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

Immigration Litigation Bulletin

Vol. 16, No. 4 April 2012

LITIGATION HIGHLIGHTS

Inside

Court of Appeals Adverse Credibility Project 2011-12

The Adverse Credibility Project was established eight years ago as a means to track decisions issued by the courts of appeals that specifically make a ruling on the agency's adverse credibility determinations. The decisions include opinions, memorandum dispositions, and orders – that is, decisions that are unpublished and published, non-precedent and precedent.

The "database" or source for obtaining these decisions are the paper copies of decisions that the Clerks' offices send to OIL, electronic copies of decisions obtained by OIL paralegals, and the electronic copies of adverse decisions that the Adverse Support Team (headed by Angela Green) obtains by searching the courts' electronic dockets.

The data compiled below reflects a tally of all decisions in which – regardless of the ultimate outcome of the petition for review – the appellate court has either approved of, or reversed, the adverse credibility holding reached by the immigration judge or Board of Immigration Appeals. Petitions for review decided wholly on non-credibility related issues are not counted, even though the immigration judge or Board of Immigration Appeals made an adverse credibility determination. So, for example, cases in which the court upheld the agency's adverse credibility determination, but nevertheless granted the petition for review on a different issue, would be included in this project. However, a petition denied because of a failure to demon-

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Eleventh Circuit Halts State Court Intervention In The Visa Process Through Nunc Pro Tunc Adoption Orders

It has been well-settled Board of Immigration Appeals' ("Board") precedent for decades that, in applying 8 U.S.C. § 1101(b)(1)(E)(i) to a Petition for Alien Relative ("visa petition") filed on behalf of an adopted alien, the agency must look to the actual date of the final adoption order rather than to a state court's *nunc pro tunc* order backdating the date of the final adoption to before the alien's 16th birthday. *See Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976); *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982).

This Board precedent has necessarily guided U.S. Citizenship and Immigration Services' ("USCIS") adjudication of visa petitions filed on behalf of adopted aliens, requiring the denial of all visa petitions filed on behalf of applicants adopted after their 16th birthday regardless of the existence of subsequently issued state court *nunc pro tunc* orders. *See* 8 C.F.R. § 1003.1(g).

Yet, there has been an increasing spate of district court litigation, resulting in unanimously adverse decisions requiring both the Board and USCIS to abide by state court orders backdating the date of adoptions. *See Allen v. Brown*, 953 F. Supp. 199 (N.D. Ohio 1997); *Messina v. USCIS*, 2006 WL 374564 (E.D.

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Credibility Decisions

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strate the requisite nexus, without addressing any credibility issues, would not.

The following two charts reflect relevant decisions issued by the courts of appeals in 2010 and 2011, the most recent years for which complete data are available. The charts show that the number of relevant decisions has been decreasing. Specifically, in 2010, the overall number of adverse-credibility-related decisions (424) was 56% of what it was in 2009 (763), and in 2011, the overall number again decreased to 293, or 69% of what it was in 2010 and 38% of what it was in 2009. In both years, the Ninth Circuit issued the highest number of decisions addressing the agency's credibility finding (150 in 2010 and 112 in 2011). The number of decisions issued by the second-place circuit, the Second Circuit, dropped from 92 in 2010 to less than half that in 2011 (45). In 2010, the Third Circuit was in third place with 61 decisions, the Eleventh was in fourth place with 41 decisions, the Sixth Circuit issued 28 decisions (again, all wins), and the Fourth Circuit 22 decisions. In 2011, the Sixth Circuit was in third place with 33 decisions (all wins), and the Third Circuit issued 31, the Fourth Circuit 29, and the Eleventh Circuit 28 decisions.

The overall win percentage in adverse credibility cases in 2010 was 86% and in 2011 was 84.6%. These win percentages are lower than the overall win percentage in immigration cases for each year (93% in 2010 and 87.2% in 2011), and also lower than the overall win percentage in asylum cases (92% in 2010 and 86.7% in 2011).

By circuit, the win percentages in adverse credibility cases in 2010 ranged from 100% in the First (six cases in that circuit), Fifth (eight cases), Sixth (28 cases), Seventh

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2011 Credibility Decisions

Circuits	win (%)	win (#)	loss (%)	loss (#)	overall win % (all)
1st/pre REAL ID	100.0%	1	0.0%	0	
1st/post REAL ID	100.0%	2	0.0%	0	
1st/total	100.0%	3	0.0%	0	81.0%
2d/pre REAL ID	100.0%	8	0.0%	0	
2d/post REAL ID	86.5%	32	13.5%	5	
2d/total	88.9%	40	11.1%	5	95.1%
3d/pre REAL ID	88.9%	8	11.1%	1	
3d/post REAL ID	86.4%	19	13.6%	3	
3d/total	87.1%	27	12.9%	4	88.7%
4th/pre REAL ID	87.5%	7	12.5%	1	
4th/post REAL ID	95.2%	20	4.8%	1	
4th/total	93.1%	27	6.9%	2	94.8%
5th/pre REAL ID	--	0	--	0	
5th/post REAL ID	100.0%	6	0.0%	0	
5th/total	100.0%	6	0.0%	0	97.1%
6th/pre REAL ID	100.0%	20	0.0%	0	
6th/post REAL ID	100.0%	13	0.0%	0	
6th/total	100.0%	33	0.0%	0	93.2%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	66.7%	2	33.3%	1	
7th/total	75.0%	3	25.0%	1	80.6%
8th/pre REAL ID	100.0%	1	0.0%	0	
8th/post REAL ID	--	0	--	0	
8th/total	100.0%	1	0.0%	0	92.5%
9th/pre REAL ID	71.0%	66	29.0%	27	
9th/post REAL ID	73.7%	14	26.3%	5	
9th/total	71.4%	80	28.6%	32	81.4%
10th/pre REAL ID	--	0	--	0	
10th/post REAL ID	100.0%	1	0.0%	0	
10th/total	100.0%	1	0.0%	0	90.5%
11th/pre REAL ID	100.0%	11	0.0%	0	
11th/post REAL ID	94.1%	16	5.9%	1	
11th/total	96.4%	27	3.6%	1	93.2%
TOTAL	84.6%	248	15.4%	45	87.2%
Total/pre REAL ID	80.9%	123	19.1%	29	
Total/post REAL ID	88.7%	125	11.3%	16	

Credibility Decisions

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(six cases), Eighth (four cases), and Tenth (six cases) Circuits, to 69% in the Ninth Circuit. In between were the Eleventh Circuit at 98%, the Third Circuit at 97%, the Second Circuit at 93.5%, and the Fourth Circuit at 86%. In 2011, the win percentage was again 100% in the First (three cases in that circuit), Fifth (six cases), Sixth (33 cases), Eighth (one case), and Tenth (one case) Circuits. In 2011, the lowest win percentage was again in the Ninth Circuit, this time at 71%. The win percentage was 75% in the Seventh Circuit, but that number is the result of only four cases. In between the lowest percentages and 100% were the Eleventh Circuit at 96%, the Fourth Cir-

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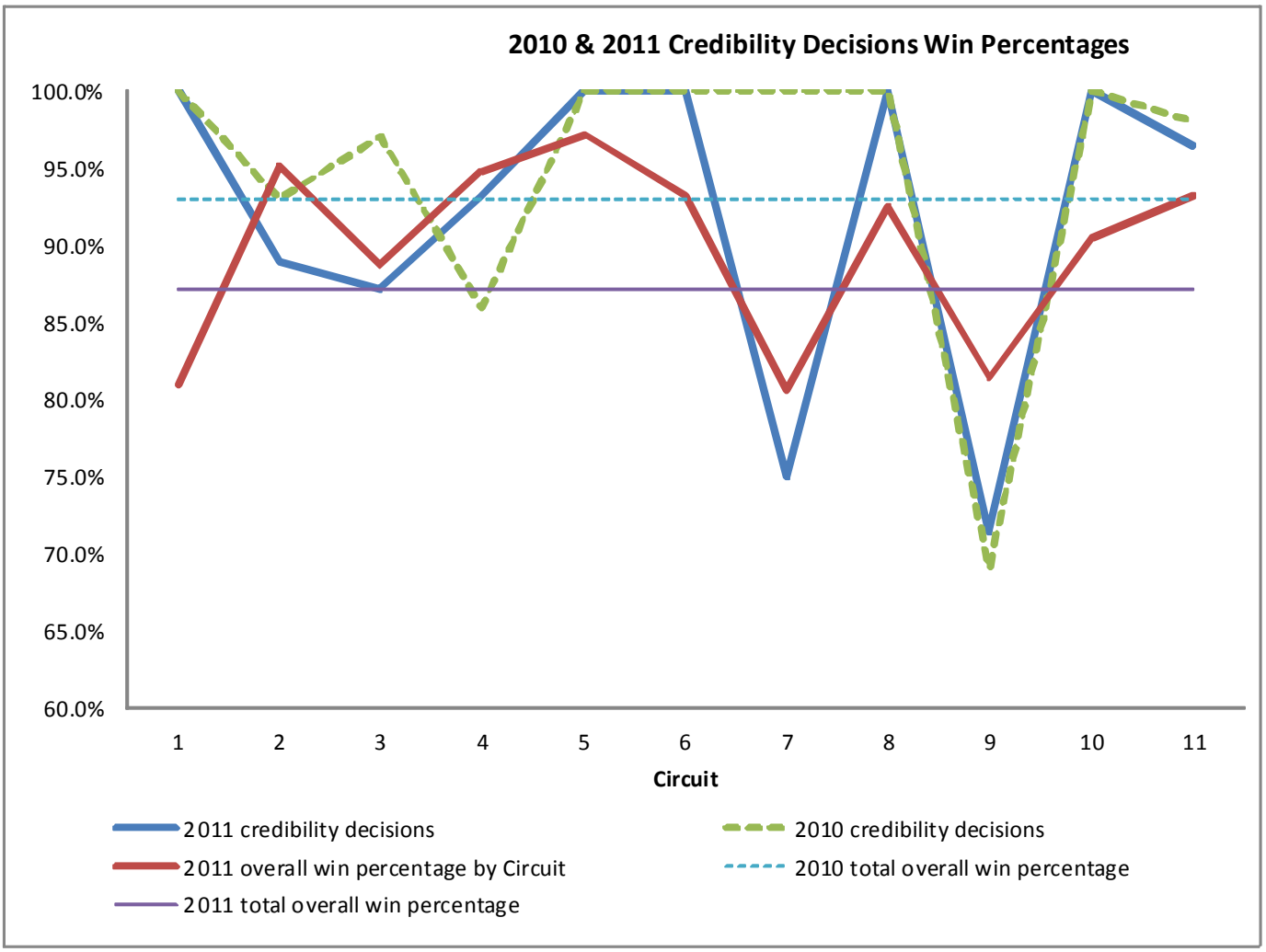
2010 Credibility Decisions

	win (%)	win (#)	loss (%)	loss (#)
1st	100.0%	6	0.0%	0
2d	93.5%	86	6.5%	6
3d	96.7%	59	3.3%	2
4th	86.4%	19	13.6%	3
5th	100.0%	8	0.0%	0
6th	100.0%	28	0.0%	0
7th	100.0%	6	0.0%	0
8th	100.0%	4	0.0%	0
9th	69.3%	104	30.7%	46
10th	100.0%	6	0.0%	0
11th	97.6%	40	2.4%	1
TOTAL	86.3%	366	13.7%	58

Overall win % in all immigration cases — 93%
Overall win % in asylum cases—92%



Credibility Decisions

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cuit at 93%, the Second Circuit at 89%, and the Third Circuit at 87%.

Compared with the 2010 statistics, the Second, Third, and Eleventh Circuits experienced decreases in win rates in adverse credibility cases (as did the Seventh Circuit, but based on only four cases in 2011 and six in 2010). The Third experienced the largest decrease, dropping 10 percentage points from 97% to 87%. The Second Circuit's decrease was roughly half that. Until 2010 the win percentage in the Second Circuit had been rising steadily, from 14% in 2006 to 54% in 2007 to 90% in 2008 to 96% in 2009. In 2010, the win percentage in the Second Circuit dropped from 96% to 93%, and then it decreased again in 2011 to 89%. The Eleventh Circuit declined only slightly, from 98% in 2010 (after 96% in 2009) back down to 96% in 2011. On the other hand, the Ninth and the Fourth Circuit both experienced increases in win rates. The Fourth Circuit's win percentage increased from 86% in 2010 (after 96% in 2009) to 93% in 2011. The Ninth Circuit win percentage, historically around 60%, dropped slightly from 73% in 2009 to 69% in 2010, then regained half of that loss, to 71%, in 2011.

The 2011 decisions were also categorized into whether they involved application of the changes introduced by the REAL ID Act. The Second Circuit had the largest number of post-REAL ID Act decisions, with 37. The Third Circuit was second in absolute numbers with 22 and the Fourth Circuit next had 21. The Ninth Circuit's 112 decisions included only 19 post-REAL ID Act cases. Only the Fourth and the Ninth Circuit had higher win percentages in post-REAL ID Act cases than in pre-REAL ID Act cases; the Fourth's win percentages were 95% and 87.5% respectively and the Ninth's were 74% and 71%.

2009 Credibility Decisions

Circuits	Win	(number)	Loss	(number)
1st	0%	0	100%	1
2nd	96%	278	4%	10
3rd	74%	39	26%	14
4th	96%	27	4%	1
5th	95%	21	5%	1
6th	100%	58	0%	0
7th	0%	0	100%	1
8th	86%	6	14%	1
9th	73%	173	27%	63
10th	0%	0	0%	0
11th	96%	66	4%	3
Total	87%	668	13%	95

2008 Credibility Decisions

Circuits	Win	(number)	Loss	(number)
1st	80%	4	20%	1
2nd	90%	236	10%	27
3rd	92%	23	8%	2
4th	100%	19	0%	0
5th	100%	5	0%	0
6th	92%	48	8%	4
7th	75%	12	25%	4
8th	93%	14	7%	1
9th	62%	106	38%	66
10th	100%	6	0%	0
11th	96%	54	4%	2
Total	83%	527	17%	107

2007 Credibility Decisions

Circuits	Win	(number)	Loss	(number)
1st	83%	10	17%	2
2nd	54%	93	46%	78
3rd	50%	7	50%	7
4th	95%	19	5%	1
5th	100%	10	0%	0
6th	84%	26	16%	5
7th	41%	7	59%	10
8th	83%	10	17%	2
9th	61%	121	39%	76
10th	89%	8	11%	1
11th	100%	59	0%	0
Total	76%	370	24%	182

Previous uses for this project's results include support for the REAL ID Act's amendments regarding the agency's credibility determinations and the Department's ongoing efforts to challenge the Ninth Circuit's pre-REAL ID Act adverse credibility rules.

By Donald E. Keener, OIL Deputy Director; Carol Federighi, OIL; Sunah Lee, OIL

State Court Intervention In The Visa Process

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Mich. 2006) (unreported); *Velazquez v. Holder*, 2009 WL 4723597 (N.D. Cal. 2009); *Gonzalez-Martinez v. DHS*, 677 F. Supp. 2d 1233 (D. Utah 2009); *Taddeo v. USCIS*, 08-6346 (D.N.J. 2010) (unreported); *Hong v. Napolitano*, 10-cv-00379 (D. Hawaii 2011) (unreported). These adverse district court decisions have also resulted in mounting awards under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). *See*, *e.g.*, *Hong*, 10-cv-00379 (award of $16,650.79); *Gonzalez-Martinez*, 677 F. Supp. 2d 1233 (award of $20,000.00); *Velazquez*, 2009 WL 4723597 (award of $32,951.59). However, recently the Eleventh Circuit became the first appellate court to directly address the issue, and its holding potentially foreshadows a shifting of the judicial tide.

In *Mathews v. USCIS*, 2012 WL 555665 (11th Cir. Feb. 21, 2012) (per curiam), the Eleventh Circuit, in an unpublished decision, reversed the district court's grant of summary judgment to an alien, holding that the Board reasonably interpreted 8 U.S.C. § 1101(b)(1)(E)(i) to require an alien's actual adoption to have occurred before her 16th birthday, regardless of the later *nunc pro tunc* amendment of her adoption date.

This brief article addresses Congress's intent to allow only a person adopted before the age of 16 to qualify as an adopted "child," the rising number of state court orders issued for the purpose of contravening that intent, the flawed district court decisions that have sided with the alien in every case, and the Eleventh Circuit's decision that correctly afforded the Board's precedent the required deference, and for the time-being, halted the rising tide of contrary decisions allowing aliens to obtain state court orders effectively nullifying the age limit that Congress set in 8 U.S.C. § 1101(b)(1)(E).

Adjustment Of Status And The Immediate Relative Petition Process For Adopted Children

A lawful permanent resident or United States citizen may file a petition seeking to confer immigrant status upon a child. *See* 8 U.S.C. § 1154(a)(1)(A)(i). The statutory definition of "child" includes one who is "adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." 8 U.S.C. § 1101(b)(1)(E)(i); *see also* 8 C.F.R. § 204.2(d)(2)(vii).

The legislative history strongly suggests that Congress's reason for enacting 8 U.S.C. § 1101(b)(1)(E)(i) was to reject the notion that an individual adopted after the relevant date could still qualify as "child."

Legislative History Of 8 U.S.C. § 1101(b)(1)

The legislative history strongly suggests that Congress's reason for enacting 8 U.S.C. § 1101(b)(1)(E)(i) was to reject the notion that an individual adopted after the relevant date could still qualify as "child." As originally enacted in 1952, the definition of "child" under the Immigration and Nationality Act ("INA") did not include adopted children. *See* INA of 1952, Pub. L. No. 82-414, § 101(b)(1), 66 Stat. 163, 171; *see also Matter of S-*, 5 I&N Dec. 289 (BIA 1953).

Congress expanded the definition of "child" in 1957 to include a person who was "adopted while under the age of 14 years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." Act of September 11, 1957, Pub. L. No. 85-316, § 2, 71 Stat. 639. In 1981, Congress again modified the definition of "child" by raising the age by which a "child" must be adopted to 16 years. *See* INA Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611; 8 U.S.C. § 1101(b)(1)(E)(i).

Board Precedent

For more than 50 years, the Board has strictly construed the age restriction set forth in the definition of "child" under 8 U.S.C. § 1101(b)(1)(E), holding that for an adopted person to qualify as a "child" for immigration purposes, formal adoption proceedings must have concluded before he or she reached the statutory age limit. *See*, *e.g.*, *Matter of Caramanzana*, 12 I&N Dec. 47, 49 (BIA 1967). The Board first addressed the problem of retroactive or *nunc pro tunc* adoption orders in *Matter of Cariaga*, 15 I&N Dec. at 716-17, and then again in *Matter of Drigo*, 18 I&N Dec. at 223-24. In *Matter of Cariaga*, the beneficiary's adoption did not actually occur until he was 19 years old. 15 I&N Dec. at 716-17. However, the adoption decree, issued by an Iowa court in 1975, declared the adoption retroactive to 1963. *Id.* at 717. At that time, the definition of "child" set forth in 8 U.S.C. § 1101(b)(1)(E) required an adoption to have occurred before the beneficiary reached age 14 to qualify as an "immediate relative" for immigration purposes. *Id.* The Board construed the age restriction strictly, holding that the actual "act of adoption must occur before the child attains the age of fourteen." *Id.* In so holding, the Board relied upon the legislative history of the INA, including Congress's deliberate exclusion of adopted children from immigration benefits in the 1952 Act "for fear that fraudulent adoptions would provide a means of evading the quota restrictions" in the INA. *Id.* The Board held that, because the retroactive date applied by the state court did not alter the fact that the adoption actually occurred after the beneficiary reached the statutory age limit, the 19 year-old beneficiary could not be considered a "child" for immi-

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State Court Intervention In The Visa Process

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gration purposes. *Id.* The Board later reaffirmed this interpretation in *Matter of Drigo*, upholding the denial of the visa petition filed on behalf of an adopted alien, when the alien was adopted after his 14th birthday, and reiterating that "[i]t was Congress' intent that the age restriction in [8 U.S.C. § 1101(b)(1)(E)] be construed strictly." 18 I&N Dec. at 224 (citing *Matter of Cariaga*, 15 I&N Dec. 716).

The District Court Decisions

Despite Congress's apparent intent to prohibit people who were adopted after the age of 16 from qualifying for immigration benefits, at least seven district courts have now held that the Board must abide by state court orders adjusting the date of adoption so that applicants adopted after their 16th birthday can still qualify. In each of these cases, a United States citizen or lawful permanent resident petitioned to adopt an alien relative, and the adoptions were not finalized until after the adoptees' 16th birthdays. After the adoptees turned 16, a state court in each case issued a *nunc pro tunc* order adjusting the date of adoption with the intention of qualifying the adoptees for eligibility under 8 U.S.C. § 1101(b)(1)(E)(i). Consistent with its precedent, the Board determined that, regardless of the *nunc pro tunc* orders, the adoptees could not qualify as "children" because they were not adopted before they turned 16. However, the district courts unanimously relied on flawed reasoning to conclude that the Board erred by not upholding the state court *nunc pro tunc* orders.

The district court decisions are generally based on two significant errors. First, none of the decisions have paid deference to the Supremacy Clause, despite the Government's arguments that the effect of the *nunc pro tunc* orders has been to impose requirements that are contrary to established federal policy, and that the United States Constitution expressly grants Congress control over immigration matters. Indeed, the decisions uniformly ignore the basic rule of statutory construction that "in the absence of a plain indication to the contrary . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (internal quotation omitted).

At least seven district courts have now held that the Board must abide by state court orders adjusting the date of adoption so that applicants adopted after their 16th birthday can still qualify.

The government has argued that there is no "plain indication" that Congress intended the meaning of the phrase "adopted while under the age of sixteen" to vary according to state laws about the effective dates of adoptions, particularly given that Congress chose to define when an adopted person qualifies as a "child" for immigration purposes. Nevertheless, the district courts, either explicitly or implicitly, all determined that the meaning of the phrase "adopted while under the age of sixteen" is governed by state, rather than federal, law. *See, e.g., Messina*, 2006 WL 374564 at *5-6.

Second, and of import here, the district court decisions uniformly failed to conduct the necessary analysis as required by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For example, in *Gonzalez-Martinez*, the district court concluded that the Board placed "undue emphasis" on "the fear that fraudulent adoptions would provide a means of evading the quota restrictions," instead of promoting the "overriding purpose of Congress to keep families 'united.'" 677 F. Supp. 2d at 1237. However, under a proper *Chevron* analysis, the district courts were required to defer to the agency's decision about how to balance those competing goals, as long as the agency's decision was a reasonable interpretation of the statute. 467 U.S. at 845. Notwithstanding these errors, the government declined to appeal any of the district court losses until *Mathews*, which presented facts more favorable to the government than the others. As discussed below, the Eleventh Circuit correctly held that the Board's decision to favor the avoidance of fraud was reasonable; thus, the district court was not free to displace the Board's decision with its own opinion about how to best effectuate the goals of the statute. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

Mathews v. USCIS

In *Mathews*, the alien was the beneficiary of a visa petition filed on her behalf by her adoptive father. However, USCIS denied the visa petition because the adoption had occurred after her 16th birthday. Following USCIS's denial, and more than five years after the initial adoption, Mathews sought and obtained a *nunc pro tunc* state court order, backdating the date of her adoption to several days before her 16th birthday. The Board, relying on its precedential decisions, denied the appeal and affirmed USCIS's finding that Mathews did not fit the definition of "child" under 8 U.S.C. § 1101(b)(1)(E) because she was not adopted before her 16th birthday. Mathews filed a complaint in the United States District Court for the Southern District of Florida, alleging that the denial of the visa petition was arbitrary and capricious, an abuse of discretion, and/or not in accordance with the law under the APA.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On April 2, 2012, the Supreme Court granted a writ of certiorari over government opposition in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a published decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. 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. *Moncrieffe's* merits brief is due June 21, 2012; the government response August 29, 2012.

Contact: Manning Evans
☎ 202-616-2186

Cancellation — Imputation

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

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

Asylum — Particular Social Group

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

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

Conviction — Conjunctive Plea

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

Contact: Bryan Beier
☎ 202-514-4115

Retroactivity — Judicial Decisions

The Ninth Circuit granted rehearing *en banc*, vacating its prior opinion, ***Garfias-Rodriguez v. Holder***, 649 F.3d 942 (9th Cir. 2011), in which the court had held that an alien inadmissible for reentering after accruing unlawful presence may not adjust his status under 8 U.S.C. § 1245(i). The court permitted supplemental briefing for the parties to address whether the court's decision, deferring to an agency precedent decision rejecting a prior circuit precedent, should be applied retroactively to cases pending at the time of the agency decision. The court also invited the parties to discuss whether the *en banc* court should overrule *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010). Oral argument is scheduled for June 20, 2012.

John W. Blakeley
☎ 202-514-1679

Aggravated Felony — Missing Element

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

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

Asylum — Corroboration

On May 3, 2012, the Ninth Circuit granted 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). No supplemental briefing was ordered for en banc rehearing, calendared for oral argument the week of September 17, 2012.

John W. Blakeley
☎ 202-514-1679

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that the BIA Failed to Make Requisite Findings for Denying Asylum for Lack of Corroboration

In ***Soeung v. Holder***, __F.3d__, 2012 WL 1415643 (Torruella, *Lipez*, Howard) (1st Cir. April 25, 2012), a pre-REAL ID Act case, the First Circuit vacated a BIA order denying an asylum claim for failure to corroborate.

The petitioner, a citizen of Cambodia, entered the United States on September 2003, on a non-immigrant visitor visa, overstayed, and timely applied for asylum, withholding of removal, and CAT protection with USCIS. The Asylum Officer did not grant the application and petitioner was placed in removal proceedings where he renewed his request. The petitioner claimed past harassment and a fear of further reprisal for his antagonism to the ruling Cambodian People's Party. He claimed that between July 2002 and September 2003, in his capacity as an immigration officer at Cambodia's largest airport, he covertly gave sensitive information concerning terrorist activities in Cambodia to an employee of the United States government, Amy Fox. The Cambodian government discovered petitioner's dealings with the Fox, and he was interrogated and threatened with arrest and death. In fear, petitioner enlisted Fox's help to escape Cambodia in September 2003. He has not attempted to contact her and does not know her current whereabouts.

Eventually following the BIA's remand to the IJ for clarification of the findings, the BIA determined that the IJ "properly determined that [petitioner] needed additional corroboration, such as evidence from the United States government, to support his claim" and that "[t]he inconsistencies noted by the [IJ] in conjunction with the lack of sufficient corroborating evidence support a determination that [petitioner] failed to provide a plausible and coherent account of the basis for his [application]."

In remanding the case to the BIA, the court held that before the failure to produce corroborating evidence can be held against an applicant, there must be explicit findings that (1) it was reasonable to expect the applicant to produce corroboration and (2) the applicant's failure to do so was not adequately explained. The court explained that "despite the unusual nature of the corroboration at issue, there were no explicit findings by the IJ or the BIA that it was reasonable to expect [petitioner] to produce corroboration of his involvement with Fox, and that his explanation for the absence of such corroboration—namely, that Fox had warned him against disclosing their involvement and that he had inferred her unwillingness to document their dealings with each other—was inadequate."

"Despite the unusual nature of the corroboration at issue, there were no explicit findings by the IJ or the BIA that it was reasonable to expect [petitioner] to produce corroboration ."

In a concurring opinion, Judge Howard suggested that given the current posture of the case, "one might also reasonably expect the government itself now to take the modest step of attempting to verify this petitioner's story."

Contact: Jesse Bless, OIL
☎ 202-305-2028

First Circuit Holds Asylum Applicant Did Not Show Changed Country Conditions to Warrant Reopening

In ***Chen v. Holder,*** __F.3d__, 2012 WL 1059613 (1st Cir. March 30, 2012) (*Torruella*, Souter, Boudin), the First Circuit concluded the BIA correctly denied petitioner's request for reopening because he had not demonstrated a change in country conditions in China. The petitioner entered the United States without inspection on October 16, 1996. Following a removal hearing in 1997, he was denied asylum but granted voluntary departure. Subsequently petitioner's counsel withdrew the BIA's appeal on the grounds that petitioner had returned to China. Petitioner apparently never left the United States. Instead he married and started a family, which grew to include three children, all of whom were born between the years 2004 and 2009.

In mid-August 2010, petitioner was apprehended and detained by ICE and shortly thereafter he filed a motion to reopen his removal proceedings with the BIA. He asserted that reopening was warranted because his former counsel had "egregiously acted upon [Chen's] pending appeal in a way that is well beyond the ineffective assistance of counsel." He alleged that he was acting under the impression—pressed upon him by counsel—that his appeal to the BIA had been dismissed and that he was unaware of counsel's representation to the BIA that he had departed to China. Complicating matters further, petitioner's counsel died in or about 2002. The BIA denied the motion as untimely because it had been filed eleven years after the BIA had deemed petitoner's appeal withdrawn. The BIA also determined that petitioner had not acted with reasonable diligence in seeking such reopening.

In December 2010, petitioner filed a second motion to reopen alleging changed country conditions. The BIA denied reopening after reviewing the proffered documentation, including evidence challenging the findings of the Department of State's 2007 Country Profile, and in particular an affidavit from Dr. Flora Sapio that challenged the reliability, factual conclusions, and reporting methodology of the Country Profile.

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The First Circuit rejected petitioner's contention that the BIA had failed to review all evidence, noting that it was not required to discuss each piece of evidence but that in this case the BIA had "punctiliously presented its reasons for either declining to consider it or deeming it insufficient to support [petitioner's] claims." The court held that the BIA properly "weighed the 2007 Country Profile against Dr. Sapio's report and found the former to be more compelling."

The BIA had "punctiliously presented its reasons for either declining to consider [the evidence] or deeming it insufficient to support [petitioner's] claims."

Contact: Kevin Conway, OIL
☎ 202-353-8167

First Circuit Grants Petitioner's Motion for Final Judgment After Retaining Jurisdiction Despite Remand to the Agency

In ***Castaneda-Castillo v. Holder***, __F.3d__, 2012 WL 1224283 (1st Cir. April 12, 2012) (*Torruella*, Ripple, Lipez), the First Circuit held that where it had explicitly retained jurisdiction upon remand to the BIA, and where the case was now administratively final, it had authority to issue a final judgment.

This asylum case, as the court noted, has been pending for 18 years. Castaneda, a former Peruvian military officer had been accused of participating in a massacre in the village of Accomarca in 1985. Although a Peruvian government commission found that Castaneda was not responsible for the massacre, the Shining Path, a Maoist guerrilla organization sent him and his family death threats. Castaneda and his family left Peru in 1991and affirmatively applied for asylum in 1993. In 1999, his case was referred to the immigration court where he renewed his request for asylum.

Following a series of decisions at the administrative level and by the First Circuit, the court last remanded the case to the BIA to consider whether military officers linked to the massacre comprised a social group. *Castaneda-Castillo v. Holder*, 638 F.3d 354 (1st Cir. 2011). On October 11, 2011, the BIA held that military officers associated with the massacre constituted a cognizable social group and that Castaneda had suffered past persecution for his membership in that group. The BIA remanded the case to the IJ to consider whether the government could rebut the presumption of a well-founded fear of future persecution. On February 7, 2012, the IJ granted asylum and the government did not file an appeal.

Castaneda then filed a motion with the First Circuit to issue a final judgment. The court rejected the government's argument that it lacked jurisdiction, explaining that it had "retained jurisdiction for the express purpose of ensuring a speedy resolution of this case." Accordingly, the court dismissed the petition for review as moot because the aliens had been granted asylum on remand and directed the clerk of court to issue a final judgment.

Contact: Matt Crapo, OIL
☎ 202-353-7161

First Circuit Holds False Testimony Supports Denial of Cancellation of Removal

In ***Restrepo v. Holder***, __F.3d__, 2012 WL 1220490 (1st Cir. April 12, 2012) (*Torruella,* Souter, Boudin), the First Circuit held that the BIA properly denied cancellation of removal based on a lack of good moral character, where the applicant provided false testimony at his immigration hearing regarding his sham divorce and later remarriage to his wife.

The court also concluded that the BIA properly upheld the adverse credibility determination. However, the court rejected the government's contention that it should not review the credibility findings under the three-prong test of *Matter of A–S–*, 21 I&N Dec. 1106 (BIA 1998), because that holding was limited to the asylum context. The court noted that the BIA has cited the *Matter of A–S–* three–pronged framework for assessing an IJ's credibility determinations in deciding an appeal involving a denial of an alien's application for cancellation of removal at least once in the past. "[E]ven if the *Matter of A–S–* framework were applicable in this context, it would not help Restrepo," said the court.

Contact: Nancy E. Friedman, OIL
☎ 202-353-0813

SECOND CIRCUIT

Second Circuit Holds that Finding Concerning Future Event is a Factual Finding Reviewed for Clear Error and Objective Determination Concerning Eligibility is Reviewed *De Novo*

In ***Huang v. Holder***, __F.3d__, 2012 WL 1003506 (2d Cir. March 27, 2012) (*Newman*, Jacobs, Leval), the Second Circuit held that an IJ's finding that a future event will occur if an applicant is removed is a factual finding subject only to clear-error review by the BIA. The court thus reversed and remanded on this issue, but approved the BIA's application of the *de novo* standard to the objective component of the well-founded fear of persecution inquiry. Finally, the court concluded that the BIA may determine the weight to be accorded State Department country reports.

Contact: Anh-Thu P. Mai-Windle, OIL
☎ 202-353-7835

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Second Circuit Holds that Second Degree Assault Is Categorically a "Crime of Violence" Aggravated Felony

Morris v. Holder, __F.3d__, 2012 WL 1372142 (2d Cir. April 23, 2012) (Walker, McLaughlin, *Livingston*), the Second Circuit held that an alien's 1993 conviction for second degree assault, in violation of New York Penal Law § 120.05(2), categorically constitutes a "crime of violence" under 18 U.S.C. § 16(b) and, therefore, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). Further, the court joined the Seventh Circuit in holding that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), does not alter longstanding precedent that statutes retroactively setting forth criteria for deportation and removal do not violate the *ex post facto* clause of the United States Constitution, as these proceedings are civil in nature.

Contact: Kiley L. Kane, OIL
☎ 202-305-0108

Second Circuit Holds that Witness Tampering Under Connecticut Law Is an Offense Relating to Obstruction of Justice

In *Higgins v. Holder*, __F.3d__, 2012 WL 1352584 (2d Cir. April 19, 2012) (Katzmann, Carney, Restani) (*per curiam*), the Second Circuit held that witness tampering under Connecticut General Statute § 53a-151 was "an offense relating to obstruction of justice" for purposes of the aggravated felony definition under 8 U.S.C. § 1101(a)(43)(S). The court applied the BIA's framework in *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999), declining to rule on whether it must defer to that case, but reasoning that because it was the narrowest of all the cases it surveyed, the result would be the same under any approach.

Contact: Kristofer R. McDonald, OIL
☎ 202-532-4520

THIRD CIRCUIT

Third Circuit Holds Alien's False Oath in Bankruptcy Did Not Meet the Definition of an Aggravated Felony Under INA § 101(a)(43)(M)(i)

In *Singh v. Att'y Gen. of the U.S.*, __F.3d__, 2012 WL 1255061 (3d Cir. April 16, 2012) (Scirica, Ambro, *Van Antwerpen)*, the Third Circuit vacated the BIA's order of removal. While the court affirmed the BIA's determination that the alien's conviction for making a false oath in bankruptcy in violation of 18 U.S.C. § 152(3) involved deceit, the court held, contrary to the BIA, that the circumstances of the alien's offense revealed that it resulted in no actual losses to either the bankruptcy trustee or the creditors. Accordingly, the court held that the Department of Homeland Security failed to prove that the alien's offense met the definition of an aggravated felony under INA § 101(a)(43)(M)(i), which includes fraud or deceit crimes with losses exceeding $10,000.

Contact: Jesse M. Bless, OIL
☎ 202-305-2028

FOURTH CIRCUIT

Fourth Circuit Holds that an Alien Who Lawfully Entered, Adjusted Status and Committed an Aggravated Felony Remains Eligible for Section 212(h) Waiver

In *Bracamontes v. Holder*, __F.3d__, 2012 WL 1037479 (4th Cir. March 29, 2012) (*Wynn,* Agee; Niemeyer (dissenting)), the Fourth Circuit held that the plain language in INA § 212(h) dictates that an alien is ineligible for a § 212(h) waiver if the alien lawfully entered the United States, with lawful permanent resident status, and subsequently committed an aggravated felony. The court held in this case that Bracamontes remained eligible for the waiver since he had lawfully entered the United States as a temporary resident, adjusted his status post-entry, and subsequently committed an aggravated felony.

Bracamontes remained eligible for the [§ 212(h)] waiver since he had lawfully entered the United States as a temporary resident, adjusted his status post-entry, and subsequently committed an aggravated felony.

The court distinguished this case from one where the alien had no lawful entry before adjustment, noting that § 212(h) is silent on how to treat an alien with no lawful entry at all. Judge Niemeyer, in dissent, held that § 212(h) is ambiguous and the court should defer to the BIA's interpretation as it is more plausible and consistent with the INA.

Contact: Sheri R. Glaser, OIL
☎ 202- 616-1231

SIXTH CIRCUIT

Sixth Circuit Denies Venue Transfer to Fourth Circuit, Even Though Immigration Judge Completed Proceedings in Arlington, Virginia, with Alien Physically Present

In *Thiam v. Holder*, __F.3d__, 2012 WL 1470133 (Boggs, *Rogers*, Sutton) (6th Cir. April 30, 2012), the Sixth Circuit declined to transfer venue to the Fourth Circuit, even though the petitioner, whose proceedings began in the Cleveland Immigration Court with an Arlington Judge presiding by televideo, traveled to Arlington and personally appeared at the final merits hearing. The Sixth Circuit reasoned that the INA's venue provision under 8 U.S.C. § 1252(b)(2), was not

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jurisdictional and that transfer would not be "in the interest of justice." The court remanded for the BIA to apply the four-factor firm-resettlement test in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).

Contact: Christina Parascandola, OIL
☎ 202-514-3097

NINTH CIRCUIT

Ninth Circuit Finds Jurisdiction To Review The Non Action of a Consular Official on a Request for a Reconsideration of a Visa Denial

In ***Rivas v. Napolitano***, __F.3d__, 2012 WL 1416008 (9th Cir. April 25, 2012) (*Pregerson*, Wardlaw; Bea concurring and dissenting), the Ninth Circuit in a split decision, held that the doctrine of consular nonreviewabilty did not bar the court's jurisdiction over the plaintiff's action seeking to require the U.S. Consul General to act on his request for reconsideration of the denial of his immigrant visa.

Rivas, a Mexican national sought an immigrant visa based on an approved visa petition (I-130) filed by his daughter Lorena. The consular official in Ciuaded Juarez, Mexico, denied Rivas' visa application. Rivas then sought an order from the district court to compel the Consul General and other federal defendants to act on his letter requesting reconsideration of the denial and on his application for Permission to Reapply for Admission (Form I-601). The district court ruled that under the doctrine of consular nonreviewability, it lacked jurisdiction to review the consular official's discretionary decisions. The court noted that a consular official had rejected Rivas' Form I-601.

On appeal, the Ninth Circuit affirmed the district court's dismissal of Rivas' claim as to Form I-601 for lack of subject matter jurisdiction. The court determined that the consular official had a "facially legitimate and bonafide reason" for rejecting Form I-601, because Rivas had been arrested on a smuggling charge and the consular official believed that he was inadmissible under INA § 212(a)(6)(E).

The Ninth Circuit found, however, that Rivas' request for reconsideration was not barred by the doctrine of consular nonreviewability because the government had taken no action on the request. The court explained that the governing regulation at 22 C.F.R. § 42.81 (e), makes the act of reconsideration nondiscretionary when an applicant for a visa files for reconsideration within one year of the date of refusal. "Once this is done, consular officials have a duty to reconsider a case and must take action," said the court. Therefore, it explained, the district court had subject matter jurisdiction under the Mandamus Act, the APA, and under the Declaratory Judgment Act. The court then determined that the record on appeal was insufficient to determine whether the proffered evidence for reconsideration was sufficient to overcome the reasons for the original denial. That question, said the court, will have to be resolved the by the district court in the first instance.

The Ninth Circuit found that Rivas' request for reconsideration was not barred by the doctrine of consular nonreviewability because the government had taken no action on the request.

In a concurring and dissenting opinion, Judge Bea would have agreed with the majority opinion as to the non-reviewability of the I-601 decision but would also have found that the doctrine of consular nonreviewability deprived the court of jurisdiction to review Rivas' letter requesting reconsideration. He explained that the nondiscretionary duty to reconsider a visa refusal under 22 C.F.R. § 42.81(e), is triggered only when the applicant adduces evidence tending to overcome the ground of ineligibility. Here, Rivas had violated the law prohibiting alien smuggling and the undisputed evidence was that he had admitted that fact, wrote Bea.

Contact: Scott Marconda, OIL-DCS
☎ 202-305-4831

Ninth Circuit Holds that It Will Review "Particularly Serious Crime" Determinations for Abuse of Discretion

In ***Arbid v. Holder***, __F.3d__, 2012 WL 1089595 (9th Cir. April 3, 2012) (Tallman, Graber, Timlin) (*per curiam*), the Ninth Circuit held that the proper standard of review for evaluating "particularly serious crime" determinations is abuse of discretion.

The petitioner, citizen of Lebanon, claimed that after suffering torture at the hands of Syrian intelligence agents in Lebanon, he fled to the West, traveling first to Mexico in 2000 and then entering the United States on the basis of his false claim to U.S. citizenship. Several months after his illegal entry, he was placed in removal proceedings where he sought asylum and withholding. An IJ determined that he qualified for asylum and withholding of removal.

In April 2008, petitioner pleaded guilty to mail fraud under 18 U.S.C. 134, as a result of his involvement in a scheme to defraud mortgage lenders of nearly $2 million. He was sentenced to sixteen months in prison and was ordered to pay $650,000. Following the completion of his criminal sentence, DHS moved to reopen petitioner's removal proceedings, charging that he was no

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longer eligible for asylum and withholding because he had been convicted of a particular serious crime. An IJ agreed to the charge and also determined that country conditions had changed in Lebanon such that it was no longer more likely than not that petitioner would be tortured if removed to that country. The BIA upheld the IJ's decision.

Preliminarily, the Ninth Circuit held that it had jurisdiction to review the BIA's finding that an applicant for asylum and withholding had been convicted of a particularly serious crime. It rejected the government's position that the criminal alien review bar applied in the case. The court then ruled, as a matter of first impression, that "in determining whether a crime is particularly serious is an inherently discretionary decision, and we will review such decisions for abuse of discretion."

The Ninth Circuit held that the BIA's precedential ruling that the crime of misprision of a federal felony in violation of 18 U.S.C. § 4 is a crime involving moral turpitude, does not rest on a permissible statutory interpretation.

Here, the court found that the BIA did not abuse its discretion in determining that petitioner's federal mail fraud conviction was a "particularly serious crime," because it had considered the nature of his conviction, the sentence imposed, the circumstances and underlying facts of the conviction, and the nature and scope of the crime.

Finally, the court concluded that substantial evidence supported the BIA's denial of the petitioner's claim for deferral of removal under CAT, noting that since the late 1990s when petitioner was persecuted, the Syrian military has withdrawn from Lebanon.

Contact: Kiley L. Kane, OIL
☎ 202-305-0108

Ninth Circuit Holds that Misprision (Knowing Concealment) of a Felony Is Not a Crime Involving Moral Turpitude

In ***Robles-Urrea v. Holder***, __F.3d__, 2012 WL 1382856 (9th Cir. April 23, 2012) (Schroeder, *Reinhardt*, Pollak (E.D. Pa., by designation)), the Ninth Circuit held that the BIA's precedential ruling that the crime of misprision of a federal felony, in violation of 18 U.S.C. § 4, is a crime involving moral turpitude, see *Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (BIA 2006), does not rest on a permissible statutory interpretation. The court determined that the Board failed to give a reasoned foundation for concluding that knowingly concealing a federal felony is "inherently base or vile" or involves an "evil intent," hallmarks of moral turpitude. The court remanded for consideration of whether the alien's conviction (concealing a conspiracy to distribute marijuana and cocaine) established that his actions were base or depraved.

Contact: Anh-Thu P. Mai-Windle, OIL
☎ 202-353-7835

ELEVENTH CIRCUIT

Eleventh Circuit Holds that it Lacks Jurisdiction over an Untimely Petition for Review

In ***Lin v. U.S. Attorney General***, __F.3d__, 2012 WL 1288811 (Tjoflat, *Pryor*, Fay) (11th Cir. April 17, 2012), the Eleventh Circuit, held that it lacked jurisdiction over a petition for review that was filed one day late because the court was accessible on the day that the petition was due, despite petitioner's argument that Federal Express was unable to deliver the petition on time due to inclement weather.

The petitioners, who were appealing their denial of a motion to reopen, urged the court to rule that their petition was timely because they paid a commercial parcel service to provide overnight delivery 29 days after the BIA issued its decision and, but for a delay caused by inclement weather, the petition would have reached the court on the day it was due. The government acknowledged that the petition was untimely, but did not ask that the court dismiss their petition.

In dismissing the petition, the court explained that petitioners had offered no evidence or assertion that the weather made it impossible for them to access the Clerk's office, "nor do they contend that they lacked internet access to file their petition electronically." The Clerk's office "was not physically inaccessible due to inclement weather. . . Although the Lins assert that they should not suffer for the delay by Federal Express, they fail to explain how the Clerk's office was inaccessible."

Contact: Linda Cheng, OIL
☎ 202-514-0500

Confidentiality Provisions Pertaining to Asylum Applicants Not Violated by Disclosure of Applicant's Name to Hospital Administrator

In ***Lyashchynska v. U.S. Attorney General***, __F.3d__, 2012 WL 1107991 (11th Cir. April 4, 2012) (Dubina, *Fay*, Kleinfeld), the Eleventh Circuit affirmed the BIA's adverse credibility determination based on a State Department report that concluded that petitioner, an asylum applicant from Ukraine, had submitted false documents in support of her claim. The court rejected petitioner's assertion that the State De-

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partment investigator violated the asylum confidentiality provisions of 8 C.F.R. § 1208.6(a) by disclosing the alien's name to a hospital administrator.

The petitioner was admitted to the United States on or about May 23, 2006, as a J–1 exchange visitor and changed her status to student on December 11, 2006. On March 28, 2007, she affirmatively applied for asylum, claiming that she had been mistreated in Ukraine due to her sexual orientation. When her application was not granted, she was referred to an IJ for a removal hearing charged as an alien admitted as a nonimmigrant who failed to comply with the conditions of such status.

At her hearing, petitioner testified that she had been raped by a man she had been dating for several months and two other men, who wanted to teach her "how to be a real woman." Petitioner also claimed that she belonged to a social club off campus where members were of "untraditional orientation," and that one day in 2004, six man came into the club and began calling everyone "filthy gays and lesbians." Petitioner was kicked, had her hair pulled, and suffered bruises to her legs. Petitioner also submitted police reports and medical records to support her claim. However, the authenticity of those documents was questioned. As a result of an investigation by the Fraud Detection National Security Section and the Department of State, the IJ determined that the documents were not credible. The IJ gave petitioner an opportunity to rebut the government's information but following several continuances she was unable to produce any corroborating evidence. Accordingly, petitioner's application was denied based on her failure to corroborate her story. On appeal, the BIA affirmed the IJ's decision and also rejected petitioner's argument that the government had violated the confidentiality requirements during the investigation of her medical and police reports by disclosing her name to Ukrainian officials.

In affirming the adverse credibility finding, the Eleventh Circuit found that both the IJ and the BIA had weighed the evidence of authenticity and determined that the State Department's Report was more credible than petitioner's testimony and the claims of her family. "Their determinations were not based on any single source or inconsistency, but on substantial record evidence," said the court.

Regarding the confidentiality claim, the court said that at most, the disclosure of petitioner's name was made to a hospital administrator (to determine if she had ever been treated at that facility) but not to police officials or other government actors. "Even if this was a disclosure, it does not give rise to the inference that petitioner applied for asylum," explained the court. The court then held that "disclosure of a person's name is not sufficient for a breach of confidentiality; indeed without disclosure of a name, investigating these claims would be impossible."

Contact: Kathryn McKinney, OIL
☎ 202-532-4099

DISTRICT COURTS

District of Colorado Grants Motion to Dismiss Habeas Petition Seeking Alien's Return from Libya

In ***Mohamed v. Napolitano,*** No. 11-cv-1803 (D. Colo. April 12, 2012) (Martinez, J.) the court granted the government's motion to dismiss the alien's habeas petition. The alien alleged that his removal from the United States to Libya, despite an immigration court-ordered stay of removal, violated his constitutional rights. The alien asked the court to issue a writ of habeas corpus compelling the government to return him to the United States. The government had executed the alien's final order of removal prior to receiving notice of the stay. The court dismissed the case, concluding that, regardless of whether the decision was discretionary, INA § 242(g) stripped the court of jurisdiction over the habeas petition because the alien's claims related directly to the decision to execute his removal order.

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

Eastern District of Pennsylvania Denies in Part Individual Defendant's Qualified Immunity Claim

In ***Galarza v. Szalczyk***, No. 10-cv-6815 (Gardner, J.) [E.D. Pa.]. On April 2, 2012, the District Court for the Eastern District of Pennsylvania granted in part and denied in part the motion to dismiss filed by a U.S. Immigration and Customs Enforcement ("ICE") agent sued in his individual capacity. The court held that the agent was entitled to qualified immunity with respect to a procedural due process claim against him, but it concluded that the plaintiff sufficiently alleged that the agent violated his equal protection and Fourth Amendment rights by issuing a detainer that resulted in local law enforcement's detaining the plaintiff, a U.S. citizen, for one weekend. On the same date, the district court granted the motion to dismiss filed by a second ICE agent sued in his individual capacity. The court held that, at most, this agent relayed information from one law enforcement officer to another, and was thus protected by qualified immunity. Finally, in a ruling which may have significance in other challenges to ICE's use of detainers because it is in tension with ICE's current litigating position, the court granted the motion to dismiss filed by the county that enforced the detainer, a co-defendant in the matter, concluding that the county cannot be liable for complying with a federal detainer because it is a requirement rather than a request.

Contact: Colin Kisor, OIL-DCS
☎ 202-532-4331

This Month's Topical Parentheticals

ADVANCE PAROLE

■ *Matter of Arrabally*, 25 I&N Dec. 771 (BIA Apr. 17, 2012) (holding that an alien who leaves the U.S. temporarily pursuant to a grant of advance parole does not thereby make a "departure . . . from the United States" within the meaning of section 212(a)(9)(B)(i)(II) of the INA) (clarifying *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007))

ASYLUM

■ *Lyashchynska v. U.S. Atty. Gen.*, __ F.3d__, 2012 WL 1107991 (11th Cir. April 4, 2012) (upholding adverse credibility finding on the basis that the documents showing petitioner's alleged persecution based on sexual orientation lacked authenticity, and also finding that the asylum confidentiality provision was not breached given the presumption of regularity afforded to government investigations)

■ *Soeung v. Holder*, __ F.3d __, 2012 WL 1415643 (1st Cir. Apr. 25, 2012) (pre-REAL ID credibility case interpreting *Matter of S-M-J*'s corroboration rule as precluding IJ from holding alien's failure to corroborate against him, unless IJ first makes explicit findings that: (1) it was reasonable for IJ to expect corroboration and; (2) the alien failed to adequately explain his failure to corroborate)

CANCELLATION

■ *Restrepo v. Holder*, __ F.3d __, 2012 WL 1220490 (1st Cir. Apr. 12, 2012) (holding that substantial record evidence supported IJ's finding that petitioner, while under oath, provided false testimony at his immigration hearings regarding the motives underlying his divorce in 1996, and was therefore ineligible for cancellation of removal for lack of good moral character)

CRIME

■ *Moncrieffe v. Holder*, __ U.S __, 2012 WL 1069211 (Apr. 2, 2012) (granting certiorari on the question of whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony)

■ *Robles-Urrea v. Holder*, __ F.3d __, 2012 WL 1382856 (9th Cir. Apr. 23, 2012) (refusing to defer to the BIA's precedential decision and holding that misprision of a felony is not categorically a CIMT because it does not, by its very nature, involve conduct that is "inherently base, file or depraved")

■ *Higgins v. Holder,* __ F.3d __, 2012 WL 1352584 (2d Cir. Apr. 19, 2012) (holding that witness tampering under Connecticut law constitutes an "offense relating to obstruction of justice" pursuant to INA § 101(a)(43)(S) because the offense requires a "specific intent to interfere with the process of justice")

■ *Morris v. Holder*, __ F.3d __, 2012 WL 1383075 (2d Cir. Apr. 23, 2012) (holding that a conviction for second-degree assault under NY law constitutes a crime of violence because the crime requires a defendant to intentionally cause physical injury through the use of a deadly weapon or dangerous instrument; also holding that *Padilla v. Kentucky* did not overturn precedent holding that the Ex Post Facto Clause is not applicable in immigration proceedings)

■ *Singh v. Att'y Gen. of United States* __ F.3d __, 2012 WL 1255061 (3d Cir. Apr. 16, 2012) (holding that 8 U.S.C. § 1101(a)(43)(M)(i) requires "an actual, not merely intended, loss" of $10,000 to the victim(s), and that such requirement was not satisfied with regard to petitioner's conviction for making a false statement in a bankruptcy proceeding. The court reasoned that a government sting operation made any intended benefit impossible and prevented any potential or incidental losses from in fact occurring because at all times: (a) a government entity (the Port Authority) had custody of the money; (b) petitioner had no capacity to obtain this money for personal benefit; (c) the trustee's personal compensation had not been affected; and (d) the creditors had not been deprived of any property for any length of time)

■ *Matter of M-W-*, 25 I&N Dec. 748 (BIA April 9, 2012) (holding that pursuant to the categorical approach, a conviction for the aggravated felony of murder, as defined in INA § 101(a)(43)(A), includes a conviction for murder in violation of a statute requiring a showing that the perpetrator acted with extreme recklessness or a malignant heart, notwithstanding that the requisite mental state may have resulted from voluntary intoxication and that no intent to kill was established)

CRIMINAL PROSECUTION

■ *United States v. Esparza*, __ F.3d __, 2012 WL 1372142 (5th Cir. Apr. 20, 2012) (affirming district court's decision in an illegal reentry prosecution case, rejecting defendant's argument that he is a citizen, and refusing to credit 2010 state court's *nunc pro tunc* order which purportedly amended 1994 divorce decree by retroactively altering custody arrangement to designate defendant's U.S. citizen father as managing conservator)

JURISDICTION

■ *Thiam v. Holder,* __ F.3d __, 2012 WL 1470133 (6th Cir. Apr. 30, 2012) (denying government's motion to transfer PFR to Fourth Circuit because transfer would not be in the

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interests of justice, and remanding for BIA to apply its firm resettlement law to Mauritanian alien who was a victim of violence by military and was sent to neighboring Senegal where she lived for 14 years selling fruit)

■ *Rivas v. Napolitano,* __ F.3d __, 2012 WL 1416008 (9th Cir. Apr. 25, 2012) (invoking exception to consular nonreviewability and remanding to district court where: (1) consular officer failed to act on the alien's motion for reconsideration of the visa denial; (2) a regulation requires the consular officer to reconsider the denial if an alien submits evidence tending to overcome the ground of denial; and (3) the court was unable to determine from the record whether the proffered evidence overcame the basis of the denial, as it was not clear that plaintiff admitted to alien smuggling in his consular interview)

■ *Arbid v Holder*, __F.3d__, 2012 WL 1089595 (9th Cir. April 3, 2012) (finding jurisdiction to review for abuse of discretion a "particularly serious crime" determination for purpose of asylum and withholding, and holding that BIA properly concluded that applicant from Syria who had been convicted of mail fraud, had committed a particularly serious crime rendering him ineligible for asylum and withholding)

■ *Mehanna v. USCIS,* __ F.3d __, 2012 WL 1345627 (6th Cir. Apr. 19, 2012) (holding that DHS's decision to revoke a visa petition pursuant to 8 U.S.C. § 1155 is "an act of discretion," over which the court lacks jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii); focusing on § 1155's language which provides that the DHS Secretary "may at any time" revoke the petition "for what [s]he deems to be good and sufficient cause")

■ *Lin v. United States Att'y Gen.,* __ F.3d __, 2012 WL 1288811 (11th Cir. Apr. 17, 2012) (dismissing PFR as untimely where petitioners paid Federal Express to deliver petition to the court on January 13, 2011, but petition was not delivered until January 14 (31 days after BIA issued decision); holding that there were "no extenuating circumstances" that made the clerk's office "inaccessible" where the office delayed opening until 10:30am on January 13 due to inclement weather, but where petitioners did not argue that the weather made it impossible for them to access the office or file their petition electronically)

■ *Castaneda-Castillo v. Holder*, __ F.3d __, 2012 WL 1224283 (1st Cir. Apr. 12, 2012) (entering a "final judgment" dismissing the PFR as moot in light of the IJ's grant of asylum; the government argued that the court lacked authority to enter a "final judgment" because it had improperly "retained" jurisdiction over the case while the agency addressed the issues on remand)

REFUGEE

■ *Matter of D-K-*, 25 I&N 761 Dec. (BIA Apr. 12, 2012) (holding that an alien who is a refugee under section 207 of the INA, and has not adjusted status to LPR status may be placed in removal proceedings without a prior determination by DHS that the alien is inadmissible; further holding that when removal proceedings are initiated against an alien who has been "admitted" to the U.S. as a refugee, the charges of removability must be under section 237 of the INA rather than section 212)

USCIS Proposes Process Change for Certain Waivers of Inadmissibility
Proposal would reduce time that U.S. citizens are separated from immediate relatives

On April 2, 2012, USCIS published a proposed rule that would reduce the time U.S. citizens are separated from their spouses, children, and parents (*i.e.* immediate relatives) who must obtain an immigrant visa abroad to become lawful permanent residents of the United States. 77 *Fed. Reg.* 19902 (April 2, 2012).

The proposed rule would allow certain immediate relatives of U.S. citizens to apply for a provisional waiver of the unlawful presence ground of inadmissibility while still in the United States if they can demonstrate that being separated from their U.S. citizen spouse or parent would cause that U.S. citizen relative extreme hardship.

The proposed rule will not alter how USCIS determines eligibility for a waiver of inadmissibility or how an individual establishes extreme hardship. "The law is designed to avoid extreme hardship to U.S. citizens, which is precisely what this proposed rule will more effectively achieve," said USCIS Director Alejandro Mayorkas.

USCIS also proposes creating a new form for immediate relatives of U.S. citizens who choose to apply for a provisional unlawful presence waiver. Once in effect, this form would be used for individuals filing an application for a provisional unlawful presence application before he or she departs the United States to complete the immigrant visa process at a U.S. Embassy or consulate abroad. The streamlined process would only apply to immediate relatives who are otherwise eligible for an immigrant visa based on an approved immediate relative petition.

USCIS advised that individuals at this time should not to submit an application for a provisional unlawful presence waiver, or allow anyone to submit one on their behalf because it will be rejected.

State Court Intervention In The Visa Process Through Nunc Pro Tunc Adoption Orders

(Continued from page 6)

The district court reversed the Board's decision as arbitrary and capricious, finding that the Government "had no valid reason to refuse to recognize the Florida Court's order." *Mathews v. Swacina*, 10-cv-20014, *7 (S.D. Fla, Jan. 5, 2011). Although the Government had presented a three-pronged argument in support of the Board's decision, the district court's holding rested on the sole ground that the state court's *nunc pro tunc* order backdating Mathews's adoption was not facially invalid and was therefore entitled to deference. The district court opined that "'[c]ourt orders are presumed valid, and it is beyond the province of an administrative agency to declare an order 'unacceptable' and act as though the order did not exist.'" *Mathews*, 10-cv-20014, *7 (quoting *Messina*, 2006 WL 374564; citing *Velazquez*, 2009 WL 4723597; *Gonzalez-Martinez*, 677 F. Supp. 2d 1233). The district court remanded the case to the Board with instructions to "give deference to the *nunc pro tunc* date of adoption" when considering the visa petition filed on Mathews's behalf. *Id.* at *8. The Government appealed, contending, among other things, that the district court erred when it ordered the Board to honor the state court's *nunc pro tunc* modification of the adoption date, because the district court did not give proper deference to the Board's interpretation of 8 U.S.C. § 1101(b)(1)(E)(i).

On appeal, the Eleventh Circuit reversed the district court's grant of summary judgment to Mathews and remanded "with instructions for the district court to grant the government's motion for summary judgment." *Mathews*, 2012 WL 555665, *2. Specifically, the Eleventh Circuit observed that the Board had previously addressed the issue of retroactive adoption and *nunc pro tunc* amendment of adoption dates in *Matter of Cariaga* and *Matter of Drigo*. *Id.* The Eleventh Circuit succinctly explained that the Board's determination that "Congress' intent was to avoid fraudulent adoptions, which warranted a strict reading of the age restriction," was a reasonable interpretation of 8 U.S.C. § 1101(b)(1)(E)(i). *Id.* (citing *Matter of Cariaga*, 15 I&N Dec. at 716-17). Therefore, the Eleventh Circuit concluded that the Board reasonably required Mathews's actual adoption to have occurred before her 16th birthday, regardless of the subsequent *nunc pro tunc* amendment of her adoption date. *Id.*

In *Mathews*, the Eleventh Circuit issued a straight-forward decision utilizing the requisite *Chevron* analysis that the prior district court decisions all lacked. The INA defines the term "child" to include "a child *adopted while under the age of sixteen years* . . . ." 8 U.S.C. § 1101(b)(1)(E)(i) (emphasis added). In *Mathews*, like the prior district court cases, the adoption decree was not entered until after the alien's 16th birthday. Nevertheless, in *Mathews*, the alien similarly obtained a state court *nunc pro tunc* order retroactively changing the effective date of her adoption. Like the prior district court decisions, the district court here failed to accord the Board's reasonable interpretation of the INA's definition of "child adopted while under the age of sixteen years" the high level of deference it is owed. Given the Eleventh Circuit's reversal, hopefully future district courts will heed the court's guidance to apply the requisite *Chevron* analysis, and cease rewarding aliens who obtain state court *nunc pro tunc* adoption orders for the sole purpose of subverting Congress's strict intent to avoid fraudulent adoptions in the visa process.

By Alex Goring, OIL
☎ 202-353-3375

NOTED: "The Devil Made Me Do It: The Plenary Power Doctrine and the Myth of the Chinese Exclusion Case," EARL M. MALTZ, Rutgers, The State University of New Jersey - School of Law — Camden

ABSTRACT: For many commentators, *Chae Chan Ping v. United States,* 130 U.S. 581 (1889) -- commonly known as the Chinese Exclusion Case – occupies a prominent place in the rogues gallery of infamous Supreme Court decisions. In large measure, the reaction to the decision is simply a byproduct of the outcome of the case; in both *Chae Chan Ping* and its first cousin, *Fong Yue Ting v. United States*, 149 U.S. 628 (1893), the Court upheld measures that explicitly singled out Chinese immigrants for unfavorable treatment on the basis of their national origin.

But *Chae Chan Ping* and *Fong Yue Ting* are also reviled for another reason; together with the contemporaneous decision in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), they are generally seen as the source of the hated "plenary power" doctrine – the view that, for constitutional purposes, congressional decisions on immigration and naturalization issues are qualitatively different from other federal legislation, and thus should generally not be subjected to judicial scrutiny. This Supreme Court has also cited these decisions as the source of the plenary power doctrine.

This article will contend that the standard interpretation of *Chae Chan Ping, Fong Yue Ting* and *Nishimura Ekiu* is simply wrong. It will argue that, far from being based on the plenary power doctrine, the decisions in those cases were based upon constitutional principles that the Court viewed as equally applicable to immigration and nonimmigration cases.

Head of NY law firm enters guilty plea for immigration fraud

An attorney based in Canada who headed a New York law firm pleaded guilty Monday to operating a massive immigration fraud mill through his Manhattan-based practice. This plea comes as a result of an investigation led by U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) and the Department of Labor's Office of Inspector General (DOL-OIG).

Earl Seth David, aka Rabbi Avraham David, 48, and his co-conspirators submitted fraudulent claims to labor and immigration authorities concerning employers they claimed were sponsoring tens of thousands of illegal aliens who were seeking legal status. David was indicted along with 11 other defendants in October 2011 and extradited to the United States from Canada in January 2012. In all, 27 individuals have been charged in connection with the scheme.

From 1996 until early 2009, David operated a Manhattan-based immigration law firm that made millions of dollars purportedly procuring legal immigration status for its clients. However, the firm, which charged up to $30,000 per client, applied for and obtained thousands of DOL certifications based upon phony claims that U.S. employers had sponsored the aliens for employment. As part of the scheme, David's firm used fabricated documents, including fake pay stubs, fake tax returns and fake experience letters, purporting to show that the sponsorships were real and that the aliens possessed special employment skill sets justifying labor-based certification by DOL. In reality, the sponsors had no intention of hiring the aliens, and the sponsor companies often did not even exist other than as shell companies for use in the fraudulent scheme.

To date, the government has identified at least 25,000 immigration applications submitted by David's firm – the vast majority of which have been determined to contain false, fraudulent and fictitious information. As a result of the fraud, DOL issued thousands of certifications, and immigration authorities granted legal status to thousands of David's clients who did not meet the legal requirements.

In furtherance of the scheme, David and his employees recruited many people to participate, including dozens of individuals who agreed to falsely represent to DOL that they were sponsoring aliens for employment in exchange for payment from the firm. They also recruited corrupt accountants who created fake tax returns for the fictitious sponsor companies and a corrupt DOL employee who helped ensure that DOL certifications were granted based upon the fraudulent applications.

David continued to operate the scheme even after he was suspended from practicing law in New York in March 2004. He fled to Canada in 2006 after learning that his firm was under federal criminal investigation, but illicit profits from the scheme continued to be funneled to him via a Canadian bank account. In 2009, David's firm ceased operations when federal search warrants were executed at several of its locations.

David pleaded guilty to one count of conspiracy to commit immigration fraud and one count of conspiracy to commit mail and wire fraud. He faces a maximum sentence of 25 years in prison. As part of his agreement, David also agreed to forfeit at least $2,500,000.

With David's plea, 13 of the 27 defendants charged in connection with the scheme have pleaded guilty. The charges against the remaining defendants are pending. Two defendants are fugitives.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Immigration Litigation Seminar Scheduled for July 11-13 at the NAC

This annual immigration litigation seminar is designed for Assistant United States Attorneys and DOJ litigating division attorneys who have some experience in immigration law. The seminar will present various panels and individual speakers to address topics of current interest to practitioners in the nation's courts, focusing heavily on litigation of detention and jurisdictional issues, and removal based on criminal grounds. Among some of the topics to be addressed are litigation of national security cases, states' encroachment over federal power to control immigration, habeas corpus litigation, ethics in immigration, naturalization litigation, credibility determinations in asylum cases, issues involving consular actions, and agency decision-making.

We encourage contributions to the Immigration Litigation Bulletin

Contact: Francesco Isgro

INSIDE OIL

Congratulations to Trial Attorney ***Robert Markle***, who has been promoted to Senior Litigation Counsel.

Senior Litigation Counsel ***Anh-Thu "Anh" P. Mai-Windle*** is currently on detail to CRS as Special Counsel to the Director and Conciliation Specialist.

OILers at a recent game at Nationals' park

INSIDE EOIR

Christopher A. Santoro, Appointed Assistant Chief Immigration Judge

Christopher A. Santoro was appointed as an ACIJ in March 2012. He received a bachelor of arts degree in 1991 from Tufts University and a juris doctorate in 1994 from the Boston University School of Law.

In 2011, Judge Santoro served as an Air Force Reserve trial judge, and, in 2012, he was appointed to be the Air Force Reserve's deputy chief trial judge, a position he still holds. From 2009 to 2011, he served as special advisor, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security (DHS).

From 2005 to 2009, Judge Santoro served in leadership roles including counsel, deputy director, and senior advisor within the Office of Inspection, Transportation Security Administration, DHS. Also during this time, Judge Santoro served as a military trial judge.

From 2001 to 2005, Judge Santoro was a trial attorney in the Criminal Section, Civil Rights Division, U.S. Department of Justice. He entered active duty with the U.S. Air Force in 1995, and served as a senior regional prosecutor and appellate attorney until 2001. From 1988 to 1995, Judge Santoro was a patrol officer with the Wolfeboro, New Hampshire Police Department.

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

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

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

Office of Immigration Litigation

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

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linda.purvin@usdoj.gov