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LITIGATION HIGHLIGHTS

Inside

Eleventh Circuit rejects *Silva-Trevino's* approach for determining whether a conviction is for a CIMT

In ***Fajardo v. Attorney General***, __F.3d__, 2011 WL 4808171 (11th Cir. Oct. 12, 2011), the Eleventh Circuit joined with the Third and Eighth Circuits in finding that "Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude," and rejected the Attorney General's interpretation in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *See Jean–Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009); *Guardado–Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010).

The petitioner, a Cuban citizen and an LPR, was admitted to the United States in February 2002. One month later, he was arrested in Florida and ultimately convicted of false imprisonment, misdemeanor assault, and misdemeanor battery, as a result of an altercation with his wife.

After returning to the United States from a visit abroad in 2005, the petitioner was stopped at Miami International Airport and placed in removal proceedings under INA § 212(a)(2)(A)(i)(I), on the ground that his convictions qualified as CIMTs. Petitioner moved to terminate the proceedings, contending that his prior convictions could not be deemed CIMTs. The DHS conceded that the assault and battery convic-

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Standard of review: ambiguous terminology with varying interpretations

In a recent oral argument, the Second Circuit sought an explanation for why the Board was permitted to review the alien's eligibility for relief *de novo*, while the court was bound by the more limited substantial evidence standard of review. Perhaps the court longed for the expansive power which comes with such review authority. It would be a mistake, however, to apply the rationale behind the Board's review to that of the courts of appeals' review over final orders of removal, as the two standards are rooted apart. Where the court's standard of review, before its codification in 8 U.S.C. § 1252(b)(4), was formed by case law and the Administrative Procedures Act, the Board's standard of review was created by regulation. *See* 8 C.F.R. §§ 1003.1(d)(3)(i) & (iii). Thus, the similar ambiguous terminology discussing the same subject matter found in these standards of review differ historically and have varying interpretations. Accordingly, the rationale behind the Board's standard cannot be used to understand the courts'.

On September 25, 2002, the regulations currently governing the Board's standard of review went into effect and fundamentally altered the Board's authority. The Board previously reviewed all ques-

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Eleventh Circuit Rejects Matter of Silva-Trevino's CIMT Analysis

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tions were not CIMTs, however, the IJ concluded that petitioner's conviction for false imprisonment constituted a conviction of such a crime, and ordered his removal on that ground.

There is no ambiguity in the definition of conviction" for purpose of establishing an alien's removability under the first prong of § 212(a)(2)(A)(i)(I).

In finding that petitioner had been convicted of a CIMT, the IJ considered and relied upon extraneous information outside the record of petitioner's false imprisonment conviction -- to wit, information regarding his misdemeanor assault and battery convictions -- to determine that his false imprisonment conviction fell "strictly into the area in which an individual is restraining the liberty of another person without lawful authority by force or threats," and thus qualified as a CIMT.

On appeal, petitioner contended that the IJ had erred in relying on the his convictions for assault and battery to determine that his conviction for false imprisonment satisfied a finding of inadmissibility under § 212(a)(2)(A)(i)(I). The BIA dismissed petitioner's appeal on the ground under *Matter of Silva–Trevino*, the IJ could consider extraneous information, such as petitioner's misdemeanor assault and battery convictions.

In rejecting the Attorney General's interpretation in *Matter of Silva-Trevino*, the court noted that historically the courts and the BIA have applied a "categorical approach" to determine whether a particular conviction of a crime is a CIMT. If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction — i.e., the charging document, plea, verdict, and sentence — may also be considered under the modified categorical approach. "However, counts charging separate offenses, even if simultaneously charged, may not be combined and considered collectively to determine whether one or the other constitutes a conviction of a crime involving moral turpitude," said the court.

Here, the count charging petitioner with false imprisonment tracks the general language of the *Florida Statute*, 787.02(1)(a). Under that provision, a person may be convicted either by the use of forcible threats or merely from nonviolent confinement or restraint, i.e., locking or barring a door. However, to conclude that petitioner was inadmissible, the IJ used information regarding his misdemeanor assault and battery convictions to determine that his false imprisonment conviction fell "strictly into the area in which an individual is restraining the liberty of another person without lawful authority by force or threats," and thus qualified as a conviction of a CIMT.

In declining to give deference to *Matter of Silva-Trevino,* the court explained that there is no ambiguity in the definition of "conviction" for purpose of establishing an alien's removability under the first prong of § 212(a)(2)(A)(i)(I). The court rejected the government's contention that there was ambiguity because Congress had also used the words "committed" and "committing" in the parts of § 212(a)(2)(A)(i)(I) dealing with admissions. The court explained that those words were used in the parts of the statute addressing "admissions" and that in petitioner's case is removal was based on a "conviction." Moreover, the court noted that this issue was not presented to the IJ or the BIA.

In a footnote, the court noted that in *Silva–Trevino*, the Attorney General had made several policy arguments to justify abandoning the categorical approach. "Yet because Congress has clearly spoken on this precise issue, the Department of Justice 'is not free to disregard Congress's judgment, merely because it believes that it has fashioned a better alternative, or that Congress's approach is ill-advised,'" said the court.

The court also noted that *Nijhawan v. Holder*, 557 U.S. __, 129 S. Ct. 2294, 174 L.Ed.2d 22 (2009), was inapplicable because the provisions at issue there were far different from the provision at issue in petitioner's case. In *Nijhawan* the Supreme Court's rejected the categorical approach as *to §§ 101(a)(43) and 237 (a)(2)(A)(iii)* and applied a circumstance-specific approach to determine if a conviction was for a crime exceeding the $10,000 threshold required by the statute.

Accordingly, the court granted the petition, but remanded the case to the BIA because it had assumed without deciding that the Florida offense of false imprisonment was not categorically a CIMT.

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We encourage contributions to the Immigration Litigation Bulletin

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Standard of Review: Terminology

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tions of law and fact under the *de novo* standard, but the new regulation provides that "[t]he Board will not engage in *de novo* review of findings of fact determined by an immigration judge." 8 C.F.R. § 1003.1(d)(3)(i). In this regard, "[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous." *Id.* To the extent the Board retains *de novo* review authority, the regulation provides that this review is permissive or discretionary. Thus, "[t]he Board *may* review questions of law, discretion, and judgment and all other issued in appeals from decisions of immigration judges *de novo*." 8 C.F.R. § 1003.1(d)(3)(ii).

The regulation's text is silent about the meaning of "findings of fact," "questions of law," or question of "discretion" or "judgment," but the Attorney General's preamble is explicit. It explains that *de novo* review is used for legal questions, mixed questions of fact and law, judgments involving eligibility determinations, and the question of a well-founded fear of persecution. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54, 888-90 (Aug. 26, 2002). Indeed, the Attorney General explained that the "clearly erroneous" standard does not apply to determinations of law nor to the application of legal standards to a set of facts, which would include "judgments as to whether the facts established by a particular alien amount to 'past persecution' or a 'well-founded fear of persecution.'" *Id.* at 54, 890. "What happened" to the alien is a factual determination that the Board reviews under the clearly erroneous standard, but "the judgment exercised based on those findings of fact, and the weight accorded to individual factors, may be reviewed by the Board *de novo*." *Id.*

The Attorney General further explained that the Board retained *de novo* review of mixed questions involving applications of legal standards to facts in order to permit the Attorney General to allocate adjudicative resources most efficiently . *Id.*

The regulation's text is silent about the meaning of "findings of fact," "questions of law," or question of "discretion" or "judgment," but the Attorney General's Preamble is explicit.

The regulations were intended to "focus[] on qualities of adjudication that best suit the decision makers." *Id.* In particular, the Attorney General noted that immigration judges are better positioned to review the decisions from the perspective of legal standards and discretion. *Id.* Thus, "[w]here the Board reviews . . . a mixed question of law and fact . . . [which] is not referred to as a discretionary decision, the Board will defer to the factual findings of the immigration judge unless clearly erroneous, but the Board members will retain their 'independent judgment and discretion' . . . regarding the review of pure questions of law and the application of the standard of law to those facts." *Id.* at 54, 888-89. Finally, the Attorney General advised that "properly understood, the 'clearly erroneous' standard will only apply to specific findings of fact by the immigration judge;" whereas, "the Board will still be able to consider and resolve instances where 'different decisions may be reached based on essentially identical facts.'" *Id.*

Seeking to clarify ambiguous terms in its standard of review, the Board, within eight years of its promulgation, issued three precedential decisions interpreting this regulation. *See Matter of H-L-H- & Z-Y-Z-*, 25 I. & N. Dec. 209 (BIA 2010); *Matter of V-K-*, 24 I. & N. Dec. 500 (BIA 2008); *Matter of A-S-B-,* 24 I. & N. Dec. 493 (BIA 2008).

Matter of A-S-B- relied heavily on the Attorney General's preamble to interpret the regulation. It held that the Board "retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law." *Matter of A-S-B-*, 24 I. & N. Dec. at 496. The Board also held that "[i]n determining whether established facts are sufficient to meet a legal standard, such as a 'well-founded fear,' the Board is entitled to weigh the evidence in a manner different [than] . . . the [i]mmigration [j]udge, or to conclude that the foundation of the [i]mmigration [j]udge's legal conclusions was insufficient or otherwise not supported by the record." *Id.* The Board held that findings about "what happened" in a case — predicate or historical factual findings — are subject to clear-error review. *Id.* at 497. But the question of whether these facts rise to the level of a well-founded fear of persecution is subject to *de novo* review. *Id*. The Board also concluded that the well-founded fear determination is an essentially predictive judgment or finding about events or conduct that have not yet occurred; it is therefore not a "fact" or matter subject to limited clear-error review. *Id.* at 498. Accordingly, the Board exercised its independent judgment, reversed the immigration judge's decision, and found that the well-founded-fear-of-future-persecution standard was not satisfied. *Matter of A-S-B-*, 24 I. & N. Dec. at 499.

Likewise, in *Matter of V-K-*, the Board reviewed *de novo* whether an applicant demonstrated a clear probability of future torture for purposes of eligibility for protection under CAT. *Matter of V-K-*, 24 I. & N. Dec. 500. Relying on the preamble and *Matter of A-S-B-*, the Board concluded that the question of whether future torture

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Standard of Review: Terminology

is more likely than not to occur "relates to whether the ultimate statutory requirement for establishing eligibility for [CAT protection] was met and is therefore a mixed question of fact and law, or a question of 'judgment,'" specifically reserved by the Board's regulation for *de novo* review. *Id.* at 502. The Board also explained that it "d[id] not consider a prediction of the probability of future torture to be a ruling of 'fact.'" *Id.* at 501.

Finally, in *Matter of H-L-H- & Z-Y-Z-*, the Board reiterated that the regulation authorizes *de novo* review of eligibility determinations. *Matter of H-L-H- & Z-Y-Z-*, 24 I. & N. Dec. at 209-11. While the Board reviewed the immigration judge's factual findings under the "clearly erroneous" standard, the Board relied on *Matter of V-K-* and determined that whether facts establish that the respondent has a well-founded fear of persecution is a legal determination to be reviewed *de novo*. *Id.* at 212. In doing so, the Board explained that it "has authority to give different weight to the evidence from that given by the immigration judge," which is "critical to permit the Board to determine whether the facts as found by the [i]mmigration [j]udge meet the relevant legal standard." *Id.* Further, the Board explained that this review authority promotes consistency in the application of legal standards. *Id.*

In contrast to the Board's revised standard of review, the courts' substantial evidence standard of review has been used to review administrative proceedings for nearly eighty years. *See Consol. Edison v. NLRB*, 305 U.S. 197, 216-17 (1938); *see also* 5 U.S.C. §§ 702, 706; A.P.A. Pub.L. 79-404, 60 Stat. 237, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) ("Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . , or when the agency action is based on a public adjudicatory hearing."). Indeed, the courts have examined removal orders using the substantial evidence standard of review for decades. *E.g.*, *Hang v. INS*, 360 F.2d 715, 717 (2d Cir. 1966) ("[F]actual findings on which a discretionary denial of suspension [of deportation] is predicated must pass the substantial evidence test.").

In 1996, in order to "overhaul all provisions relating to apprehension, adjudication, and removal" of aliens, IIRIRA codified the substantial evidence standard of review as it is currently written in 8 U.S.C. § 1252(b)(4)(B), and "limit[ed] the appealability of removal orders." H.R. Rep. No. 104-879, at 123 (1997). With this codification came ambiguous terminology similar to that found in the Board's standard. In relevant part, it states that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

While the legislative history is devoid of an explanation for the term "administrative findings of fact," case law establishes that the courts continue to review eligibility determinations for substantial evidence. *See, e.g.*, *Ritonga v. Holder*, 633 F.3d 971, 976-77 (10th Cir. 2011); *Kohwarien v. Holder*, 635 F.3d 174, 179 (5th Cir. 2011); *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1138 (6th Cir. 2011); *Abufayad v. Holder*, 632 F.3d 623, 629 (9th Cir. 2011); *Azie v. Holder*, 602 F.3d 916, 919 (8th Cir. 2010); *Mehmeti v. U.S. Att'y Gen.*, 572 F.3d 1196, 1200 (11th Cir. 2009); *Ravix v. Mukasey*, 552 F.3d 42, 47 (1st Cir. 2009); *Wu v. Att'y Gen. of U.S.*, 571 F.3d 341, 318 (3d Cir. 2009); *Patel v. Holder*, 581 F.3d 631, 635 (7th Cir. 2009); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 451-54 (4th Cir. 2007); *Tun v. INS*, 445 F.3d 554, 562 (2d Cir. 2006); *Gutierrez-Rogue v. INS*, 954 F.2d 769, 772 (D.C. Cir. 1992). Accordingly, the courts review eligibility determinations as "administrative findings of fact."

Moreover, administrative agencies — like the Board — possess a greater latitude in reviewing matters than do appellate courts who review those dispositions. *See Huang v. Att'y Gen.*, 620 F.3d 372, 387 n. 9 (3d Cir. 2010). For example, in *Lion Uniform, Inc. Janesville Apparel Div. v. NLRB*, 905 F.2d 120, 123-24 (6th Cir. 1990), the court found that an agency properly reviewed an administrative law judge's award of attorney's fees *de novo*, even though the court reviewed the same issue for substantial evidence. In making this finding, the court reiterated that the two types of appeals accomplish different functions. *Id.* While the administrative appeal renders a decision on behalf of the agency, a court's review is to ensure that the Board's decision is rooted in the record. *Id.* Indeed, "[b]ecause the decision the court reviews is the product of a *de novo* review, it makes sense to look to that decision as the basis of deciding whether the agency's determination that its position was substantially justified is supported by substantial evidence." *Id.* at 124.

At first glance, the similar terminology found in both the courts' and the Board's standard of review could cause one to believe the rationales should be linked. Avoid this mistake. Their separate foundations, interpretations, and context preclude the courts from relying on the Board's standard of review as a basis for expanding their power of review over final orders of removal.

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U-Visas: A Primer

I. Introduction and Background

Congress created the U Visa for victims of certain qualifying criminal activity to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in [8 U.S.C. § 1101(a)(15)(U)(iii)] committed against aliens." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533 (2000). Under the statute, the alien is eligible for a U Visa if the Secretary of the Department of Homeland Security ("DHS") determines that the alien has suffered "substantial physical or mental abuse" as a result of qualifying criminal activity and that the alien "has been helpful, is being helpful, or is likely to be helpful" to law enforcement authorities investigating or prosecuting the crime. 8 U.S.C. § 1101(a)(15)(U)(I). Prior to the publication of the regulations in 2007, DHS provided "interim relief" to aliens in similar circumstances, including parole, deferred action, and stays of removal. *See Lee v. Holder*, 599 F.3d 973, 975-76 (9th Cir. 2010). Under the current regulations, DHS continues to provide "interim relief" to qualified applicants who are placed on a waiting list until visa numbers become available (Congress limited the number of recipients to 10,000 per fiscal year), *see* 8 C.F.R. § 214.14(d). Recipients of U Visas can receive lawful status for up to four years, *see* 8 C.F.R. § 214.14(g), and may, in certain circumstances, eventually be permitted to become lawful permanent residents. *See* 8 U.S.C. § 1255(m)(1).

II. Basic Requirements And Application Procedure

As with most forms of relief from removal, the alien bears the burden of demonstrating his or her eligibility for a U Visa. 8 C.F.R. § 214.14(c)(4). Since October 2005 and continuing under the regulations, "DHS, [and more specifically, Citizenship and Immigration Services ("CIS"),] acting through [its] Vermont Service Center, has exclusive authority to adjudicate requests for 'U' visa[s] . . . neither [Immigration and Customs Enforcement] nor Immigration Judges have authority to issue 'U' visa interim relief." *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 442 n.5 (7th Cir. 2007); *see* 8 C.F.R. § 214.14(c)(1).

Before reaching the substantive requirements of the U Visa, the applicant must overcome an initial hurdle. U visas are only granted to aliens who are admissible to the United States, or where the alien's grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i). The regulation located at 8 C.F.R. § 212.17 describes the procedures for requesting waivers of inadmissibility. USCIS may grant a waiver of inadmissibility, as a matter of discretion, if it determines that to do so would be in the public or national interest. 8 C.F.R. § 212.17(b)(1). Where an alien is inadmissible on criminal grounds, USCIS will consider the number and severity of the alien's convictions before granting any waiver; and, in that regard, in cases in which the waiver applicant has committed "violent or dangerous crimes," a favorable exercise of discretion will be made only in "extraordinary circumstances." 8 C.F.R. § 212.17(b)(2). There is no administrative appeal from USCIS' denial of a waiver, but an applicant may re-file a waiver request. 8 C.F.R. § 212.17(b)(3). Where a waiver of inadmissibility has been granted, the DHS Secretary may revoke it at any time, and there is no administrative appeal from such a revocation. *See* 8 C.F.R. § 212.17(c). The absence of an administrative appellate mechanism, however, has not prevented some applicants from challenging USCIS's denial of waivers of inadmissibility in the courts of appeals. *See, e.g., Torres-Tristan v. Holder*, – F.3d – , 2011 WL 3849636, at *6 (7th Cir. 2011). However, as will be discussed more thoroughly below, the courts have held that no jurisdiction exists to entertain these challenges. *Id*.

Recipients of U Visas can receive lawful status for up to four years, and may, in certain circumstances, eventually be permitted to become lawful permanent residents.

Once the applicant has demonstrated his or her admissibility, or received the appropriate waiver(s), the applicant must submit the appropriate application (Form I-918), and demonstrate his or her eligibility for a U Visa to the satisfaction of USCIS. 8 C.F.R. § 214.14(c)(1) & (4). There are three main requirements. First, the alien must demonstrate that he or she has suffered substantial physical or mental abuse as a result of having been the victim of certain enumerated criminal activity. 8 U.S.C. § 1101(a)(15)(i)(I); *see* 8 C.F.R. § 214.14(b)(1). Whether the abuse is "substantial" is, essentially, based on the totality of the circumstances. Factors USCIS considers include, but are not limited to: the nature of the injury inflicted, the severity of the perpetrator's conduct, and the duration of the infliction of harm. *See* 8 C.F.R. § 214.14(b)(1). No single factor is dispositive. *Id*.

Second, the alien must demonstrate that he or she possesses information regarding the qualifying criminal activity. 8 U.S.C. § 1101(a)(15)(i)(II); *see* 8 C.F.R. § 214.14(b)(2). The alien's information must be credible and reliable, and must relate to specific facts regarding the criminal activity. 8 C.F.R. § 214.14(b)(2). If the alien is a minor, or is incapacitated or incompetent, a parent, guardian, or "next friend" may possess the information regarding the qualifying crime. *Id*. Notably, the criminal ac-

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A Primer on U Visas

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tivity must have violated U.S. law, or have occurred in the United States. 8 U.S.C. § 1101(a)(15)(i)(IV); 8 C.F.R. § 214.14(b)(4).

Third, the alien must demonstrate that he or she has been helpful, is being helpful, or is likely to be helpful to law enforcement authorities that are prosecuting or investigating the enumerated criminal activity. 8 U.S.C. § 1101(a)(15)(i)(III); *see* 8 C.F.R. § 214.14(b)(3). In that regard, the alien must acquire and submit as evidence to CIS a supplemental form (Form I-918, Supplement B), signed by a certifying official within six months immediately preceding the filing of the U Visa Application. 8 C.F.R. § 214.14(c)(2)(i); *see* 8 U.S.C. § 1184(p)(1). The form must be signed by the head of the certifying agency, or any person in a supervisory role who has been designated to issue such certifications, and the form must state that: (1) the person signing the form is qualified to do so; (2) the agency is qualified to investigate and prosecute criminal activity; (3) that the applicant has been a victim of qualifying criminal activity; (4) that the applicant has been, is being, or will likely be helpful in the investigation or prosecution of that activity; and (5) that the criminal activity violated U.S. law or occurred in the United States. *Id*.

USCIS' denial of U Visa petitions may be appealed to the Administrative Appeals Office ("AAO"). 8 C.F.R. § 214.14(c)(5)(ii). If the alien chooses to appeal, the U Visa denial is not administratively final unless and until the AAO issues a decision dismissing the appeal. *Id*.

III. The Effect Of U Visa Petitions On Removal Proceedings

Aliens in removal proceedings, must still file petitions for U Visas with USCIS. *See* 8 C.F.R. § 214.14(c)(1)(i). As noted, immigration judges have no authority to issue U Visas. *See Fonseca-Sanchez*, 484 F.3d at 442 n.5. As a practical matter, ICE counsel *may* agree, as a matter of discretion, to file, at the request of the alien, a joint motion to terminate the removal proceedings before the Immigration Court without prejudice pending the outcome of the U Visa petition. 8 C.F.R. § 214.14(c)(1)(i). Aliens with outstanding final orders of removal are not precluded from filing a U Visa petition with USCIS; however, such a filing has "no effect on ICE's authority to execute [that] final order . . . ." 8 C.F.R. § 214.14(c)(1)(ii).

Notably, USCIS' approval of a U Visa cancels an order of removal, deportation, or exclusion that was issued *by the DHS Secretary* as a matter of law. 8 C.F.R. § 214.14(c)(5)(i). Orders of removal issued by the immigration courts remain valid, and aliens may seek to cancel such orders by filing a motion to reopen and terminate proceedings. *Id*. Once again, ICE counsel may agree to join in a motion to reopen the alien's proceedings, as a matter of discretion, in order to overcome any time or numeric limitations. *Id*. Where removal proceedings have been terminated, and the U Visa petition is subsequently denied, DHS must issue a new Notice to Appear and begin removal proceedings anew. *See* 8 C.F.R. § 214.14(c)(5)(ii).

USCIS' approval of a U Visa cancels an order of removal, deportation, or exclusion that was issued by the DHS Secretary as a matter of law.

IV. The Effect Of U Visas On Petitions For Review And OIL's Litigating Position

It is well established that the denial of a visa petition is a collateral issue that is separate and apart from a removal order, and fails to invoke the courts' of appeals jurisdiction. *See* 8 U.S.C. § 1252(a)(1), (a)(5); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216 (1970); *Torres-Tristan v. Holder*, – F.3d –, 2011 WL 3849636 (7th Cir. 2011); *Fonseca-Sanchez*, 484 F.3d at 444-45; *Conti v. INS*, 780 F.2d 698, 702 (7th Cir. 1985); *Elbez v. INS*, 767 F.2d 1313, 1314 (9th Cir. 1985); *Scalzo v. Hurney*, 314 F.2d 675 (3d Cir. 1963); *but see Morales-Izquierdo v. DHS*, 600 F.3d 1076, 1082-83 (9th Cir. 2010). As the pertinent regulations indicate, the grant or denial of a U Visa petition has no bearing on the outcome of removal proceedings, or on the validity of an outstanding order of removal. *See* 8 C.F.R. § 214.14(c)(1)(i)-(ii). Accordingly, OIL has successfully argued that the courts of appeals lack jurisdiction to review USCIS' adjudication of U Visa petitions, or CIS' denial of waivers of inadmissibility. Indeed, the Seventh, Ninth, Eleventh, and D.C. Circuits have all held that no jurisdiction exists to review USCIS' denial of a U Visa. *See Torres-Tristan v. Holder*, 2011 WL 3849636; *Chang Young Jung v. Holder*, 393 F. App'x 530 (9th Cir. 2010); *Eun Kyeong Seo v. Holder*, 358 F. App'x 884 (9th Cir. 2009); *Semiani v. U.S.*, 575 F.3d 715 (D.C. Cir. 2009); *cf. Bejarano v. DHS*, 300 F. App'x 651, 653 (11th Cir. 2008) (finding no jurisdiction because the issuance of the U Visa is discretionary in nature). The Seventh Circuit has suggested on more than one occasion in dicta that the appropriate venue for challenging U Visa denials is in District Court, presumably under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq. *See Torres-Tristan*, 2011 WL 3849636 at *8 n.10; *Fonseca-Sanchez*, 484 F.3d at 445; *see also Sec'y of Labor v. Farino*, 490 F.2d 885, 888 (7th Cir. 1973) (holding that the denial of labor certification that was essential to visa application was reviewable under the APA). Moreover, the Seventh Circuit acknowledged, however, that "the pendency of [the District Court] proceedings would not affect the execution of a standing removal order." *Torres-Tristan*, 2011 WL

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FURTHER REVIEW PENDING: Update on Cases & Issues

212(c) - Comparability

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

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Aggravated Felony - Tax Fraud

On November 7, 2011, the Supreme Court heard oral argument in ***Kawashima v. Holder*** (No. 10-577). The question presented is whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under INA § 101(a)(43)(M)(i), and petitioners were therefore removable.

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MTR - Post-Departure Bar

Oral argument was heard on November 15, 2011, bu the Tenth Circuit on *en banc rehearing* in ***Contreras-Bocanegra v. Holder***, 629 F.3d 1170 (10th Cir. 2010). A panel of the court had held that the BIA appropriately applied the post-departure bar codified at 8 C.F.R. § 1003.2(d) when it determined it lacked jurisdiction to consider a motion to reopen filed by an alien who had already been removed. In upholding the BIA's determination, the court relied on its precedential decisions in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), and *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009), both of which affirmed the validity of the post-departure bar.

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Cancellation - Imputation

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

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Retroactivity – "admission" definition

The Supreme Court has scheduled oral argument for January 18, 2012 in ***Vartelas v. Holder*** (S. Ct. 10-1211). The question presented is whether the 1996 amended definition of "admission," which eliminated the right of a lawful permanent resident to make "innocent, casual, and brief" trips abroad without being treated as seeking admission upon his return, is impermissibly retroactive when applied to an alien who pled guilty prior to the effective date of the 1996 statute?

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Aggravated Felony — Missing Element

In ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the Ninth Circuit has withdrawn its decision and received supplemental briefing on the effect of its en banc decision in ***U.S. v. Aguila-Montes de Oca***, __F.3d__, 2011 WL 3506442 (Aug. 11, 2011). The government petition for rehearing en banc challenged the court's use of the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), and the *Aguila-Montes de Oca en banc* decision overruling *Navarro-Lopez*.

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Conviction – Conjunctive Plea

The week of December 12, 2011, an *en banc* panel of the Ninth Circuit will hear oral argument on rehearing in ***Young v. Holder***, originally published at 634 F.3d 1014 (2011). Where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. The government argues that the panel's opinion is contrary to the court's en banc decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

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Child Status Protection Act

On November 14, 2011, the government filed petitions for panel rehearing and *rehearing en banc* challenging the Fifth Circuit's decision in ***Khalid v. Holder***, 655 F.3d 363. The court ruled that the decision of the BIA in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), holding that derivative beneficiaries of third- and fourth-preference category visas were not entitled to conversion and retention under section 203(h)(3) of the INA, was not entitled to deference on review because it conflicted with the plain, unambiguous language of the statute.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Adverse Credibility Determination Was Supported By Substantial Evidence

In *Stanciu v. Holder*, __ F.3d __, 2011 WL 5041748 (1st Cir. October 25, 2011) (Lynch, *Boudin*, Thompson), the First Circuit held that the agency's adverse credibility determination was supported by substantial evidence. The court found that the record supported the agency's finding that the petitioner's claim of past persecution, though plausible, was hampered by his incredible testimony regarding the frequency and severity of the mistreatment he received, and his untruthful testimony about his ability to travel outside of Romania before he fled to the United States.

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SECOND CIRCUIT

Second Circuit Concludes That Promoting Prostitution In Violation Of New York Law Is Not Categorically An Aggravated Felony Offense That Relates To Managing Or Supervising A Prostitution Business

In *Prus v. Holder*, __ F.3d __, 2011 WL 4470540 (2d Cir. September 28, 2011) (Calabresi, Wesley, Lynch), the Second Circuit reversed the BIA ruling that the alien's conviction for promoting prostitution was categorically an aggravated felony "offense that relates to the owning, controlling, managing or supervising of a prostitution business" under INA § 101(a)(43)(K)(i).

The petitioner, a citizen of Ukraine, entered the United States in May 1995 as a derivative refugee. In June 1996, she adjusted her status from refugee to lawful permanent resident. In June 2007, she was convicted of promoting prostitution in the third degree, under New York Penal Law §§ 20.00 and 230.25. In November 2007, DHS instituted removal proceedings against petitioner under INA § 237 (a)(2)(A)(iii) for having been convicted of an aggravated felony under INA § 101(a)(43)(K)(i). The IJ terminated proceedings agreeing with petitioner that her conviction was not an aggravated felony, but the BIA reversed. In particular, the BIA noted that even though New York's definition of prostitution encompassed acts that would not constitute prostitution under the federal law, petitioner's offense " 'relat[ed] to' the owning, controlling, managing or supervising of a 'prostitution business' as described in the [INA]."

It is "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."

The court found that Congress had not defined the term "prostitution." However, the court explained, for purpose of inadmissibility under INA § 212 (a)(2)(D), the regulations define the term as "engaging in promiscuous sexual intercourse for hire." 22 C.F.R. § 40.24 (b).

The court further explained that because it is "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," the same definition of prostitution should be used to interpret § 101(a)(43)(K)(i). Therefore, the court held that the word "prostitution" means "promiscuous sexual intercourse for hire," and because N.Y. Penal Law § 230.25(1) punishes conduct that does not involve a "prostitution business" as the term prostitution is used in the INA, petitioner's conviction did not constitute an aggravated felony. The court remanded with directions to terminate the removal proceedings.

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THIRD CIRCUIT

Third Circuit Holds Five-Year Limit On Rescinding Adjustments of Status Inapplicable To Aliens Who Obtain Immigrant Status Through Consular Processing

In *Malik v. Att'y Gen*, __ F.3d __, 2011 WL 4552466 (3d Cir. October 4, 2011) (*Fisher*, Hardiman, Greenaway), the Third Circuit upheld the agency's determination that INA § 246(a), which prohibits the institution of removal proceedings more than five years after an erroneously granted adjustment of status, does not apply to an alien who obtains immigrant status through consular processing under INA § 221(a).

The petitioner, a citizen of Pakistan, entered the United States in April 1999 as an LPR after receiving an IR–1 immigrant visa based on his 1996 marriage to a United States citizen. Petitioner divorced his U.S. spouse in 2000. In 2005, the DHS initiated removal proceedings, charging petitioner with being removable under 8 U.S.C. § 1227(a)(1)(A), for being inadmissible upon entry, and under 8 U.S.C. § 1182(a)(6)(C)(i), as an alien who attempted to procure a visa through fraud. Before the IJ, petitioner argued that 8 U.S.C. § 1256(a) prohibited institution of removal proceedings against him because more than five years had passed since his admission to the United States in 1999. The IJ ruled that § 1256(a) did not prevent the institution of removal proceedings, and concluded the marriage was fraudulent because Malik and the U.S. citizen spouse never intended to establish a life together. The BIA affirmed, reasoning that § 1256(a) did not apply to Malik be-

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cause his status was never adjusted to LPR.

The court determined that under its precedents, the time bar in § 1256 (a) applies to both rescission and removal proceedings initiated based on a fraudulent adjustment of status. Here, however, petitioner never received an adjustment of status. Rather, he obtained his LPR status by receiving an immigrant visa through the consular process. "There is nothing in the statute to suggest its applicability to proceedings against an alien who never adjusted his status, " said the court.

"The BIA will sometimes reach opposite conclusions in cases that have many factual similarities, but this does not reflect a failure of the agency to follow its own precedent."

The court also upheld the agency's finding that petitioner had obtained his immigrant visa through a fraudulent marriage.

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SIXTH CIRCUIT

■ **Sixth Circuit Dismisses Petitioner's Challenge To Cancellation Denial After Concluding That Discretionary Review Bar Applies To Argument That The BIA Failed To Follow Its Precedent**

In ***Ettienne v. Holder***, __ F.3d __, 2011 WL 4582549 (6th Cir. October 5, 2011) (*Rogers*, McKeague, Donald), the Sixth Circuit concluded that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) to consider the petitioner's claim that the BIA failed to follow its precedent by by not specifically identifying every hardship factor that petitioner's family would face upon her removal to Trinidad.

The court ruled that the claim challenged the agency's weighing of the evidence, and distinguished its prior ruling in *Aburto-Rocha v. Mukasey*, 535 F.3d 500 (6th Cir. 2008), on the basis that there was no claim that the agency misapplied the proper legal standard. The court noted that "the BIA will sometimes reach opposite conclusions in cases that have many factual similarities, but this does not reflect a failure of the agency to follow its own precedent. Rather, the different outcomes are an expected result of the discretionary weighing required to make individualized determinations. Review that required a tallying of hardships would amount to second-guessing the agency's weighing of factors, an endeavor that we have repeatedly recognized as beyond our jurisdiction."

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That 1989 Judicial Recommendation Against Deportation Is Valid, And That Petitioner's Counsel's Concession Of Invalidity Was Incorrect And "Gravely Prejudicial"**

In *Solis-Chavez v. Holder*, __ F.3d __, 2011 WL 5041916 (7th Cir. October 25, 2011) (Posner, Kanne, *Sykes*), the Seventh Circuit ruled that the BIA abused its discretion in rejecting a petitioner's ineffective assistance claim stemming from his counsel's concession before the IJ that a Judicial Recommendation Against Deportation (JRAD) was ineffective to prevent removal based on the petitioner's 1989 conviction because it was entered outside the thirty-day post-sentencing window specified by statute.

The court held that the JRAD – which, before its repeal in 1990, provided a complete defense to removal based on convictions for crimes involving moral turpitude – was valid because the sentencing judge indicated her intent to retain jurisdiction to consider the request for a JRAD and the request was unopposed, and that counsel's concession was "gravely prejudicial" to the petitioner.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds That Harassment With Little Physical Harm Does Not Amount To Past Persecution**

In ***Osuji v. Holder***, 657 F.3d 719 (8th Cir. October 5, 2011) (*Loken*, Beam, Gruender), the Eighth Circuit held that mistreatment of a young Nigerian Christian asylum applicant by persons believed to be Muslim gang members did not amount to persecution.

According to petitioner, Muslim gang members stopped his bus (and other vehicles), ordered the group to exit, told them to stop preaching, whipped them with sticks, and told them to run away. Petitioner sustained a cut on his knee. The court found that this incident with little physical harm, did not constitute persecution.

The court also found that the mistreatment had been committed by private persons and not by the government or someone the government was unwilling or unable to control. The court noted that the Department of State country report on Nigeria in the administrative record suggested that, while ethnic and religious violence is all too common, the government does not condone it.

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■ **Eighth Circuit Holds That Motion To Reopen Was Properly Denied As Untimely Where Petitioner Failed To Establish Due Diligence Or Prejudice**

In *Valencia v. Holder*, 657 F.3d 745 (8th Cir. October 7, 2011) (Loken, Beam, *Murphy*), the Eighth Circuit affirmed the BIA's denial of an untimely motion to reopen. The petitioner claimed ineffective assistance of counsel in connection with her attorney's handling of a T visa application, which was not filed until after her voluntary departure period expired, and was ultimately denied. The court pointed out that the petitioner did not argue to the BIA that the motion to reopen deadline should be tolled, and held that she did not exercise due diligence in pursuing her ineffective assistance of counsel claim because she had waited six years to file her motion to reopen. The court also held that the petitioner had not shown prejudice because her motion to reopen sought adjustment of status, a remedy unrelated to her ineffective assistance claim.

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■ **Eighth Circuit Holds That Criminal Alien Failed To Exhaust Administrative Remedies In Expedited Removal Case**

In *Escoto-Castillo v. Napolitano*, __ F.3d __, 2011 WL 4835809 (8th Cir. October 13, 2011) (*Loken*, Beam, Gruender), the Eighth Circuit held it lacked jurisdiction to review an alien's challenge to a removal order entered in an INA § 238 proceeding because petitioner had failed to exhaust his administrative remedies.

The petitioner, a citizen of Mexico, entered the United States in 1995 and overstayed his six-month visitor's visa. In October 2002, he pleaded guilty in Minnesota state court to third-degree burglary. On August 27, 2010, DHS served petitioner with a Form I–851 Notice of Intent to issue a final administrative order removing him because his 2002 burglary conviction was an aggravated felony.

Petitioner sought judicial review of the administrative removal order contending that he had only been sentenced to a term of imprisonment of 364 days – one day less than a year. The court first found that petitioner had not raised the issue in the administrative removal proceeding. "Indeed, he waived his rights to contest removal, to request withholding or deferral of removal, and to remain in the United States for fourteen days while he applied for judicial review, "said the court.

"Congress has unambiguously provided that we may decide a petition for review "only on the administrative record on which the order of removal is based."

Second, the court found that petitioner's contention that his 2002 burglary conviction was not an aggravated felony was based entirely on a post-removal state court order, evidence that was not part of the administrative record on appeal. "Congress has unambiguously provided that we may decide a petition for review "only on the administrative record on which the order of removal is based," it said.

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■ **Eighth Circuit Remands For BIA To Address Whether Alien Warrants A Waiver Of Deportation**

In *Lovan v. Holder*, __ F.3d __, 2011 WL 4835811 (8th Cir. October 13, 2011) (*Loken*, Baldock, Murphy), the Eighth Circuit held that the BIA had disregarded *INS v. St. Cyr*, 533 U.S. 289 (2001), when it ruled that an alien convicted of sexual abuse of a child was not eligible for a waiver under former § 212(c) of the INA by applying its statutory counterpart rule.

The petitioner, citizen of Laos and an LPR, was convicted of sexually abusing a child in 1991 and served thirteen months in prison. He traveled to Laos in 2002 under a permit issued by the former INS, returning to the United States one month later. He reentered without challenge, but INS commenced removal proceedings when he applied for naturalization later that year, alleging that he was deportable due to the 1991 conviction. Petitioner applied for a 212(c) waiver, but the IJ and the BIA denied the waiver on the basis that the aggravated felony ground of removal with which petitioner was charged [sexual abuse of a minor] has no statutory counterpart in the grounds of inadmissibility under § 212(a).

In petitioner's first petition for review, the court in *Lovan v. Holder*, 574 F.3d 990, 996 (8th Cir. 2009), remanded the case to consider whether petitioner would have been eligible for § 212(c) relief *nunc pro tunc* when Congress repealed § 212 (c) in 1996. On remand, however, the BIA again concluded that petitioner was ineligible for § 212(c) relief reasserting the prior reasoning for denial.

In the second petition for review, the court again reversed the BIA, holding that "rather than analyze the issue of retroactive effect" as instructed by the court's remand, "the BIA majority simply declared that it was free to apply the statutory counterpart doctrine as it has

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evolved in post-repeal cases. This 'was an error of law in applying *St. Cyr*,'" said the court. Accordingly, the court granted the petition and directed the BIA to exercise its discretion and decide whether to grant petitioner's request for the 212(c) waiver.

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NINTH CIRCUIT

■ **Ninth Circuit Holds That Alien's MTR Filed On First Business Day Following Last Day of Voluntary Departure Period On A Weekend Was Filed Before VD Period Expired**

In *Meza-Vallejos v. Holder*, __ F.3d __, 2011 WL 4792882 (9th Cir. October 11, 2011) (*B. Fletcher*, Reinhardt, Wardlaw), the Ninth Circuit held that the BIA abused its discretion when it denied a motion to reopen in 2007 that was filed on the Monday after the weekend day that the alien's voluntary departure period elapsed. Under the court's precedent in effect at the time, the BIA was required to treat a motion to reopen filed within an alien's voluntary period as tolling the running of the period while the motion is under consideration.

"We hold that where, as here, a period of voluntary departure technically expires on a weekend or holiday, and an immigrant files a motion that would affect his request for voluntary departure on the next business day, such period legally expires on that next business day," said the court. The court reasoned that the BIA's ruling, though reasonable, effectively deprived the alien of the final days of his period for voluntary departure where the alien wished to file a motion to reopen and the last day of his voluntary departure period falls on a weekend.

The court remanded to the BIA for adjudication of the motion on its merits.

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■ **Ninth Circuit Holds That Issue Exhaustion Applies To "Particularly Serious Crime" Determinations**

In *Arsdi v. Holder*, __ F.3d __, 2011 WL 5027508 (9th Cir. October 24, 2011) (Kozinski, *O'Scannlain*, Bea), the Ninth Circuit held that it lacked jurisdiction to consider the petitioner's argument that the immigration judge erred by holding that his conviction for armed robbery was a "particularly serious crime" barring asylum and withholding of removal because the petitioner did not raise that issue in his appeal to the BIA and the BIA did not decide that issue. The court upheld the denial of the petitioner's request for CAT protection in a separate unpublished order.

In his dissent Judge Ikuta said that the extension of the stay order provided a windfall not available to petitioners who do not have cases pending before the court.

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■ **After Denial Of Certiorari, Divided Ninth Circuit Panel Extends Stay Of Removal Of Petitioner Convicted of Multiple Serious Crimes Pending Disposition Of Administrative Motion To Reopen**

In *Myers v. Holder*, __ F.3d __, 2011 WL 5024276 (9th Cir. October 20, 2011) (Pregerson, Nelson, Ikuta (dissenting)), the Ninth Circuit granted a motion to extend its stay of the court's mandate and the petitioner's removal pending adjudication of a motion to reopen recently filed with the BIA. In December 2007, the court stayed the petitioner's removal pending review of the government's opposition. In January 2011, after denying the petition for review and rehearing, the court stayed its mandate (without affording the government time to file a response to the petitioner's motion) pending the filing and decision on a petition for certiorari. On September 29, 2011, two business days before the Supreme Court denied certiorari, the petitioner moved the court to stay its mandate pending decision on a motion to reopen filed with the BIA two weeks earlier. Judge Ikuta dissented from the panel's decision to further stay its mandate, arguing that the court failed to explain the source of its authority to grant a further stay, that the court's order provided a windfall not available to petitioners who do not have cases pending before the court, and that the court should not interfere with the normal agency procedures and the applicable regulatory framework for seeking a stays of removal from the agency.

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TENTH CIRCUIT

■ **Tenth Circuit Holds That Procedurally Regular Admission Of Previously-Removed Alien Constitutes An Illegal Reentry For Purposes Of Reinstatement**

In *Cordova-Soto v. Holder*, __ F.3d __, 2011 WL 4908351 (10th Cir. October 17, 2011) (Hartz, *Holloway*, Porfilio), the Tenth Circuit held that a procedurally regular entry of an alien (a Border Patrol officer purportedly waived through the taxi in which she was a passenger) consti-

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tuted an illegal entry for the purposes of reinstatement under 8 U.S.C § 1231(a)(5).

The petitioner, a Mexican citizen, became a lawful permanent resident in 1991 at the age of 13. In October 2005 DHS initiated removal proceedings against her, charging her as removable on three grounds: as an aggravated felon, as an alien convicted of two crimes involving moral turpitude, and as an alien convicted of a controlled substance offense. At the removal hearing petitioner submitted a Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing (Stipulation); admitted all factual allegations in the NTA; conceded all charges of removability; waived any right to apply for relief from removal; waived her right to appeal the removal order; and attested that she had executed the Stipulation voluntarily, knowingly, and intelligently. The immigration judge ordered petitioner removed on November 8, 2005.

On March 18, 2010, petitioner was found in Wichita, Kansas, and identified as an alien who had previously been removed. DHS then issued a Notice of Intent/Decision to Reinstate Prior Order, advising her that she was subject to removal under 8 U.S.C. § 1231(a)(5). Petitioner filed a petition for review of the reinstatement order arguing that his last entry into the U.S., in which a border official waived her through, was not illegal.

The court preliminarily held that because petitioner had failed to file her petition for review within thirty days of her 2005 removal order, the court lacked jurisdiction to review that order, including constitutional claims or questions of law. The court then determined that petitioner's reentry was illegal because she had failed to obtain permission from the Attorney General to legally re-enter the United States following removal, rendering her inadmissible at the time of her entry.

The court was not "persuaded" by petitioner's argument that she had made a "lawful entry" under *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), where the BIA had held that Congress had not intended to require that an alien's entry be substantively lawful in order to qualify for adjustment of status. The court said that it did not "believe that the BIA's unusual construction of "lawful entry" in the definition of "admitted" in § 1101(a)(13)(A) — which ignores the plain meaning of that term — reasonably extends beyond its use in that definition."

"There is no agency or court precedent for requiring an IJ to grant an indefinite continuance so that a petitioner may remain in this country while awaiting eligibility for adjustment of status."

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■ **Tenth Circuit Holds That Fourth Amendment Violation Did Not Warrant Termination of Removal Proceeding**

In ***Luevano v. Holder***, __ F.3d __, 2011 WL 4509473 (10th Cir. September 30, 2011) (Kelly, Seymour, *O'Brien*), the Tenth Circuit concluded that the petitioner failed to demonstrate a due process violation when the van he was riding in with six passengers was stopped at a sobriety checkpoint, and its occupants, including petitioner, who were "under suspicion of being illegal aliens," were interviewed by an ICE agent.

The petitioner, a citizen of Mexico, applied for adjustment of status during her removal proceedings and requested indefinite continuance in anticipation of receipt of visa. The IJ determined that petitioner was not then eligible for adjustment of status and denied his request for continuance because the anticipated visa would not be available for several years. The IJ also denied petitioner's request to terminate the proceedings base on allegations that the search of the van violated his Fifth Amendment rights. On appeal, the BIA affirmed the IJ's denial of the continuance and determined that petitioner had not shown a violation of his constitutional rights.

Before the Tenth Circuit, petitioner contended that the interrogation at the sobriety checkpoint was the result of racial profiling because his ethnicity was the only reason to suspect he was in the country illegally. The court determined that even petitioner had demonstrated a violation, he had failed to request the suppression of specific evidence. The court also ruled that a Fourth Amendment violation would not deprive the immigration court of jurisdiction, and thus nonetheless would not warrant termination of proceedings.

Finally, the court held that the IJ did not abuse his discretion in denying a motion to continue proceedings for the purposes of adjustment of status under INA § 245(i) when no visa was immediately available to the petitioner or would become available for an indeterminate period of time. "There is no agency or court precedent for requiring an IJ to grant an indefinite continuance so that a petitioner may remain in this country while awaiting eligibility for adjustment of status," said the court.

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DISTRICT COURTS

■ **Southern District Of New York Rejects Challenge To USCIS Fee Regulations**

In ***Barahona v. Napolitano***, No. 10-1574 (S.D.N.Y. October 12, 2011) (*Scheindlin, J.*), the United States District Court for the Southern District of New York dismissed a putative class action challenge to two USCIS fee regulations. The suit claimed that USCIS's promulgation of the Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, effective July 30, 2007, and the USCIS Fee Schedule, effective November 23, 2010, violated 8 U.S.C. § 1356 (m) and was arbitrary, capricious, an abuse of discretion, and not in accordance with law because the regulations "bundle" the fees petitioners must pay for services. In granting summary judgment for the government, the court ruled that the agency's interpretation of 8 U.S.C. § 1356 (m) is reasonable and entitled to *Chevron* deference. The court also held that USCIS adequately explained and justified its decision to shift from charging separate fees to charging a bundled fee.

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■ **Middle District Of Florida Denies Preliminary Injunction In Diversity Visa Case**

In ***Amador v. Napolitano***, No. 11 -cv-1977 (M.D. Fla. September 28, 2011) (Whittemore, J.), the District Court for the Middle District of Florida denied plaintiffs' motion for a preliminary injunction to compel approval of their applications to adjust status prior to the expiration of their diversity visas on September 30, 2011. The court found that plaintiffs were not significantly likely to prove that the denials of their adjustment applications are arbitrary and capricious. USCIS had denied the applications because plaintiffs failed to maintain lawful nonimmigrant status for more than three years. Plaintiffs argued that they qualified to adjust under a "no fault" exception because they had paid $17,000 to an ICE assistant chief counsel (who was later convicted of accepting bribes in exchange for immigration benefits and sentenced to eighteen years in prison), and had relied upon his promises to help them secure lawful permanent residency.

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■ **District of Vermont Rules That It Lacks Jurisdiction To Review Petitioner's Battered Spouse Self-Petition**

In ***Lakhani v. USCIS***, No. 2:11–cv–58 (D. Vt. September 30, 2011) (*Sessions, J.*), the United States District Court for the District of Vermont granted the government's motion to dismiss the petitioner's habeas petition, finding that it lacked jurisdiction to review the merits of the battered spouse self-petition under 8 U.S.C. § 1154(a)(1)(J) because the USCIS decision is not reviewable under 8 U.S.C. § 1252(a)(2)(B)(ii). The court also denied petitioner's motion to stay removal for lack of jurisdiction under the REAL ID Act, and dismissed his claim that USCIS failed to timely adjudicate his visa application as moot.

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■ **Northern District Of Georgia Finds Plaintiffs Lack Standing To Bring Putative Class Action Challenging Legality Of ICE's § 287(g) Program**

In ***Albarran v. Morton***, No. 10-cv -3261 (N.D. Ga. October 19, 2011) (*Pannell, J.),* the United States District Court for the Northern District of Georgia dismissed a putative class action, finding that plaintiffs lack standing to seek declaratory and injunctive relief because they could not show a real and immediate threat of future harm. Plaintiffs challenged ICE agreements with the Cobb County Sheriff's Office and the Georgia Department of Public Safety under INA § 287(g), that allow qualified state and local officials to enforce immigration laws. Plaintiffs also challenged the constitutionality of § 287(g) itself. Plaintiffs all had been subject to the 287(g) program in the past and sought certification of a class of Hispanic resident petitioners. The court found that plaintiffs failed to show that they would again be arrested and subjected to the 287(g) program.

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■ **Northern District Of Illinois Grants Government's Motion For Summary Judgment, Rejecting Challenge to USCIS's Denial Of Employment-Based Immigrant Visa Petition**

In ***Regal International v. Napolitano***, No. 10-cv-5347 (N.D. Ill. September 29, 2011) (Holderman, J.), the District Court for the Northern District of Illinois granted summary judgment to the government on a challenge to the determination by USCIS AAO that the alien beneficiary, who had a three-year foreign degree, did not have the equivalent of a bachelor's degree required by regulation for classification as a professional third preference employment-based immigrant. The court deferred to the AAO's interpretation of the regulation as requiring aliens to possess a single-source, four-year degree to qualify as a professional under the regulation, finding it not plainly erroneous or inconsistent with the regulation.

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This Month's Topical Parentheticals

ADJUSTMENT

■ *Malik v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 4552466 (3d Cir. Oct. 4, 2011) (affirming agency's determination that section 246(a) of the INA, which prohibits the initiation of removal proceedings more than five years after an erroneously granted adjustment of status, does not apply to an alien who obtains immigrant status through consular processing; also affirming agency's finding that petitioner obtained his immigrant visa through a fraudulent marriage)

■ *Alhuay v. United States Att'y Gen.*, __ F.3d __, 2011 WL 5061386 (11th Cir. Oct. 26, 2011) (agreeing with four other circuits that the five-year statute of limitations period in 8 U.S.C. § 1256(a) limits, if anything, DHS's power to rescind an erroneous adjustment of status more than five years after adjustment is granted, and does not apply to limit DHS's ability to initiate removal proceedings)

ADMISSION

■ *Matter of Rivens*, 25 I.&N. Dec. 623 (BIA Oct. 19, 2011) (holding that in order to establish that a returning LPR alien is to be treated as an applicant for admission, DHS has the burden of proving by clear and convincing evidence that one of the six exceptions to the general rule for LPRs set forth at section 101(a)(13)(C) of the INA applies; further finding that the offense of accessory after the fact is a CIMT, but only if the underlying offense is such a crime)

ASYLUM

■ *Osuji v. Holder*, __ F.3d __, 2011 WL 4578441 (8th Cir. Oct. 5, 2011) (upholding denial of Nigerian's asylum application where petitioner, a Christian, suffered harassment but little if any physical harm from Muslim gangs, his family continued to live, work and practice Christianity unharmed in the same town, and petitioner presented no evidence that the Nigerian government condoned the harassment)

■ *Stanciu v. Holder*, __ F.3d __, 2011 WL 5041748 (1st Cir. Oct. 25, 2011) (affirming IJ's REAL ID Act adverse credibility finding as to Romanian Gypsy's plausible claim of past and future police persecution, given aggregate effect of inconsistencies between petitioner's testimony and wife's testimony and documents about dates, duration, and severity of police beatings and number of departures from the country; failure to apply for asylum in several prior visits to US; and petitioner's post-hearing affidavit that did not squarely explain the inconsistencies and claimed lack of memory or scam by American attorney)

CRIMES

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

■ *Fajardo v. United States Att'y Gen.*, __ F.3d __, 2011 WL 4808171 (11th Cir. Oct. 12, 2011) (refusing to grant deference to AG's decision in *Silva-Trevino* and reasoning that "Congress unambiguously intended adjudicators to use the categorical and modified categorical approach" to determine whether a person was convicted of a CIMT; finding that the BIA and the IJ erred by considering evidence beyond the record of petitioner's false imprisonment conviction to determine that he had been convicted of a CIMT)

■ *Santos-Reyes v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 5068089 (3d Cir. Oct. 26, 2011) (rejecting petitioner's contention that the BIA erred in applying the stop-time rule by failing to use her arrest date rather than the date that she began to participate in the criminal conspiracy to determine when her period of continuous residency ended for purposes of cancellation eligibility).

DUE PROCESS – FAIR HEARING

■ *Solis-Chavez v. Holder*, __ F.3d __, 2011 WL __ (7th Cir. Oct. 25, 2011) (holding that former counsel's concession of the JRAD's invalidity was "gravely prejudicial" because, although the JRAD was not entered within the 30-day post-sentencing window, the sentencing judge indicated her intent to retain jurisdiction for the express purpose of considering the JRAD)

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

■ *Garcia-Torres v. Holder*, __ F.3d __, 2011 WL 5105808 (8th Cir. Oct. 28, 2011) (refusing to apply exclusionary rule to exclude evidence of alienage and removability where petitioner points to "nothing more than a warrantless entry of business premises and arrest, mere garden-variety error," rather than "egregious conduct")

JURISDICTION

■ *Ettienne v. Holder*, __ F.3d __, 2011 WL 4582549 (6th Cir. Oct. 5, 2011) (concluding that 8 U.S.C. § 1252(a)(2)(B)(i) divested the court of

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This Month's Topical Parentheticals

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jurisdiction over petitioner's claim that the BIA failed to follow precedent in denying cancellation)

■ *Escoto-Castillo v. Holder*, __ F.3d __, 2011 WL 4835809 (8th Cir. Oct. 13, 2011) (holding court lacked jurisdiction to review challenge to BIA's removability finding where petitioner failed to raise that claim in 238(b) removal proceedings by filing a motion to reopen with ICE after issuance of the administrative removal order)

■ *Gonzalez-Ruano v. Holder*, __ F.3d __, 2011 WL 5120696 (1st Cir. Oct. 31, 2011) (finding court lacked jurisdiction to review BIA's discretionary denial of special rule cancellation of removal, and rejecting petitioner's contention that the exercise of discretion was "tainted by errors of law")

■ *United States v. Vann*, __ F.3d __, 2011 WL 4793230 (4th Cir. Oct. 11, 2011) (*en banc*) (nine judges of the twelve-judge panel held that defendant's conviction records for violating North Carolina's indecent-liberties-with-a-minor statute do not establish a conviction for an offense that "involves conduct that presents a serious potential risk of physical injury to another" under the ACCA; a seven-judge majority concluded that convictions for violating the North Carolina law are susceptible to some sort of modified categorical analysis)

■ *Matter of Bautista*, 25 I.&N. Dec. 616 (BIA Oct. 13, 2011) (holding that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony even though the State crime lacks the jurisdictional element in the applicable Federal arson offense)

■ *Ramos v. Holder*, __ F.3d __, 2011 WL 5101510 (4th Cir. Oct. 27, 2011) (deferring to agency's "reasoned conclusion" that petitioners' successful efforts to financially facilitate their children's illegal entry into the United States satisfied both the assistance and knowledge requirements of the "alien smuggling" provision, and rendering petitioners ineligible for cancellation of removal)

■ *Arsdi v. Holder*, __ F.3d __, 2011 WL 5027508 (9th Cir. Oct. 24, 2011) (holding that petitioner failed to exhaust his administrative remedies where he did not challenge the IJ's finding that his conviction for armed robbery was a particularly serious crime for purposes of withholding of removal eligibility, and where the BIA did not otherwise reach that issue)

MOTION TO REOPEN

■ *Valencia v. Holder*, __ F.3d __, 2011 WL 4634220 (8th Cir. Oct. 7, 2011) (affirming the BIA's denial of an untimely motion to reopen alleging ineffective assistance of counsel where petitioner failed to argue before the BIA that equitable tolling should apply and that, in any event, petitioner failed to establish due diligence and prejudice)

REINSTATEMENT

■ *Cordova-Soto v. Holder*, __ F.3d __, 2011 WL 4908351 (10th Cir. Oct. 17, 2011) (concluding that petitioner could not collaterally attack the underlying removal order that was reinstated because she failed to file a PFR within 30 days of that order; further holding that the alien's entry into US through inspection was an illegal entry for purposes of the reinstatement statute where the alien failed to obtain the AG's consent to reenter after deportation)

REMOVAL

■ *Myers v. Holder*, __ F.3d __, 2011 WL 5024276 (9th Cir. Oct. 20, 2011) (granting motion to stay issuance of the mandate pending adjudication of MTR before the BIA) (in dissent Judge Ikuta explained that the majority's stay of the mandate is contrary to existing regulations which grant the agency the authority to issue a stay of removal pending a motion to reopen; further noting that the stay is unfair and raises separation-of-powers concerns)

RETROACTIVITY

■ *Duran Gonzales v. DHS*, __ F.3d __, 2011 WL __ (9th Cir. Oct. 25, 2011) (holding that its prior decision in *Duran Gonzales* applies retroactively to plaintiffs where the panel in that case applied its holding to the parties before it, and where the court subsequently held in *Morales-Izquierdo* that *Duran-Gonzales* applied retroactively; distinguishing the court's *en banc* decision in *Nunes-Reyes* as involving the *St. Cyr*-type waiver of constitutional rights)

VISAS

■ *Matter of Zamora-Martinez*, 25 I.&N. Dec. 606 (BIA Oct. 6, 2011) (holding that (1) section 201(f)(2) governs whether an alien who is the beneficiary of a visa petition according him or her second-preference status as the child of a LPR under section 203(a)(2)(A) is an immediate relative upon the naturalization of the petitioning parent; (2) pursuant to section 201(f)(2), an alien's actual, not adjusted, age on the date of his or her parent's naturalization determines whether he or she is an immediate relative; and (3) section 204(k)(2) does not allow an alien to retain his or her 2A-preference status by opting out of automatic conversion to the first-preference category as a son or daughter of a United States citizen upon his or her parent's naturalization)

VOLUNTARY DEPARTURE

■ *Meza-Vallejos v. Holder*, __ F.3d __, 2011 WL 4792882 (9th Cir. Oct. 11, 2011) (holding that where, as here, a period of voluntary departure technically expires on a weekend or holiday, and an alien files a motion on the next business day that would either have tolled, automatically withdrawn, or otherwise affected his

Department of Justice Challenges South Carolina's Immigration Law

In a complaint, filed in the District of South Carolina, on October 31, 2011, the Department states that certain provisions of Act No. 69, as enacted by the state on June 27, 2011, are unconstitutional and interfere with the federal government's authority to set and enforce immigration policy, explaining that "the Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country." South Carolina's law clearly conflicts with the policies and priorities adopted by the federal government and therefore cannot stand.

South Carolina's law is designed to further criminalize unauthorized immigrants and, like the Arizona and Alabama laws, expands the opportunity for police to push unauthorized immigrants towards incarceration for various new immigration crimes by enforcing an immigration status verification system. Similar to Arizona's S.B. 1070 and Alabama's H.B. 56, this law will place significant burdens on federal agencies, diverting their resources away from high-priority targets, such as terrorism, drug smuggling and gang activity, and those with criminal records. In addition, the law's mandates on law enforcement will also result in the harassment and detention of foreign visitors and legal immigrants, as well as U.S. citizens, who cannot readily prove their lawful status.

"Today's lawsuit makes clear once again that the Justice Department will not hesitate to challenge a state's immigration law, as we have in Arizona, Alabama and South Carolina, if we find that the law interferes with the federal government's enforcement of immigration," said Attorney General Eric Holder. "It is understandable that communities remain frustrated with the broken immigration system, but a patchwork of state laws is not the solution and will only create problems. We will continue to monitor the impact these laws might have on our communities and will evaluate each law to determine whether it conflicts with the federal government's enforcement responsibilities."

"DHS continues to enforce federal immigration laws in South Carolina in smart, effective ways that focus our resources on criminal aliens, recent border crossers, repeat and egregious immigration law violators and employers who knowingly hire illegal labor," said Department of Homeland Security Secretary Janet Napolitano. "This kind of legislation diverts critical law enforcement resources from the most serious threats to public safety and undermines the vital trust between local jurisdictions and the communities they serve, while failing to address the underlying problem: the need for comprehensive immigration reform at the federal level."

Topical Parentheticals

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request for voluntary departure, the voluntary departure period legally expires on that next business day)

WAIVERS

■ *Lovan v. Holder*, __ F.3d __, 2011 WL 4835811 (8th Cir. Oct. 13, 2011) (remanding and directing BIA to exercise 212(c) discretion where BIA failed to adequately address prior precedent -- *In re L-* and *In re G-A-* (cases where an excludable alien traveled abroad and re-entered before being charged as deportable, and found to be eligible for 212(c) relief) -- and thus failed to consider whether its denial of 212(c) relief based on petitioner's conviction had an impermissibly retroactive effect under *St. Cyr*)

U Visas Primer

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3849636 at *8 n.10. This is not to say that U Visa proceedings never implicate petitions for review in the courts of appeals. For instance, in *Ramirez Sanchez v. Mukasey*, the Ninth Circuit acknowledged that CIS has sole jurisdiction over U Visas, but remanded the alien's case and ordered the Board to consider the alien's request for a U Visa "as a request for a continuance [of the removal proceedings], or to consider any joint motion for a stay or termination." 508 F.3d 1254, 1256 (9th Cir. 2007). This interpretation was ostensibly contrary to the pertinent regulations that indicate that U Visas, and their denials, are inapposite to independent removal orders. 8 C.F.R. § 214.14(c)(1)(i)-(ii).

In conclusion, U Visa petitions are matters of USCIS' discretion and, with limited exceptions, should have no bearing on the outcome of removal proceedings or outstanding removal orders. Where an alien successfully petitions for a U Visa, ICE counsel may exercise discretion and agree to terminate removal proceedings without prejudice, or reopen proceedings that have already been completed. At the appellate level, the courts of appeals have held that no jurisdiction exists to review the denial of a U Visa petition in conjunction with an order of removal.

By Joseph A. O'Connell, OIL
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Remembering Lauri Flippu

Lauri S. Flippu, a former Member of the Board of Immigration Appeal and the first Deputy Director of the Office of Immigration Litigation, passed away on October 30, 2011. He was loved by all here at OIL and at EOIR.

Lauri received both his undergraduate and law degrees from the State University of New York at Buffalo, and was a member of the New York State bar. He began his career in the Department in 1973, under the Attorney General's Honors Program, as an Attorney Advisor with the BIA. He joined the Criminal Division, General Litigation and Legal Advice Section in 1976, where he litigated immigration cases in the federal courts.

In 1983, he moved to the Civil Division, joining the Office of Immigration Litigation at its inception as its Deputy Director. During his tenure with OIL, he received both the Attorney General's John Marshall Award in 1987 and the Attorney General's Distinguished Service Award in 1994. In 1995, left OIL for the Executive Office of Immigration Review, returning to the BIA as a Board Member. He retired from the BIA in July 2011.

In writing a tribute to Lauri, Juan Osuna, the Director of EOIR, said that "Lauri was a true professional, and a gentleman to everyone that he worked with. He was unwaveringly faithful to the law and to EOIR's mission. He often spoke of his role as a Board Member as a public service that he performed on behalf of the Attorney General and the President, and for the American people. He invoked our greatest public servants, never cognizant of how all of us counted him among them."

As Director Osuna wrote, "none of us will ever forget Lauri. He leaves a legacy that will last far into the future. "

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Ethics: A Nation's Right To Exclude

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may permissibly refuse to associate with immigrants who seek to enter their communities. "In other words, just as an individual may permissibly choose whom (if anyone) to marry, and a golf club may choose whom (if anyone) to admit as new members, a group of fellow citizens is entitled to determine whom (if anyone) to admit into their country."

Wellman also defended his theory against critiques. One open-borders argument contends that refusing entry to an impoverished foreigner is tantamount to sacrificing a human life for the sake of wealth and luxury. Against this egalitarian critique, Wellman counters that "wealthy states can satisfactorily discharge their duties to the world's poor without opening their borders."

A libertarian critique argues that a closed-borders policy impinges on the property and free-association rights of a citizen, such as a Texas rancher, seeking to associate with a would-be immigrant, such as a Mexican ranch hand. But property rights are not absolute, Wellman says; just as a state prohibits property owners from presiding over criminal matters on their land, "I see nothing objectionable about admitting that property rights may permissibly be curtailed to make room for a (duly limited) state."

A third critique contends that allowing states to exclude all outsiders is inefficient and disincentives sharing wealth with the world's poor. Among other responses, Wellman believes that opening borders would actually cause a brain drain in poorer countries: only the relatively well-off — doctors, engineers, lawyers and other professionals — could afford to emigrate, leaving the rest of the country even worse off. There are better ways to share wealth, he said. Concluding, Wellman emphasized that a state's right to exclude immigrants is a deontologically based moral right, not a consequentialist prescription for maximizing welfare. "I'm not defending the status quo . . . . But my point is that there would be a way of arranging things, international affairs, which is compatible with treating people freely and equally and also having closed borders."

by Benjamin Mark Moss, OIL

INSIDE OIL

Excluding Immigrants is Ethical, Political Philosopher Says

Do countries have the right to exclude immigrants?

On October 20, 2011, at a Brown Bag Lunch&Learn presentation to OIL, Christopher Heath Wellman, Professor of Philosophy at Washington University, and co-author with Professor Phillip Cole of the recently published book *Debating the Ethics of Immigration: Is There a Right to Exclude*?, discussed the outer limits of morally permissible immigration policies. A country is fully justified in excluding immigrants, he argued, even if complete exclusion might not be advisable as a policy matter.

Wellman began by positing a number of deontological ethical facts, a sort of natural law that he says exists independent of any legal regime or constitution. He first identified a moral presumption against political states, by nature coercive institutions. The presumption can be rebutted, however, because some coercion "is necessary to perform the requisite political functions of protecting basic moral rights."

More that 70 government attorneys attended the 17th Annual Immigration Law Seminar. Picture above, the panel on "Clients Relations," Michelle Latour, Deputy Director, OIL , Peter Vincent, Principal Legal Advisor, ICE, John Miles, Deputy Chief Counsel, USCIS , Kathleeen Hooke, Assistant Legal Adviser, Department of State, Robin Stutman, General Counsel, EOIR.

Turning to the ethics of excluding immigrants, Wellman's core premises are that: (1) legitimate states — those that adequately protect their constituents' rights and respect the rights of all others — are entitled to political self-determination; (2) freedom of association is an integral component of self-determination; and (3) freedom of association includes the right *not* to associate with others.

From these principles, Wellman argues that legitimate political states

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

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

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

Office of Immigration Litigation

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