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LITIGATION HIGHLIGHTS

Inside

Aliens Who Adjust to Lawful Permanent Resident Status Are Eligible for Waiver of Inadmissibility

In ***Leiba v. Holder***, 699 F.3d 346 (4th Cir. 2012) (*Traxler*, Davis, Cogburn), the Fourth Circuit held that aliens who adjust to lawful permanent resident status are not "admitted" to the United States as "aliens lawfully admitted for permanent residence," and it is therefore unambiguous that they are eligible to seek waivers of inadmissibility under INA § 212(h).

The petitioner, citizen of El Salvador, entered the United States illegally. He married in 1994, and he and his wife now have five children. In 1995 he adjusted his status through an employment-based immigration petition, and his wife became a naturalized U.S. citizen in 2001.

In 2008, petitioner was convicted in the Circuit Court of Loudoun County, Virginia, of receiving stolen property. DHS subsequently charged him with removability under INA § 237 (a)(2)(A)(iii), as an alien who, "any time after admission," was convicted of an aggravated felony as defined in INA § 101(a)(43)(G), i.e., which includes theft offenses for which the term of imprisonment was at least one year. Petitioner admitted the NTA's factual allegations but denied removability as charged and indicated he would apply for adjustment of status and a waiver under INA § 212(h). Under § 212(h) the Attorney General can waive an alien's inadmissibility that is based on the alien's conviction for an aggravated felony if the "denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien."

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Fifth Circuit Holds That Even Aliens Convicted by Jury Trial Prior to Repeal of INA § 212(c) Are Now Eligible for That Relief

In ***Carranza-De Salinas v. Holder***, 700 F.3d 768 (5th Cir. 2012) (Davis, Smith, *Dennis*) the Fifth Circuit held that under *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), the petitioner, who had been convicted by a jury prior to the repeal of INA § 212 (c), only had to show "likelihood of reliance on prior law," to avoid the retroactive application of the repeal of § 212(c).

The petitioner, a citizen of Mexico, lawfully entered the United States in 1985. In 1993, after turning down a plea agreement, was convicted by a Louisiana jury of possession of marijuana with intent to distribute and was sentenced to five years of hard labor, all but one of which were suspended, and four years of probation. Petitioner received an automatic first offender pardon in 1994, and the conviction was expunged on April 16, 1999.

In 1997, the formed INS instituted removal proceedings against the petitioner on the basis that her conviction constituted an aggravated felony and a controlled substance violation. Initially, in 1999, the INS

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Availability of § 212(c) relief extended

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conceded that petitioner was eligible for § 212(c). However, when the case was heard on the merits, the IJ agreed with the INS attorney's contention that she was ineligible for that relief because her conviction resulted from a jury trial rather than a guilty plea. Following a technical remand from the BIA, the IJ also concluded that despite the expungement of petitioner's conviction, she was no longer eligible for § 212(c) relief. On appeal, the BIA also determined that petitioner was ineligible for § 212(c).

The court explained that, when considering a retroactivity claim, *Vartelas* does not require "a showing of actual, subjective reliance."

On appeal, to the Fifth Circuit, the court remanded the case in light *INS v. St. Cyr*, 533 U.S. 289 (2001), to give petitioner an opportunity to make a record on her retroactivity claim. The court noted, however, that petitioner's case was distinguishable from *St. Cyr*, because there the petitioner had pleaded guilty prior to the repeal of § 212(c), while the petitioner had decide to go to trial. On remand, petitioner acknowledged that she had not direct evidence of "reliance," but argued that she delayed in filing for relief until she had expunged her conviction, and that her decision to forgo an appeal was the equivalent of a plea agreement. The IJ, and subsequently the BIA, determined that petitioner remained ineligible for § 212(c) because she had not demonstrated actual reliance.

On appeal for the second time to the Fifth Circuit, petitioner argued that the reasoning of the Supreme Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), applied in her case. In *Vartelas*, the Supreme Court in considering another INA provision also amended in 1996, explained that the amended provision could not be applied retroactively to a lawful permanent resident on the basis that he had shown a "likelihood of reliance on prior law." *Vartelas,* who had been convicted prior to the amendment, became subject to removal proceedings upon his return from a trip abroad. Under the prior law, petitioner had been free to travel abroad without triggering admissibility requirements.

The Fifth Circuit rejected the government's contention that petitioner could not show reliance. The court explained that *Vartelas* does not require "a showing of actual, subjective reliance." Moreover, it noted that in *Vartelas* the Court said that it has never required a showing of reliance to demonstrate that a statute applies retroactively. And, even if showing of reliance is required, the requirement is a showing of "likelihood." Here, the court held that petitioner had shown the kind of reliance described by the Court in *Vartelas*. "An alien in [petitioner's] shoes who decided not to appeal might have chosen not to do so because she had been sentenced to five years or fewer in prison, which, under pre-IIRIRA rules, would allow her to remain eligible for discretionary relief under § 212(c)," explained the court. Accordingly, the court remanded the case to the BIA to permit petitioner to pursue 212(c) relief.

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§ 212(h) waiver available to adjusted LPR

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DHS subsequently moved to pretermit petitioner's application, arguing that his conviction following his adjustment of status, rendered him statutorily ineligible for a § 212(h) waiver. The IJ granted DHS's motion, ruling that an alien convicted of an aggravated felony after obtaining LPR status is ineligible for a § 212(h) waiver. The IJ therefore ordered petitioner removed and the BIA affirmed the decision.

The court ruled that under *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012), no gap exists to fill in INA § 212(h) regarding aliens with no lawful admission. In *Bracamante*, the court had rejected the government's contention that Bracamontes had been "admitted" by virtue of his obtaining of his 1990 status adjustment for purposes of § 212(h). The court there concluded that to do so would require it "to ignore the plain meaning of Congress's definition of 'admitted,' which '[c]learly' does not "include [ ] an adjustment of status.'" The government also argued that the court's interpretation would produce the absurd result that aliens who adjust to LPR status after entering the country would receive more favorable treatment than those who entered with LPR status. The court responded that Congress "may have had rational reasons for making such a distinction."

The court again acknowledged that some awkwardness existed in applying Congress's definition of "admitted" in other contexts, but concluded that no absurdity was produced by the facts presented in this case. The court observed that it was "not surprising that each circuit to construe § 212(h) in the context we address today has concluded that obtaining LPR status unambiguously does not constitute being 'admitted' in the context of § 212(h)."

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

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

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Asylum — Particular Social Group

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

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Asylum – Particular Social Group

On September 27, 2012, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510 (2012), 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 December 11, 2012, an en banc panel of the Ninth Circuit heard argument on rehearing in ***Oshodi v. Holder***. The court granted a *sua sponte* call for en banc rehearing, and withdrew its prior published opinion, 671 F.3d 1002, which declined to follow, as dicta, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed en banc supplemental briefs.

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Convictions – Modified Categorical Approach

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

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Convictions – Modified Categorical Approach

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

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Consular Nonreviewability

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

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds That Asylum Claims Based on Family Membership Will Succeed Only Where The Motivation for Persecution Is Kinship

In *Perlera-Sola v. Holder*, 699 F.3d 572 (1st Cir. 2012) (Lynch, Boudin, *McConnell*), the First Circuit held that the "kinship" criterion for asylum "applies only where the motivation for the persecution is kinship and not because multiple family members happen to be persecuted for a common reason but the animus is not kinship."

The petitioner, a citizen of El Salvador, entered the United States without inspection on December 19, 2007, at the age of seventeen. Petitioner's family owned a pig farm in El Salvador from 1998 until 2007. On July 8, 2006, petitioner's father, while driving to a nearby town to purchase feed for the farm animals, was stopped in the middle of a road by unknown assailants, and shot three times. The bullets pierced him in his left arm, upper back, and hip. Petitioner's father spent several months in the hospital recovering from the shooting.

During the year following the shooting, the petitioner witnessed unknown vehicles drive by his home and received phone calls threatening the lives of his family if they remained in the area. Ultimately, petitioner and his family decided to leave El Salvador in December of 2007 because they felt it was too dangerous to remain. Petitioner also testified that friends currently living on his family's farm in El Salvador have informed him that suspicious vehicles continue to drive by the farm. At his removal hearing petitioner contended that his family's perceived wealth was the reason for the attack on his father and the ensuing drive-bys and continuous telephonic threats, and that he and his family could not remain in El Salvador because there was a clear threat of imminent danger. Moreover, he asserted that the Salvadorian government failed to investigate the crime or protect the family in any capacity.

In rejecting petitioner's claim of persecution based on the social group criterion, the court underscored the absence of evidence of the assailant's motives much less that petitioner's family had been targeted on account of their membership in that family. The court also rejected petitioner's legal theory that persecution based also on his family's wealth constituted persecution of account of membership in a particular social group. The court explained that, in *Sicaju–Diaz v. Holder*, 663 F.3d 1, 4 (1st Cir. 2001) it had rejected this theory as providing a statutory basis for asylum.

"The Court nevertheless believes that the requirement of social visibility at the very least merits additional examination by and clarification from the BIA."

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Persons Returning from the United States with Citizen Children, and Perceived as Wealthy, Are Not a Particular Social Group

In *Rojas-Perez v. Holder*, 699 F.3d 74 (1st Cir. 2012) (*Torruella*, Thompson, Howard (concurring)), the First Circuit concluded that substantial evidence supported the agency's ruling that Mexican citizens who are wealthy, or would be perceived as such upon their return to Mexico, where crime is endemic, do not constitute a particular social group for purposes of withholding of removal.

The petitioners, who had entered the United States unlawfully in 2007, claimed that if they returned to Mexico, their son -- a U.S. citizen born in the United States in 2006 -- could be kidnapped and held for ransom. The IJ denied the request for withholding and the BIA dismissed their appeal on the basis that "perceived wealth does not constitute a particular social group under the [INA]."

The First Circuit, in light of its ruling in *Beltrand–Alas v. Holder*, 689 F.3d 90 (1st Cir. 2012), affirmed the BIA's decision. However, the court questioned the BIA's social visibility requirement. "The Court nevertheless believes that the requirement of social visibility at the very least merits additional examination by and clarification from the BIA. It is particularly unclear how courts are to square the BIA's more recent statements regarding the social visibility requirement with its former decisions, which allow as cognizable those characteristics in particular social groups that are only visible when made known by individual members," said the court.

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First Circuit Holds Series of Unrelated Incidents Do Not Constitute Past Persecution

In *Tay-Chan v. Holder*, 699 F.3d 107 (*Lynch*, Tarvella, Boudin) (1st Cir. 2012), the First Circuit rejected petitioner's contention that a series of unrelated crimes against his family evinced past persecution on account of a particular social group, namely victims of gang threats and possible extortion, where the motive behind two of the incidents was unknown, and the others were motivated by extortion. The court explained that the BIA "reasonably rejected this purported 'social group' as overly broad and having insufficient particularity to meet the social group criterion, and explained why." The court also rejected petitioner's attempt to redefine the proposed social group, in the first in-

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stance, as "expatriates returning to Guatemala after long residence in the United States who return with their United States citizen children."

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■ **First Circuit Rejects Particular Social Group of Guatemalan Nationals Repatriated From the United States**

In ***Escobar v. Holder***, 698 F.3d 36 (1st Cir. 2012) (*Boudin*, Thompson, Torruella), the First Circuit rejected petitioner's claim that he would be persecuted in Guatemala based on his membership in the particular social group of "Guatemalan nationals repatriated from the United States." The court observed that the petitioner's theory appeared to be that Guatemalan gangs will assume he amassed significant wealth during his stay in the United States and thus target him for extortion. The court held that Guatemalans who are perceived as wealthy do not constitute a social group within the meaning of the INA, citing *Sicaju-Diaz v. Holder*, 663 F.3d 1 (1st Cir. 2011).

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FOURTH CIRCUIT

■ **Fourth Circuit Holds That Implausible Testimony and Insufficient Corroboration Supported Adverse Credibility Determination**

In ***Singh v. Holder***, 699 F.3d 321 (*Duncan*, Agee, Diaz) (4th Cir. 2012), the Fourth Circuit held the agency supplied sufficient reasons for its adverse credibility finding, which was based on the petitioner's inherently implausible testimony and failure to adequately corroborate his claims.

The petitioner, a citizen of India from the Punjab state, and member of the Sikh religion, claimed that he had been subjected to persecution because of his involvement with the Akali Dal Party, widely considered the leading Sikh political party. He claimed that the problems started when his father refused to support the ruling Nationalist Congress party and the mayor of the town where they lived. On one occasion, petitioner alleged that police arrested him and detained him for two days. During his detention beat him with a police club, breaking his arm and rendering him unconscious, and at night tied his arms behind his back. The IJ did not find petitioner's story credible and the BIA agreed.

In affirming the adverse credibility finding, the court found that the IJ had provided specific and cogent reasons explaining his adverse credibility determination, and had properly supported that determination with petitioner's inability to provide corroborating evidence of his statement and testimony. The court also denied petitioner's claim that an incompetent translator violated his right to due process because the alien failed to show how any errors in translation prejudiced his claim.

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■ **Fourth Circuit Upholds Denial of Relief Due to Material Support of Terrorist Organization Where Angolan Petitioner Knew Or Should Have Known That The Group Engaged In Terrorist Activities**

In ***Viegas v. Attorney General***, 699 F.3d 798 (4th Cir. 2012) (Motz, King, *Wynn*), the Fourth Circuit affirmed the BIA's determination that petitioner was statutorily-barred from asylum and withholding of removal for providing material support to the Front for the Liberation of Cabinda ("FLEC"), which was dedicated to the independence of Cabinda, an Angolan enclave, from Angola.

The Fourth Circuit concluded that DHS met its burden of establishing FLEC as a terrorist organization and that the IJ properly shifted the burden to petitioner to show that the material support bar did not apply.

Petitioner, a citizen of Angola, used a fraudulent passport to enter the United States in 2005. In his affirmative asylum application, petitioner claimed that he was a member of FLEC who paid dues, hung posters, and, after participating in a peaceful protest, was arrested and beaten by the police. Petitioner testified that he was "vaguely" aware that other FLEC factions attacked civilians but asserted that he was unaware of the activities of his particular faction.

The IJ applied the material support bar to deny petitioner's applications for asylum and withholding of removal because he supported FLEC, a recognized terrorist organization, but granted petitioner deferral under the CAT. On appeal, the BIA rejected petitioner's argument that the material support bar should not apply because he belonged to a peaceful faction. The BIA found that because petitioner "aided the FLEC in continuing its fight against the Angolan government," his activities constituted material support for terrorism.

The Fourth Circuit concluded that DHS met its burden of establishing FLEC as a terrorist organization and that the IJ properly shifted the burden to petitioner to show that the material support bar did not apply. The court further held that petitioner knew or should have known that the FLEC engaged in terrorist activities, especially as he heard reports of the group's violent activities, and that he materially aided the group by hanging posters and paying monthly membership dues. "Every month for four years, [petitioner] voluntarily paid dues and hung posters for the FLEC. As the BIA concluded, the sum of petitioner's dues 'was sufficiently substantial standing alone to have some effect on

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the ability of the FLEC to accomplish its goals,'" explained the court.

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FIFTH CIRCUIT

■ **Departure Bar Regulation Cannot Be Applied To A Statutory Motion To Reopen**

In ***Garcia Carias v. Holder***, 697 F.3d 257 (5th Cir. 2012) (Jolly, DeMoss, *Stewart*), the Fifth Circuit held that "section 240(c)(7) unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States." Thus, the court concluded that the BIA erred in applying the departure bar to alien's motion to reopen, which was filed after he was removed from the United States and was based on the Supreme Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006). The court also found that its decisions in *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003), and *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009), did not apply because they addressed the applicability of the departure regulation to the BIA's regulatory power to reopen or reconsider *sua sponte*.

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■ **Fifth Circuit Holds Departure Bar Regulation Inapplicable to Timely Reconsideration Motion**

In ***Lari v. Holder***, 697 F.3d 273 (5th Cir. 2012) (Jolly, DeMoss, *Stewart*), the Fifth Circuit extended *Garcia-Carias v. Holder,* 697 F.3d 257, to hold that the departure bar regulation could not preclude a timely motion to reconsider. The court declined to address the government's motion to remand concerning the adequacy of a group hearing.

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SIXTH CIRCUIT

■ **Sixth Circuit Affirms BIA's Asylum Denial Where Senegalese Mother Raised Fear That United States Citizen Daughter Might Be Subjected to FGM**

In *Dieng v. Holder*, 698 F.3d 866 (6th Cir. 2012) (Norris, Sutton, *Griffin*), the Sixth Circuit determined that substantial evidence supported the BIA's conclusion that a mother of two daughters did not establish a well-founded fear of genital mutilation in Senegal for herself or her daughters. Petitioner "does not fit the demographic profile of a woman at risk of FGM. Her individualized fear of persecution is negated by her age and marital status, her Wolof husband's opposition to FGM, and petitioners' ability to relocate safely to an urban location or region of Senegal where the outlawed practice of FGM is rare," explained the court.

The court concluded that petitioner could not derive asylum eligibility through her United States citizen daughter. "The governing principle that we announced in *Abay* must be tempered by an overriding obligation under the INA to examine the unique facts of each case."

Distinguishing its precedent in *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004), and following the BIA's precedent in *Matter of A-K-,* 24 I. & N. Dec. 275 (BIA 2007), the court concluded petitioner could not derive asylum eligibility through her United States citizen daughter. "The governing principle that we announced in *Abay* must be tempered by an overriding obligation under the INA to examine the unique facts of each case . . . In particular, 'FGM practices vary by ethnic group, religion and geographic region, as well as by the age and marital status of the woman or girl.'"

The court also determined that petitioner's fear that her oldest daughter, who is residing in Gambia, would be subjected to FGM in Senegal was based on conjecture and therefore insubstantial.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds Pakistani Nationals Did Not Establish Refugee Status Because They Failed to Show They Were Targeted on Account of a Protected Ground**

In ***Shaikh v. Holder***, __F.3d__, 2012 WL 5897293 (7th Cir. November 26, 2012) (*Flaum*, Ripple, Williams), the Seventh Circuit concluded that petitioners failed to demonstrate that the Muttahida Quomi Movement's (MQM) central reason for targeting them for persecution was on account of their political opinion, rather than their extra-marital relationship.

Petitioners, a husband and wife from Pakistan, entered the United States in 2006 and filed affirmative applications for asylum. Petitioners joined the political party BLAH (MQM) while still married to their first spouses and, subsequently, divorced their first spouses and married each other. Following the remarriage, members of the MQM pressured them to divorce and return to their ex-spouses and attacked petitioners several times. The IJ found that petitioners failed to establish they suffered past persecution on account of a political opinion where the attempted violence only occurred after their affair. The BIA agreed, noting that MQM's primary motive was not to force petitioners to rejoin or support the group.

The Seventh Circuit held that substantial evidence supported the

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agency's conclusion that petitioners' political opinion was, at best, an incidental or superficial motivation for the persecution. Rather, the court held that MQM's actions were largely prompted by petitioners' extramarital affair and decision to divorce their first spouses. The court explained that "the Real ID Act modifies our earlier mixed motive cases only to require among that mix of motives a protected ground qualifying as a central reason" and that, when more than one motivation exists, an applicant must show that "the protected status played more than a minor role in motivating the persecutor."

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■ **Seventh Circuit Holds Regulation Defining "Extraordinary Circumstance" Exception to Asylum Time-Bar Is Not Unconstitutionally Vague**

In ***Vrljicak v. Holder***, 700 F.3d 1060 (7th Cir. 2012), (*Easterbrook*, Rovner, Hamilton), the Seventh Circuit concluded that 8 C.F.R. § 1208.4(a)(5)(iv), which describes the "extraordinary circumstance" exception to the one-year period in which an asylum application must be filed, was not unconstitutionally vague where it provided that an alien may request asylum within a "reasonable" period of time after a period of authorized immigration status ends.

Petitioner, a citizen of Serbia, entered the United States on a work visa in 2009 and filed an affirmative application for asylum on July 14, 2010, approximately nine months after his status ended. In his application, petitioner claimed he would be persecuted in Serbia on account of his sexual orientation. The IJ found that petitioner did not apply for asylum within a reasonable period after the expiration of his visa and the BIA agreed.

The Seventh Circuit rejected petitioner's argument that the "reasonable" period exception should be struck as unconstitutionally vague, noting as a practical matter that striking the exception would leave petitioner with no grounds to challenge the untimeliness finding. Additionally, the court noted that the language of the exception allowed immigration officials to accommodate unanticipated circumstances. The court also denied the request of an amicus curiae to hold the entire regulation deficient, reasoning that those parties should approach the DOJ as "[j]udicial review should follow, and not precede, full consideration by the officials charged with devising and applying the rules for implementing the statute."

An alien who had previously been subjected to expedited removal was ineligible for adjustment of status because he was inadmissible under INA § 212(a)(9)(C)(i)(II).

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■ **Alien's Prior Removal from the United States Rendered Him Ineligible for Adjustment of Status and Cancellation of Removal**

In ***Nunez-Moron v. Holder***, __F.3d__, 2012 WL 5315860 (7th Cir. October 30, 2012) (Easterbrook, *Manion*, Tinder), the Seventh Circuit held that an alien who had previously been subjected to expedited removal was ineligible for adjustment of status because he was inadmissible under INA § 212 (a)(9)(C)(i)(II). The court also held that the alien's expedited removal from the United States, pursuant to INA § 235(b)(1), severed his physical presence in the United States and rendered him ineligible for cancellation of removal.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds That Equal Protection Does Not Require Equal Treatment Under the INA of Aliens Subject to State First Offender Laws, Relative to those Subject to the Federal First Offender Act**

In ***Brikova v. Holder***, 699 F.3d 1005 (8th Cir. 2012) (Riley, Colloton, *Gruender*), the Eighth Circuit held that the Equal Protection Clause did not require that aliens convicted under a state first offender statute be treated under the Immigration and Nationality Act in the same manner as an alien subject to the Federal First Offender Act (FFOA). While state first offender dispositions count as convictions under the INA, dispositions under the FFOA presumably do not. Since Equal Protection did not require equal treatment, it was unnecessary to determine whether the alien's state conviction would have qualified for FFOA treatment.

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■ **Eighth Circuit Upholds Denial of Motion to Reopen on the Basis that Guatemalans Who Resist Joining a Gang Are not a Particular Social Group**

In ***Lopez-Mendez v. Holder***, 698 F.3d 675 (8th Cir. 2012) (*Riley*, Smith, Colloton), the Eighth Circuit determined that the BIA did not abuse its discretion when it concluded that the evidence petitioner offered to reopen his asylum proceedings — threats motivated by the petitioner's refusal to join a gang in Gua-

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temala — did not establish a nexus between the threats and a protected ground, and therefore would not likely change the result of the case. The court also rejected the petitioner's claim that the BIA abused its discretion by not finding that gang members persecuted the alien based on his membership in an indigenous group. The court reaffirmed its view that "persons resistant to gang violence are too diffuse to be recognized as a particular social group."

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■ **Eighth Circuit Holds that Petitioner's Publications Criticizing the Kenyan Government Failed to Demonstrate Eligibility for Asylum and that an Alien Does Not Have a Protected Right to Asylum**

In ***Wanyama v. Holder***, 698 F.3d 1032 (8th Cir. 2012) (Riley, Arnold, *Gruender*), the Eighth Circuit concluded that the petitioner failed to demonstrate a particularized threat of persecution based on either the publication of articles criticizing the Kenyan government, his political affiliation, or the mistreatment his mother and brother suffered in Kenya.

The petitioner entered the United States as a J–1 nonimmigrant exchange visitor in 1992. His wife and their children followed in 1995. Upon expiration of his visa in 2005, petitioner conceded removability and applied for asylum, withholding of removal, and CAT protection on behalf of himself and his family. He claimed fear of persecution primarily on account of an article he wrote in 2004 criticizing the government of Kenyan President Mwai Kibaki and praising his Orange Democratic Movement opponent Raila Odinga. The article appeared in The East African Standard, a widely read Kenyan daily newspaper. The Kenyan government began to harass his family members in Kenya after the article was published. Petitioner testified that his brother was fired as managing director of a public development corporation, and a local member of parliament made "suspicious remarks" to his mother, questioning her about his activities and whereabouts.

There is no constitutionally protected liberty or property interest in receiving asylum, because it is "statutorily created relief that is subject to the unfettered discretion of a governmental authority."

Although the IJ closed the asylum hearing in April 2008, in December 2009 the IJ allowed the parties to submit additional evidence, which included evidence of improved country conditions as a result of the formation of a coalition government in Kenya. The IJ then denied asylum and withholding finding that petitioner had failed to show an objectively reasonable fear of future persecution. The BIA also affirmed on that ground.

The court agreed with the BIA's conclusion that petitioner had not demonstrated an objectively reasonable fear of future persecution due to changed circumstances. Specifically the court explained, the organization that the petitioner supported was in power. Additionally, the court rejected the petitioner's due process claim holding that aliens do not have a constitutionally protected liberty or property interest in receiving asylum, because it is "statutorily created relief that is subject to the unfettered discretion of a governmental authority."

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■ **Eighth Circuit Remands for Clarification of The BIA's Rejection of Past Persecution Claim, Determines BIA Engaged in Improper Factfinding**

In ***Flores v. Holder***, 699 F.3d 998 (*Melloy*, Benton, Baker) (8th Cir. 2012), the Eighth Circuit remanded for clarification of the BIA's findings on past persecution. The court could not discern a clear basis for the BIA's finding that petitioner did not suffer past persecution, where the alien's family had been harmed and it is not impossible for such harm to support a claim of past persecution. Alternatively, the court held that if the BIA based its decision on a lack of nexus to a protected ground, it engaged in improper factfinding because the Immigration Judge did not make any nexus determination. The court also held that the BIA improperly found facts when it determined that the alien gave false testimony to obtain an immigration benefit because the IJ made no such finding.

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■ **Eighth Circuit Holds that Substantial Evidence Supports Finding that Alien Committed a Serious Nonpolitical Crime**

In ***Zheng v. Holder***, 698 F.3d 710 (8th Cir. 2012) (*Loken*, Gruender, Benton), the Eighth Circuit held that substantial evidence supported the BIA's finding that petitioner's premeditated attack on a Chinese family planning official for refusing to return his property was a serious non-political crime, rendering him ineligible for asylum and withholding of removal.

The petitioner entered the United States in 1993 and filed a request for asylum. In 2005, petitioner was placed in removal proceedings where he conceded removability and sought asylum, withholding of removal, and CAT protection, claiming past persecution and a well-founded fear of persecution as a result of his resistance to China's coercive family planning policies. At the June 2010 administrative hearing, petitioner testified that following

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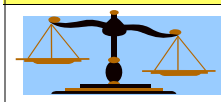

Summaries Of Recent Federal Court Decisions

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the birth of a second child, petitioner and his wife left their village to avoid being sterilized for having violated China's one-child policy. As a result, officers came to their home and confiscated furniture. Subsequently petitioner's wife was taken to a hospital and underwent forced sterilization. Petitioner then sought to pay a fine at the family planning office and get his furniture back. The officials refused, even after petitioner paid the fine. He argued with the head official but did not fight him in the office. Instead, knowing where the official lived, petitioner waited for the official on his way home, pushed him off his bicycle, and beat him with a wooden stick until he was bloody, resulting in what petitioner described as "a very serious injury."

The court agreed with the IJ that the assault of the family planning official was a serious non-political crime, and not a political response to China's family planning policy. The court explained that petitioner was motivated by the official's refusal to return petitioner's property, noting petitioner's testimony that he lay in wait and beat the official "because he refused to return [his] property after his wife was involuntarily sterilized and he paid a fine."

The court also denied the petitioner's attorney's motion to withdraw, filed after the court had heard the argument in the case, which alleged that his client had admitted to fabricating elements of his claim. The court held that the attorney's motion was not accompanied by corroborating evidence of the alleged dishonesty, and declined to assume the truth of the attorney's unsworn allegations. Citing 8 U.S.C. § 1252(a)(1) and precedent, the court also ruled that in any event, Congress has barred a remand to the BIA for further fact-finding or consideration of this new information.

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NINTH CIRCUIT

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

In ***Arbid v. Holder***, 674 F.3d 1138 (9th Cir. 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 court ruled that the BIA did not abuse its discretion in determining that petitioner's federal mail fraud conviction rendered him ineligible for withholding of removal because it was a "particularly serious crime." The court also ruled that substantial evidence supported the BIA's denial of the petitioner's claim for deferral of removal under CAT because conditions in Lebanon had changed such that it was no longer more likely than not that petitioner would be tortured upon his return there.

The court deferred to the BIA's holding that an alien's continuous physical presence ends when the alien voluntarily departs the United States under the threat of removal proceedings.

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TENTH CIRCUIT

■ Tenth Circuit Holds that District Court Must Determine the Proper Forum for UNTOC Claims

In ***Musau v. Carlson***, 2012 WL 4903251 (10th Cir. October 17, 2012) (*Kelly*, McKay, O'Brien (dissenting)), the Tenth Circuit, in an unpublished decision, reversed and remanded the district court's dismissal for lack of subject matter jurisdiction under the REAL ID Act. In so holding, the court instructed the district court on remand to determine three issues: (1) whether an alien can pursue a United Nations Convention Against Transnational Organized Crime ("UNTOC") claim before immigration tribunals or a circuit court; (2) if an alien cannot pursue an UNTOC claim in either forum, whether an alien is entitled to relief under the UNTOC; and (3) if so entitled, whether the REAL ID Act unconstitutionally suspends the writ of habeas corpus.

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■ Tenth Circuit Holds Alien's Continuous Physical Presence Ends When He Voluntarily Departs the United States Under Threat of Removal Proceedings

In ***Barrera Quintero v. Holder***, 699 F.3d 1239 (10th Cir. 2012) (Kelly, *Holloway*, Matheson), the Tenth Circuit joined six other circuits in deferring to the BIA's holding that an alien's continuous physical presence ends when the alien voluntarily departs the United States under the threat of removal proceedings.

Petitioner, a native and citizen of Mexico, entered the United States without inspection in 1990. In 2004, petitioner pleaded guilty to falsifying government records after he was apprehended with a fake social security card. After being taken into custody by immigration officials, petitioner signed a Form I-826 indicating his choice to voluntarily return to Mexico in lieu of a hearing before an immigration judge. Petitioner illegally reentered approximately two months later and was placed in removal proceedings in 2007. The IJ denied his application for cancellation of removal for failure to establish the requisite physical presence and the BIA affirmed.

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This Month's Topical Parentheticals

ADJUSTMENT

■ ***Leiba v. Holder,*** __ F. 3d __, 2012 WL 5458479 (4th Cir. Nov. 9, 2012) (holding that section 212(h) unambiguously dictates that an alien who adjusts status to that of a lawful permanent resident was never admitted to the United States as an alien lawfully admitted for permanent residence, and is therefore eligible to seek a 212 (h) waiver)

■ ***Lee v. Holder,*** __ F. 3d __, 2012 WL 5992157 (2d Cir. Dec. 3, 2012) (holding that the AG's interpretation of 8 U.S.C. § 1255(i)(1)(B)(ii), as set forth in 8 C.F.R. §§ 245.10(j), 1245.10(j) -- that the provision applies to beneficiaries actually listed on labor-certification applications as of April 30, 2001, not individuals who were later substituted as beneficiaries -- is reasonable and entitled to *Chevron* deference)

ADMISSION

■ ***Matter of Valenzuela-Felix,*** 26 I.&N. Dec. 53 (BIA Nov. 16, 2012) (holding that when DHS paroles a returning LPR for prosecution, it need not have all the evidence to sustain its burden of proving that the alien is an applicant for admission, but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings) (BIA member Cole issued a concurring and dissenting opinion)

ASYLUM

■ ***Rojas-Perez v. Holder,*** __ F. 3d __, 2012 WL __ (1st Cir. Nov. 5, 2012) (holding that "persons who have lengthy residence in the [US] and are parents of a [US] citizen" are not "a particular social group" in Mexico for failure to meet the "social visibility" requirement; joining other First Circuit cases in rejecting asylum for people claiming repatriation from U.S. will subject them to persecution on account of perceived wealth)

■ ***Zheng v. Holder,*** __ F. 3d __, 2012 WL 5350157 (8th Cir. Oct. 31, 2012) (affirming that Chinese asylum applicant's after-hours planned assault of a family-planning official causing serious injury, in order to recover property confiscated for earlier violation of family-planning laws, is a "serious non-political crime" barring asylum and does not constitute "other resistance" to family planning, because serious criminal nature of the offense outweighed its political aspect)

■ ***Wanyama v. Holder,*** __ F. 3d __, 2012 WL 5357933 (8th Cir. Nov. 1, 2012) (affirming that asylum applicant from Kenya failed to establish well-founded fear of persecution by the government on account of political opinion for writing three articles in U.S. criticizing President Kibaki and praising his opponent Odinga, where: i) two instances of possible retaliation against family in Kenya were low-level harassment, not pattern of persecution tied to applicant; ii) past deaths of two Kibaki political opponents, one of whom was applicant's cousin, were for unknown reasons; iii) there are changed country conditions with Odinga who applicant praised now serving as president; and iv) applicant is not similarly situated to Kenyan journalists allegedly subject to pattern of persecution, because applicant is a U.S. professor who wrote only three articles in several years)

■ ***Singh v. Holder,*** __ F. 3d __, 2012 WL __ (4th Cir. Nov. 5, 2012) (post-REAL ID Act credibility case holding that inconsistencies or other problems need not go to the heart of the claim, and affirming an adverse credibility finding regarding asylum claim based on pro-Sikh political opinion, based on (i) inherent implausibility of Singh's account of his father having secured Singh's release from prison; (ii) unresponsiveness while testifying; (iii) failure to identify a political view likely to subject Singh to police persecution; (iv) failure to provide corroborating evidence from sister in the US; (v) suspicious alteration in affidavit submitted as corroboration; and (vi) inconsistency between corroborating affidavit and Singh's testimony. Further holding that the adverse credibility regarding asylum was fatal to withholding based on same facts, and BIA properly conducted individualized analysis of CAT claim without treating adverse credibility finding as dispositive)

■ ***Viegas v. Holder,*** __ F. 3d __, 2012 WL 5838202 (4th Cir. Nov. 19, 2012) (holding that the BIA did not err in finding petitioner statutorily ineligible for asylum and withholding of removal under the INA's material support bar for supporting the Front for the Liberation Enclave of Cabinda (monthly dues totaling around $50, and hanging several hundred pro-FLEC posters); finding that there was evidence that some (if not most) FLEC branches engaged in terrorist activities, and thus the burden properly shifted to petitioner to show he was not ineligible)

■ ***Matter of M-H,*** 26 I.&N. Dec. 46 (BIA Nov. 13, 2012) (concluding that the holding in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), that an offense need not be an aggravated felony to be considered a particularly serious crime for purposes of barring asylum or withholding of removal, should be applied to cases within the jurisdiction of the Court of Appeals for the Third Circuit).

■ ***Vrljicak v. Holder,*** __ F. 3d __, 2012 WL 5846283 (7th Cir. Nov. 20, 2012) (rejecting petitioner's challenge to 8 C.F.R. § 1208.4(a)(5)(iv) as constitutionally vague, and explaining that the term "reasonable" for purposes of requiring an alien to file an asylum action within a "*reasonable* time after authorized status ends" provides agency adjudicators with flexibility to consider unanticipated circumstances)

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This Month's Topical Parentheticals

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■ ***Shaikh v. Holder,*** __ F. 3d __, 2012 WL 5897293 (7th Cir. Nov. 26, 2012) (construing the REAL ID Act's "one central reason" requirement for mixed-motive persecution in asylum and withholding claims to permit denial of asylum if "an unprotected ground forms the primary motivation for the persecution, and secondary motivations rooted in protected grounds do not rise to the level of central motivations"; further holding that this does not mean that secondary (or "tertiary") motives can never qualify for asylum, but they must play "a central" role in motivating the persecutor, not a minor role; affirming that threats and violence against a Pakistani married couple by a local political party after the couple left the party do not qualify for asylum, where timing of incidents and content of perpetrators' statements showed this was centrally motivated by couple's prior adultery and remarriage to each other, and political animosity for having left the party was only an incidental or superficial motivation)

■ ***Perlera-Sola v. Holder,*** __ F. 3d __, 2012 WL 5477097 (1st Cir. Nov. 9, 2012) (holding: (i) no well-founded fear of persecution of applicant "on account of" membership in family as a social group, where shooting of applicant's father and threats toward the family were for unknown reasons; (ii) persecution "on account of" family membership means kinship must be the motive for persecution; (iii) persecution "on account of" family membership is not proven simply by fact that some family members have been persecuted for unknown reasons; (iv) identity of perpetrators is relevant to motive, and in absence of positive identification of persecutors, an applicant must provide some credible evidence of identity or motive, not simply speculation)

■ ***Tay-Chan v. Holder,*** __ F. 3d __, 2012 WL 5458439 (1st Cir. Nov. 9, 2012) (holding: (i) no past persecution or likelihood of future persecution of Guatemalan withholding applicant "on account of" membership in his family as a social group, where brother, cousins, uncle, and applicant were shot over span of 20 years for unknown reasons, or by Mara gang in extortion attempts; (ii) "[i]t is not enough merely to show that multiple members of a single family had negative experiences," because applicant must show experiences of family members were "directly related" to their family relationship; frther holding that BIA properly rejected claim that this was persecution on account of membership in a social group of "victims of gang threats and possible extortion")

■ ***Pechenkov v. Holder,*** __ F. 3d __, 2012 WL 5995430 (9th Cir. Dec. 3, 2012) (holding that 8 U.S.C. § 1252 (a)(2)(C) precludes review of petitioner's challenge to the BIA's discretionary determination that his conviction constitutes a particularly serious crime; further upholding the revocation of petitioner's asylee status and dismissing his constitutional challenges as baseless) (Judge Graber concurred, encouraging the court to reconsider its flawed interpretation of section 1252(a)(2)(C))

■ ***R.K.N. v. Holder,*** __ F. 3d __, 2012 WL 5990286 (8th Cir. Dec. 3, 2012) (affirming adverse credibility finding against Kenyan man seeking asylum based on claimed fear of future persecution on account of social group membership in either Mungiki group or group of HIV positive people, where aspects of testimony that were inconsistent and not credible were relevant to both claims; also holding that any error by IJ in applying post-REAL ID Act credibility law to pre-REAL ID Act case was harmless in the circumstances, since applicant's inconsistencies supported adverse credibility finding under either standard)

■ ***Martinez v. Napolitano,*** __ F. 3d __, 2012 WL 5995444 (9th Cir. Dec. 3, 2012) (affirming district court's dismissal of petitioner's challenge to BIA's asylum denial and reasoning that 8 U.S.C. § 1252(a)(5) precludes district court review of APA claims that indirectly challenge a removal order)

■ ***Zheng v. Holder,*** __ F. 3d __, 2012 WL 5909914 (7th Cir. Nov. 27, 2012) (BIA did not abuse its discretion in denying MTR filed by Chinese woman based on birth of two U.S children, where: (i) this was change in personal circumstances not country conditions; (ii) no showing of changed country conditions in China regarding one-child policy which has been in effect for 30 years; (iii) applicant failed to show risk of forced sterilization in her locale in China; iv) BIA found Sapio testimony critiquing State Department unpersuasive and unreliable)

■ ***Garcia-Colindres v. Holder,*** __ F. 3d __, 2012 WL 5970975 (8th Cir. Nov. 30, 2012) (affirming that petitioner was ineligible for asylum because eight-hour detention with minor beatings and threats did not rise to the level of persecution, and there was no evidence of the identity or motives of the individuals involved in the deaths and disappearance of his children; further holding no well-founded fear of future persecution in Guatemala given changed country conditions)

■ ***Gasparian v. Holder,*** __ F. 3d __, 2012 WL 5992167 (1st Cir. Dec. 3, 2012) (affirming BIA's denial of asylum reopening but staying the mandate for 90 days to allow one of the petitioners to apply for relief under DACA which is "seemingly tailored for individuals" like him; also staying mandate of the parent petitioners for 90 days "because they are parents of a young adult who appears to be a candidate for deferred action")

■ ***Lin v. Att'y Gen. of the United States,*** __ F. 3d __, 2012 WL 5907497 (3d Cir. Nov. 27, 2012) (BIA did not abuse its discretion in denying MTR filed by Chinese asy-

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This Month's Topical Parentheticals

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lum applicant based on alleged, previously-unavailable arrest warrant from China for house church activities and pictures allegedly taken in U.S., where alien make no attempt to authenticate the new evidence which was questionable, and failed to file a new asylum application where previous one was untimely)

CANCELLATION

■ *Barrera-Quintero v. Holder,* __ F. 3d __, 2012 WL 5521836 (10th Cir. Nov. 15, 2012) (deferring to BIA's interpretation in *Romalez-Alcaide*, and holding that petitioner's departure under threat of removal proceedings ended his accrual of continuous physical presence for cancellation purposes; further holding that court lacked jurisdiction to review whether forced departure was voluntary)

■ *Bedoya-Melendez v. United States Att'y Gen.,* __ F. 3d __, 2012 WL 5259041 (11th Cir. Oct. 25, 2012) (denying en banc rehearing; Judge Barkett dissented arguing that the court's conclusion that there is no judicial review of the AG's determination of whether petitioner was "battered or subjected to extreme cruelty" for purposes of cancellation eligibility "is based on a misreading of 8 U.S.C § 1252(a)(2)(B)")

CRIME

■ *Matter of Sanchez-Lopez,* 26 I.&N. Dec. 71 (BIA Nov. 29, 2012) (holding that the offense of stalking in violation of section 646.9 of the Cal. Pen. Code is "a crime of stalking" under section 237(a)(2)(E)(i) of the INA)

■ *Matter of Davey,* 26 I.&N. 37 (BIA Oct. 23, 2012) (holding that: (1) for purposes of section 237(a)(2)(B)(i) the phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana" calls for a circumstance-specific inquiry into the character of the alien's unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime; (2) an alien convicted of more than one statutory crime may be covered by the exception to deportability for an alien convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana" if all the alien's crimes were closely related to or connected with a single incident in which the alien possessed 30 grams or less of marijuana for his or her own use, provided that none of those crimes was inherently more serious than simple possession)

■ *Carranza-De Salinas v. Holder,* __ F. 3d __, 2012 WL 5392829 (5th Cir. Nov. 6, 2012) (holding that under *Vartelas*, an alien convicted by trial prior to the repeal of section 212(c) is not required to demonstrate actual reliance on 212(c) relief but need only show, if at all, a "likelihood of reliance on prior law"; finding that petitioner had made such a showing where she declined plea agreement, was convicted at trial, and chose not to appeal her conviction)

CUBAN ADJUSTMENT ACT

■ *Silva-Hernandez v. USCIS,* __ F. 3d __, 2012 WL 5478435 (11th Cir. Nov. 13, 2012) (holding that USCIS's pattern and practice, as provided for in the Immigration Service Adjudicator's Field Manual, of limiting a non-Cuban spouse's "rollback date" (*i.e.*, backdating the date of adjustment) to the date of marriage, rather than recording a date thirty months prior to the non-Cuban spouse's filing of the application for adjustment of status (or the date of the non-Cuban spouse's arrival in the United States, whichever is later), violates the plain language of the Cuban Adjustment Act) (Judge Evans dissented)

DETENTION

■ *Amanatullah v. Obama,* __ F. Supp.2d __, 2012 WL 5563955 (D.D.C. Nov. 15, 2012) (applying DC Circuit's decision in *Al Maqaleh* to hold that the Suspension Clause does not apply to non-U.S. citizen detainees held at Bagram Airfield in Afghanistan)

■ *United States v. Trujillo-Alvarez,* __ F. 3d __, 2012 WL 5295854 (D. Or. Oct. 29, 2012) (holding that ICE may not detain an alien for the purpose of securing his appearance at a criminal trial without satisfying the requirements of the Bail Reform Act, which gives defendants a statutory right to pre-trial release)

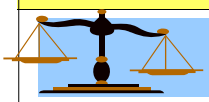
FOIA

■ *American Immigration Council v. DHS,* __ F. Supp.2d __, 2012 WL 5928643 (D.D.C. Nov. 27, 2012) (concluding that two-thirds of the records withheld by USCIS should have been largely or wholly released under FOIA)

TERMINATION PROCEEDINGS

■ *Matter of Sanchez-Herbert,* 26 I.&N. 43 (BIA Nov. 2, 2012) (holding that where an alien fails to appear for a hearing because he has departed the United States, termination of the pending proceedings is not appropriate if the alien received proper notice of the hearing and is removable as charged)

■ *Aguilar-Aguilar v. Napolitano,* __ F. 3d __, 2012 WL 5992179 (10th Cir. Dec. 3, 2012) (rejecting argument that the IJ improperly granted DHS's motion to terminate 240 proceedings so DHS could commence administrative removal under 8 U.S.C. § 1228(b); further rejecting petitioner's claim that DHS deprived him of due process by issuing the Notice of Intent and the Final Administrative Removal Order at the same time, and reasoning that petitioner conceded removability, and has no liberty or property interest in discretionary relief)



Summaries Of Recent Federal Court Decisions

The Tenth Circuit deferred to the BIA's holding that "a departure that is compelled under threat of the institution of deportation or removal proceedings is a break in physical presence" for cancellation of removal purposes. The court further held that the voluntariness of the alien's departure is a discretionary determination over which the court does not have jurisdiction to review. Finally, the court rejected petitioner's claim that his due process rights were violated when an immigration official testified telephonically where petitioner was given "the opportunity for a full and thorough examination of the witness" and failed to establish any prejudice.

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ELEVENTH CIRCUIT

■ **BIA Did Not Abuse its Discretion in Finding the Time-Bar for Motions to Reopen Mandatory, and Alien Failed to Establish Changed Country Conditions**

In *Ruiz-Turcios v. Holder*, __F.3d__, 2012 WL 5440099 (11th Cir. November 8, 2012) (Barkett, Martin, Fay) (*per curiam*), the Eleventh Circuit held that the BIA did not abuse its discretion when it relied on *Abdi v. U.S. Att'y Gen.*, 430 F.3d 1148, 1150 (11th Cir. 2005), to conclude that it lacked jurisdiction over the alien's untimely and number-barred motion to reopen, insofar as it alleged ineffective assistance of counsel.

In reaching its decision, the court acknowledged that *Abdi*'s determination that the time bar is not subject to equitable tolling might be dicta rather than a holding, noting a recent Supreme Court precedent in *Holland v. Florida*, 130 S. Ct. 2549, 2560–61 (2010), which suggested that *Abdi* might have been decided incorrectly. The court also held that the Board did not abuse its discretion in denying the alien's motion to reopen based on changed country conditions, as the gang violence in Honduras has remained unchanged since his previous hearing.

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■ **Eleventh Circuit Finds Cuban Adjustment Act Unambiguous and Reverses USCIS's Longstanding Interpretation of Rollback Dates for Spouses**

In *Silva-Hernandez v. U.S.C.I.S.*, __F.3d__, 2012 WL 5478435 (11th Cir. November 13, 2012) (Marcus, Black, Evans (dissenting)) (*per curiam*), the Eleventh Circuit reversed the district court's grant of summary judgment to the government on an issue of statutory interpretation. The court determined that the statute was not ambiguous and specifically mandated that the roll-back provisions applied to spouses and children of a Cuban national, without regard to the timing of the marriage or to the citizenship and place of birth of the spouse or child. The court further determined that any absurdity of such a provision did not rise to a level that would mandate a different reading.

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DISTRICT COURTS

■ **Southern District of New York Rejects Table Tennis Player's Claims to an EB-1 Visa**

In *Noroozi v. Napolitano*, No. 11-cv-8333 (S.D.N.Y. November 12, 2012) (*Engelmayer, J.*) , the District Court for the Southern District of New York rejected claims brought by a table-tennis player seeking classification as an alien of "extraordinary ability." The court upheld the revocation of the alien's first EB-1 petition and the denial of his second EB-1 petition. Notably, the court remarked that the alien's "argument would appear to oblige USCIS to grant extraordinary ability visas to at least the top 284 performers (to the extent they are not American citizens) in each [of the hundreds, if not thousands, of fields of game or sport]."

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We encourage contributions to the Immigration Litigation Bulletin

INSIDE OIL

Congratulations to Senior Litigation counsel ***Patrick J. Glen*** whose forthcoming article on *Health Care and the Illegal Immigrant* (to be published at Case Western's Health Matrix journal) has been awarded first prize by the Conferencia Interamericana de Seguridad Social in their annual research paper competition: http://cissblog.blogspot.com/.

Congratulations to Assistant Director ***David Bernal***, Senior Litigation Counsels, ***Allen W. Hausman***, and ***James A. Hunolt***, for receiving their 40 years of Service Award. Congratulations also to Senior Litigation counsel ***Norah A. Schwarz*** and ***Paralegal Darlene Waddy*** for receiving their 35-years of Service Award.

Congratulations to the following OILers who received their 25-years of service Award: Assistant Director ***Emily Radford***, Trial Attorneys ***Ann Varnon***, ***Michele Sarko***, ***Emily Radford***, and ***Regina Byrd***, and Secretary ***Vicky Prince***,

INSIDE EOIR

The Executive Office for Immigration Review has announced the appointment of ***Ana M. Kocur*** as the agency's Deputy Director, and ***Jeff Rosenblum*** as the agency's General Counsel, both effective December 16, 2012.

Ms. Kocur, is a career EOIR employee, who has served as the agency's Chief of Staff since September 2011. In her new capacity as Deputy Director, Ms. Kocur will directly supervise the agency's senior staff and will be responsible for formulating and administering mission-focused policies, agency-wide programs, and both long- and short-term goals and strategies.

Ms. Kocur received a bachelor of arts degree in 1993 from Pennsylvania State University and a juris doctorate in 1996 from the American University Washington College of Law. From September 2011 to December 2012, she served as EOIR Chief of Staff. From March 2011 to September 2011, Ms. Kocur served as acting chief administrative hearing officer and counsel to the director at EOIR. From March 2006 to March 2011, she served as a senior panel attorney and team leader at the Board of Immigration Appeals. From 1996 to 2006, Ms. Kocur served as an attorney-advisor at the BIA, entering on duty through the Attorney General's Honors Program. In 2003, she served on detail with the Office of Immigration Litigation, Civil Division.

As General Counsel, Mr. Rosenblum will oversee the Office of General Counsel's Immigration Unit, the Freedom of Information Act Office, the Employee/Labor Relations Unit, the Attorney Discipline Program, and the Fraud Program. He will also serve as EOIR's principal liaison to other agencies on all agency-related legal matters.

Mr. Rosenblum received a bachelor of arts degree in 1994 from the University of Maryland at College Park and a juris doctorate in 1999 from Loyola University Chicago School of Law. From May 2010 to December 2012, he served as a supervisory attorney in EOIR's Office of the General Counsel. From 2006 to May 2010, Mr. Rosenblum served as an assistant general counsel for the Executive Office for U.S. Attorneys, Department of Justice.

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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