of the Liberal Party, and his membership in the particular social group of truckers who refused to cooperate with FARC and collaborated with law enforcement. Finally, the IJ ruled that, contrary to DHS's allegations, petitioner had not provided material support to FARC.

Following DHS' appeal, the BIA reversed the grant of asylum finding that petitioner had not shown that he was persecuted. It reasoned that the burning of his trucks was a form of nonphysical, economic disadvantage insufficiently severe to be considered persecution. The BIA added that, even if petitioner had been persecuted, any such persecution was not on account of his political beliefs or his membership in a particular social group. The BIA also stated that petitioner's suggested social group did not meet the statutory criteria. It understood him to be arguing for a group consisting of truckers, and it rejected that group as one that reflected neither an immutable characteristic nor a characteristic that one should not be required to change as a matter of conscience.

In reversing the BIA, the court first found that the mistreatment and threats of violence by the FARC against the petitioner amounted to persecution. The "FARC's acts were ongoing, escalating in violence, and impossible for [petitioner] to evade," said the court. The court then found that the petitioner's group of former truckers who resisted FARC and collaborated with the authorities can be a particular social group. The court disagreed with the BIA's assumption that petitioner can shed the status of being a former trucker who resisted FARC and helped the government. "No more than the rest of us, [petitioner] cannot change the past," just as the group former employees of Colombia's Attorney General's office in *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006). Finally, the court determined that the FARC persecuted him on account of his membership in his particular social group, rejecting the BIA's view that "that the only reason FARC targeted [petitioner] was for his trucking capabilities." The court explained that the FARC targeted petitioner "because of a combination of his profession and his views, not because of a simple refusal to cooperate."

The court declined to rule on petitioner's argument that he had been persecuted on account of hi political opinion noting that on remand the BIA should consider the issue in light of all the evidence. However, the court remanded the case to the BIA to also consider the government's argument that petitioner is barred from a grant of asylum or withholding of removal because he allegedly provided material support to a terrorist organization and has been convicted of a particularly serious crime.

In a concurring opinion Judge Easter brook wrote that the court's "discussion of the 'social group' question is compatible with recent decisions in this circuit," but expressed his skepticism "about this circuit's approach to the subject." He explained that "under this court's approach, any person mistreated in his native country can specify a 'social group' in a circular fashion and then show that the mistreatment occurred because of membership in that ad hoc group. Anyone threatened or injured in the past, or who sought police protection, has an 'immutable' characteristic (the past can't be changed), and the selection criteria used by the persecutor (here, people who own trucks and prefer not to give free transport to rebels, or more generally 'have a special skill') become the defining characteristics of the 'social group'. The structure of § 1101(a)(42)(A) unravels, and the distinction between asylum

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and withholding of removal (or the CAT) collapses."

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■ **Ninth Circuit Amends Opinion and Denies En Banc Rehearing of Ruling that Alien Who Refuses to Provide Relevant Information Requested By Agency Adjudicator is Not Barred from Relief from Removal**

In *Rosas-Castaneda v. Holder*,__ F.3d __, 2011 WL 4014321 (9th Cir. September 12, 2011) (Cowen, Tashima, *Silverman*), the Ninth Circuit issued an order amending its published opinion (630 F.3d 881), and denying the government's rehearing petition. The court reversed the agency's ruling that a criminal alien failed to prove eligibility for discretionary relief from removal because he did not comply with an immigration judge's request for a transcript of his guilty plea proceeding, a document relevant to establishing eligibility. As amended, the opinion permits the government to submit documents relevant to the alien's eligibility on remand; its prior opinion did not authorize this. Judge Kozinski, joined by Judge O'Scannlain, dissented, arguing that the panel created an end run around *Chevron*, rendering it useless whenever a panel chooses to ignore an agency's interpretation of its own statute, and creating a sweeping rule preventing full development of the record. Judge Kozinski also suggested that the court "should solve [this problem] ourselves rather than counting on the Supreme Court to solve it for us."

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■ **Ninth Circuit Allows Alien to Withdraw Concession of Removability**

In *Santiago-Rodriguez v. Holder*,__ F.3d __, 2011 WL 3966121 (Fletcher, *Berzon*, Callahan) (9th Cir. September 9, 2011), the Ninth Circuit, held that petitioner presented "egregious circumstances" such that he was not bound by his prior counsel's concession of removability for alien smuggling. The court concluded that the agency's decision to the contrary failed to consider *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005), which "clarified" the elements of alien smuggling.

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■ **Ninth Circuit Holds that Agency Applied Incorrect Timeliness Standard for Asylum Application**

In *Singh v. Holder*, __ F.3d __, 2011 WL 3927366 (9th Cir. September 8, 2011) (*Thomas*, Rawlinson, Carney), the Ninth Circuit held that the agency incorrectly required the alien to establish "clear and convincing evidence" of changed circumstances to excuse his asylum application's untimeliness, and failed to properly consider whether the arrest of the alien's wife constituted changed circumstances. The court also held that the agency misinterpreted the "directly related" requirement for extraordinary circumstances to excuse the untimeliness by requiring him to demonstrate that circumstances were directly related to the application filing, instead of directly related to the filing delay.

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■ **Ninth Circuit Holds There Are 365 Days in a Year, Even in Leap Year**

In *Habibi v. Holder*,__ F.3d __, 2011 WL 4060417 (9th Cir. September 14, 2011) (Fisher, *Bybee*, Strom), the Ninth Circuit affirmed a BIA's decision holding that for purposes of 8 U.S.C. § 1101(a)(43)(F), there are 365 days in a year even in a leap year. The disputed section specifies that a crime of violence for which the term of imprisonment is "at least one year," is an aggravated felony.

The answer to "How many days are in a year? . . . is more complicated than it may first appear.

According to the Judge Bybee, who wrote the court's opinion, the answer to "How many days are in a year? . . . is more complicated than it may first appear. According to the Royal Observatory in Greenwich, the astronomically correct answer is approximately 365.24237 days. Since it would be impractical for our calendars to add 0.24237 days at the end of each year, we make up the difference by adding an extra day, February 29, every fourth year, which is known as 'leap year.'" However, the court found that § 1101(a)(43)(F) is not about calculating calendar periods, but about defining how many days a sentence must be to be a sentence of "at least one year." Accordingly, a sentence of 365 days qualifies as a 'term of imprisonment [of] at least one year,' even when the sentence was served in whole or in part during a leap year," concluded the court.

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TENTH CIRCUIT

■ **Tenth Circuit Deems Particularity and Social Visibility Requirements for Particular Social Groups Reasonable**

In *Rivera-Barrientos v. Holder*, __ F.3d __, 2011 WL 3907119 (*Tymkovich*, Brorby, Matheson) (10th

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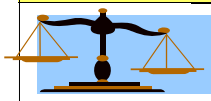

Summaries Of Recent Federal Court Decisions

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Cir. September 7, 2011) the Tenth Circuit held that substantial evidence supported the agency's determination that the alien failed to demonstrate past persecution on account of her claimed social group membership of Salvadoran women between the ages of 12 and 25 who resisted gang recruitment.

The petitioner, a native of El Salvador, claimed that while living in her small town she routinely witnessed acts of violence and crime committed by members of the Mara Salvatrucha street gang (MS–13). On two occasions the MS-13 sought to recruit her. In August 2005, when members of the MS-13 asked her to join, she refused, stating, "No, I don't want to have anything to do with gangs. I do not believe in what you do." They told her: "[i]f you don't want to join with us, if you don't participate with us, if you are against us, your family will pay." In January 2006, petitioner came upon five gang members while walking alone to the bus station. They again demanded that she join the gang, and again she refused. The gang members then forced her into a car, blindfolded her, and drove her to a field where she was brutally raped. Afterwards, they told her that she had to join the gang, and that if she talked to the police they would kill both her and her mother. Petitioner did not report the rape because she feared the gang members would follow through with their threats, and she did not believe the police could protect her. When M-13 members came to her house to look for her, she left her country and sought to enter the United States without inspection. When apprehended by DHS she was placed in removal proceedings where she applied for asylum, withholding, and CAT protection.

Following a hearing, an IJ denied each of petitioner's claims and ordered her removed. The IJ concluded, in relevant part, that petitioner's claim for asylum lacked merit because she failed to establish past persecution on account of her political opinion or membership in a particular social group. On appeal, the BIA affirmed the IJ's decision.

The court first determined that petitioner had not shown past persecution on account of political opinion. The court relied on *INS v. Elias–Zacarias*, 502 U.S. 478 (1992) where the Supreme Court held that a group's attempt to coercively recruit an individual is not necessarily persecution on account of political opinion. The court, while noting that petitioner had shown some vocal opposition to the M-13, and therefore there was a possibility that she was attacked on that basis, said that it was "equally likely that she was attacked for her refusal to join." Accordingly, the court found that the BIA's conclusion that the central reason for the attack was petitioner's resistance to recruitment and not her opposition to MS–13 was supported by substantial evidence.

"A discrete class of young persons sharing the past experience of having resisted gang recruitment can be a particularly defined trait."

The court then considered petitioner's claim that she had been attacked because of her membership in a particular social group, namely "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment." This, said the court, raised "a more difficult question and requires us to explore the evolving boundaries of social group membership." The court, after rejecting the contention of amici, and UNHCR, that the BIA's "particularity" requirement for social group designation was not consistent with UNHCR guidelines, nonetheless disagreed with the BIA that petitioner's claimed group was not a "particular social group." "The specific trait of having resisted recruitment is not so vague. A discrete class of young persons sharing the past experience of having resisted gang recruitment can be a particularly defined trait," said the court, distinguishing petitioner's group from that in *Matter of S-E-G-*, where the BIA found that Salvadoran youths who resist membership in the MS–13 gang do not constitute a group that is defined with particularity.

Assuming that petitioner's group met the particularity requirement, the court then found that the group did not meet the social visibility requirement as required by the BIA under *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). The court first rejected the UNHCR argument that the "social visibility" requirement was unreasonable, pointing to the Seventh Circuit's decision in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), where the court said that the requirement "made no sense." "We see no need to interpret social visibility as demanding the relevant trait be visually or otherwise easily identified," as *Gatimi* understood *Matter of C-A-* to require, said the court. "The BIA decision adopting this test, *Matter of C–A–*, does not appear to contemplate such a narrow definition . . .If opposition to genital mutilation, kinship ties, and prior employment as a police officer are socially visible, social visibility cannot be read literally. Rather, social visibility requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publically accessible," explained the court. Second, on the merits, the court agreed with the BIA's finding

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that individuals who have resisted gang recruitment do not make up a socially visible group in El Salvador. Petitioner "offered no evidence to suggest that Salvadoran society considers young women who have resisted gang recruitment to be a distinct social group," said the court. The fact that petitioner "was targeted thus does not provide evidence that society perceives her to be a member of a particular social group," it concluded.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds that Alien Who Entered Without Inspection and Was Granted TPS Is Not Eligible for Adjustment of Status to Lawful Permanent Resident**

In ***Serrano v. Holder,*** 2011 WL 4345670 (11th Cir. September 16, 2011) (Hull, Anderson, Vinson, JJ.) (*per curiam*), the Eleventh Circuit affirmed the Northern District of Georgia's dismissal of Plaintiff's challenge to USCIS denial of his application for adjustment of status. In order to be eligible for adjustment of status, 8 U.S.C. § 1255(a) requires that an alien be initially inspected and admitted or paroled. However, under 8 U.S.C. § 1254a(f)(4), an alien with Temporary Protected Status has "lawful status as a nonimmigrant" for purposes of adjusting status to that of a lawful permanent resident. The court held that the plain language compelled a finding that Plaintiff, who entered the United States without inspection, was ineligible for adjustment of status because he was never inspected and admitted or paroled. The court alternatively granted *Skidmore* deference to USCIS's longstanding interpretation that mirrors the Court's plain language analysis.

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DISTRICT COURTS

■ **Northern District of California Upholds Spousal Visa Denial on Polygamy Grounds**

In ***Sharabi v. Heinaur***, No. 10-2695 (N.D. Cal. September 7, 2011) (Conti, J.), the Northern District of California granted summary judgment to the government in an action where USCIS denied a spousal visa petition on grounds that, at the time plaintiff entered into a polygamous marriage with the beneficiary, the union was invalid for U.S. immigration purposes, despite the fact that the polygamous marriage is legal in Yemen, the place of celebration. The court disagreed with plaintiff's argument that his divorce from his first wife legitimated the marriage with the beneficiary. The court determined that USCIS's long-standing policy of not recognizing polygamous marriages was consistent with BIA's precedent and not contrary to law.

The court determined that USCIS's long-standing policy of not recognizing polygamous marriages was consistent with BIA's precedent and not contrary to law.

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■ **District of Massachusetts Finds Alien's Detention Unconstitutional**

In ***Ortega v Hodgson***, No. 11-10358 (D. Mass. September 13, 2011) (Bowler, J.), the District of Massachusetts found unconstitutional the twenty-month detention of an alien whom ICE had detained under the mandatory provision of 8 U.S.C. § 1226(c). The alien was convicted of an aggravated felony and held in mandatory detention during the pendency of her ongoing removal hearings. The court found that a challenge to the constitutionality of prolonged mandatory detention is not a challenge to the government's "discretionary judgment" or "decision" and that the court therefore had subject matter jurisdiction to hear such a challenge. The court further determined that, under the circumstances, the period of detention exceeded the reasonableness standard previously outlined by the courts in the District of Massachusetts. The court ordered the government to file a status report updating the court on the pending appeal before the BIA. In the event the BIA has not resolved the alien's pending appeal, the court will set a bail hearing to determine the alien's risk of flight and dangerousness.

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■ **Middle District of Tennessee Certifies to Tennessee Supreme Court Question of Whether ICE's Immigration-Enforcement Agreement With Nashville Metro Government Violates State Law, and Grants ICE's Motion to Dismiss Plaintiffs' Due Process Claim**

In ***Renteria v. Metro. Gov't of Nashville & Davidson Cnty.***, No. 11-218 (M.D. Tenn.) (Sharp, J.) Plaintiffs filed suit against ICE and the Metropolitan Government of Nashville and Davidson County (Metro). Plaintiffs premised their lawsuit on their claim that ICE's agreement with Metro under the INA § 287(g) – which allows Metro deputies to perform immigration officer functions – violated the Metro government charter. ICE moved to dismiss Plaintiffs' two claims against it, in which Plaintiffs claimed that: (1) the 287(g) Agreement violated the Administrative Procedure Act (APA); and (2) ICE

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Summaries Of Recent Federal Court Decisions

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was responsible for alleged due process deprivations committed by Metro deputies arising from the 287(g) Agreement. On September 12, 2011, the Middle District of Tennessee granted, in part, ICE's motion to dismiss, holding that Plaintiffs did not state a plausible claim against ICE regarding the alleged due process violations. However, the Court denied ICE's motion to dismiss the APA claim. The Court held that the APA claim hinged on the question whether the 287(g) Agreement violates the Metro charter. The Court certified this dispositive question to the Tennessee Supreme Court.

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■ **Central District of Illinois District Court Dismisses Mandamus Action in Investor Visa Case**

In ***Sun v. Holder***, No. 10-2035 (C.D. Ill. September 8, 2011) (Baker, J.), the Central District of Illinois dismissed plaintiffs' mandamus action in an investor visa case. Plaintiffs had asked the court to compel USCIS to adjudicate their investor visa petitions and naturalization applications. The government argued that the 2002 investor visa law required USCIS to promulgate new regulations before it could deny any investor visas. The court agreed, finding that it could not grant plaintiffs the relief they requested. The court also dismissed plaintiffs' mandamus action as to their naturalization applications under Federal Rule of Civil Procedure 12(b)(6), finding that plaintiffs are conditional permanent residents and do not qualify for naturalization until the conditions are removed. Finally, the court dismissed plaintiffs' due process causes of actions, finding that Plaintiffs have no due process right to adjudication of their investor visas or their naturalization applications.

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■ **Eastern District of Virginia Holds that Alien's Confinement to a Penal Institution for 180 days or More Statutorily Bars His Naturalization**

In ***Agoujdad v. USCIS***, No.11-295 (E.D. Va. September 27, 2011) (Smith, J.), the Eastern District of Virginia District Court granted the government's motion to dismiss an alien's challenge to the denial of his naturalization application. The government argued that the INA barred the alien from naturalizing. USCIS denied the application after the alien served a sentence of eight months in prison during a period when the naturalization statute required him to have good moral character. Noting that the INA expresses that an alien cannot show good moral character if confined to a penal institution for an aggregate period of 180 days or more, the court rejected the alien's argument that USCIS failed to consider the fact that a judge had reduced his sentence from 18 months to eight months. The court further found that the fact that USCIS did not deny the alien's application until six years after its filing did not alter the court's conclusion or provide the alien with any basis for relief.

An alien cannot show good moral character if confined to a penal institution for an aggregate period of 180 days or more.

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■ **District of Kansas Court Grants Government's Motion for Summary Judgment in Denaturalization Case**

In ***United States v. Ruiz***, No. 11-2040 (D. Kan. September 26, 2011) (Robinson, J.), the District Court for the District of Kansas granted the government's motion for summary judgment seeking to cancel the alien's United States citizenship and certificate of naturalization. The court found that the alien illegally procured his certification of naturalization because he had been convicted of an aggravated felony between the time of the initial approval for naturalization and the time of his naturalization oath. The court further found that the alien made a willful material misrepresentation on his application for naturalization when he failed to disclose his aggravated felony arrest. The court found that the government met its burden of demonstrating that the defendant improperly obtained his United States citizenship.

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■ **Central District of California Concludes that Defense of Marriage Act Is Constitutional in Immigration Case**

In ***Lui v. Holder***, No. 11-1267 [C.D. Cal. September 28, 2011) (Wilson, J.),the District Court for the Central District of California granted the government's partial motion to dismiss plaintiffs' sex discrimination claims asserted under the INA. In the same opinion, the court also granted Intervenor Bipartisan Legal Advisory Group of the House of Representatives' motion to dismiss plaintiffs' claims that are predicated on the contention that Section 3 of the Defense of Marriage Act, violates the equal protection component of the Fifth Amendment's Due Process Clause. This case involves a legally married same-sex couple's challenge to USCIS' denial of a petition for an alien relative.

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This Month's Topical Parentheticals

ADJUSTMENT

■ *Cheruku v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 4392429 (3d Cir. Sept. 22, 2011) (deferring to BIA's interpretation of 8 U.S.C. § 1182(a)(9)(B)(i) as reasonable, and holding that petitioner is ineligible to adjust under the Life Act because her unlawful presence renders her inadmissible pursuant to § 1182(a)(9)(B)(i)(II))

■ *Serrano v. United States Att'y Gen.*, __ F.3d __, 2011 WL 4345670 (11th Cir. Sept. 16, 2011) (holding that the fact that an alien with Temporary Protected Status has "lawful status as a nonimmigrant" for purposes of adjusting his status does not alter the adjustment statute's threshold requirement that he must establish that he was initially inspected and admitted or paroled in order to be eligible for adjustment)

■ *Matter of Cruz De Ortiz*, 25 I&. Dec. 601 (BIA Sept. 20, 2011) (holding that because section 246(a) of the INA, entitled "Rescission of Adjustment of Status," relates only to proceedings to rescind LPR status acquired through adjustment of status, the 5-year statute of limitations in that section is not applicable to bar the removal of an alien who was admitted to the US with an immigrant visa)

■ *Matter of Herrera Del Orden*, 25 I&N Dec. 589 (BIA Sept. 13, 2011) (holding that: (1) when an alien in removal proceedings seeks "review" of DHS's denial of a waiver to file a joint petition to remove the conditional basis of LPR status, he or she may introduce, and the IJ should consider, any relevant evidence without regard to whether it was previously submitted or considered in proceedings before the DHS; and (2) the scope of the review authority provided in 8 C.F.R. § 1216.5(f) is coterminous with the IJ's ordinary powers and duties in removal proceedings)

ADMISSION

■ *Doe v. Attorney General*, __ F.3d __, 2011 WL 3930281 (3d Cir. September 8, 2011) (holding that for purpose of treating a returning LPR as an alien seeking admission, the government must show by probable cause that he has committed a crime)

ASYLUM

■ *Haile v. Holder*, __ F.3d __, 2011 WL 4436267 (9th Cir. Sept. 26, 2011) (holding that the BIA's conclusion that Petitioner is ineligible for asylum and withholding because she engaged in terrorist activities in support of a terrorist organization [the Eritrean Liberation Front] is supported by substantial evidence)

■ *Chen v. Holder*, __ F.3d __, 2011 WL 4430806 (2d Cir. Sept. 23, 2011) (post-REAL ID act case affirming IJ's conclusion that asylum applicant failed to meet her burden of proof as to facts of her claim where testimony, although credible, was vague, lacking in detail, and lacked explanations for inconsistencies, and applicant failed to produce illegal alien husband to corroborate her claim; further holding that husband was reasonably available to testify despite his illegal status because he could be expected to support wife's asylum claim if true since he would be eligible for derivative asylum from her)

■ *Jonaitiene v. Holder*, __ F.3d __, 2011 WL 4435995 (7th Cir. Sept. 26, 2011) (affirming BIA's decision that Lithuanian asylum applicants who were witnesses in US visa fraud investigation of Lithuanian co-conspirator are not a PSG and risk of future harm is private revenge, not persecution on account of covered ground; further holding that evidence that Lithuanian police arrested but did not prosecute the co-conspirator, and firemen rather than police investigated possible arson against family members, do not establish government is "unable or unwilling to control" the co-conspirator, where there is no "indicator as to why those decisions were made, and whether they constituted a deviation from standard operating procedures")

■ *Tchitchui v. Holder*, __ F.3d __, 2011 WL 4347961 (2d Cir. Sept. 19, 2011) (affirming BIA's construction that "firm resettlement" in another country prior to coming to US barring asylum is determined based on totality of circumstances, including ties in the third country that alien formed before he fled persecution in his home country)

■ *Escobar v. Holder*, __ F.3d __, 2011 WL __ (7th Cir. Sept. 7, 2011) (holding that under Seventh Circuit's immutable characteristic approach "former truckers in Colombia who resisted FARC and collaborated with the government" are a PSG, because past trucking skills, past resistance to FARC, and past government collaboration are unchangeable characteristics)

■ *Carrizo v. Holder*, __ F.3d __, 2011 WL 3828561 (11th Cir. Aug. 31, 2011) (holding that substantial evidence supported the IJ's and BIA's adverse credibility findings where the record contained numerous material inconsistencies between petitioner's testimony and the documentary evidence submitted in support of his asylum application)

CAT

■ *Cole v. Holder*, __ F.3d __, 2011 WL 4395622 (9th Cir. Sept. 22, 2011) (reversing and remanding for articulated reasoning and consideration of all the expert evidence BIA's decision that tattooed former US gang member did not establish future torture is more likely than not in Honduras because of his tattoos, where BIA failed to give reasoned

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This Month's Topical Parentheticals

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consideration to potentially dispositive expert testimony and mischaracterized other expert's testimony)

CRIMES

■ *Prus v. Holder*, __ F.3d __, 2011 WL 4470540 (2d Cir. Sept. 28, 2011) (holding that the BIA erred in concluding that Petitioner's conviction for promoting prostitution was categorically an aggravated felony "offense that relates to the owning, controlling, managing or supervising of a prostitution business" under section 101(a)(43)(K)(i))

■ *United States v. Hong*, __ F.3d __, 2011 WL 3805763 (10th Cir. Aug. 30, 2011) (concluding that the Supreme Court's decision in Padilla v. Kentucky announced a new rule of constitutional law under the framework set forth in Teague v. Lane, and therefore Padilla's holding does not apply retroactively to Petitioner's collateral challenge to his conviction)

■ *Rosas-Castaneda v. Holder*, __ F.3d __, 2011 WL 4014321 (9th Cir. Sept. 12, 2011) (amending its published opinion and denying rehearing; the court reversed the agency's ruling that a criminal alien failed to prove eligibility for discretionary relief because he did not comply with an IJ's request for a transcript of his guilty plea proceeding, a document relevant to establishing eligibility; as amended, the opinion permits the Government to submit documents relevant to the alien's eligibility on remand)

■ *Habibi v. Holder*, __ F.3d __, 2011 WL 4060417 (9th Cir. Sept. 14, 2011) (holding that the BIA correctly concluded that, for purposes of 8 U.S.C. § 1101(a)(43)(F), a sentence of 365 days qualifies as a "term of imprisonment [of] at least one year," even when the sentence was served in whole or in part during a leap year")

United States v. Tafoya-Montelongo, __ F.3d __, 2011 WL 4060586 (9th Cir. Sept. 14, 2011) (holding that defendant's conviction for attempted sexual abuse of a child under Utah Code § 76-5-404.1 qualified as a "crime of violence" under the modified categorical approach for purposes of the sentencing guidelines)

■ *Singh v. Holder*, __F.3d __, 2011 WL 3927366, (9th Cir. September 8, 2011) (holding that the "clear and convincing" standard does not apply when evaluating "changed circumstances" for untimely filing an asylum application)

■ *Rivera-Barrientos v. Holder*, __ F.3d __, 2011 WL 3907119 (10th Cir. September 7, 2011) (deferring to BIA's interpretation that "women in El Salvador between the ages of 12 and 25 who resist gang recruitment" is not a particular social group because it lacks social visibility)

■ *Sarhan v. Holder*, __ F.3d __, 2011 WL ___ (7th Cir. Sept 2, 2011) (in violation of *Thomas* and *Ventura*, holding in first instance, without prior decision by BIA, that under Acosta immutable-characteristic approach "women in Jordan who have (allegedly) flouted repressive social norms" is a PSG and feared future honor killing of Jordanian woman by brother because of false accusation of adultery would be "on account of" membership in this group; rejecting BIA's position that brother's actions are not "on account of" group membership or affiliation with other women accused of adultery, but because of personal retribution between woman and her brother for dishonoring their family)

■ *Li v. Holder*, __ F.3d __, 2011 WL 3850050 (9th Cir. Sept. 1, 2011) (holding that the BIA's decision affirming denial of asylum but remanding IJ's grant of withholding of removal solely for completion of background checks was a final order of removal; affirming BIA's finding that asylum should be denied as a matter of discretion based on the totality of circumstances, including the alien's dangerous method of entry – *i.e.*, being concealed in a metal box affixed to the underside of a vehicle)

■ *Lin v. Holder*, __ F.3d __, 2011 WL 3805751 (7th Cir. Aug. 30, 2011) (holding that the agency erred in applying its decision in *Huang v. Gonzales* to find petitioner incredible, and explaining that *Huang* does not *per se* require an adverse credibility finding when an abortion certificate is submitted, but that the agency should consider additional corroborating evidence)

CSPA

■ *Khalid v. Holder*, __ F.3d __, 2011 WL 3925337 (5th Cir. September 8, 2011) (holding that CSPA automatic conversion and retention of priority dates apply broadly to all "aged out" derivative beneficiaries")

■ *De Osorio v. Mayorkas*, __ F.3d __, 2011 WL 3873797 (9th Cir. Sept. 2, 2011) (deferring to the BIA's interpretation of the Child Status Protection Act as set forth in *Matter of Wang,* and holding that an aged-out derivative beneficiary of a F3 or F4 family preference petition is not entitled to relief under 8 U.S.C. § 1153(h))

DETENTION

■ *Diop v. ICE*, __ F.3d __, 2011 WL 3849739 (3d Cir. Sept. 1, 2011) (holding that Petitioner's release from custody (after a grant of withholding of removal) did not moot detention claim because ICE can take him back into custody and therefore the issue is capable of repetition and evading review; further holding that Petitioner's mandatory detention under section 236(c) was unconstitutional because that statute "authorizes only mandatory detention that is reasonable in length" and Petitioner's detention of 1,072 was not reasonable)

This Month's Topical Parentheticals

DUE PROCESS –FAIR HEARING

Luevano v. Holder, __ F.3d __, 2011 WL 4509473 (10th Cir. Sept. 30, 2011) (concluding that petitioner failed to demonstrate a due process violation after he was stopped at a sobriety checkpoint, and that even if he had demonstrated a violation, he failed to request the suppression of specific evidence; further affirming denial of continuance where no visa was available to the alien or would become available for an indeterminate period of time)

Jiang v. Holder, __ F.3d __, 2011 WL 4436265 (9th Cir. Sept. 26, 2011) (holding that the IJ erred in failing to allow Petitioner to authenticate foreign documents through his testimony; further finding that IJ abused her discretion in denying petitioner a continuance because he was not given adequate notice of the authentication requirement)

Santiago-Rodriguez v. Holder, __F.3d __, 2011 WL 3966121 (9th Cir. September 9, 2011) (holding that an alien in removal proceedings can withdraw his former ineffective counsel's admission where those admissions are later proved to be false)

■ *Lopez-Gabriel v. Holder*, __ F.3d __, 2011 WL 3862586 (8th Cir. Sept. 2, 2011) (affirming the BIA's finding that Petitioner failed to present evidence of an "egregious violation" of his liberty that would warrant suppression of evidence where Petitioner offered no evidence to support his claim that his traffic stop and arrest were racially motivated)

JURISDICTION

■ *Casillas v. Holder*, __ F.3d __, 2011 WL 3873776 (6th Cir. Sept. 2, 2011) (holding that court lacked jurisdiction to review ICE's denial of a stay of deportation and IJ's denial of motion for a bond hearing because those determinations were not part of a final order of deportation)

Torres-Tristan v. Holder, __ F.3d __, 2011 WL 3849636 (7th Cir. Sept. 1, 2011) (holding that court lacked jurisdiction to review USCIS's denial of a U Visa and accompanying waiver of inadmissibility because the denials were collateral to ICE's reinstatement order, and thus was not part of a final order of removal)

MOTIONS TO REOPEN

Patel v. Holder, __ F.3d __, 2011 WL 3820847 (8th Cir. Aug. 31, 2011) (affirming IJ's and BIA's denials of motions to reopen because Petitioners failed to present substantial and probative evidence to rebut the presumption of effective service of the OSCs and hearing notices where the immigration court sent those documents by certified mail and received signed return receipts)

NATURALIZATION

Shewchun v. Holder, __F.3d __, 2011 WL 3926378 (6th Cir. September 8, 2011) (holding that when an alien seeks to terminate proceedings based on prima facie eligibility for naturalization under 8 CFR § 1239.2(f), it's appropriate for IJ/BIA to require some affirmative communication from DHS)

WAIVERS

Luna v. Holder, __ F.3d __, 2011 WL __ (9th Cir. Sept. 19, 2011) (holding that the April 26, 2005 deadline at 8 C.F.R. § 1003.44 for filing special motions to reopen to apply for 212(c) relief pursuant to the holding in *St. Cyr* is a "constitutionally-sound procedure and that absent some exceptional circumstances, not present here, petitioners that miss the deadline are not entitled to relief from that deadline")

Rana v. Holder, __ F.3d __, 2011 WL 3805790 (5th Cir. Aug. 30, 2011) (holding that a waiver of inadmissibility pursuant to section 212(h) of the INA is not available to an applicant who has been convicted of two separate offenses of possessing 30 grams or less of marijuana, and has already received a 212(h) waiver relating to the first offense)

VISAS

Pai v. USCIS, __ F. Supp.2d __, 2011 WL 3874717 (D.D.C. Sept. 2, 2011) (holding that petitioner lacked standing to challenge USCIS's denial of I-140 petition filed by prospective employer).

ICE Opens New Training Facility

ICE Director John Morton and FLETC Director Connie Patrick officially recently opened the ICE Academy complex Glynco, Ga. The new facility is dedicated to training and preparing the agency's special agents and officers to enforce the nation's immigration and customs laws. The ICE Academy site gives agency recruits the specialized training needed to work as a part the principal investigative arm of DHS.

The ICE Academy and FLETC collaborated on the $2.5 million renovation to create a state-of-the-art learning facility for students. The three-story facility contains four computer labs, nine classrooms, two electronics labs and two breakout rooms. The goal of the ICE-funded project was to provide a central classroom location for all ICE Academy basic and specialized training programs. The FLETC will use excess classroom capacity for other training course available at the Glynco site.

The classroom complex will house ICE's two basic training programs: ICE Enforcement and Removal Basic Law Enforcement Training and ICE Homeland Security Investigations Special Agent Training.

INSIDE OIL

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Judicial Law Clerk/Attorney Advisor with the Executive Office for Immigration Review (2009-2011) at the Newark & Elizabeth Immigration Courts through the Honors Program. Following law school, Tayo worked at a mid-size New Jersey firm practicing insurance coverage and defense.

Rebekah Nahas, prior to joining OIL, served as a Judicial Law Clerk/ Attorney Advisor at the Los Angeles Immigration Court from 2009 to 2011. Before her clerkship, Rebekah was an associate at a boutique immigration law firm in Falls Church, Virginia where she primarily represented individuals in removal proceedings from 2007 to 2009. Rebekah received her B.A. from the University of Florida in 2004, and her J.D from The George Washington University Law School in 2007.

INSIDE EOIR

Attorney General Eric Holder appointed two new Immigration Judges to the Los Angeles court, ***Robert E. Coughlon*** and ***Arlene E. Dorfman.***

Judge Coughlon is a graduate of the College of the Desert, Palm Desert, California and the Western State University College of Law. From August 2010 through July 2011, he served as a SAUSA in Phoenix and from 2007 to 2010, served as an Assistant Chief Counsel for ICE.

Judge Dorfman is a graduate of the University of California, Los Angeles, and Loyola Law School. From 2009 to 2011, she served as senior attorney for ICE, in Los Angeles. From March 2003 to 2009, she was an assistant chief counsel for ICE. From 2000 to February 2003, she was an assistant chief counsel for the former Immigration and Naturalization Service.

Child Status Protection Act Expanded

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Wang's daughter and the petitioner in this case.

The Fifth Circuit rejected the BIA's interpretation finding that the "traditional canons of statutory construction, and the interdependency between subsections (h)(1), (h)(2), and (h)(3) compel the conclusion that the [p]etitions described in (h)(2) apply with equal force to (h)(1) and (h)(3)." Thus, "the statute, as a whole, clearly expresses Congress' intention" about the universe of petitions covered by (h)(3)," said the court, and therefore there is no ambiguity and "no room for the agency to impose its own answer to the question." The court noted that the Second Circuit in *Li v. Renaud*, __F.3d__, 2011 WL 2567037 (2d Cir. June 30, 2011), had interpreted the "statute differently" holding that applicants such as Wang's daughter, could not retain their priority date because the conversion would require changing the petitioner—in this case from petitioner's aunt to petitioner's now-LPR mother. The Second Circuit concluded that "such a change would not be a conversion to the appropriate category." The Fifth Circuit found instead that there was nothing in subsection (h)(3), that "states or implies that the petitioner cannot change as a result of the conversion."

Accordingly, the court reversed and remanded the case to the BIA to adjudicate the application for adjustment because a visa was immediately available to petitioner.

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OIL TRAINING CALENDAR

■ **October 20, 2011.** Brown Bag Lunch & Learn with author and Professor Christopher Heath Wellman co-author of the just-published book: "*Debating the Ethics of Immigration: Is there a Right to Exclude?*"

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

Contributions to the Immigration Litigation Bulletin Are Welcomed!

INSIDE OIL: 2011 HONOR GRADS

OIL welcomes onboard five new attorneys hired under the Department's Honors Program

Benjamin Mark Moss is a former OIL intern (summer '07) and is excited to be back. He joined OIL after working as Attorney-Advisor to Administrative Law Judge Timothy D. Wing at the Office of Administrative Law Judges within the Drug Enforcement Administration. Ben is a graduate of the University of Wisconsin-Madison (B.A.), Ben-Gurion University of the Negev (M.A.) (in Be'er Sheva, Israel) and American University Washington College of Law (J.D.).

Meadow Wirick Platt interned at OIL in 2008, and she is pleased to return as an Honors Program Trial Attorney. She spent the past two years working as an attorney advisor with the San Francisco Immigration Court. Prior to that, she clerked for the Hon. Laura Cordero at the D.C. Superior Court. She received her J.D. from American University (2008) and her B.A. from Smith College (2002).

Victor M. Mercado received his A.B. in 2004 from The University of Chicago and his J.D. in 2011 from Temple University Beasley School of Law. As a law student, Victor was part of Temple's Immigration Law Clinic at Nationalities Service Center representing asylum applicants. In addition, Victor was a legal intern for Justice James J. Fitzgerald of the Superior Court of Pennsylvania. Prior to law school, Victor was a paralegal at the Florence Immigrant and Refugee Rights Project in Florence, Arizona, where he worked with detainees facing removal proceedings.

Meadow Wirick Platt, Enitan Tayo Otunla, Rebekah Nahas, Victor Mercado-Santana, Benjamin Mark Moss

Enitan Tayo Otunla received her B.A. in 2003 from Wesleyan University, Middletown, Connecticut, and her J.D. in 2007 from Rutgers Newark School of Law. Prior to joining OIL, Tayo was a

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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

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