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Immigration Litigation Bulletin

Vol. 16, No. 7 July 2012

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Ninth Circuit Holds That The Material Support Bar Does Not Contain A Duress Exemption

In ***Annachamy v. Holder***, __ F.3d __, 2012 WL 2550592 (9th Cir. July 3, 2012) (*Fisher*, Rawlinson, Mills), the Ninth Circuit held that the material support bar in INA § 212(a)(3)(B)(vi)(III), "does not include an implied exception for individuals who assist organizations engaged in legitimate political violence or who provide support under duress." Therefore the petitioner, who had given assistance to the Liberation Tigers of Tamil Eelam (LTTE), a terrorist organization, was statutorily ineligible for asylum, withholding of removal, and protection under the Convention Against Torture.

The petitioner, a native and citizen of Sri Lanka, was placed in removal proceedings in 2005 and charged with being present in the U.S. unlawfully. He conceded his removability but sought asylum, withholding, and protection under CAT. He claimed that between 1986 and 2004, he was arrested several times by the Sri Lankan army on suspicion that he was involved with the LTTE, a militant group that was then at war against the Sri Lankan government. Each time the army detained him, they beat him, and committed acts of torture.

Petitioner also testified that although he was never a member of the LTTE, under threat of force he had given money to them (about $37) and, on other occasions he had been forced to cook, dig trenches, fill sandbags, and help build fences. While

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EAJA's "Special Circumstances" Defense: An Underutilized Bar to Attorney's Fees

Under the Equal Access to Justice Act (EAJA), "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . , including proceedings for judicial review of agency action, brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Much has been said about the various defenses available to the government in EAJA litigation, including timeliness of the application, whether the applicant is a "prevailing party," the amount and reasonableness of the fees incurred, and whether the Government's position was "substantially justified." The courts have said little, however, about the "special circumstances" defense to fees and expenses, particularly in the immigration context.

EAJA's legislative history reveals that the "special circumstances" defense is a "safety valve" designed to ensure "that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives

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No duress exception in INA § 212(a)(3)(B)

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carrying out these tasks for the LTTE, he said that there was no possibility of escaping and that he would have been killed if he had sought help from the police.

The IJ determined that, despite some inconsistencies, petitioner was credible and granted asylum and withholding. The IJ also ruled that petitioner was eligible for relief even though he had given assistance to the LTTE because he had been forced to do so. Following an appeal by DHS, the BIA reversed the IJ decision and ruled that because petitioner had provided material support to a terrorist organization he was ineligible for asylum and withholding. Instead, the BIA granted deferral of removal under CAT and remanded the case to the IJ to complete the required background checks. Petitioner then sought judicial review.

Although "silence is certainly not conclusive as to whether an exception exists . . . the statutory framework makes it clear that no exception was intended, " said the court.

Preliminarily, the Ninth Circuit ruled that it had jurisdiction to review the denial of asylum and withholding because where "the BIA denies relief and remands pursuant to 1003.1(d)(6) for background checks." On the merits, petitioner conceded that he materially assisted the LTTE and that the LTTE qualified as a Tier III terrorist organization. However, he challenged the BIA's decision on two grounds: First, that the material support bar did not apply to him because the LTTE was engaged in legitimate political violence; and, second, that the bar did not apply to him because he supported the LTTE under duress. The court rejected both arguments.

The court first found that the plain language of the statute allowed for no exception, including petitioner's argument that the "political offense" exception applied implicitly. Petitioner "provides no textual hook for his argument that the material support bar does not apply to political offenses," said the court. The court also noted that it had previously rejected arguments that denying relief to aliens who participated in political offenses would violate U.S. obligations under international law.

The court then determined that the text of the material support bar "does not provide an exception for material support that is involuntary or coerced." Although "silence is certainly not conclusive as to whether an exception exists . . . the statutory framework makes it clear that no exception was intended," said the court. The court explained that Congress had carved an exception in the case of Tier III terrorist organizations and this was "some indication that Congress would have likewise excepted involuntary support if it intended to do so." The court also pointed out, as had BIA, that Congress had also created an explicit involuntariness exception in the provision governing aliens who had been members of the Communist or totalitarian parties. Additionally, the court said that the executive branch had been given authority to establish an administrative waiver provision, thus weakening petitioner's argument that the BIA's reading of the statute was overly broad. The fact that Congress also requires the Executive to report annually on the number of duress waivers that it has granted, is an indication "that Congress has appreciated the distinction between voluntary an involuntary conduct when amending the INA," said the court.

Finally, the court rejected petitioner's arguments that interpreting the material bar to include aliens who provided support under duress was inconsistent with *Fedorenko* and *Negusie*, noting that in INA § 212 Congress "deliberately omitted a voluntariness requirement from the material support. "The court also rejected that the contention that by not including a duress exception, the statute violated obligations under the U.N. Protocol. The court said that the Protocol is not self-executing and that either under the Protocol or Convention on Refugees, "Congress is free to decide that an alien who provided material support is a danger to the security of the United States."

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DHS Outlines Deferred Action for Childhood Arrivals Process

USCIS expects to make all forms, instructions, and additional information relevant to the deferred action for childhood arrivals process available on August 15, 2012. USCIS will then immediately begin accepting requests for consideration of deferred action for childhood arrivals. In a national media call, DHS noted the following:

- Requestors – those in removal proceedings, those with final orders, and those who have never been in removal proceedings – will be able to affirmatively request consideration of deferred action for childhood arrivals with USCIS.
- Requestors will use a form developed for this specific purpose.
- Requestors will mail their deferred action request, together with an application for an employment authorization document and all applicable fees, to the USCIS lockbox.
- All requestors must provide biometrics and undergo background checks.

The EAJA's "special circumstances" defense

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the court discretion to deny awards where equitable considerations dictate an award should not be made." H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990. The legislative history, thus, establishes two main categories of "special circumstances," namely: (1) "novel but credible" legal theories, and (2) general equitable considerations. *Id.* The United States Supreme Court has not yet provided guidance on the outer limits of this defense. In the handful of EAJA cases to reach the high court, only one decision makes specific reference to the "safety valve" provided in 28 U.S.C. § 2412 (d)(1)(A). *Scarborough v. Principi*, 541 U.S. 401, 422-23 (2004) (referring to the "special circumstances" provision as a "built-in check" to any potential "unfair imposition" against the government).

Outside of the immigration context, courts have weighed in on the issue, albeit in a relatively limited number of cases. The results have been mixed. For example, the Ninth and Sixth Circuits have limited the application of the "special circumstances" defense to the substantive legal issues in the case. In other words, the courts interpreted the statute as requiring that the "special circumstances" relate to the merits of the case, rather than, for example, external financial considerations that would render an award unjust. *See, e.g.*, *Grason Elec. Co. v. NLRB*, 951 F.2d 1100, 1103 (9th Cir. 1991) (rejecting the government's categorical claim that the fee request was unjust because non-party affiliates helped finance the litigation); *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 972 F.2d 669, 672 (6th Cir. 1992) (same); *but see United States v. 27.09 Acres of Land*, 43 F.3d 769, 772-75 (2d Cir. 1994) (stating that "'special circumstances' justified the denial of an award" and that the "EAJA should be administered in ways that deter free riding by unnecessary parties"). This interpretation seems to conflate "substantial justification" with "special circumstances" by requiring that both defenses be tied to the merits of the litigation, a requirement that is not explicitly provided by the statute.

This result is understandable, however, because there are likely few cases where a court would find that the government was not substantially justified in pursuing the litigation, but at the same time find that the novel arguments made *on the merits* present a "special circumstance" barring fees. Indeed, the Ninth Circuit has stated that whether an issue is a matter of first impression, *i.e.*, novel, is pertinent to the "substantial justification" defense rather than the "special circumstances" inquiry. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001); *but see Animal Lovers Volunteer Ass'n, Inc. v. Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989) (recognizing that "litigation on the merits . . . involv [ing] a close or novel question" implicates the "special circumstances" defense). This restrictive interpretation runs contrary to the legislative history, as House Report 1418 explicitly states that the "special circumstances" defense was designed, in part, to allow the government to advance novel interpretations of the law. H.R. Rep. No. 96-1418, at 11.

The legislative history, thus, establishes two main categories of "special circumstances," namely: (1) "novel but credible" legal theories, and (2) general equitable considerations.

On the other hand, several circuits have recognized that the "special circumstances" defense encompasses wider equitable concerns, without requiring that the circumstances relate to the specific legal arguments raised in the merits phase of the litigation. *Taylor v. United States*, 815 F.2d 249, 252 (3d Cir. 1987) ("The EAJA thus 'explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees'") (quoting *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983)); *U.S. Dep't of Labor v. Rapid Robert's Inc.*, 130 F.3d 345, 349 (8th Cir. 1997) ("Rapid Robert's has reaped a windfall by escaping its duty to pay for clear violations of a valid statute. To add to that windfall by requiring the government to pay attorneys' fees and expenses would be patently unjust"). This less restrictive view respects the broad statutory language and accompanying legislative history by recognizing that there are two distinct bars to fees rather than one general merits-related defense. *Oguachuba*, 706 F.3d at 99 ("In viewing applications for such awards in the context of general equitable principles, we are not required to limit our scrutiny to a single action or claim on which the applicant succeeded but must view the application in light of all the circumstances").

There is a dearth of cases on this issue within the immigration context; however, there are a few key decisions worth noting. In *Oguachuba,* an alien appealed from the denial of attorneys' fees stemming from a lower court's grant of his petition for a writ habeas corpus. 706 F.3d at 94. The Second Circuit addressed whether Oguachuba's protracted history of misconduct constituted a "special circumstance," which could bar a fee award under 28 U.S.C. § 2412(d)(1)(A). *Id.* at 97-99. The court found that "Oguachuba's extraordinary persistence in evading the lawful efforts of the [Immigration and Naturalization Service] to deport him to Nigeria, his flagrant contempt

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The EAJA's "special circumstances" defense

for United States law and the fact that his own decision not to acquiesce in deportation caused his incarceration constitute the 'special circumstances' that make it inequitable to award him attorneys' fees under the EAJA." *Id.* at 94. The court assumed for the sake of argument that the Government's opposition to the habeas petition was not substantially justified and found, exclusively on the "special circumstances" ground, that Oguachuba's conduct was a valid basis for an equitable denial of attorneys' fees. *Id.* at 98-99 (relying on the EAJA's legislative history in determining that "Oguachuba is without clean hands").

Until the courts define the contours of the "special circumstances" defense, the government is able to make good faith arguments consistent with the facts of each case, while bearing in mind that a handful of courts have cautioned about raising the defense too freely.

In an unpublished disposition, the Fourth Circuit denied attorney's fees attributed to an alien's motion for a stay of removal, and granted fees relating to the merits phase of the case. *Nken v. Holder*, 385 F. App'x 299, 302-03 (4th Cir. 2010). The court explained that "[a]n award of fees related to Nken's motion for a stay would punish the government for advancing a plausible legal argument in good faith." *Id.* at 303. The court recounted that the government initially opposed Nken's stay request based on then-valid Circuit precedent, and prevailed. *Id.* Before the Supreme Court, the government continued to defend Circuit precedent, but did not prevail. *Id.* After remand from the Supreme Court, the government took action that mooted the necessity for a stay of removal. *Id.* Taking these factors into consideration, the Court reasoned that the government "pressed its position only as long as controlling law clearly supported it, and a fee award relating to that portion of the litigation would therefore not serve the purposes of the EAJA." *Id.* Citing its "equitable discretion," the Court denied fees relating to the stay motion. *Id.*

The Ninth Circuit has opined, in a footnote, that a government-initiated remand to correct a misapplication of the law is not a "special circumstance" under which the agency could avoid fees because it "would neutralize the clear congressional intent that EAJA deter agencies from making those types of errors in the first place." *Li v. Keisler*, 505 F.3d 913, 920 n.1 (9th Cir. 2007) (distinguishing a remand to correct a legal error from a remand to allow the agency to apply intervening law). Similarly, the government cannot immunize itself from fees by including a single meritorious and novel issue in an otherwise unsuccessful motion raising a host of issues. *Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929, 957 (C.D. Cal. 2010).

A lower court within the Eleventh Circuit rejected the government's call to deny fees where the case arose out "of an extraordinary series of events unlikely to reoccur." *Bruland v. Howerton*, 742 F. Supp. 629, 635 (S.D. Fla. 1990) (concerning boat owners involved in the Mariel boatlift, who were penalized by immigration authorities for aiding Cuban refugees). The court stated: "Given the humanitarian nature of [the boat owners'] efforts and the conflicting pronouncements of the United States, the government is in no position to argue that the special circumstances of this case render an award of attorney's fees unjust."

A large number of the immigration-related decisions that mention "special circumstances" — outside of merely reciting the statutory language — simply note that the Government did not raise the defense in its opposition to the EAJA application. Unless the government affirmatively advances this argument in its pleadings, the courts are likely to continue to make only passing reference to this independent basis for denying or limiting fees. *See, e.g.*, *De Allende v. Baker*, (891 F.2d 7, 9 n.3 (1st Cir. 1989) ("Although . . . it is also possible for the government to avoid liability by proving that special circumstances make an award unjust . . . the government does not allege that such circumstances exist in this case").

Until the courts define the contours of the "special circumstances" defense, the government is able to make good faith arguments consistent with the facts of each case, while bearing in mind that a handful of courts have cautioned about raising the defense too freely. *Vincent v. Comm'r of Social Security*, 651 F.3d 299, 304 (2d Cir. 2011) ("Indeed, if the 'special circumstances' exception is to function as an equitable 'safety valve,' its contours can emerge only on a case-by-case basis"). As this is a relatively underdeveloped area of litigation, the government is afforded a unique opportunity to aid the courts in crafting a consistent and reasonable body of law.

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We encourage contributions to the Immigration Litigation Bulletin

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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 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 was filed on June 22; the government response is due August 31, 2012.

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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.

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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.

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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 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 BIA precedent.

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Asylum – Particular Social Group

On May 31, 2012, the Seventh Circuit granted en banc rehearing and vacated its prior published opinion in ***Cece v. Holder***, 668 F.3d 510, which held 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). Supplemental briefing was ordered for en banc rehearing, calendared for oral argument the week of December 10, 2012.

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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 was held on June 20, 2012.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Concludes that Substantial Evidence Supports Agency's Denial of Asylum, Withholding of Removal, and CAT Protection

In ***Lobo v. Holder***, 684 F.3d 11 (1st Cir. 2012) (*Torruella*, Lipez, Howard), the First Circuit held that substantial evidence supported the IJ and BIA's denial of asylum and withholding of removal where the petitioner failed to suffer any harm rising to the level of persecution, his fear of harm if removed to Honduras was not objectively reasonable, and his testimony contained inconsistencies which made it difficult to fully credit his testimony without further corroboration.

Petitioner claimed that as a tax analyst, and chief of the commercial department for his city in Honduras, he had the responsibility of filing or closing businesses that failed to meet their tax obligations. However, he ran into some problems when he discovered and reported to his superiors that a casino managed by an individual who had connections with the government had not paid taxes. When this information became public he began receiving threats at his office and at home. Petitioner testified that he received five or six threats in total between July 1990 and September 1991. He never reported these threats. In September 1991 petitioner and his three children left Honduras and on October 27, 1991, entered the United States without inspection. On May 21, 1992, petitioner filed an affirmative asylum application. He was interviewed by an AO in 2006, and was referred to immigration court in September 2007. An IJ concluded that the threats petitioner received did not rise to the level of persecution and that there was no evidence that the threats were likely to be carried out. On appeal the BIA affirmed.

In upholding the denial of asylum, the court noted that "hollow threats, without more, certainly do not compel a finding of past persecution." Here "given the lack of credibility or impendency to the threats at issue, including the absence of any harm actually betiding the [petitioners], the evidence does not compel a disturbance of the agency's conclusion" said the court. The court further found that that there was no evidence that the threats that petitioner received were linked to any statutorily protected ground. The court also upheld the finding that petitioner's fear of future persecution was not objectively reasonable given that the threats had occurred two decades ago, and that his mother and siblings had continued to live in Honduras following his departure without suffering any harm.

The court noted that "hollow threats, without more, certainly do not compel a finding of past persecution."

In light of petitioner's failure to qualify for asylum the court affirmed the agency's denial of withholding and also denied CAT protection because the record was devoid of any evidence that petitioner would be tortured if returned to Honduras.

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First Circuit Upholds Finding of No Past Persecution or Well-Founded Fear of Future Persecution in Guatemala

In ***Ayala v. Holder***, 683 F.3d 15 (1st Cir. 2012) (Lynch, Selya, *Thompson*), the First Circuit upheld the BIA's finding that petitioner had not established past persecution on account of her membership in a "family opposed to guerillas" because there was no evidence that guerillas targeted the family on account of that ground.

The petitioner, a woman from Guatemala, entered the United States unlawfully in 1993. A few months later she affirmatively applied for asylum. In 2006, DHS placed her in removal proceedings where she renewed her claim for protection. She testified that in the 1980s two of her cousins had been killed by the guerrillas and her grandparents had been threatened. The IJ found her credible but denied her request for asylum. The BIA affirmed.

The court upheld the finding that she had not demonstrated past persecution on account of a protected ground. The court also held that petitioner had not established a well-founded fear of future persecution on account of her membership in a "family opposed to guerillas" because of a lack of evidence or membership in a group of "Guatemalans who are perceived as wealthy because they lived in the United States." The court explained that it has "consistently rejected asylum claims based on perceived wealth because of a petitioner connection to the United States," citing to *Lopez-Castro v. Holder* 577 F.3d 49 (1st Cir. 2009).

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First Circuit Affirms Dismissal of Petitioner's Claims for Failure to Comply with Immigration Judge's Filing Deadlines

In ***Gomez-Medina v. Holder***, __F.3d__, 2012 WL 3055575 (1st Cir. July 27, 2012) (*Lynch*, Boudin, Lipez), the First Circuit affirmed the Immigration Judge's dismissal of petitioner's application for asylum and related relief, because she had failed to comply with his directives.

The petitioner, a Colombian citizen, was placed in removal proceedings in 2006 as an alien present unlawfully in the United States. She then

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sought asylum on the basis that in Colombia she had witnessed an attack by the FARC guerrillas on a public transit bus where five passengers were killed. The IJ requested additional information for petitioner, including documentation regarding her date of entry into the U.S., the applicability of the one-year bar, and biometric processing data. The case was continued several times. However, on November 13, 2008, the date scheduled for the merits hearing, petitioner and her counsel failed to comply with the IJ directives. The IJ considered petitioner's reasons for the failure, denied a motion for another continuance and then denied the claims as abandoned. The BIA affirmed the decision, finding that petitioner had been afforded an opportunity for a full and fair hearing.

In upholding the IJ's denial of a continuance, the court said that IJs are afforded broad authority to impose deadlines for court filings. "This authority reflects 'the government's strong interest in the orderly and expeditious management of immigration cases.'" Here, the court found that petitioner failed to abide by the IJ's directives without furnishing a reasonable justification, and therefore the IJ was well within his discretion in denying the motion for lack of good cause.

The court also upheld the IJ's decision that petitioner had abandoned her claim for asylum, and rejected her contention that the dismissal violated her right to a full and fair hearing. The court noted that "there is a strong public interest in compliance with immigration court deadlines, whether they are statutory, regulatory, or those set by judges [and] [t]here is also a strong interest in not allowing manipulations of the system in order to cause delay." Accordingly, the court found that in light of petitioner's dilatory actions that petitioner had abandoned his application for relief. Additionally, the court found that the IJ had not abused his discretion under 8 C.F.R. 1003.47(c), which provides for dismissal of a case for failure to update biometric data.

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SECOND CIRCUIT

Second Circuit Affirms Government's Summary Judgment Win in Marriage Fraud Case

In ***Koffi v. Holder***, No. 11-3170 (2d Cir. July 11, 2012) (Hall, Carney, Berman)(*per curiam*), the Second Circuit in an unpublished opinion, affirmed the district court's decision granting the government's motion for summary judgment in a suit challenging the denial of a marriage-based petition for marriage fraud. The alien's husband's administrative file included an agency memorandum documenting a criminal investigation of his former immigration attorney, which revealed that the alien's earlier marriage to a U.S. citizen had been fraudulently arranged. The husband and wife argued that they were prejudiced by the fact that the agency made the marriage fraud finding several years after the criminal investigation and never provided them with a copy of the memorandum prior to the federal court litigation.

There was no obligation for government to provide the actual memorandum on which the marriage fraud finding was based under 8 C.F.R. § 103.2(b)(16)(i).

The Second Circuit disagreed, holding that the agency's marriage fraud determination was supported by substantial evidence. Moreover, there was no obligation for government to provide the actual memorandum on which the marriage fraud finding was based under 8 C.F.R. § 103.2(b)(16)(i); rather, aliens need only be "advised of" the derogatory information.

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THIRD CIRCUIT

Exit and Reentry after Stop-Time Rule Is Triggered Does not Restart Continuous Residence

In *Nelson v. Attorney General*, __ F.3d __, 2012 WL 2765862 (3d Cir. May 22, 2012) (Vanaskie, *Barry*, Cudahay), the Third Circuit affirmed the BIA's determination that an alien who triggered the stop-time rule and ceased accumulating continuous residence for cancellation of removal did not begin a new residence period by briefly departing and reentering the United States.

The petitioner, a Jamaican citizen, was admitted to the United States as an LPR on November 3, 1994. In early 1999, less than five years after his admission to the United States, he pleaded guilty in New York state court to possession of approximately 16 ounces of marijuana. In August 2000, petitioner visited Canada for two days. Although his 1999 conviction rendered him inadmissible to the United States, petitioner was nonetheless allowed to reenter the country through a border checkpoint. Following his reentry, he did not leave the United States again and lived here without interruption. On May 2008, he was tried by a jury in New Jersey state court and found guilty of attempted possession with intent to distribute marijuana.

On November 26, 2008, DHS placed petitioner in removal proceedings asserting that he was removable because his 2008 convictions constituted aggravated felonies and controlled substances offenses. The IJ originally found petitioner removable based on these convictions, but later withdrew those findings after petitioner established that the convictions

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were on direct appeal and thus were not "final." On September 8, 2009, DHS issued additional removal charges based on petitioner's 1999 conviction. Petitioner subsequently applied for cancellation of removal. The IJ found petitioner removable and denied cancellation on the basis that he had not accrued the required seven years of continuous residence. In particular, the IJ found that petitioner's 1999 drug offense triggered the "stop-time" provision.

On appeal to the BIA petitioner argued that, based on *Okeke v. Gonzales,* 407 F.3d 585 (3d Cir. 2005), he was entitled to establish a new period of continuous residence after his reentry to the United States in 2000. The BIA, in *Matter of Nelson*, 25 I&N Dec. 410 (BIA 2011), affirmed the IJ and dismissed the appeal. The BIA distinguished *Okeke* and concluded that "the clock does not start anew simply because an alien departs and reenters the United States following the commission of a triggering offense."

The Third Circuit found that the cancellation statute was ambiguous as to whether it permitted an alien, such as petitioner, to restart the clock following reentry. The court then noted that because *Okeke* was decide by a "fractured panel" making it difficult to articulate a controlling rationale, it was not unreasonable for the BIA to refuse to follow it. "An alien who leaves for a two-day trip to Canada after committing a crime and lives in the United States for seven years after returning has no greater logical claim to be entitled to cancellation of removal than a similarly-situated alien who never leaves the country," explained the court. Accordingly, the court accorded *Chevron* deference concluding it was neither contrary to the unambiguous language of the statute, nor an unreasonable interpretation of the statute.

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■ **Third Circuit Holds that Unauthorized Wholesale Distribution of Prescription Drugs in Interstate Commerce is Neither Aggravated Felony nor Conviction Relating to Controlled Substances**

In ***Borrome v. Holder***, __ F.3d __, 2012 WL 2914111 (3d Cir. July 18, 2012) (Scirica, *Ambro*, Van Antwerpen), the Third Circuit concluded that the alien's conviction for unauthorized distribution of prescription drugs under the Food, Drug and Cosmetic Act failed the "hypothetical federal felony" test for determining whether a conviction is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). The court reasoned that the alien's conviction statutes: (1) are overbroad because they prohibit a wide range of behavior unconnected to controlled substances, and so do not "relat[e] to a controlled substance" under the categorical approach; and (2) are phrased disjunctively, precluding recourse to the modified categorical approach.

"The clock does not start anew simply because an alien departs and reenters the United States following the commission of a triggering offense."

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FIFTH CIRCUIT

■ **Fifth Circuit Holds that Minor Son Did Not Derive Citizenship When Father Naturalized**

In ***Ayton v. Holder***, __ F.3d __, 2012 WL 2508047 (5th Cir. July 2, 2012) (King, Benavides, Dennis) (*per curiam),* the Fifth Circuit held that petitioner did not derive United States citizenship under former INA § 321(a) when his father naturalized because his parents never legally separated, and he did not establish that his mother's post-stroke prolonged vegetative state met the medical and legal definitions of death or brain death.

The petitioner was born in the Bahamas on April 12, 1971. Both parents were listed on his birth certificate but they were not married. In 1972, petitioner's father married a U.S. citizen and entered the United States as an LPR. He divorced her in 1977, and subsequently naturalized on December 8, 1978. Petitioner's mother also married and divorced, retaining her married name.

On March 30, 1983, petitioner, who was eleven years old, and his mother entered the U.S. as LPRs. Petitioner then moved in with his natural father and soon thereafter his natural mother and father began to cohabitate. In 1985, petitioner's mother suffered a cerebral anoxia and entered a persistent vegetative state. In 1985 a state court found her to be incompetent and appointed petitioner's father as the guardian. Petitioner's mother died on November 21, 1991, when he was twenty years old. She never naturalized.

In 2005, Petitioner pled guilty to a cocaine charge. When placed in removal proceedings he claimed derivative citizenship under § 321 (a), contending *inter alia*, that his father had naturalized while he was still a minor and that his mother suffered brain death while he was still a minor. The BIA concluded that petitioner's mother was not brain dead and that his parents never legally separated.

The court agreed with the BIA's conclusion that under § 321(a)(2) petitioner had not proven that her mother was deceased while he was

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still a minor. The court noted that "the contemporary definition of death differentiates between brain death and persistent vegetative state." The fact that petitioner's mother survived for six years following her brain injury, noted the court, "suggests that she was in a persistent vegetative state, but not brain dead." The court also found that petitioner did not derive citizenship through his father under § 321(a)(3) because his parents never married and therefore were never legally separated.

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■ **Asylum Applicant Has a Separate Claim for Relief Based on a Breach of Confidentiality, But Affirmed Denial of Asylum Relief**

In ***Dayo v. Holder***, __ F.3d __, 2012 WL 2852833 (5th Cir. July 12, 2012) (Reavley, *Smith*, Prado), the Fifth Circuit, for the second time upheld petitioner's denial of asylum, withholding, and CAT. In its first decision, the court had noted petitioner's allegation that DHS had violated the confidentiality provision by revealing to the Nigerian consulate the contents of his asylum application. The BIA reopened the case to address that claim but once again denied the claims for relief.

The court preliminarily noted that although a breach of the confidentiality provision under 8 C.F.R. § 208.6, "does not always require vacating the order of removal, the applicant must be permitted to use the breach for a new claim for asylum, withholding of removal, and relief under CAT." Here the court found that the BIA had correctly reopened the case based on petitioner's allegation.

The court then upheld the IJ's determination that petitioner had failed to credibly establish that he suffered past persecution. The court noted that the only evidence of persecution came from petitioner's own testimony and that he had provided numerous inconsistent statements. Moreover, the documents submitted in support of his story were suspicious and none of them showed that they were mailed form Nigeria. The court also denied the asylum claim based on future persecution finding that there was no evidence that Nigeria persecutes those who seek asylum.

The court held that it lacked jurisdiction over the petition for review because the petitioner's challenge amounted to a disagreement on the facts rather than a legal dispute.

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SEVENTH CIRCUIT

■ **Seventh Circuit Emphasizes that Alien Cannot Manufacture Legal Claim out of Factual Disagreement**

In ***Jawad v. Holder***, __ F.3d __, 2012 WL 2765124 (7th Cir. July 10, 2012) (*Wood*, Williams, Tinder), the Seventh Circuit rejected petitioner's claim that the BIA had failed to consider his daughter's testimony in denying adjustment of status and cancellation of removal in the exercise of discretion.

The petitioner, a Jordanian citizen entered the United States on a non-immigrant visa in June 1986 with his wife, and son. The visa expired in February 1987. They never departed. Over the next 12 years, they had five more children, all born in the United States. In March 1998, however, petitioner divorced. Six months later, a United States citizen, filed an I–130 visa petition on petitioner's behalf. The petition represented that she and petitioner had married on March 31, 1998, in Chicago, Illinois. DHS investigated the marriage and determined following the U.S. citizen's admission that petitioner had paid her $10,000, that the marriage was fraud, and eventually denied the petition. Petitioner was then placed in removal proceedings.

In the interim, petitioner bought a home and his former spouse and children moved in with him. Four years after these proceedings began, the USCIS approved a new immediate-family visa petition for petitioner; this petition had been filed on his behalf by his daughter who is a United States citizen. She filed the petition one week following her 21st birthday. In light of his daughter's application, petitioner filed a request for cancellation of removal and an application for adjustment of status pursuant to § 245(a) of the Act. DHS responded with evidence that his marriage had been fraudulent, designed primarily to secure immigration benefits. The IJ decided that petitioner failed to show he merited a favorable exercise of discretion for either request because he committed immigration fraud and gave the court false testimony. The IJ credited the testimony of the U.S. citizen and not that of petitioner's daughter. Accordingly, the IJ denied the requested relief. The BIA affirmed.

The court held that it lacked jurisdiction over the petition for review because the petitioner's challenge amounted to a disagreement on the facts rather than a legal dispute. The court found that in exercising his discretion the IJ did not ignore petitioner's daughter testimony or skip any steps in the legal analysis. "As the old saying goes, you can't make a silk purse out of a sow's ear,

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and, as both we and our sister circuits have repeatedly held, a petitioner can't manufacture a legal dispute over a disagreement on the facts," said the court.

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■ **Alien Beneficiaries of Affidavits of Support Have No Duty to Mitigate Before Seeking to Enforce the Affidavit of Support**

In ***Liu v. Mund***, __ F.3d __, 2012 WL 2861886 (7th Cir. July 12, 2012) (*Posner*, Rovner, Wood), the Seventh Circuit held that an alien's failure to mitigate damages does not affect a sponsor's duty to provide the alien support under an I-864 affidavit of support. In this case, a permanent resident alien sought support from her ex-husband under the I-864 affidavit of support that he signed, notwithstanding her failure to make reasonable efforts to seek employment.

At the court's request, the Department of Justice filed an *amicus curiae* brief arguing that aliens have a duty to mitigate damages and that sponsors may cite an alien's failure to mitigate as a defense to reduce the amount of support they must provide. The court disagreed, holding that aliens have no duty to mitigate because such a duty would conflict with the statutory goal of preventing aliens from becoming public charges.

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EIGHTH CIRCUIT

■ **"Guatemalans Returning from the United States Who are Perceived As Wealthy" Is Not a Particular Social Group**

In ***Matul-Hernandez v. Holder***, __ F.3d __, 2012 WL 2891217 (8th Cir. July 17, 2012) (*Wollman*, Colloton, Benton), the Eighth Circuit upheld the BIA's determination that the petitioner had failed to establish that he suffered past persecution or had a well-founded fear of persecution based on his membership in the proposed group of Guatemalans returning from the United States who are perceived as wealthy. In particular the BIA found that there was little evidence that petitioner's social group would be perceived as a group by society or subject to a higher incidence of crime than the rest of the population.

"Nothing indicates that in Guatemala individuals perceived to be wealthy are persecuted because they belong to a social class or group."

In addition to concluding that the BIA's determination was supported by substantial evidence, the court was persuaded by *Sicaju–Diaz v. Holder*, 663 F.3d 1, 4 (1st Cir. 2011), where the First Circuit found that "nothing indicates that in Guatemala individuals perceived to be wealthy are persecuted because they belong to a social class or group. In a poorly policed country, rich and poor are all prey to criminals who care about nothing more than taking it for themselves." Accordingly, the court agreed with the BIA that the group "Guatemalans returning from the United States who are perceived as wealthy is not a particular social group within the meaning of the INA."

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■ **Eight Circuit Affirms Adverse Credibility Finding Based on Inconsistencies, Omissions, and Implausibilities Surrounding Alien's Identity**

In ***Ali v. Holder***, __ F.3d __, 2012 WL 2946755 (8th Cir. July 20, 2012) (*Murphy*, Melloy, Colloton), the Eighth Circuit concluded that no record evidence compelled reversal of the agency's adverse credibility finding. The court particularly noted that the agency reasonably relied upon several inconsistencies and omissions in the record relating to the alien's name, birth date, alleged marriage, and countries of residence prior to entering the United States. Having affirmed the adverse credibility finding, the court sustained the alien's removability for failing to possess a valid entry document and seeking an immigration benefit by fraud or willful misrepresentation of a material fact.

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NINTH CIRCUIT

■ **Alien Who Has Committed a Violent or Dangerous Crime Must Show Exceptional and Extremely Unusual Hardship to Himself or His Qualified Relatives to Obtain a Waiver of Inadmissibility**

In ***Rivera-Peraza v. Holder***, 684 F.3d 906 (9th Cir. 2012) (Rawlinson, Singleton, *W. Fletcher*), the Ninth Circuit upheld the BIA's finding that an alien who has committed a violent or dangerous crime and seeks a waiver of inadmissibility under 8 U.S.C. § 1182(h) must meet the heightened hardship standard established by 8 C.F.R. § 1212.7(d), requiring an applicant to show "extraordinary circumstances" such as "exceptional and extremely unusual hardship," which directs the agency to consider hardship to the alien, as well as to his or her relatives.

Petitioner, a Mexican citizen, was convicted of armed robbery with a firearm in California in 1981. After serving most of his sentence, he was deported in 1984. Since then, he has twice reentered this country without inspection. In 2004, DHS commenced removal proceedings

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against the petitioner. He admitted removability and sought adjustment of status to lawful permanent resident. Because his 1981 conviction rendered him inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I), he applied for a waiver of inadmissibility under § 1182(h)(1)(A) and (B). The IJ determined that petitioner's 1981 armed robbery was a "violent or dangerous" crime within the meaning of § 1212.7(d), and that petitioner did not meet the "exceptional and extremely unusual hardship" standard, and therefore was statutorily ineligible for adjustment of status. The BIA affirmed.

The court held that it had jurisdiction over the petition because petitioner challenged the legal standard but then held, as it had previously ruled in *Mejia v. Gonzales*, 499 F.3d 991, 999 (9th Cir. 2007), that the regulations were not inconsistent with the statute or the Attorney General's authority.

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■ **Ninth Circuit Holds It Has Jurisdiction to Review Denial of Alien Crewmember's Applications for Relief in "Asylum-Only" Proceedings**

In ***Nian v. Holder***, 683 F.3d 1229 (9th Cir. 2012) (Fernandez, Gould, *Bea*), the Ninth Circuit held that the denial of an petitioner's crewmember's applications for asylum and other relief in an "asylum-only" proceedings under 8 C.F.R. § 208.2(c), is the functional equivalent of a final order of removal. Thus, the court held, agreeing with four other circuits that had addressed the question, that it had jurisdiction over the petition for review. The court denied petitioner's petition for review on the merits in a separate memorandum disposition.

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■ **Ninth Circuit Denies Petition In Light of the Supreme Court's Rejection of the Imputation Theory in *Holder v. Martinez Gutierrez***

In ***Sawyers v. Holder***, 684 F.3d 911 (9th Cir. 2012) (Graber, Clifton, Carney) (*per curiam)*, the Ninth Circuit, on remand from the Supreme Court, held that, pursuant to the imputation rules set forth in *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), petitioner could not impute his mother's continuous residence to reach the seven-year continuous residence requirement for cancellation of removal for certain permanent residents under 8 U.S.C. § 1229b(a). The court further held that the petitioner's conviction for "maintaining a dwelling for keeping controlled substances," in violation of 16 Delaware Code § 4755(a)(5), terminated his period of continuous residence pursuant to 8 U.S.C. § 1229b(d)(1), because the indictment indicated that the conviction related to cocaine and the possession of marijuana with intent to distribute.

Petitioner could not impute his mother's continuous residence to reach the seven-year continuous residence requirement for cancellation of removal.

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■ **Ninth Circuit Concludes that BIA Improperly Conducted De Novo Review of Immigration Judge's Factual Finding**

In ***Rodriguez v. Holder***, 683 F.3d 1164 (9th Cir. 2012) (Hug, Fletcher, *Paez*), the Ninth Circuit, citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985), concluded that the BIA failed to apply the deferential clear error review standard in: (1) finding a contradiction in the alien's testimony; (2) making its own credibility determination; and (3) finding the alien inadmissible under INA § 212(a)(2)(C).

The petitioner, a Mexican citizen, was detained while seeking admission, because the gas tank of the truck which he was driving contained 46 vacuum-sealed packages that weighed approximately 101 pounds. At the removal hearing petitioner consistently denied that he knew about this contraband. He claimed that he was working for a company that supplied ships and was driving to Phoenix to pick up various parts for ships. A DHS officer testified that if petitioner had driven the distance he indicated to get to the U.S., the truck's gas tank would have been empty and petitioner would have had to refuel. Petitioner on the other hand testified that he did not fill up the tank. The IJ credited petitioner's story that he was unaware of the contraband and concluded that he had been used by his employer.

On appeal, the BIA reversed the IJ and found petitioner removable as charged. Petitioner then sought judicial review of that decision. However, the government asked the court to remand the case to the BIA, because it was concerned that the BIA might have engaged in *de novo* review of the IJ's fact-finding. On remand the BIA again reversed the IJ, specifically noting that it was evaluating the IJ decision under the clear error standard. Petitioner again sought judicial review.

The Ninth Circuit determined that the BIA had engaged in *de novo* fact finding. Specifically, the court noted that the BIA in considering and accepting as true the testimony of the DHS officer and "by stating con-

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ADJUSTMENT

■ *Matter of Valenzuela-*, 25 I.&N. 867 (BIA July 20, 2012) (holding that an alien who is admitted to the US in K-4 nonimmigrant status may only adjust his or her status to that of an LPR based on an I-130 petition filed by the US citizen K visa petitioner)

ADMISSION

■ *Abdallahi v. Holder,* __ F.3d __, 2012 WL 3089345 (6th Cir. July 31, 2012) (upholding BIA's determination that petitioner was inadmissible [and therefore ineligible to adjust] because he assisted in torture while serving in the Mauritanian military by voluntarily and knowingly bringing prisoners to interrogation rooms and standing guard while they were tortured; rejecting due process claim arising from the fact that the IJ who issued decision did not preside over removal hearing)

■ *Matter of Guzman Martinez-*, 25 I&N Dec. 845 (BIA June 29, 2012) (holding that an LPR may be treated as an applicant for admission in removal proceedings if DHS proves by clear and convincing evidence that the returning resident engaged in "illegal activity" at a United States port of entry)

ASYLUM

■ *Annachamy v. Holder,* __ F.3d __, 2012 WL 2550592 (9th Cir. June 3, 2012) (holding that alien from Sri Lanka was ineligible for asylum and withholding of removal due to his material support for the Liberation Tigers of Tamil Eelam, a terrorist group; rejecting petitioner's argument that the material support bar includes an implied exception for individuals who provide support to groups engaged in legitimate political violence or who provide support under duress)

■ *Lobo v. Holder,* __ F.3d __, 2012 WL 2627536 (1st Cir. July 6, 2012) (holding that six past unfulfilled threats to male Honduran asylum applicant over the course of a year did not rise to the level of past "persecution" because the threats were hollow, meaning there was no evidence that they were at risk of being carried out nor evidence of any physical harm to the applicant; further holding that the applicant failed to establish a well-founded fear of future persecution given the passage of two decades since the threats, the continued safety of his family members living in Honduras, and his failure to corroborate claims of family members that the people threatening the applicant still held government positions)

■ *Dayo v. Holder,* __ F.3d __, 2012 WL 2852833 (5th Cir. July 12, 2012) (joining 2nd and 4th Circuits in holding that DHS's violation of confidentiality regulation by inadvertently disclosing to an applicant's home country that he applied for asylum does not require automatic vacation of the removal order, but gives rise to a new claim of future persecution that may be raised by a MTR which the agency must consider; further holding that BIA correctly reopened Nigerian applicant's case on this basis, and that substantial evidence supported the IJ's and BIA's decisions that the future persecution claim was not credible, lacked corroboration, and failed to show that Nigeria persecutes those who seek asylum)

■ *Ayala v. Holder,* __ F.3d __, 2012 WL 2402556 (1st Cir. June 27, 2012) (holding that Guatemalan guerrillas' past killing of applicant's two cousins, and past robbery and threats to kill grandparents do not establish past, or a well-founded fear of future, persecution of female asylum applicant "on account of" membership in a putative social group of "a family that opposed guerrilla warriors," because there was no evidence that the guerrillas targeted the cousins or grandparents on account of their membership in the family; further holding that applicant failed to establish eligibility for asylum based on membership in an putative social group of "Guatemalans who are perceived as wealthy because they lived in the United States," because the First Circuit has repeatedly rejected asylum claims based on perceived wealth due to connections to the United States)

■ *Ali v. Holder,* __ F.3d __, 2012 WL 2946755 (8th Cir. July 20, 2012) (post REAL ID Act credibility decision holding that IJ's adverse credibility finding against male Somali asylum applicant is supported by substantial evidence consisting of: i) admittedly false dates of birth on applicant's signed immigration papers, passport, and medical documents; ii) inconsistencies between applicant's testimony at a prior naturalization hearing and the asylum hearing regarding his name and date of alleged marriage to woman who petitioned for him to come to US as a spouse; iii) inconsistencies in testimony as to African countries where applicant lived after leaving Somalia; and iv) changes, evasiveness, and unresponsiveness in applicant's testimony about his identity)

■ *Matul-Hernandez v. Holder,* __ F.3d __, 2012 WL 2891217 (8th Cir. July 17, 2012) (affirming BIA's decision that "Guatemalans returning from the United States who are perceived as wealthy are not a particular social group, because there was no evidence: i) that Guatemalans returning from U.S. are perceived to be wealthy or are subject to a pattern or practice of persecution because of perceived wealth; ii) that applicant's uncle was kidnapped, held for ransom, and killed because he was visiting from the U.S.; iii) that the putative group would be perceived as a determinable group by the society; also reasoning that the evidence showed that rich and poor alike are targeted by gangs in Guatemala)

CANCELLATION

■ *Sawyers v. Holder,* __ F.3d __, 2012 WL 2507513 (9th Cir. June 29,

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2012) (denying petition in light of Supreme Court's rejection of the imputation theory in *Holder v. Martinez Gutierrez*)

■ *Nelson v. Att'y Gen. of United States,* __ F.3d __, 2012 WL 2765862 (3d Cir. May 22, 2012) (designated for publication July 10, 2012) (deferring to BIA and rejecting petitioner's argument that although his conviction in 1999 triggered the stop-time rule, he should be deemed to have begun a new period of continuous residence after the conviction based solely on his reentry to the United States from Canada following a brief trip)

CITIZENSHIP

■ *Ayton v. Holder,* __ F.3d __, 2012 WL 2508047 (5th Cir. July 2, 2012) (holding that petitioner did not derive US citizenship under former INA § 321(a) when his father naturalized because his parents never legally separated and he did not establish that his mother's post-stroke prolonged vegetative state met the medical and legal definitions of death or brain death)

CRIME

■ *Spacek v. Holder,* __ F.3d __, 2012 WL 3079216 (8th Cir. July 31, 2012) (holding that petitioner's racketeering conviction under North Dakota law qualified as an aggravated felony under section 1101(a)(43)(J) without regard to whether the racketeering activity affected interstate or foreign commerce, as required in the federal statute, and reasoning that "interstate commerce nexuses are jurisdictional and not substantive elements of federal criminal statutes")

■ *Borrome v. Att'y Gen. of United States,* __ F.3d __, 2012 WL 2914111 (3d Cir. July 18, 2012) (holding that conviction for unauthorized distribution of prescription drugs under the FDCA failed the "hypothetical federal felony" test for determining whether a conviction amounts to an aggravated felony because the statutes of conviction were overbroad and not phrased in the disjunctive, precluding recourse to the modified categorical approach; similarly holding that the conviction was not a conviction of a violation of a law "relating to a controlled substance" because the statutes prohibit a wide range of behavior completely unconnected to controlled substances)

■ *Rodriguez v. Holder,* __ F.3d __, 2012 WL 2401984 (9th Cir. June 27, 2012) (holding that the BIA, in the context of adjudicating a charge of inadmissibility for drug smuggling, erred by: (1) engaging in fact-finding when it accepted the CBP officer's opinions as true even though the IJ did not make such findings; (2) finding a contradiction in the alien's testimony by drawing factual inferences from that testimony; and (3) making its own credibility determination)

■ *Matter of Valenzuela Gallardo—*, 25 I&N Dec. 838 (BIA June 27, 2012) (holding that a crime "relate[s] to obstruction of justice" for purposes of 8 U.S.C. § 1101(a)(43)(S) if it includes the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice, irrespective of the existence of an ongoing criminal investigation or proceeding; further holding that a conviction for accessory to a felony under Cal. Pen. Code § 32 that results in a term of imprisonment of at least 1 year is a conviction for an aggravated felony because it "relate[s] to obstruction of justice")

■ *Flores-Lopez v. Holder,* __ F.3d __, 2012 WL 2690323 (9th Cir. July 9, 2012) (holding that resisting an executive officer under Cal. Pen. Code § 69 is not categorically a crime of violence because it requires only de *minimis* force, as opposed to "physical force," and is a general intent crime that does not by its nature create a substantial risk that force will be used; remanding to BIA for modified categorical analysis and acknowledging that the elimination of the "missing element rule" was a significant change in the controlling law)

■ *United States v. Akinsade,* __ F.3d __, 2012 WL 3024723 (4th Cir. July 25, 2012) (granting challenge to conviction based on failure to properly inform of immigration consequences where former counsel advised petitioner that he could not be deported for the crime of embezzlement by a bank employee, and where petitioner relied on the advice to plead guilty; court concluded that the sentencing court's advisal that a plea *could* lead to deportation was insufficient to cure counsel's affirmative misrepresentation or to properly advise petitioner that he faced "mandatory deportation")

■ *Matter of Cuellar-Gomez—*, 25 I&N Dec. 850 (BIA July 18, 2012) (holding that a formal judgment of guilt of an alien entered by a municipal court is a "conviction" under section 101(a)(48)(A) if the proceedings in which the judgment was entered were "genuine criminal proceedings;" finding that a Wichita, Kansas, municipal ordinance which recapitulates a Kansas statute prohibiting marijuana possession is a "law or regulation of a State . . . relating to a controlled substance" under section 237(a)(2)(B)(i); further holding that possession of marijuana after a prior municipal ordinance conviction for marijuana possession is an aggravated felony under section 101(a)(43)(B) by virtue of its correspondence to the federal felony of "recidivist possession," 21 U.S.C. § 844 (2006))

■ *United States v. Franco-Lopez,* __ F.3d __, 2012 WL 2989801 (10th Cir. July 23, 2012) (holding that the offense of transporting an illegal alien at 8 U.S.C. § 1324(a)(1)(A)(ii) does not require proof that the transported illegal alien "entered" the United States in violation of law when the government has established the

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alien's illegal presence in the United States by other means)

DUE PROCESS – FAIR HEARING

■ *Gallegos-Hernandez v. United States,* __ F.3d __, 2012 WL 2914038 (5th Cir. July 18, 2012) (holding that a federal prisoner's due process rights were not violated by BOP policy denying access to drug rehabilitation programs to ICE detainees; further holding that exclusion of prisoners with ICE detainers from rehabilitation programs or from halfway house placement did not violate equal protection)

■ *Gomez-Medina v. Holder,* __ F.3d __, 2012 WL __ (1st Cir. July 27, 2012) (holding that the IJ did not abuse his discretion in denying a continuance and dismissing petitioner's claims as abandoned where for nearly two years she failed, without reasonable justification, to comply with the IJ's directives to provide biometrics data as well as a declaration detailing her entry into the US and a brief addressing whether the one-year asylum bar applies)

JURISDICTION

■ *Nian v. Holder,* __ F.3d __, 2012 WL 2433520 (9th Cir. June 28, 2012) (finding jurisdiction to review a crewmember's applications for relief and protection in "asylum-only" proceedings because the denial of such applications is the functional equivalent of a final order of removal)

■ *Jawad v. Holder,* __ F.3d __, 2012 WL 2765124 (7th Cir. July 10, 2012) (rejecting petitioner's claim that the BIA failed to consider petitioner's daughter's testimony in denying adjustment of status and cancellation of removal in the exercise of discretion; holding that it lacked jurisdiction over the petition because petitioner's challenge amounted to a disagreement on the facts rather than a legal dispute)

■ *Wahid v. Gates,* __ F. Supp.2d __, 2012 WL 2389984 (D.D.C. June 26, 2012) (applying *Boumedienne* and holding that the Suspension Clause does not allow an Afghani citizen detained by the US in Afghanistan from challenging his custody through a habeas corpus petition)

■ *Latif v. Holder,* __ F.3d __, 2012 WL __ (9th Cir. July 26, 2012) (holding that the district court had original jurisdiction over plaintiffs' claim that the government failed to afford them an adequate opportunity to contest their apparent inclusion on a "No-Fly List" developed and maintained by the Terrorist Screening Center)

■ *Lau v. Holder,* __ F. Supp.2d __, 2012 WL 3108863 (D. Mass. July 31, 2012) (dismissing naturalization petition in light of pending removal proceedings against petitioner, and disagreeing with Third Circuit that it can exercise jurisdiction because petitioner is entitled to declaratory relief)

WAIVER

■ *Rivera-Peraza v. Holder,* __ F.3d __, 2012 WL 2505963 (9th Cir. June 29, 2012) (upholding BIA's finding that an alien who commits a violent or dangerous crime and seeks a 212 (h) waiver must meet the heightened hardship standard at 8 C.F.R. § 1212.7(d), requiring an applicant to show "extraordinary circumstances" such as "exceptional and extremely unusual hardship," which directs the agency to consider hardship to the alien as well as to his or her relatives)

■ *Liu v. Mund,* __ F.3d __, 2012 WL 2861886 (7th Cir. July 12, 2012) (holding that alien may sue in federal court to enforce an I-864 affidavit of support and has no duty to mitigate damages by seeking work)

EOIR Notice Regarding Prosecutorial Discretion and Administrative Closure

In 2011, DHS announced a new process to ensure that its resources are focused on its highest enforcement priorities. This process is referred to as "prosecutorial discretion," or "PD." Under PD, DHS reviews pending cases to see whether they meet certain criteria for cases that are considered a low enforcement priority. If a case meets the criteria, DHS may request "administrative closure" of the case.

"Administrative closure" is an order by the court that removes the case from the court's calendar of hearings. Administrative closure does not mean that the alien's case is completed or that the court has granted any application for relief that the alien may have filed with the court. If the court orders the alien's case administratively closed, it simply means the alien will have no further hearings unless the alien or DHS specifically ask the court to schedule a hearing.

DHS is currently reviewing cases already filed with and pending before the Immigration Court to see whether any cases should be administratively closed. If DHS agrees that the alien's case meets the PD criteria, then DHS may file a motion asking the court to administratively close the alien's case. Immigration judges are prepared to adjudicate these motions on a case-by-case basis as they are filed.

For guidance regarding PD, aliens should contact an attorney or representative. Aliens may also contact the Office of the Chief Counsel (the attorney for DHS). Contact information is available at http://www.ice.gov/contact/opla/

Summaries of Recent Court Decisions

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clusively that petitioner's truck's gas gauge read full at the border inspection station, the BIA had engaged in impermissible fact-finding in violation of 8 CFR 1003.1(d)(3)(iv)."

The court again remanded the case and so did not resolve whether a "reason to believe" under INA § 212(a)(2)(C) is the equivalent of probable cause under the Fourteenth Amendment.

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■ **Ninth Circuit Holds that District Courts Lack Jurisdiction over Adjustment Denials When Removal Proceedings are Pending**

In ***Curva v. DHS***, No. 10-55367 (9th Cir. July 6, 2012) (Schroeder, Hawkins, Gould) (*per curiam*), the Ninth Circuit found that the district court lacked jurisdiction to review USCIS's denial of the alien's application to adjust status. Given that the alien was in removal proceedings, the court, citing *Cabaccang v. USCIS*, 627 F.3d 1313, 1316-18 (9th Cir. 2010), held that USCIS's denial was non-final, as the plaintiff had not exhausted her administrative remedies.

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■ **Ninth Circuit Holds that Resisting an Executive Officer under California Penal Code § 69 Is Not Categorically a Crime of Violence**

In ***Flores-Lopez v. Holder***, __ F.3d __, 2012 WL 2690323 (9th Cir. July 9, 2012) (Callahan, Wardlaw, *Martinez*), the Ninth Circuit concluded that resisting an executive officer under California Penal Code § 69 requires only *de minimis* force, as opposed to the "physical force" necessary for a crime of violence. The court also concluded that resisting an executive officer is a general intent crime that does not by its nature create a substantial risk that force will be used. Finally, the court remanded to allow the BIA to apply a "revised modified categorical approach," acknowledging that the elimination of the "missing element rule" was a significant change in the controlling law.

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D.C. CIRCUIT

■ **D.C. Circuit Affirms Dismissal of Diversity Visa Lottery Litigation**

In ***Smirnov v. Clinton***, No. 11-5258, 12-5100 (D.C. Cir. July 3, 2012) (Garland, Brown, Griffith) (*per curiam*), the D.C. Circuit, in an unpublished decision, affirmed the dismissal of a lawsuit arising from the State Department's cancellation of lottery results intended to select applicants eligible to apply for diversity visas. A putative class of approximately 22,000 individuals who learned they had been selected in the first lottery sought to revive those results and to enjoin the State Department from accepting applications from the selectees of a replacement drawing.

The court ruled that the State Department acted reasonably in voiding the results of the first lottery as unlawful because a computer error had prevented a random selection, as required by regulation. The court also affirmed the district court's denial of plaintiffs' Rule 60(b) motion, based on a State Department Inspector General report issued after the district court's decision. The court ruled that the report could not support an equitable estoppel claim against the government because the report detailed actions that fell short of the "affirmative misconduct" required to apply equitable estoppel against the government, and estoppel would unfairly harm the selectees of the second drawing. "Although we understand the plaintiffs' frustration and heartbreak, there is no legal theory entitling them to enforce the results of a lottery rendered unlawful by the Department's apparent negligence," said the court.

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OIL TRAINING CALENDAR

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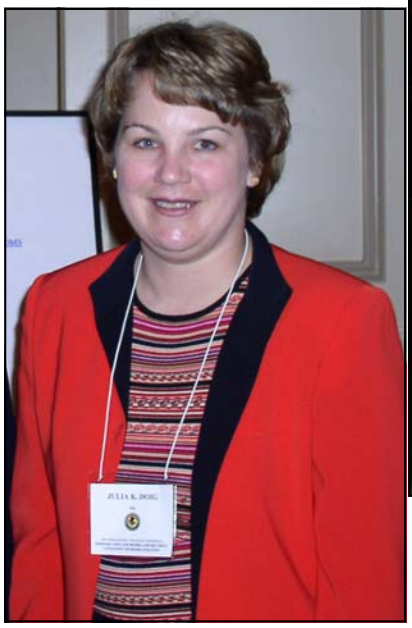
August 15-16, 2012. OIL's E-Discovery expert, Ted Hirt, will show a video program produced by the ABA Litigation Section entitled "73 Ways to Win, A Treasury of Litigation Tactics and Strategies." In the program, expert trial advocates provide tips and advice on a range of litigation issues (primarily geared towards trial court practice). This program will be shown in two separate, 80 minute segments, on August 15 and August 16 2012, at noon in room LL 100.

INSIDE OIL

The Office of Immigration Litigation mourns the passing of former colleague **Julia Katherine Doig Wilcox,** who died unexpectedly Saturday, July 28, at her home in Fredericksburg. She was 45.

Julia began her career with the Department of Justice in 1992 when she joined the former INS as a General Attorney in the Office of the District Counsel, New Orleans, Louisiana. In 1994, she transferred to the Office of the General Counsel where she served as Associate General Counsel for the Examinations Law Division. In 1996, Julia transferred to the Office of Appellate Counsel where she served as Appellate Counsel before her promotion to Chief Appellate Counsel in June 1998.



Julia joined OIL in September 2000 and worked initially as a Trial Attorney under the direction of Assistant Director Mark Walters. She moved to a Senior Litigation Counsel position shortly thereafter and was assigned to assist then Deputy Director David McConnell with the day-to-day operational management of the Office. This was a significantly challenging time in OIL's history, as OIL began to experience the surge in litigation during Julia's tenure that ultimately resulted in the tripling of the Office's attorney staff. During this period, Julia was an example of courage and endurance for her colleagues, as she faced many professional challenges while at the same time experiencing significant health challenges in her personal life. When she left OIL to assume a position at USCIS as Chief Regulatory Coordinator, she left behind many admiring colleagues and friends at OIL who continue to remember her fondly.

Julie was born Nov. 10, 1966, in Chelsea, Mass. She received her A.B. degree in Politics from Mount Holyoke College in 1987 and her J.D. from Louisiana State University in 1990. Following law school, Ms. Doig served as a judicial law clerk to Judge Robin M. Giarrusso of the Orleans Parish (Louisiana) Civil District Court from 1990-1992. She is expected to be interred at Arlington National Cemetery as an undetermined future date.

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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