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Immigration Litigation Bulletin

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Ninth Circuit En Banc Panel Holds that Alien's Conviction Bars Relief from Removal Under the REAL ID Act When Record Indicates Possibility that Conviction Is Disqualifying

In *Young v. Holder*, __F.3d__, 2012 WL 4074668 (9th Cir. Sept. 17, 2012), a badly-splintered Ninth Circuit en banc panel ruled that by amending the INA to codify that an alien applicant generally bears the burden of demonstrating eligibility for relief from removal in removal proceedings, the REAL ID Act of 2005 raised the standard for establishing that a conviction does not bar a grant of cancellation of removal. In so holding, the 11-judge court partially overruled two immigration precedents, *Rosas-Castaneda v. Holder*, 655 F.3d 875 (9th Cir. 2011), and *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), and for other reasons, partially overruled a line of criminal sentencing precedents, including a recent en banc decision, *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc) (per curiam). The court upheld the removal order in the case of Joseph Young, an alien convicted of a serious drug crime, for reasons different from those given by the agency. The decision narrows a circuit split on one immigration law issue, but maintains a broader split on a more general issue concerning the "modified categorical analysis" of convictions.

Several INA provisions that authorize relief from removal to removable aliens also restrict granting relief to aliens convicted of particular clas-

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En Banc Ninth Circuit Expands Reach of CSPA Rejects BIA's Interpretation in *Matter of Wang*

In *De Osorio v. Scharfen*, __F.3d__, 2012 WL 4373336 (Kozinski, Pregerson, McKeown, Wardlaw, Fletcher, Fisher, Gould, Paez, Rawlinson, Smith, Jr., *Murguia*) (9th Cir. September 26, 2012), in a six-to-five decision, the en banc Ninth Circuit reversed its earlier ruling in two related cases, and held that the Child Status Protection Act (CSPA), INA § 203(h), unambiguously extends priority date retention and automatic conversion benefits to aged-out derivatives beneficiaries of all family visa petitions.

The appellants, lawful permanent residents, challenged the USCIS' denial of their request for priority date retention under the CSPA, on behalf of their children. These children had been granted derivative visas but due to visa quotas and substantial backlogs "aged out" of visa eligibility upon turning 21 before their parents could immigrate or adjust status.

The district court granted USCIS summary judgment, deferring to the BIA's interpretation in *Matter*

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Convictions under the REAL ID Act of 2005

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ses of criminal activity: among these, the cancellation-of-removal statute, 8 U.S.C. § 1229a, provides that the Attorney General may cancel the removal of an alien if the alien "has not been convicted of" various classes of offenses, including, in the case of a lawful permanent resident such as Young, "an aggravated felony." *See* 8 U.S.C. §§ 1229b(a)(3) and 1229b(b)(1)(C). Young's conviction record disclosed that he had pled guilty to a California state charge that he had unlawfully transported, imported into the State of California, sold, furnished, administered, *and* gave away cocaine base, *and* offered to do all these things, *and* attempted to do all of these things. Before the immigration judge, Young testified that, when he pled guilty to that charge, he admitted selling cocaine base. The Board of Immigration Appeals observed that this testimony would support a finding that Young had been convicted of a disqualifying aggravated felony if it could be considered. Relying on Ninth Circuit precedent that a guilty plea to such a conjunctively-phrased charge can be treated as admitting each allegation, the Board reasoned that, because the charge to which he pled guilty included allegations of aggravated felony conduct, Young failed to prove that the conviction does not bar a grant of relief.

The Ninth Circuit held that when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes that the defendant was convicted under at least one of the theories but not necessarily all of them.

The en banc court overruled the precedent relied on by the Board. It held that when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes that the defendant was convicted under at least one of the theories but not necessarily all of them. In the opinion for the court, Judge Susan Graber wrote that viewing a plea to a charging document that alleges "A and B" as necessarily admitting "A" and "B" for purposes of a modified categorical analysis would treat convictions by guilty plea differently from convictions based on jury verdicts – in the latter instance, Judge Graber wrote, a defendant found guilty by a jury under an indictment alleging "A and B" would not be viewed as necessarily convicted of both "A" and "B." Judge Graber acknowledged that other courts of appeals had resolved this issue the other way. Her opinion pointed out that those courts of appeals had applied the law of the convicting jurisdiction regarding the significance of a guilty plea in reaching that conclusion, and concluded that the significance of a guilty plea to such a charging document is governed by federal law rather than the law of the convicting jurisdiction. In doing so, the court rejected the government's argument that taking the rules of the convicting jurisdiction governing guilty pleas into account comports with fairness and that no federal interest warrants a departure from the background rules of criminal procedure in effect in the convicting jurisdiction at the time of the plea when conducting a modified categorical analysis.

The government urged that federal courts are obliged to follow the "law or usage" of state courts as they give effect to the "records and judicial proceedings" in those courts, see 28 U.S.C. §1738, and it is natural that the federal courts and the Board would also refer to the "law and usage" in the particular convicting jurisdiction as it evaluates the significance of a guilty plea. Although the court rejected this argument, it stated that it would continue to resort to the law of the convicting jurisdiction "to understand the meaning of a state specific type of plea to a state criminal charge," referring specifically to a *People v. West* plea under California law.

The en banc court also considered whether the Board could consider Young's testimony in determining whether his conviction barred his application for relief, and concluded that it could not. In a brief submitted at the invitation of the en banc panel after argument, the government urged the court to overrule its precedent that "the only evidence that can be considered on the issue" of whether a conviction bars relief from removal is documents of the type described in *Shepard v. United States*, 544 U.S. 13 (2005), which concerned the Armed Career Criminal Act, and hold instead that the Board possesses latitude under the INA to consider probative information about a defendant's plea even if it is not presented in a *Shepard*-type document (a charging instrument, transcript of the plea colloquy, plea agreement, stipulation of facts, or comparable judicial record of this information). The court ruled that the *Shepard* limitations apply, rejecting the government's argument.

Having decided those points, the court also addressed how the burden-of-proof provision added by the REAL ID Act applies in Young's case. In *Sandoval-Lua*, the court had reasoned that, when the charging document that lists conduct that does constitute an aggravated felony, it was not necessary to find the elements of the aggravated felony conduct in order to convict the alien. And, because the record must prove that an alien either was or was not convicted of conduct which constituted an aggravated felony, under those circumstances, it cannot be said that the alien was convicted of an aggravated felony that bars the application for relief. *Rosas-Castaneda* held that the REAL ID Act amendments did not affect that result. Disagreeing, the Young majority reasoned that demonstrating that the record is inconclusive merely establishes that the evidence about the conviction "is in equipoise," and where the evidence is in equipoise, the issue is resolved against the appli-

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Ninth Circuit Rejects *Wang*

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of Wang, 25 I&N Dec. 28 (BIA 2009). A panel of the Ninth Circuit affirmed, also deferring to the BIA's interpretation.

In *Wang*, the BIA after finding the relevant CSPA provisions ambiguous, determined that only subsequent visa petition that do not require a change of petitioner may convert automatically to a new category and retain the original petition's priority date. Automatic conversion and priority date retention would thus be only available to F2A (spouses and children of LPRs) petition beneficiaries, including primary child beneficiaries and derivative beneficiaries of F2A spousal petition. This is because these aged out beneficiaries may become primary beneficiaries of an F2B (adult sons and daughters of LPRs) petition filed by the same petitioner.

In the cases before the Ninth Circuit, none of the appellants had been the beneficiaries of an F2A visa petition. For example, the lead appellant, De Osorio, had been granted an F3 visa, as the married daughter of a U.S. citizen. That visa had been filed in May 1998, when De Osorio's son, who was listed as a beneficiary, was 13 years old. Due to visa numbers waiting line, the F3 visa number became available in November 2005. By then the son was no longer a "child" because he was over twenty-one, and therefore no longer eligible for a derivative visa. De Osorio immigrated to the United States and became an LPR in 2006. In 2007 she then filed an F2B visa petition for her adult son and requested that he retain the priority date of the original F3 visa, May 1998. USCIS did not grant the request based on *Matter of Wang*.

In reversing the BIA, the en banc Ninth Circuit noted that two other circuits that had addressed the questions had reached different conclusions and neither had found the language in the statute ambiguous.

The CSPA states in relevant part:

§ 203(h) - Rules for determining whether certain aliens are children

(1) In general
For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described
The petition described in this paragraph is—
(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or
(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date
If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions
Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

In *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011), the Fifth Circuit found the CSPA unambiguous and concluded that CSPA extends automatic conversion and priority date retention to both F2A beneficiaries and aged-out derivative beneficiaries of other family-sponsored petitions. Thus, contrary to *Wang*, it held that automatic conversion is available for derivative beneficiaries of all family petitions, even when this necessitates a change in the identity of petitioner.

On the other hand, the Second Circuit in *Lin v. Renaud*, 654 F.3d 376 (2d Cir. 2011), without deferring to *Wang*, held that an aged-out derivative beneficiary of an F2B petition was not entitled to automatic conversion and priority date retention when his mother filed an F2B petition that named him as the primary beneficiary. According to the Second Circuit, a change in the petitioner forecloses the possibility of automatic conversion.

The Ninth Circuit found no ambiguity in the statute and therefore, under *Chevron* it gave no deference to the BIA's interpretation in *Wang*. The court rejected the contention, raised by the dissenters, that the existence of a circuit split meant that the CSPA was ambiguous. In particular, the court determined that § 203 (h)(3) which provides for retention of priority dates and automatic conversion is triggered by the application of

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On October 6, 2012, the Supreme Court heard argument in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. The Second and Third Circuits require that the government make these showings, because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution.

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Asylum — Particular Social Group

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

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Asylum – Particular Social Group

On September 27, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510, which held that an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Asylum — Corroboration

On May 3, 2012, the Ninth Circuit issued a *sua sponte* call for en banc rehearing, and withdrew its opinion in ***Oshodi v. Holder***, previously published at 671 F.3d 1002, which declined to follow, as dicta, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed supplemental briefing. En banc rehearing, calendared for oral argument the week of December 10, 2012.

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Convictions – Modified Categorical Approach

On August 31, 2012, the Supreme Court granted certiorari in ***Descamps v. United States,*** a criminal sentencing case in which the question presented is whether the Ninth Circuit was correct in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach. Resolution of the case is expected to implicate the entire reasoning of *Aguila-Montes* and the "missing element" rule that it overruled. The petitioner's brief was filed on October 24, 2012. The government's brief is due by December 3, 2012. Oral argument will be heard January 7, 2013.

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Convictions – Modified Categorical Approach

In ***Aguilar-Turcios v. Holder***, 691 F.3d 1025 (9th Cir. 2012), and ***Sanchez-Avalos v. Holder***, 693 F.3d 1011 (9th Cir. 2012), the Ninth Circuit applied ***United States v. Aguila-Montes De Oca***, 655 F.3d 915 (9th Cir. 2011) (en banc) and held that the aliens' convictions did not render them deportable. The government has requested extensions of time to seek rehearing through December 14, 2012, so that any rehearing petitions in those cases may be coordinated with the government's brief to the Supreme Court in *Descamps v. United States.*

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Consular Nonreviewability

On July 25, 2012, the government filed a petition for rehearing en banc in ***Rivas v. Napolitano***, 677 F.3d 849 (9th Cir. 2012), which held that the district court had jurisdiction to review a consular officer's failure to act on the alien's request for reconsideration of the visa denial. The petition argues that the longstanding doctrine of consular nonreviewability recognizes that the power to exclude aliens is inherently political in nature and that consular decisions and actions are generally not, therefore, appropriately subject to judicial review. The court ordered the appointment of pro bono counsel to respond to the government petition by December 27, 2012.

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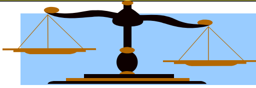

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Upholds Agency's Denial of Relief for Applicant Claiming Persecution On Account Of Her Pentecostal Faith

In *Rebenko v. Holder*, 693 F.3d 87 (9th Cir. September 4, 2012) (*Lynch*, Boudin, Lipez), the First Circuit held that substantial evidence supported the agency's denial of asylum, withholding and CAT because the series of isolated incidents of mistreatment that petitioner experienced did not rise to the level of persecution.

The petitioner, an Ukrainian citizen, entered the United States on a J-1 non-immigrant visa on July 1, 2001, and later obtained an F-1 student visa with authorization to remain until July 31, 2006. On October 12, 2004, petitioner filed an affirmative application for asylum, claiming that she had been persecuted since childhood because of her Pentecostal faith. Her application was not granted and her case was then referred to the immigration court. The IJ denied petitioner's application for asylum finding that the mistreatment she had been subjected to, did not rise to the level of persecution. The BIA affirmed.

The court concluded that a reasonable adjudicator could find that petitioner's single arrest, where the police detained her for eight hours but did not harm her, did not constitute persecution.

The First Circuit held that substantial evidence supported the agency's determination that the four isolated incidents petitioner testified to, all of which took place before June 2000, did not amount to persecution. The court concluded that a reasonable adjudicator could find that petitioner's single arrest, where the police detained her for eight hours but did not harm her, did not constitute persecution. The court also found no error in the agency's determination that petitioner failed to establish an independent well-founded fear of future persecution in light of evidence in the State Department's *International Religious Freedom Report* that the Ukrainian government generally respects the right to religious freedom and the number of Protestant churches had grown "rapidly" in Ukraine.

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First Circuit Holds that Alien Failed to Establish Eligibility for Withholding of Removal Based on a Single Incident of Harm in Venezuela

In *Cabas v. Holder*, __F.3d__, 2012 WL 4351899 (1st Cir. September 25, 2012) (*Howard*, Ripple, Selya), the First Circuit concluded that the record did not compel the conclusion that petitioner, a Venezuelan citizen, who had been kidnapped, beaten, and left unconscious, and on other occasions received threats to his safety, had suffered past persecution.

The court pointed out that the single incident of physical harm suffered by the petitioner was an isolated event and the resulting injuries were not sufficiently severe to require medical attention. "We have numerous times affirmed BIA determinations that maltreatment did not rise to the level of persecution in cases presenting comparable, if not more egregious, facts," said the court.

The court also determined that petitioner had not shown a likelihood of future persecution where he returned to his native country after the act of mistreatment and his family continued to live there unharmed.

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SECOND CIRCUIT

Second Circuit Holds that BIA Applied Erroneous Legal Standard to Petitioner's Political Asylum Claim

In *Yu v. Holder*, 693 F.3d 294 (2d Cir. September 7, 2012) (Jacobs, *Parker*, Hall), the Second Circuit concluded that the BIA failed to meaningfully engage with the facts in the record and applied an erroneous legal standard when assessing whether the petitioner's opposition to corruption at a government-run airplane factory in China constituted an actual political opinion.

The petitioner entered the United States in February 2009 on a B-1 business visa and shortly thereafter filed an affirmative asylum application. His application was not found credible and he was placed in removal proceedings where he renewed his claim. The IJ found that petitioner did not establish that his actions were an expression of his political opinion where he challenged the corruption of individual plant managers, rather than government corruption at the plant. The BIA affirmed.

The Second Circuit concluded that petitioner's conduct was in many ways typical of political protests and faulted the agency for ignoring the "full factual context" of the claim. "The BIA also failed to mention that Yu organized and accompanied other workers to demand their wages. The IJ and BIA never discussed whether Yu's views on wage theft within the factory constituted a challenge to the legitimacy of the government's entrenched modes of conduct. While the BIA is not obliged to recite every fact, its failure to meaningfully engage with the record showcases its failure to assess Yu's claim under the correct legal standard," said the court.

The court held that the BIA also erred by failing to consider petitioner's claim of imputed political opinion, es-

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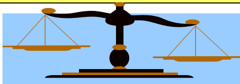

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pecially in light of petitioner's testimony that police arrested him for "undermining the social order" and detained him until he promised to stop lodging complaints.

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Second Circuit Holds Young, Unmarried Albanian Women Are Not a Particular Social Group

In *Gjura v. Holder*, __F.3d__, 2012 WL 4354496 (Pooler, Wesley, Lohier) (*per curiam*) (2d Cir. September 25, 2012), the Second Circuit held that young, unmarried Albanian women are not a "particular social group" for asylum purposes.

The petitioner, a citizen of Albania, entered the United States on December 25, 2004, under the Visa Waiver Program by using a fraudulent Italian passport. She was subsequently referred to an IJ for an "asylum only" hearing. In 2005, petitioner filed an application for asylum, withholding of removal, and CAT protection, asserting that the Albanian Mafia had twice attempted to kidnap and force her into prostitution, and that she feared she, like her sister and cousin, would be kidnapped and killed if she returned to Albania.

The IJ granted the asylum application, finding that petitioner had testified credibly and that she belonged to a particular social group -- "young, unmarried Albanian women" -- at risk of being kidnapped and forced into prostitution. On appeal, the BIA reversed the IJ, finding that the purported social group was "too amorphous" to constitute a protected ground, noting the lack of evidence showing that young, unmarried Albanian women were targeted more than children and married Albanian women. The BIA also found that petitioner failed to show past persecution or a nexus to a protected ground because the evidence did not establish that (1) the attacks rose to the level of persecution, (2) the attacks were for the purpose of human trafficking, and (3) the government was unwilling to provide protection.

The court further determined that the petitioner failed to establish a nexus to her proposed group because she merely assumed that her abductors were Mafia and intended to force her into prostitution, and because individuals outside of her proposed group were equally subject to abduction and forced prostitution. The court also ruled that the petitioner failed to establish that she suffered past persecution given the brief duration of her abduction and lack of physical injury, and that the Albanian government was not unable or unwilling to protect her. Finally the court explained that, "[w]hen the harm visited upon members of a group is attributable to the incentives presented to ordinary criminals rather than to persecution, the scales are tipped away from considering those people a 'particular social group' within the meaning of the INA."

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THIRD CIRCUIT

Third Circuit Holds that Plain Language of INA § 212(h) Means Admission Is a Physical Event of Entering Country, and Not Illegal Entry and Subsequent Status Adjustment

In *Hanif v. Att'y Gen. of the U.S.*, 694 F.3d 479 (3d Cir. 2012) (Hardiman, *Greenaway, Jr.,* Greenberg), the Third Circuit held that being "admitted" under INA § 101(a)(13)(A) requires an alien's physical entry and does not include illegal entry and subsequent status adjustment. The court held that the statutory language was unambiguous and declined to defer to the BIA's interpretation in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010).

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Being "admitted" under INA § 101(a)(13)(A) requires an alien's physical entry and does not include illegal entry and subsequent status adjustment.

Third Circuit Holds that the BIA Applied the Wrong Standard to Convention Against Torture Claim

In *Roye v. Att'y Gen. of the U.S.*, 693 F.3d 333 (3d Cir. September 10, 2012) (Sloviter, Chagares, *Jordan*), the Third Circuit held that the BIA, in its denial of deferral of removal under the Convention Against Torture, erroneously considered whether Jamaican authorities would imprison petitioner for the specific purpose of torturing him, rather than considering whether the abuse of mentally ill prisoners that occurs in Jamaican prisons rises to the level of torture.

The petitioner, a Jamaican citizen, was admitted in 1984 as the spouse of a United States citizen. On April 30, 1992, petitioner pled guilty in the Pennsylvania Court of Common Pleas to committing an aggravated assault, and to endangering the welfare of a child. The amended information to which he pled alleged that he had "sexual intercourse . . . by forcible compulsion" with his eight-month old daughter.

The BIA reversed the IJ's grant of protection under the CAT after determining that petitioner failed to demonstrate that the government would imprison petitioner specifically to torture him or would acquiesce to petitioner's torture. Following a hearing, at which several witnesses testified in support of petitioner's CAT claim, the IJ found petitioner removable due to his felony convictions, but granted his request for deferral of removal under the CAT.

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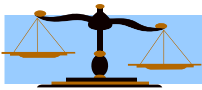

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In particular, the IJ found that petitioner's prospective persecutors would physically and sexually assault him with "the specific intent to inflict severe pain or suffering, i.e. . . . the goal or purpose of inflicting severe pain or suffering."

On appeal, the BIA reversed. Based on its examination of the record, the BIA concluded that petitioner had failed to "[meet] his burden of establishing by a preponderance of the evidence that it is more likely than not that he would be tortured if returned to Jamaica, either through the government inflicting or instigating the feared torture, or because the government would consent or acquiesce to such torture."

"Acquiescence to torture can be found when government officials remain willfully blind to torturous conduct and thereby breach their legal responsibility to prevent it."

The Third Circuit held that, while the BIA articulated the correct legal standard for specific intent in a CAT case, it improperly focused on the intent of officials who would imprison petitioner and not the intent of the prison guards who petitioner alleged would torture him. "By concentrating its inquiry on whether the act of detaining mentally ill deportees is an act of torture, rather than on whether the physical and sexual abuse of mentally ill prisoners that occurs in Jamaican prisons rises to the level of torture, the BIA incorrectly analyzed [petitioner's] claim for relief," said the court.

The court further found that the BIA had ignored the import of *Silva–Rengifo v. Att'y Gen.*, 473 F.3d 58, 64 (3d Cir. 2007), and therefore applied an incorrect legal standard when it stated that willful blindness is insufficient to prove government consent to or acquiescence. Under *Silva-Rengifo*, said the court "acquiescence to torture can be found when government officials remain willfully blind to torturous conduct and thereby breach their legal responsibility to prevent it."

Additionally, the error was compounded said the court, "when the BIA conflated the *mens rea* requirement pertaining to those who commit acts of torture (i.e., specific intent) with the minimum *mens rea* requirement pertaining to those who consent to or acquiesce in acts of torture committed by others (i.e., willful blindness)."

The court remanded the case to the BIA for consideration of the claim under the correct standards.

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Third Circuit Holds that an Alien Admitted as a Lawful Permanent Resident Was Ineligible for a 212 (h) Waiver, Even Though His Admission Was Substantively Unlawful

In *Martinez v. Att'y Gen. of the U.S.*, __F.3d__, 2012 WL 3854968 (3d Cir. September 6, 2012) (McKee, Hardiman, *Jones II*), the Third Circuit held that the statutory language in INA § 212(h), 8 U.S.C. § 1182(h), which bars certain criminal aliens from obtaining inadmissibility waivers if they have "previously been admitted to the United States as [aliens] lawfully admitted for permanent residence" unambiguously applies to an alien whose admission was procedurally regular, and does not require that the alien actually have been lawfully entitled to permanent resident status at the time of that admission.

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Third Circuit Remands for Alien to Present Evidence Supporting Motion to Suppress Evidence of Removability Obtained by Government Agents During Early-Morning Warrantless Entry and Search of Co-resident's Apartment

In *Oliva-Ramos v. Att'y Gen. of the U.S.*, __F.3d__, 2012 WL 4017478 (3d Cir. September 13, 2012) (*McKee*, Rendell, Ambro), the Third Circuit held that the BIA erred by denying the alien's motion to suppress evidence obtained by ICE agents during an early-morning warrantless raid on a residence. The court explained that under *INS v. Lopez-Mendoza*, 486 U.S. 1032 (1984), the Fourth Amendment's exclusionary rule may apply in removal proceedings where an alien shows "egregious violations . . . that might . . . undermine the probative value of the evidence obtained," and rejected the BIA's determination that evidence could only be suppressed based on "fundamentally unfair" circumstances that violated the due process clause of the Fifth Amendment.

Thus, without prejudging the outcome, the Third Circuit remanded to permit the alien to adduce evidence related to whether agents committed egregious violations of the Fourth Amendment or agency regulations.

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FIFTH CIRCUIT

Fifth Circuit Holds Departure Bar Regulation Inapplicable to Statutory Motion to Reopen

In *Garcia-Carias v. Holder*, __F.3d__, 2012 WL 4458228 (Jolly, DeMoss, *Stewart*) (September 27, 2012), the Fifth Circuit held that the INA unambiguously permits aliens to move to reopen regardless of wheth-

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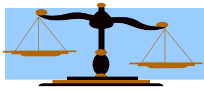

Summaries Of Recent Federal Court Decisions

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er they have left the United States. Thus, the court concluded that the BIA erred by applying the departure bar regulation, 8 C.F.R. § 1003.2(d) and 23(b)(1), to the alien's motion to reopen filed after he was removed.

The court distinguished its decisions in *Navarro–Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003) and *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009), on the basis that in those decisions they only addressed the applicability of the departure regulation to the BIA's *regulatory* power to reopen or reconsider *sua sponte*.

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Fifth Circuit Holds Departure Bar Regulation Inapplicable to Timely Reconsideration Motion

In ***Lari v. Holder***, __F.3d__, 2012 WL 4458213 (5th Cir. September 27, 2012) (Jolly, DeMoss, *Stewart*), the Fifth Circuit applied *Garcia Carias v. Holder*, __F.3d __ (5th Cir. 2012), and held that the departure bar regulation could not preclude a timely motion to reconsider. The court declined to address the government's motion to remand concerning the adequacy of a group hearing.

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SEVENTH CIRCUIT

Seventh Circuit Holds Frivolous Asylum Application Filed with USCIS Bars Relief

In ***Pavlov v. Holder***, __F.3d__, 2012 WL 4477374 (7th Cir. October 1, 2012) (*Easterbrook*, Bauer, Wood), the Seventh Circuit held that the petitioner, who admitted filing a frivolous asylum application, was ineligible for adjustment of status. The court ruled that the permanent bar to relief contained in INA § 208(d)(6) applied to petitioner even though he filed his application with the USCIS and received the frivolous application warning from an asylum officer, rather than from an Immigration Judge.

The permanent bar to relief contained in INA § 208(d)(6) applied to petitioner even though he filed his application with the USCIS and received the frivolous application warning from an asylum officer, rather than from an Immigration Judge.

The court rejected the petitioner's contention that he did not "knowingly" file a frivolous application because he repeated the falsehoods contained in his application during his asylum interview. "Frivolous applications for asylum require investigation and divert time that could be put to use addressing serious claims by honest applicants. Section 208(d)(6) is designed to prevent aliens from creating these costs — and helping themselves to additional time in the United States — during the months or years before an immigration judge convenes a hearing," said the court.

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EIGHTH CIRCUIT

Eighth Circuit Holds that Alien Cannot Have a Well-Founded Fear that His Daughter Will Be Subjected to FGM Where the Daughter Does Not Have a Well-Founded Fear of FGM

In ***Hounmenou v. Holder***, __F.3d__, 2012 WL 3930991 (Riley, Smith, *Shepherd*) (8th Cir. September 11, 2012), the Eighth Circuit held that, assuming the petitioner, a citizen of Benin, could raise a claim of direct persecution based on the threat of female genital mutilation (FGM) to his daughter by their extended family, substantial evidence supported the agency's finding that he did not have a well-founded fear of future persecution. Specifically, the court noted that the petitioner and his wife did not belong to a religion that practiced FGM and were strongly opposed to its practice, the petitioner's parents had previously resisted pressure by the extended family to participate in their religion, the petitioner resisted his extended family after his father passed away, and threats from the extended family were never acted upon.

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NINTH CIRCUIT

Ninth Circuit Holds Alien Denied Statutory Right to Counsel in Immigration Proceedings Need Not Show Prejudice

In *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012) (Clifton, Murguia, *Collins* (by designation)) the Ninth Circuit joined the Second, Third, Seventh, and D.C. Circuits in holding that a violation of an alien's statutory right to "counsel in an immigration proceeding is serious enough to be reversible without a showing of prejudice." The court also determined that the petitioner's lie about when he learned that his attorney was withdrawing – the primary basis for the immigration judge's denial of a continuance to secure replacement counsel – was because of the judge's "prolonged and hostile interrogation, which did not give petitioner a fair opportunity to explain himself."

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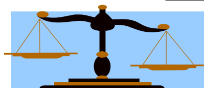

Summaries Of Recent Federal Court Decisions

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Lawful Permanent Resident Who Engaged in Alien Smuggling Had No Right to Counsel During Questioning at the Border

In *Gonzaga-Ortega v. Holder*, __F.3d__, 2012 WL 4040247 (*Clifton*, Murguia, Collins) (9th Cir. September 14, 2012), the Ninth Circuit held that an LPR, who was stopped at the border because he engaged in alien smuggling was not entitled to counsel under 8 C.F.R. § 292.5(b) during primary or secondary inspection. The court ruled that immigration officers are permitted to treat an LPR as an "applicant for admission" based on their determination that the LPR engaged in illegal activity, and that the officers may do so without waiting for a final administrative determination by an Immigration Judge or the BIA. Because the alien was properly deemed an "applicant for admission," the court concluded that 8 C.F.R. § 292.5 did not provide him with a right to counsel during primary and secondary inspection.

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Aliens' Presence in the CNMI Did Not Count Toward the Residency and Physical Presence Requirements for Naturalization

In *Eche v. Holder*, __F.3d__, 2012 WL 3939622 (9th Cir. September 11, 2012) (*Schroeder*, Callahan, Smith), the Ninth Circuit affirmed the district court's decision granting the Government's motion for summary judgment. The district court held that the alien-plaintiffs' residence in the Commonwealth of the Northern Mariana Islands (CNMI) prior to the effective date of the Consolidated Natural Resources Act of 2008 (CNRA) did not count towards the residency and physical presence requirements for naturalization.

The Ninth Circuit held that the operative clause of Section 705(c) of the CNRA, which provides that residence or presence in the CNMI is not residence or presence in the United States, applies to all categories of aliens, and that Section 705(c) did not make residence or presence in the CNMI before the transition date count towards the naturalization requirements. Finally, the court held that the Naturalization Clause of the Constitution, which provides that Congress shall have the power "[t]o establish a uniform Rule of Naturalization . . . throughout the United States," does not apply to the CNMI, as the CNMI is an unincorporated territory.

The Naturalization Clause of the Constitution, which provides that Congress shall have the power "[t]o establish a uniform Rule of Naturalization . . . throughout the United States," does not apply to the CNMI, as the CNMI is an unincorporated territory.

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Sexual Battery under California Penal Code § 243.4(a) is Not a Sexual Abuse of a Minor Aggravated Felony Offense Where the Criminal Record Did Not Show that the Victim's Age Was "Necessary" to the Conviction

In *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012) (McKeown, *Clifton*, Bybee (dissenting)), the Ninth Circuit concluded that the petitioner's sexual battery conviction under California Penal Code § 243.4(a) was not an aggravated felony (sexual abuse of a minor).

The petitioner entered the United States in 1977 and became a lawful permanent resident in 1986. Petitioner pled no contest to sexual battery by arousal and was placed in removal proceedings after he returned from a trip abroad in 2004. The IJ denied petitioner's request for a § 212(h) waiver because his sexual battery conviction qualified as a "sexual abuse of a minor" aggravated felony. The BIA affirmed.

The Ninth Circuit first determined that petitioner's conviction was not categorically an aggravated felony because the California statute does not specify that the victim must be a minor. In applying the modified categorical approach, the court acknowledged that the victim's age was established in the information and transcript of the plea colloquy but held that it was precluded from considering the victim's age because it was not a fact on which the conviction "necessarily rested." The court then remanded the case for further proceedings including, if appropriate, a review of the IJ's decision not to grant petitioner's request as a matter of discretion.

Judge Bybee dissented, arguing that the majority erred because the victim's age was recited in the indictment, was the only information that identified the victim, and was admitted by the alien when he pled no contest.

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Written Advisals Provided on the I–589 Asylum Application Form Constitute Sufficient Notice Under INA § 208(d)(4)(A)

In *Cheema v. Holder*, __F.3d__, 2012 WL 3857163 (Fernandez, Paez, *Nguyen*) (9th Cir. September 6, 2012), the Ninth Circuit held that, as a matter of law, the printed advisals on the I–589 asylum application form provide applicants with adequate notice of the consequences of filing a frivolous asylum application and of the privilege of being represented by counsel, as required by INA § 208(d)(4)(A).

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This Month's Topical Parentheticals

ADMISSION

Hanif v. Att'y Gen. of United States, __ F. 3d __, 2012 WL 4044727 (3d Cir. Sept. 14, 2012) (holding that being "admitted" under 8 U.S.C. § 1101(a)(13)(A) requires an alien's physical entry and does not include illegal entry and subsequent status adjustment; refusing to defer to the BIA's interpretation because the statutory language was unambiguous)

Martinez v. Att'y Gen. of United States, __ F.3d__, 2012 WL 3854968 (3d Cir. Sept. 6, 2012) (holding that an alien who was accorded the status of "lawfully admitted for permanent residence" upon physical entry into the US, but who in fact did not substantively qualify for such status because of his failure to disclose an arrest and guilty plea at the time of entry, is barred from seeking 212(h) relief based on a subsequent conviction for an aggravated felony)

ASYLUM

Gjura v. Holder, __ F. 3d __, 2012 WL 4354496 (2d Cir. Sept. 25, 2012) (affirming denial of asylum to Albanian woman claiming past attempted abduction and future risk of trafficking and forced prostitution by Mafia on account of membership in an alleged particular social group of "young unmarried Albanian women," where: (i) there was no evidence that two, brief past attempted abductions were by the Mafia or for trafficking; (ii) applicant cannot establish past "persecution" of herself based on past trafficking and killing of her sister and cousin; (iii) "young unmarried Albanian women" do not constitute a PSG because too amorphous; (iv) motive for trafficking is ordinary crime rather than persecution; and (v) the Albanian government is able and willing to control trafficking because government has increased prosecution of sex-traffickers and is working to address police corruption in trafficking)

Cabas v. Holder, __ F. 3d __, 2012 WL 4351899 (1st Cir. Sept. 25, 2012) (affirming denial of withholding to Venezuelan man, because one past incident of kidnaping and beating by FARC, break-in at parents' home, and some threats to applicant and his family do not compel a finding of past "persecution," and applicant failed to show a clear probability of future persecution given family's continued safety)

Green v. Att'y Gen. of United States, __ F. 3d __, 2012 WL 2866612 (3d Cir. July 13, 2012) (designated for publication, Sept. 12, 2012) (rejecting claim that IJ and BIA erred in failing to apply Third Circuit's two-pronged *Kaplun* test for likelihood of future torture in a CAT claim, which requires assessment: i) of likelihood of future harm; and ii) whether harm would amount to legal definition of "torture"; holding that the *Kaplun* issue was not exhausted to the BIA, and in any event the IJ and BIA determined that the applicant failed to satisfy the second prong of the *Kaplun* test, so it was unnecessary to make a finding as to the first prong)

Hounmenou v. Holder, __ F. 3d __, 2012 WL 3930991 (8th Cir. Sept. 11, 2012) (assuming without deciding that a parent was entitled to raise a claim for asylum based on direct persecution of the parent due to future FGM to his child, but rejecting such a claim where father from Benin failed to prove well-founded fear of future FGM to his daughter, given evidence that he and his wife were strongly opposed to FGM and were Catholics who do not practice FGM)

Yu v. Holder, __ F. 3d __, 2012 WL 3871371 (2d Cir. Sept. 7, 2012) (reversing BIA and holding that arrest and mistreatment of Chinese asylum applicant after complaining to factory management and city anti-corruption bureau that management failed to pay workers' wages because of embezzlement was persecution on account of political opinion, because (i) applicant was challenging a governing institution, not merely objecting to aberrational corruption by certain individuals as agency found; and (ii) applicant's conduct was "typical of political protest" because he was seeking to vindicate rights of others, criticizing a state institution (factory), and was punished by organ of the state (police)

Rebenko v. Holder, __ F.3d __, 2012 WL 3793128 (1st Cir. Sept. 4, 2012 (holding that substantial evidence supports IJ and BIA's conclusions that female asylum applicant from Ukraine failed to establish past persecution or well-founded fear of future persecution on account of her Pentecostal religion, where (i) several past incidents of mocking, assault by skinheads, and one brief arrest were single isolated incidents not cumulatively rising to level of past "persecution" and (ii) DOS Religious Freedom Report and country reports show that fear of future religious persecution is not well-founded)

Cheema v. Holder, __ F. 3d __, 2012 WL 3857163 (9th Cir. Sept. 6, 2012) (joining the Tenth Circuit in holding that the advisals on the standard asylum application provide adequate notice to applicants both of the privilege of being represented by counsel and of the consequences of knowingly filing a frivolous application)

Matter of E-A-, 26 I&N Dec. 1 (BIA Sept. 11, 2012) (holding that in assessing whether there are serious reasons for believing that an asylum applicant has committed a serious nonpolitical crime, an IJ should balance the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the acts outweighs their political character; finding that applicant's actions as a member of a group that burned passenger buses and cars, threw stones, and disrupted the economic activity of merchants in the market, while

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This Month's Topical Parentheticals

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pretending to be from the opposition party, reached the level of serious criminal conduct that, when weighed against its political nature, constituted a serious nonpolitical crime)

CANCELLATION

Matter of Y-N-P-, 26 I.&N. 10 (BIA Sept. 20, 2012) (holding that an applicant for special rule cancellation of removal under section 240A (b)(2) cannot utilize a 212(h) waiver to overcome the section 240A(b)(2) (A)(iv) bar resulting from inadmissibility under section 212(a)(2))

CONVENTION AGAINST TORTURE

Roye v. Att'y Gen. of United States, __ F. 3d __, 2012 WL 3892963 (3d Cir. Sept. 10, 2012) (reversing BIA's denial of CAT protection to Jamaican applicant claiming risk of future torture (sexual abuse) by inmates and guards in Jamaican prison, and holding BIA erred by (i) focusing on wrong conduct alleged to be torture [focused on prison official's act of detaining mentally ill deportees as torture rather than on inmates' and some guards' physical and sexual abuse of mentally ill prisoners]; and (ii) conflating the legal standards for intent required of those who commit torture (intentional infliction of pain or suffering) with the minimum state of mind to prove government consent or acquiescence in torture by others ("willful blindness" to non-government torture))

CNMI

Eche v. Holder, __ F. 3d __, 2012 WL 3939622 (9th Cir. Sept. 11, 2012) (holding that aliens' presence in the CNMI did not count toward the residency and physical presence requirements for naturalization; further holding that the Naturalization Clause does not apply to the CNMI, as the CNMI is an unincorporated territory)

CHILD STATUS PROTECTION ACT

De Osorio v. Mayorkas, __ F. 3d __, 2012 WL 4373336 (9th Cir. Sept. 26, 2012)(en banc) (refusing to defer to the BIA and holding that the plain language of the Child Status Protection Act unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries)

CRIMES

Young v. Holder, __ F. 3d __, 2012 WL 4074668 (9th Cir. Sept. 17, 2012) (en banc) (overruling precedent and holding that alien failed to prove that his conviction for violating a California controlled substances statute is not an aggravated felony for purposes of cancellation eligibility when the record is inconclusive as to whether the conviction is for an aggravated felony) (Judge Fletcher, joined by five judges, dissented) (Judge Ikuta, joined by four judges, also dissented, arguing that the majority should have held that the strict evidentiary limitations on evaluating the consequences of a conviction for federal sentencing purposes need not apply in this context)

Matter of Leal-, 26 I&N Dec. 20 (BIA Sept. 21, 2012) (holding that the offense of "recklessly endangering another person with a substantial risk of imminent death" in violation of section 13-1201(A) of the Arizona Revised Statutes is categorically a CIMT under *Matter of Silva-Trevino* even though Arizona law defines recklessness to encompass a subjective ignorance of risk resulting from voluntary intoxication).

Sanchez-Avalos v. Holder, __ F. 3d __, 2012 WL 3799665 (9th Cir. Sept. 4, 2012) (remanding to BIA after concluding that the crime of sexual battery under Cal. Pen. Code § 243.4(a) is categorically broader then the federal generic crime of "sexual abuse of a minor" because the state crime may be committed against a victim of any age; further holding that under the modified categorical analysis, the court could not consider evidence in the indictment indicating that petitioner admitted the victim was 13 years-old because it was not a fact on which the conviction "necessarily rested")

DETENTION

Jackson v. Holder, __ F. Supp.2d __, 2012 WL 4458692 (S.D.N.Y. September 27, 2012) (holding that petitioner's removal from the United States mooted his detention challenge because he was no longer in custody, and therefore his petition no longer presents a live controversy)

DUE PROCESS

United States v. Carmen, __ F. Supp.2d __, 2012 WL 4040253 (9th Cir. Sept. 14, 2012) (holding that government undermined defendant's opportunity to present a complete defense, in violation of the Fifth and Sixth Amendments, by deporting a witness it knew could give exculpatory evidence)

United States v. Terraza-Palma, __ F. Supp.2d __, 2012 WL 4017482 (C.D. Cal. Sept. 11, 2012) (holding in a criminal prosecution for illegal reentry that a warrant of removal is inadmissible to prove alienage because it constitutes inadmissible hearsay evidence)

EXCLUSIONARY RULE

Oliva-Ramos v. Att'y Gen. of United States, __ F. 3d __, 2012 WL 4017478 (3d Cir. Sept. 13, 2012) (holding that the BIA erred by denying petitioner's motion to suppress evidence obtained by ICE agents during an early-morning warrantless raid on a residence; explaining that under *INS v. Lopez-Mendoza*, the Fourth Amendment's exclusionary rule may apply in removal proceedings where an alien shows "egregious violations . . . that might . . . undermine the probative value of the evidence obtained" and rejecting the BIA's determination that evidence could only be suppressed based on

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This Month's Topical Parentheticals

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"fundamentally unfair" circumstances that violated the due process clause of the Fifth Amendment; remanding to permit the alien to adduce evidence related to whether ICE agents committed egregious violations of the Fourth Amendment or agency regulation)

ENFORCEMENT

Melendres v. Arpaio, __ F. 3d __, 2012 WL 4358727 (9th Cir. Sept. 25, 2012) (holding that absent 287 (g) authority, Maricopa County cannot detain a person based on suspicion of unlawful presence; because defendants may enforce only immigration-related laws that are criminal in nature and because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is "afoot")

EXTRADITION

Meza v. United States Att'y Gen., __ F. 3d __, 2012 WL 3847275 (11th Cir. Sept. 6, 2012) (affirming in part the district court's decision that a Honduran national may be extradited to Honduras based on the alleged murder of a fellow Honduran national for refusal to deliver on a bribe for government contracts; rejecting on ripeness grounds petitioner's claim that the CAT bars his extradition because the Secretary of State has not yet determined whether he is likely to be tortured)

FOIA

Skinner v. United States Department of Justice, __ F. Supp.2d __, 2012 WL 4465788 (D.D.C. September 28, 2012) (holding that USCIS properly withheld information from a one-page screen printout under FOIA because the information fell within FOIA's law enforcement exemptions)

MOTION TO REOPEN/RECONSIDER

Garcia Carias v. Holder, __ F. 3d __, 2012 WL 4458228 (5th Cir. Sept. 27, 2012) (holding that the BIA's application of the departure bar to statutory motions to reopen is invalid under *Chevron*'s first step as the statute plainly does not impose a general physical presence requirement) (Judge DeMoss, Jr. dissented encouraging the Justice Department to seek Supreme Court review of the issue)

Lari v. Holder, __ F. 3d __, 2012 WL 4450976 (5th Cir. Sept. 27, 2012) (applying *Garcia Carias* and holding that the BIA's application of the departure bar to statutory motions to reconsider is invalid under *Chevron*'s first step)

RIGHT TO COUNSEL

Gonzaga-Ortega v. Holder, __ F. 3d __, 2012 WL 4040247 (9th Cir. Sept. 14, 2012) (holding that an LPR who was stopped at the border because he engaged in alien smuggling was not entitled to counsel under 8 C.F.R. § 292.5(b) during primary or secondary inspection; reasoning that immigration officers are permitted to treat an LPR as an "applicant for admission" based on their determination that the LPR engaged in illegal activity, and that the officers may do so without waiting for a final determination by an IJ or BIA)

Montes-Lopez v. Holder, __ F. 3d __, 2012 WL 4075747 (9th Cir. Sept. 18, 2012) (holding that petitioner's right to counsel was violated when the IJ required him to proceed without counsel because it was not unreasonable for petitioner to wait until the hearing date to provide the IJ with a letter from his attorney indicating that the attorney would be unable to represent petitioner and asking for a continuance; further agreeing with circuits that have held that an alien who shows he has been denied the statutory right to counsel does not need to establish prejudice)

Ninth Circuit Rejects *Wang*

(Continued from page 3)

§203(h)(1), and this latter provision applies to not only F2A visas but also to derivatives of other visa categories.

The court also explained that there "the CSPA contains no indication that Congress intended the identity of the petitioner to be relevant." Instead, said the court the CSPA drafters "seem to have contemplated that automatic conversion could require more than just a change in a visa category," suggesting therefore, the possibility of a new petitioner. The court rejected the government's restrictive interpretation of subsection § 203(h)(3), noting that "it barely modifies the regulatory regime that existed at the time the CSPA was enacted."

Finally, the court acknowledged that its interpretation "will necessarily impact the wait time for other aliens in the same line. It is difficult to assess the equities of this result, but that is not our role."

Writing for the dissenters, Judge M. Smith, would have held that the CSPA language was ambiguous, "because it contains language simultaneously including and excluding derivative beneficiaries of F3 and F4 visa petitions," and would have found reasonable the BIA's interpretation in *Matter of Wang*.

By Francesco Isgro, OIL

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Young v. Holder

(Continued from page 2)

cant, the party with the burden of persuasion. Summing up, the majority stated: "It is possible that Petitioner's prior conviction constitutes an aggravated felony; it is also possible that it does not. But Petitioner bears the burden of demonstrating that he was not convicted of an aggravated felony, and he has failed to do so. The BIA therefore correctly denied Petitioner's application for cancellation of removal."

Judge Ikuta, joined by three other judges, vigorously dissented from the court's holding that the *Shepard* evidentiary limitations apply and argued that the court should have concluded the Board was not required to disregard Young's testimony and remanded to allow additional development of the record and a determination whether the preponderance of the evidence is that Young had been convicted of an aggravated felony.

Judge Ikuta wrote that the Board "ought to be able to decide in the first instance whether to credit Young's admission that he had committed an aggravated felony, or conceivably such additional documents or testimony as he may produce to show that his admission was mistaken." In her opinion, she argued that the majority erred in assuming that the *Shepard* evidentiary limitations are applicable without considering whether it is necessary to adapt those limitations "to fit the specific language of the statute at issue and the civil context of an immigration proceeding."

Judge Ikuta reasoned that the statute gives applicants for relief a reasonable opportunity to carry their burden of proving eligibility by authorizeing the applicant to introduce a wide range of information, including testimony, and that the majority's evidentiary limitations, when coupled with the statutory allocation of the burden of proof to the alien applicant, leads to unfairness that Congress could not have intended.

Highlighting that fairness point, Judge Ikuta wrote, is the separate dissenting opinion by Judge Betty Fletcher, which was joined by four other judges. Calling *Sandoval-Lua* "well reasoned," Judge Fletcher argued that the court should hold that an inconclusive record of conviction carries an applicant's burden of proof and declared that she "cannot agree that Congress intended that an application for cancellation of removal be decided on the basis of whether state court records happen to be sufficiently clear to prove a negative (*i.e.* that the lawful permanent resident was not convicted of an aggravated felony)." She added that "the clarity of state court plea or conviction records will often depend upon the habits and preferences of the individual trial judge and the clerk of the court. The decision to remove a lawful permanent resident from this country should not turn on the vagaries of state court record keeping."

Judge Fletcher also contended that, even when records exist that would support the alien's claim of eligibility, applicants may be unable to obtain them because of language barriers, a lack of information about the court system, their detained status, an inability to pay fees for copies of court records, among other reasons. At the same time, however, she argued that "it makes no sense to discard the categorical approach or *Shepard*'s limitation on the documents to be considered in determining" whether the conviction bars eligibility.

Commenting on the opinions by Judges Fletcher and Graber, Judge Ikuta observed that Judge Fletcher's opinion "has the virtue of being logical, even if it is inconsistent with the statutory language," and declared that the result Judge Graber's opinion reaches is "absurd." Summing up, she observed, "The oddities of our division have now saddled us with a ruling with nine judges disagree and which departs from the language of the statute in a way that most seriously disadvantages the alien. I do not join this result."

By Bryan S. Beier, OIL

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OIL TRAINING CALENDAR

- **November 29, 2012.** Brown Bag Lunch & Learn on "Transgender Issues" with Civil Rights attorney, Sharon McGowan.

- **December 3, 2012.** Brown Bag Lunch & Learn with professor Patrick Weil, author of the just-published book: *The Sovereign Citizen: Denaturalization and the Origins of the American Republic.*

For additional information about these training programs contact Francesco Isgro at:

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INSIDE OIL

OIL's Senior Litigation Counsel, ***Francesco Isgro,*** coordinated the 52nd Annual Ceremony commemorating Charles J. Bonaparte, held on September 12 at Main. The keynote speaker this year was the U.S. Solicitor General, Donald B. Verrilli, who recalled his Italian roots to invited guests from the Italian American community. Charles J. Bonaparte, was the 46th Attorney General of the United States and the founder of the Federal Bureau of Investigation.

On September 14, Deputy Director ***Donald Keener*** and Assistant Directors ***Shelly Goad*** and, ***Ernie Molina***, combined their resources to launch a "NFL Kickoff Party"! Lots of bowls of chilies, chicken wings, corn bread, cake and the usual beverages were enjoyed by the guests. No bets were taken on the Redskins or any other NFL team.

Donald B. Verrilli, Francesco Isgro, John DiCicco, Luca Franchetti Pardo, Judge Francis Allegra

INSIDE ICE

After more than 39 years of federal service, Boston Chief Counsel, and OIL friend, ***Fred McGrath,*** will be retiring in November of this year. Fred has spent the last 33 years of his legal career working for ICE and the former INS. He has the distinction of being the second longest-tenured ICE Chief Counsel in OPLA.

Fred started his career at the Department in 1973, as a Trial Attorney with Civil Rights Division where he was responsible for enforcing both the Public Accommodation provisions of the Civil Rights Act of 1964 and the Voting Rights Act (VRA) of 1965.

He then became an Attorney Advisor for the Administrator for the Office of Juvenile Justice and Delinquency Prevention in the Law Enforcement Assistance Administration. Fred's immigration career began in 1979 when he transferred to the INS General Counsel's office in Washington, D.C.

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.

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

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