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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Solicitor General's Cert Petition Challenges Ninth Circuit's Rules Permitting Imputation For Cancellation Of Removal Purposes

On June 23, 2011, the Solicitor General filed certiorari petitions in two cases challenging the Ninth Circuit's imputation rule of *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), and *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009). *Martinez Gutierrez v. Holder*, 411 F. App'x 121 (9th Cir. Jan. 24, 2011), *petition for certiorari filed sub nom.* ***Holder v. Martinez Gutierrez*** (U.S. June 23, 2011) (No. 10-1542); *Sawyers v. Holder*, 399 F. App'x 313 (9th Cir. Oct. 14, 2010), *petition for certiorari filed sub nom.* ***Holder v. Sawyers*** (U.S. June 23, 2011) (No. 10-1543).

The Ninth Circuit cases hold that an alien should be permitted to impute a parent's years of lawful permanent resident status and of residence after lawful admission to meet the five–year lawful permanent residence status and seven-year continuous residence requirements of the cancellation of removal statute (8 U.S.C. § 1229b(a)).

The certiorari petitions argue that the Ninth Circuit's rule has no statutory basis, is contrary to the Board of Immigration Appeals' published interpretation, and is in conflict with the decisions of two other circuits and with dicta from another circuit.

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Michelle Gorden Latour, OIL's New Deputy Director

Assistant Attorney General Tony West has selected Michelle Gorden Latour as OIL's new Deputy Director for Operations, to fill the vacancy left open by now Director David McConnel. Ms. Gorden joined OIL as a Trial Attorney in September 1998. In 2001, she was promoted as Senior Litigation Counsel and, in 2005, she was selected as an Assistant Director.

Ms. Gorden received her B.A. in Mathematics at Rutgers College, Rutgers University in 1991, and her law degree from the University of Pennsylvania in 1994. Following law school, Ms. Gorden served as a judicial law clerk for the Honorable Frederica A. Massiah-Jackson in Philadelphia County and then joined the Office of Staff Attorneys for the United States Court of Appeals for the Third Circuit.

Govt seeks cert in imputation cases

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The cancellation of removal statute provides in pertinent part as follows:

> (a) Cancellation of removal for certain permanent residents
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

The aliens involved in these two cases are lawful permanent residents (LPRs) who were found removable for alien smuggling (Martinez Gutierrez) or drug-related convictions (Sawyers) and sought cancellation of removal under this provision. However, Martinez Gutierrez had neither been lawfully admitted for permanent residence for five years (8 U.S.C. § 1229b(a)(1)) nor resided in the United States for seven years after lawful admission (8 U.S.C. § 1229b(a)(2)). Sawyers had not resided in the United States for seven years after lawful admission. Therefore, to meet the statute's requirements, they sought to "impute" one of their parent's lawful admission, years of residence after that admission, and/or years of residence as an LPR.

In *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1021-22 (9th Cir. 2005), the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement. The court later reaffirmed and extended this holding in *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009). In *Mercado-Zazueta*, the Ninth Circuit specifically overruled the Board of Immigration Appeals' post-*Cuevas-Gaspar* published decisions rejecting the Ninth Circuit's imputation rule in a *Brand X* approach, *see In re Escobar,* 24 I. & N. Dec. 231 (BIA 2007), and *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (BIA 2008) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)), and treated *Cuevas-Gaspar*'s holding as binding with respect to Section 1229b(a)(2). *See* 580 F.3d at 1115.

Because almost half of all cancellation-of-removal applications are filed within the Ninth Circuit, the Solicitor General contends that the practical consequences of the Ninth Circuit's aberrant imputation rule are significant.

The Ninth Circuit also extended *Cuevas-Gaspar* to Section 1229b(a)(1), holding that "for purposes of satisfying the five years of lawful permanent residence required under [Section 1229b(a)(1)], a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Id.* at 1113. Accordingly, in *Martinez-Gutierrez* and *Sawyers*, the Ninth Circuit granted the aliens' petitions for review and remanded the cases to the Board for application of the imputation rule in light of *Mercado-Zazueta*.

The certiorari petitions argue first, that the Ninth Circuit's imputation rule is erroneous. Nothing in Section 1229b(a)'s text or legislative history suggests that an alien may rely on a parent's admission, residence, or LPR status to satisfy the statutory requirements that the alien have a certain period of LPR status and residence after admission in order to qualify for cancellation of removal. To the contrary, the statute's plain language makes clear that only the alien's own period of LPR status and residence after admission are relevant for purposes of Section 1229b(a)(1) and (2). Even if the lack of any statutory basis for imputation somehow rendered Section 1229b(a) ambiguous, the Board's precedential interpretations of the statute as not permitting imputation are reasonable and thus entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

Second, the Solicitor General point out that the Ninth Circuit's imputation rule conflicts with the holdings of two other courts of appeals and the considered view of a third court of appeals. *See Deus v. Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin v. Att'y Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008); *see also Cervantes v. Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).

Third, because almost half of all cancellation-of-removal applications are filed within the Ninth Circuit, the Solicitor General contends that the practical consequences of the Ninth Circuit's aberrant imputation rule are significant. Not only does the rule preclude uniform administration of the immigration laws, but it also impedes the government's high-priority efforts to remove criminal aliens.

These cases are being handled by Ed Kneedler and Pratik Shah of the Solicitor General's Office and by Carol Federighi of OIL-Appellate.

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Finality and Reconsideration: *What can courts review and when?*

Most beginning students of administrative law could dutifully recite that judicial review is limited to final agency action. It is also unremarkable to state that, for an agency action to be deemed "final," it must "mark the consummation of the agency's decisionmaking process," and may not be "of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177 -78 (1997). Judicial review of removal orders is no exception: the Immigration and Nationality Act ("INA") only confers jurisdiction to review "a final order of removal." 8 U.S.C. § 1252(a)(1). In immigration law, however, finality has proven to be an elusive concept. The INA does not define a "final order of removal," except to say that an order becomes final upon the earlier of a determination by the Board of Immigration Appeals ("Board") affirming such order, or expiration of the time for appeal of the order to the Board. 8 U.S.C. § 1101(a)(43)(B). While providing clear guidance as to when a removal order may be executed, this procedurally-grounded definition of finality hardly resolves all finality questions, for purposes of federal court jurisdiction.

One litigation-prone "finality" area has involved federal court jurisdiction where the alien seeks reconsideration, at the Board level, of a removal order currently under review by a federal court. It is well-settled that the mere filing of a motion for reconsideration with the Board does not defeat finality, for purposes of judicial review. The Supreme Court so held in *Stone v. INS*, 514 U.S. 386 (1995), which recognized that the INA's consolidation provision, now found at 8 U.S.C. § 1252(b)(6), "contemplates two petitions for review": one from the underlying removal order, and a second petition from any subsequent Board order denying a motion to reopen or to reconsider. *Id.* at 394. Under Stone, the alien's deadline for seeking judicial review of his underlying removal order is not tolled, simply because he has sought reconsideration of the order at the administrative level. As the Ninth Circuit has put it, the INA "creates parallel tracks for administrative and judicial review." *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008). Thus, the petition marches forward in federal court, despite the pendency of a motion to reconsider.

One litigation-prone "finality" area has involved federal court jurisdiction where the alien seeks reconsideration.

Yet where the Board grants reconsideration and issues a new decision, application of basic tenets of administrative law would seem to point to the conclusion that the agency's original decision no longer constitutes a "final order" subject to judicial review. The original decision no longer "mark[s] the consummation of agency's decisionmaking process," as it has been superceded by the Board's new decision upon reconsideration and therefore, the court is divested of jurisdiction. Not so, according to most federal courts. The Third, Fifth, Ninth, and Eleventh Circuits have each held that the Board's grant of reconsideration and issuance of a new decision does not defeat finality of the original order under review, unless the Board vacates or materially changes the original order. *See Espinal v. Holder*, 636 F.3d 703 (5th Cir. 2011); *Thomas v. Attorney General*, 625 F.3d 134 (3d Cir. 2010); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008); *Jaggernath v. U.S. Attorney General*, 432 F.3d 1346 (11th Cir. 2005).

At least theoretically, these decisions leave room for argument that a Board decision on reconsideration effectively vacated the prior decision, thus defeating finality. However, on the records before them, the courts concluded that no material change had occurred, notwithstanding that the Board, upon reconsideration, corrected legal or factual errors, or applied new, previously unavailable precedent. *See Espinal*, 636 F.3d at 705-07 (finding no material change where the Board abandoned reliance on drug conviction it had previously cited as support for aggravated felony determination); *Thomas*, 625 F.3d at 138 (finding no material change where Board, upon reconsideration, corrected a "factual error" as to the basis for the Immigration Judge's removability determination, but left intact its prior holding that the alien was convicted of an aggravated felony barring discretionary relief); *Plascencia-Ayala*, 516 F.3d at 744-46 (finding no material change where the Board applied an intervening precedent decision holding that failure to register as a sex offender constitutes a crime involving moral turpitude, and, relying on that precedent, adhered to its prior decision); *Jaggernath*, 432 F.3d at 1351-52 (holding that decision upon reconsideration, which held that theft conviction was categorically an aggravated felony, did not significantly alter the Board's prior decision, which applied a modified categorical analysis to reach the same conclusion).

To date, the only circuit which has adopted a bright-line approach, holding that a grant of reconsideration and issuance of a new decision effectively vacates a prior order, is the Sixth Circuit, in *Mu Ju Li v. Mukasey*, 515 F.3d 575 (6th Cir. 2008) (dismissing petition for lack of jurisdiction where Board granted reconsideration to address argument

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Finality & Reconsideration

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it had overlooked as to reviewability of alien's motion to reopen to apply for asylum). In *Mu Ju Li*, the court reasoned that any other result "would place [it] in the position of reviewing a decision that the BIA has deemed errant in some regard and non-binding on the parties or itself." *Id.* at 579. The court further observed that it was "prohibited" from reviewing the Board's decision upon reconsideration, because the alien had not petitioned for review of it, and that any decision as to the validity of the prior decision would be purely advisory, since that decision had been superceded. *Id.* The court concluded that its holding would "provide those who practice before the BIA with a clear rule: Where a petition for review is filed with this court and a motion to reconsider is filed with the BIA, if the BIA grants the motion to reconsider and renders a new decision addressing the issues presented in the case, then the new decision effectively vacates the prior decision and a separate petition for review of the new decision must be filed with this court." *Id.* at 580.

Unfortunately, this "clear rule" is currently a minority rule. Although government attorneys should consider pursuing a bright-line test for jurisdiction in circuits which have not adopted a "materiality" rule, that approach is now foreclosed in four circuits. Where the circuit court retains jurisdiction over a decision that the Board has reconsidered, it is left with the thorny question of whether its review should encompass the decision upon reconsideration. On the one hand, the court's review, by statute, is confined to the administrative record "on which the order of removal is based." *See* 8 U.S.C. § 1252(b)(4)(A). On the other hand, any such review would be incomplete, without consideration of the Board's decision upon reconsideration – presumably, that decision was not a useless exercise, but was issued to correct a factual or legal error, modify the Board's prior analysis, or address arguments overlooked in the initial decision. The problem is often not resolved by the filing of a second petition for review, as the alien normally has little incentive to seek judicial review of the Board's second, more fulsome decision upon reconsideration.

Courts that have retained jurisdiction, despite issuance of a new decision on reconsideration, generally have taken a pragmatic approach and considered the new decision, regardless of whether the alien sought review of it. *See, e.g., Espinal*, 636 F.3d at 707 (rejecting the government's argument that, under section 1252(b)(4)(A), judicial review is confined to the administrative record as of the petition for review, and concluding, without analysis, that "appellate review realistically incorporates the non-material alteration" set forth in the Board's new decision upon reconsideration). *Accord, Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1023 n.1 (9th Cir. 2007) (acknowledging that Board's denial of reconsideration was not before the court, but "address[ing] that order's rationale because it articulated an alternate ground for the BIA's denial of remand, which we ultimately conclude is correct"); *Alam v. Gonzales*, 438 F.3d 184, 187-88 (2d Cir. 2006) (declining remand, despite insufficiency of original Board decision, because remand would be futile in view of decision upon reconsideration).

Courts that have retained jurisdiction, despite issuance of a new decision on reconsideration, generally have taken a pragmatic approach.

The Fourth Circuit has recently provided a more complete explanation as to why review of the Board's decision upon reconsideration is reviewable, notwithstanding section 1252(b)(4)(A). *See Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011). There, the court opined that review of the reconsideration decision does not run afoul of section 1252(b)(4)(A), because the review is confined to the Board's reasoning, "without looking to evidence outside the administrative record." Id. at 123 n.3. That is, the Board's reasoning, as set forth in its decision, is not part of the "administrative record on which the order of removal is based." *See* 8 U.S.C. § 1252(b)(4)(A). The court also rejected the notion that such review violated the *Chenery* principle, namely that "'a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency.'" *Id.* at 123 (quoting *SEC v. Chenery Corp.* 332 U.S. 194 (1947)). With respect to *Chenery*, the court explained that review of the decision upon reconsideration would not cause it to invade the agency's domain, because, in conducting such review, the court does not substitute its own rationale for that of the agency, but instead, simply analyzes a rationale already articulated by the agency. Id. "[T]o turn a blind eye to the [decision on reconsideration] . . . would "accomplish nothing," and only cause a "wasteful remand." *Id.*

This pragmatic approach, whereby the courts consider the extra-record decision upon reconsideration, may be preferable to a "wasteful remand" in circuits which have held that reconsideration does not defeat finality. However, the approach is not without its pitfalls, as it blurs the definition of "administrative record," for purposes of section 1252(b)(4)(A), and could lead to an expansion of the futility doctrine, with a concomitant rise in *Ventura* errors, as courts stray further and further beyond the decision under review. *See INS v.*

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En Banc Ninth Circuit Finds REAL ID Act's Corroboration Rules Do Not Apply to Timeliness Determinations for Asylum Applications

In ***Nirmal Singh v. Holder***, __F.3d__, 2011 WL 2418894), an *en banc* panel of the Ninth Circuit issued a published decision holding that the Board improperly relied on the corroboration rule of 8 U.S.C. § 1158(b)(1)(B)(ii) when evaluating the timeliness of an asylum application under 8 U.S.C. § 1158(a)(2)(B). The court remanded for the Board to address in the first instance whether an immigration judge could weigh the absence of corroborating evidence in applying the clear and convincing evidence standard to timeliness determinations.

When first raised to a three-judge panel, this case resulted in a favorable decision for the government. The panel not only upheld the agency's finding that the alien failed to establish timely filing of his asylum application because he failed to corroborate his entry date, but the court rejected the dissent's suggestion that a three-step notification process was required for an immigration judge to reject a claim for failure to corroborate. Although the apparent focus of the *en banc* proceedings was whether a three-step notification process was required, at oral argument it became clear that several judges were concerned that the Board mischaracterized the immigration judge's decision– suggesting that the immigration judge had in fact required corroboration in weighing the evidence against the clear and convincing standard, rather than under statutory authority. In doing so, the judges questioned not the fact that corroboration was required, but the basis on which the agency relied. Although the *en banc* panel rejected the presence of an umbrella corroboration rule, the panel suggested that application of the clear and convincing evidence standard could, if the Board so interpreted, include a corroboration requirement similar to the statutory requirement. Additionally, the *en banc* panel provided the very favorable observation that testimony may be credible without rising to the level of clear and convincing evidence.

Singh was a native and citizen of India, who entered the United States without inspection. Roughly one year later, he filed an affirmative asylum application. An asylum officer referred his application to immigration court because he could not establish his date of entry. Singh renewed his asylum application in proceedings. In a May 2006 decision, the immigration judge denied Singh's asylum application because he failed to corroborate his testimony, and therefore failed to establish his entry date by clear and convincing evidence. Although the immigration judge found that Singh established past persecution, he held that the government rebutted any presumption of future persecution (because he could reasonably be expected to relocate) and denied withholding of removal. The Board dismissed his appeal in a January 2008 decision, finding that the immigration judge appropriately required corroborating evidence under 8 U.S.C. § 1158(b)(1)(B)(ii). Singh filed a petition for review, challenging the agency decision as if it was a pre-REAL ID Act case.

The en banc panel determined that the REAL ID Act's corroboration rule applied only to requests for withholding of removal, the merits of asylum applications, and to all other forms of relief.

Although the majority denied the petition for review *(Nirmal Singh v. Holder*, 602 F.3d 982 (9th Cir. 2010)), Judge Berzon issued a lengthy dissent arguing for the first time that the Board applied the wrong statute, and that either statute required a three-step notification process when finding that an alien failed to meet his burden of proof on account of insufficient corroboration. In his petition for rehearing, the alien raised Judge Berzon's views for *en banc* consideration.

Interpreting both 8 U.S.C. §§ 1158 & 1229, the *en banc* panel determined that the REAL ID Act's corroboration rule applied only to requests for withholding of removal, the merits of asylum applications, and to all other forms of relief. The court held that the timeliness determination stood independent of the corroboration rule, although it acknowledged the clear and convincing evidence standard, and that the standard could be interpreted by the Board to allow an immigration judge to consider a lack of corroboration. Because the Board held that 8 U.S.C. § 1158 required corroboration, the court remanded for the Board to address the clear and convincing standard (and the potential influence of an absence of corroboration) in the first instance. The dissent (five judges) suggested that the REAL ID Act's three provisions addressing corroboration had created an umbrella corroboration rule, that necessarily covered timeliness determinations.

As a result of this decision, immigration judges currently lack the explicit authority to require corroboration in timeliness determinations. The *en banc* panel challenges the Board to provide that explicit authority. To the extent that the Board agrees with the *en banc* dissent's conclusion that the REAL ID Act provides an umbrella corroboration provision, the Board could revisit the issue under *Chevron*. If the Board interprets the decision as

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FURTHER REVIEW PENDING: Update on Cases & Issues

212(c) - Comparability

On April 18, 2011, the Supreme Court granted certiorari 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 and excludable under differently phrased statutory subsections, but who did not depart and reenter between his conviction and the commencement of proceedings categorically foreclosed from seeking discretionary 212(c) relief?

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Aggravated Felony - Tax Fraud

On May 23, 2011, the Supreme Court granted certiorari 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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Cancellation - Imputation

On June 23, 2011, the Solicitor General filed a petition for certiorari in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543, two cases raising 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 of removal.

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Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit en banc heard oral arguments in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the BIA determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

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Convictions - State Expungements

On December 16, 2010, the Ninth Circuit en banc heard arguments in ***Nunez-Reyes v. Holder***, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel had applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of congressionally-created immigration law.

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Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009). The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction.

The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101 (a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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Cancellation - Burden of Proof

On March 31, 2011, the government filed a petition for rehearing en banc in ***Rosas-Castaneda,*** 630 F.3d 881 (9th Cir. 2011). The issue raised in the petition is whether an alien can satisfy his burden of proving eligibility for cancellation by showing that his conviction was based on a divisible state offense, but refusing to provide the plea colloquy transcript so that the IJ could determine whether the conviction was an aggravated felony under the modified categorical approach. The Ninth Circuit has ordered petitioner to respond to the government's petition for rehearing.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds that Record, in Its Entirety, Supports Adverse Credibility Determination Even if Some Inconsistencies are Minor**

In ***Dehonzai v. Holder***, __ F.3d __, 2011 WL 1988206 (1st Cir. May 23, 2011) (*Lynch*, Boudin, Thompson (dissenting)), the First Circuit upheld the agency's denial of petitioner's applications for asylum, withholding removal, and CAT protection.

The petitioner, a citizen of the Ivory Coast, entered the United States illegally on July 25, 2000. His wife, Cecile, their three children, his mother, and three of his siblings remained in Ivory Coast. In 2001, he affirmatively applied for asylum, withholding of removal, and CAT protection claiming political persecution. That requests was not granted and, on February 22, 2002, he was placed in removal proceedings. Petitioner conceded removability but renewed his request for asylum, protection under the CAT, and withholding of removal. Following a hearing, an IJ determined that petitioner was not credible and articulated a number of specific grounds for the adverse credibility determination. Accordingly, the IJ denied the requested reliefs and CAT protection. On appeal the BIA found no error in the IJ's adverse credibility determination.

The court concluded that a reasonable fact-finder could have found that petitioner lacked credibility where he testified in a vague and evasive manner, described the mistreatment he experienced in the same words used by another individual, no other evidence supported his claim, and inconsistencies in his testimony were not adequately explained. The court explained that "some of the reasons articulated for the credibility determination are more persuasive than others does not alter the fact that, upon an assessment of the record in its entirety, a reasonable factfinder would not be compelled to make a contrary determination to the finding the BIA and IJ did make," explained the court. Finally, the court noted the petitioner's failure to provide evidence to corroborate basic elements of his claim.

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SECOND CIRCUIT

■ **Second Circuit Holds That Alien Bears Burden To Establish Existence Of Good Faith Marriage To Qualify For Waiver Of Joint Petition Requirement**

In ***Boluk v. Holder***, __ F.3d __, 2011 WL 2184305 (2d Cir. June 7, 2011) (*Jacobs*, Leval, Katzmann), the Second Circuit held that INA § 216(c)(4)(B) is unambiguous in requiring that the alien bear the burden of proving that a qualifying marriage was entered into in good faith when applying for a waiver of the joint petition requirement.

"Petitioner bore the burden of proving eligibility for a good-faith waiver of the joint filing requirement."

The petitioner is a native and citizen of Turkey who became a conditional permanent resident after marrying a United States citizen in 1988. The marriage took place in Turkey but the couple met while working at the same diner in Connecticut. Following the marriage, petitioner remained in Turkey for about a year while his spouse returned to the United States. Their marriage did not flourish and their relationship ended in 1989. In 1994, petitioner filed an I-751 petition to have the condition on his residence removed. However, petitioner's spouse failed to appear at the USCIS interview and the joint petition was denied. In 1996, petitioner filed for divorce. When the divorce became final in 2002, petitioner filed another I-751 petition, this time requesting a waiver of the joint filing requirement on the ground that he had married in good faith.

In 2006, DHS commenced removal proceedings against petitioner on the basis that his conditional status had expired. In 2007 DHS denied the I-751 waiver on the ground that he failed to provide evidence to support his claim that his marriage was entered into in good faith. At hearing before an IJ, petitioner sought review of DHS's denial of the waiver. The IJ questioned the credibility of petitioner and concluded that he had not met his burden to establish the bona fides of his relationship. The BIA affirmed, also finding that petitioner had failed to sustain his burden of proof.

The Second Circuit rejected petitioner's principal argument that because the statute was ambiguous, the burden of proof issue should have been resolved in his favor. The court found that § 216(c)(4)(B) was neither silent nor ambiguous, and that once the government established that petitioner failed to meet the requirements for removal of conditions in the face of a jointly filed petition, petitioner bore the burden of proving eligibility for a good-faith waiver of joint filing requirement.

The court further held that the IJ was permitted to analyze the conduct of the parties after the date of their actual marriage, and thus used the proper legal standard when he determined that the alien had failed to meet his burden. The court noted that petitioner "never supported [his spouse] financially; they had no joint bank account; they did not pay bills together; they signed no joint lease; and they had no children."

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Summaries Of Recent Federal Court Decisions

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Finally, the court held that it lacked jurisdiction to re-weigh the evidence of the alien's good-faith marriage because the agency's determination of how much weight is accorded to any particular fact is not a question of law.

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■ **Denial of Continuance Based on Agency's Lack of Jurisdiction Over Adjustment of Status Application Constitutes Abuse of Discretion**

In ***Friere v. Holder***, __ F.3d __, 2011 WL 2090820 (2d Cir. May 27, 2011) (Miner, Walker, Wesley) (per curiam), the Second Circuit held that the BIA abused its discretion when it denied petitioner's motion for a continuance pending a decision on an application for adjustment of status that had been filed with the USCIS.

The petitioner, a citizen of Brazil, was paroled into the United States in 1999 as a material witness in a criminal case. In 2002, his employer filed with the USCIS an I-140 employment visa petition. USCIS approved that petition in 2003. Petitioner then filed, but subsequently withdrew, an application for adjustment of status. In 2005, after petitioner's parole status had expired, he was served with a NTA charging him with removability as an arriving alien who was not in possession of a valid entry document at the time of his application for admission. Petitioner's request to the IJ for continuance so that he could refile his adjustment application was denied.

The IJ found that under former 8 C.F.R. § 1245.1(a), petitioner was not eligible to adjust his status because he was an arriving alien and that "there [was] no basis to continue the matter pending a possible Second Circuit decision." The BIA affirmed noting that it could not delay the removal proceedings pending USCIS's determination. When petitioner filed his petition for review, the parties stipulated to remand the case to the BIA in light of *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008) (holding that an IJ's lack of jurisdiction to adjudicate an arriving alien's adjustment application did not, by itself, provide an adequate reason for the BIA to deny an arriving alien's motion to reopen while the petitioner pursued adjustment of status with USCIS). On remand, the BIA reaffirmed its earlier decision and noted that it did not have "authority to grant relief based on an application over which we ultimately have no jurisdiction."

"Congress clearly intended to vest authority to consider requests for consents to reapply for admission with the Department of Homeland Security."

In reversing the BIA, the court noted that, in *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008), it held that lack of jurisdiction to adjudicate an arriving alien's adjustment of status application did not, by itself, provide adequate reason to deny an alien's motion to reopen while he pursued adjustment of status with USCIS. The court also suggested that the BIA's standard for continuances in removal proceedings (*Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009)) could be applied here as well.

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THIRD CIRCUIT

■ **Third Circuit Holds That Immigration Judges Lack Jurisdiction To Consider Request For Consent To Reapply For Admission**

In ***Sarango v. Holder,*** __F.3d __, 2011 WL 2573515 (3d Cir. June 30, 2011) (Barry, Ambro, *Van Antwerpen*), the Third Circuit, in an issue of first impression, deferred under *Chevron* to the BIA's interpretation that IJs do not have jurisdiction to consider requests for *nunc pro tunc* consent to reapply for admission to the United States under INA § 212(a)(9)(C)(ii). The BIA reasoned that IJs lack jurisdiction because Congress had delegated that authority to the Secretary of Homeland Security.

The court concluded that the "plain, unambiguous language" compels the result that "Congress clearly intended to vest authority to consider requests for consents to reapply for admission with the Department of Homeland Security." The court noted that the requirement that an alien seek consent from the Secretary of Homeland Security was the result of a 2006 statutory amendment to the INA.

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■ **Third Circuit Overturns Finding That Aliens Presented Actual And Present Danger To United States**

In ***Yusupov v. Attorney General,*** __ F.3d __, 2011 WL 2410741 (3d Cir. June 16, 2011) (*Sloviter*, Greenaway, Stapleton), the Third Circuit overturned the BIA's determination that the aliens presented an actual and present danger to the United States and granted their requests for withholding of removal.

The court ruled that the BIA's determination was not supported by substantial evidence, writing that the BIA incorrectly engaged in de novo review of the immigration judge's factual findings and relied on impermissibly speculative bases for its decision. The court also found that the IJ's adverse credibility determination regarding one of the aliens was erroneous. Further, the court granted both aliens' requests for relief on the grounds that the BIA had already twice considered the record and failed to support its conclusion with substantial evidence,

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and because the government represented at oral argument that there were no additional facts or evidence in the record linking petitioners to groups adverse to the United States.

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FOURTH CIRCUIT

■ **Fourth Circuit Deems "Conclusive, But Incomplete" Conviction Record Insufficient to Show Eligibility for Cancellation of Removal**

In ***Salem v. Holder***, __ F.3d __, 2011 WL 1998330 (4th Cir. May 24, 2011) (*Diaz*, Traxler, King), the Fourth Circuit upheld the agency's determination that petitioner had failed to meet his statutorily-prescribed burden of proof for showing the absence of a disqualifying conviction in order to qualify for cancellation of removal.

Petitioner, an LPR who claimed he was stateless as a result of changes in political boundaries in Jordan and Israel, lawfully entered the United States in 1966. As noted by the court, petitioner "ha[d] amassed a substantial criminal record while in the United States," including a 2007 felony conviction. As a result, DHS charged petitioner as being removable under two separate statutory provisions: 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two or more crimes involving moral turpitude, and 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony under 8 U.S.C. § 110 1 (a)(43)(G), specifically "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

At the IJ hearing petitioner conceded that he was removable for having been convicted of two or more crimes involving moral turpitude but sought cancellation of removal. Petitioner then challenged the DHS's contention that he had been convicted of an aggravated-felony. The IJ denied cancellation, ruling that petitioner had failed to carry his burden of showing by a preponderance of the evidence that he had not been convicted of an aggravated felony. The BIA affirmed.

The Fourth Circuit held that under the unambiguous terms of the statute, petitioner had the burden "to prove the absence of any impediment to discretionary relief." "Presentation of an inconclusive record of conviction is insufficient to meet a noncitizen's burden of demonstrating eligibility, because it fails to establish that it is more likely than not that he was not convicted of an aggravated felony. In such a case, fidelity to the INA requires that the noncitizen, as the party bearing the burden of proof, suffer the detriment." Accordingly, the court affirmed that in seeking cancellation petitioner had presented only a "complete, but inconclusive" conviction record to prove that a previous larceny conviction was for conduct that fell outside the scope of the statutory definition of an "aggravated felony."

"Fidelity to the INA requires that the noncitizen, as the party bearing the burden of proof, suffer the detriment."

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■ **Fourth Circuit Holds that Petitioner Did Not Qualify for Citizenship Because Father Did Not Meet "Legal Separation" Requirement**

In ***Johnson v. Whitehead***, __ F.3d __, 2011 WL 1998333 (4th Cir. May 23, 2011) (Traxler, *Wilkinson*, Gregory), the Fourth Circuit concluded that the alien did not qualify for citizenship under the plain meaning of INA § 321 because his father, who was never married to his mother, did not meet the "legal separation" requirement. The court rejected petitioner's argument that he qualified for citizenship because his father had sole custody of him when he naturalized. The court also rejected a constitutional challenge to the statute finding that, under the *Fiallo v. Bell* standard, "Congress certainly had a rational basis here . . . . the distinction between children born in and out of wedlock protects parental rights."

Additionally, the court rejected petitioner's argument that the DHS was precluded from relitigating the issue of alienage even though the government had failed to prove alienage in a 1998 proceeding, ruling that petitioner had failed to satisfy the requirements for issue preclusion and that, even if he had, preclusion would not apply given his apparent criminal misconduct.

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EIGHTH CIRCUIT

■ **Eighth Circuit Rules K-1 Fiancée Visa Violator Cannot Adjust Status Under INA § 245(i)**

In ***Birdsong v. Holder***, 641 F.3d 957 (8th Cir. 2011) (*Loken*, Colloton, Nelson), the Eighth Circuit held that an alien who arrived on a K-1 fiancée visa, but did not marry her petitioning fiancé or depart within ninety days as required by the terms of the visa, was not eligible for adjustment of status under INA § 245(i).

The petitioner, a citizen of the Philippines, had entered the U.S. in 2001 on a K-1 visa to marry her U.S. citizen fiancé(e), as required under the terms of the K visa. She did not do so. Instead, in April 2003, she married another U.S. citizen who filed an I-130 visa petition on her behalf. When the petition was approved in October 2004, petitioner then filed for adjustment of status. DHS denied the application and placed her in removal pro-

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ceedings for violating the terms of her K-1 visa. The IJ and the BIA likewise concluded that petitioner was barred from adjusting her status under 8 C.F.R. 1 for violating the terms of her K-1 visa.

Petitioner contended that the language of INA § 245(d) expressly prohibits only adjustment under § 245(a), and that because she fell within the catchall class of aliens who have "otherwise violated the terms of a nonimmigrant visa," she was eligible to adjust status under § 245(i) notwithstanding § 245(d) bar. The court, agreeing with the Tenth Circuit, held that the statutory language was ambiguous and gave *Chevron* deference to 8 C.F.R. § 245.1, which prohibits a K-1 visa violator from adjusting status under any provision. "These provisions, which bar [petitioner] as a K–1 visa holder from adjusting her status on any basis other than her marriage to the U.S. citizen who petitioned on her behalf, are consistent with the 'carefully crafted scheme that Congress created for the purpose of avoiding marriage fraud,'" explained the court.

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NINTH CIRCUIT

■ **Ninth Circuit Dismisses Challenge To Denial Of Stay Motion For Lack Of Jurisdiction**

In ***Shaboyan v. Holder***, __ F.3d __, 2011 WL 2557658 (9th Cir. June 29, 2011) (Canby, Gould, Tallman) (*per curiam*), the Ninth Circuit held that the BIA's denial of a motion to stay removal pending disposition of a motion to reopen, without more, is not a "final order of removal" that may give rise to a petition for review. "The order does not 'conclud[e] that the alien is deportable,' nor does it "order[] deportation," explained the court.

Consequently the court held the BIA's denial of a stay of removal may only be reviewed as part of petition to review a final order of removal, such as the denial of a motion to reopen.

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■ **Ninth Circuit Holds Agency Abused Its Discretion By Denying Petitioner's Untimely Motion To Reopen.**

In ***Avagyan v. Holder***, __F.3d__, 2011 WL 2586275 ((9th Cir. July 1, 2011) *Fletcher*, Berzon, Callahan (dissenting)), the Ninth Circuit held that the BIA abused its discretion by denying as untimely petitioner's motion to reopen on grounds of ineffective assistance in applying for adjustment of status. The court held that, notwithstanding a ten-month delay, the alien made diligent efforts to pursue her relief between the time prior counsel failed to give her competent advice and the time she learned of that failure. The court thus granted the petition for review in part and remanded the case to the agency.

Pending post-conviction motions or other collateral attacks did not negate the finality of a conviction for immigration purposes.

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TENTH CIRCUIT

■ **Tenth Circuit Concludes It Has Jurisdiction Over Denial Of Continuance, Holds Alien Is Removable Based On Heroin Conviction**

In ***Jimenez-Guzman v. Holder***, __F.3d__, 2011 WL 2547562 (10th Cir. June 28, 2011) (Matheson, *McKay*, Ebel), the Tenth Circuit held that it had jurisdiction to consider the denial of the petitioner's request for a continuance. However, the court held that the denial was not an abuse of discretion because pending post-conviction motions or other collateral attacks did not negate the finality of a conviction for immigration purposes – unless and until the conviction is overturned. The court, noted that the IJ had already continued the removal hearing several times while petitioner awaited the state trial court's disposition of his post-conviction motion.

Furthermore, the court agreed with the BIA that petitioner's express concession that he had been convicted of the drug crime charged in the notice to appear was sufficient to establish his removability, rejecting his argument that the "notice to appear must be in letter-perfect alignment with the state criminal documents." The court explained that although "DHS initially has the burden to prove removability by clear and convincing evidence . . . when an alien concedes removability, 'the government's burden in this regard is satisfied.'"

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Rejects Ineffective Assistance Of Counsel Claim**

In ***Ali v. Holder***, __F.3d__, 2011 WL 2462560 (11th Cir. June 22, 2011) (Pryor, Cox, Pannell (by designation)), the Eleventh Circuit held that an alien whose former attorney conceded removability for willful misrepresentation of a material fact did not receive ineffective assistance of counsel because contesting the allegation would have been futile.

The court explained that any challenge to the allegation would

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have been futile due, in part, to the alien's own testimony, and rejected the alien's request to strike that testimony as without precedent.

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DISTRICT COURTS

■ Central District Of California Dismisses Six Causes Of Action Surrounding Immigration Site Visit

In ***Cost Saver Management v. Napolitano***, No. 10-cv-02105 (C.D. Cal. June 7, 2011) (Tucker, J.), the District Court granted the government's motion to dismiss of six of eight causes of action brought following a USCIS site visit at a company in India. The court dismissed three claims for lack of jurisdiction, concluding that the doctrine of consular nonreviewability precluded review of the revocation of the alien beneficiary's visitor visa, and that the California and ABA Model Rules of Professional Conduct do not create a right of action for allegedly unauthorized contact with represented parties.

The court then dismissed two additional claims with prejudice, because the prospective employer had failed to identify a sufficient liberty or property interest to support a due process right in its nonimmigrant worker petition, and the Paperwork Reduction Act does not provide a private right of action. The court dismissed a challenge to USCIS's alleged site visit policy with leave to amend. The court also dismissed the alien beneficiary from the entire action for lack of standing. Two claims, challenging USCIS's denial of the employer's nonimmigrant worker petitions, remain.

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■ Southern District Of California Approves Settlement Agreement In Class Action Regarding Immigration Detainee Medical Care

In ***Woods v. Myers***, (S.D. Cal. June 10, 2011) (Sabraw, J.), the District Court for the Southern District of California held a fairness hearing and approved the parties' proposed settlement agreement of a class action lawsuit alleging inadequate medical, dental, vision and mental health care received by detainees at an ICE detention facility in San Diego.

At the fairness hearing, the court found that reasonable notice had been given to all class members, and considered the written objections by two class members who also addressed the court at the hearing. The court overruled the objections and found the agreement "fair, reasonable and adequate." Accordingly, the court approved the agreement. The agreement states that defendants will provide health care for serious medical needs and, pursuant to National Committee on Correctional Health Care standards, hire additional mental health care staff, promptly review and determine treatment authorization requests, and timely authorize off-site medical treatment. The agreement will expire after one year.

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REAL ID Act corroboration provisions

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conducting a *Chevron* step two analysis (the *en banc* decision is ambiguous regarding which level of *Chevron* analysis it applied), the Board can interpret the statute *de novo* and seek deference to its decision under *Brand X*. Even if the court's decision is seen as an application of *Chevron* step one, the court invited the Board to interpret the clear and convincing standard in a way that allows the immigration judge to weigh the lack of corroborating evidence. Either way, the Board has the leeway to establish unequivocally that an immigration judge may require corroboration even where the alien is credible.

The *en banc* decision also has the advantage of stating that "testimony may be credible without rising to the level of clear and convincing evidence," a significant change in direction from earlier rulings. In *Khunaverdiants v. Mukasey*, 548 F.3d 760 (9th Cir. 2008), the court ruled that credible testimony was virtually *per se* clear-and-convincing evidence. Later, in *Sillah v. Holder*, 333 Fed.Appx. 209 (9th Cir. Sept. 03, 2009), the court held that undisputed testimony on arrival date must be accepted as true, and that it was error for the agency to reject the claim under the clear and convincing standard.

With *Nirmal Singh*, credible testimony alone may now be insufficient to establish timeliness by clear and convincing evidence. Extending the concept, *Nirmal Singh* could potentially be used to argue that, even where an alien is credible, the agency should still be able to weigh whether evidence is sufficient to prove a claim – even under the preponderance of the evidence standard.

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This Month's Topical Parentheticals

ADJUSTMENT

■ ***Birdsong v. Holder***, __ F.3d __, 2011 WL 2304180 (8th Cir. June 13, 2011) (deferring to AG's interpretation (as set forth in regulations) that a K-1 visa holder is ineligible to adjust her status on any basis other than her marriage to the United States citizen who petitioned on her behalf to enter the US pursuant to a fiancé visa)

■ ***Boluk v. Holder,*** __ F.3d __, 2011 WL 2184305 (2d Cir. June 7, 2011) (holding BIA properly concluded that alien had burden to show his marriage was entered into in good faith for purposes of seeking a hardship waiver of the requirements for filing a joint petition with citizen spouse to lift the conditions of his residency; BIA properly considered the state of the marriage after the wedding in determining alien's intent at the time of marriage)

■ ***Matter of L-E-***, 25 I&N Dec. 541 (BIA June 23, 2011) (holding that a derivative child of a nonimmigrant fiancé(e) visa holder under section 101(a)(15)(K)(iii) of the INA, is not ineligible for adjustment of status simply by virtue of having turned 21 after admission to the United States on a K-2 nonimmigrant visa)

■ ***Palacios v. Holder***, __ F.3d __, 2011 WL 2450985 (9th Cir. June 21 2011) (finding petitioner ineligible under 8 U.S.C. § 1182(a)(9)(C)(i)(I), to adjust status because she reentered the U.S. without admission after having been "unlawfully present" in the country for more than 1 year; holding that application of § 1182(a)(9)(C)(i)(I) to petitioner was not impermissibly retroactive merely because her unlawful presence pre-dated IIRIRA's April 1, 1997 effective date; further holding that she does not fall within § 1182(a)(9)(C)(ii)'s exception to inadmissibility because she failed to remain outside the country for more than ten years before returning)

ASYLUM & WITHHOLDING

■ ***Abraham v. Holder,*** __ F.3d __, 2011 WL 2138149 (7th Cir. June 1, 2011) (holding that: [1] substantial evidence supports IJ's post-REAL ID Act adverse credibility finding regarding Syrian Christian woman's claim of past beating and future honor killing by brother and father for dating a Muslim, based on numerous inconsistencies regarding the dating relationship, contact with family after disclosure, and applicant's living situation after beating; [2] REAL ID Act constitutes sufficient notice of corroboration requirement, and IJ is not required to provide specific notice and opportunity to provide corroboration; [3] IJ did not err in failing to address cousin's corroborating testimony about future honor killing, where record shows IJ understood all the evidence and still found proof lacking)

■ ***Matter of N-M-***, 25 I&N Dec. 526 (BIA June 9, 2011) (holding that: [1] contrary to pre-REAL ID Ninth Circuit case law, threats or retaliation for whistleblowing or opposition to government corruption are not necessarily on account of political opinion, because REAL ID Act requires applicant's actual or imputed anti-corruption belief to be a central reason for persecution; [2] three factors are to be considered in assessing motive in whistleblowing cases: [i] whether applicant's activities could be perceived as expressions of anti-corruption beliefs; [ii] direct or circumstantial evidence that applicant's actual or perceived anti-corruption beliefs are motive for harm; [iii] extent of government corruption; and [3] the question whether persecution is 'on account of' a qualifying ground is factfinding reviewed by Board under clearly erroneous standard)

■ ***Nirmal Singh v. Holder***, __ F.3d __, 2011 WL 2418894 (9th Cir. June 17, 2011) (en banc) (holding that the Board statutorily erred in applying the REAL ID Act's corroboration provision for burden of proof of the merits of an asylum application to the separate provision governing burden of proof for the timeliness of an application; remanding for the agency to decide if the applicant's credible testimony, without corroboration, proves by "clear and convincing evidence" the application was timely)

■ ***Yusupov v. Att'y Gen. of United States,*** __ F.3d __, 2011 WL 2410741 (3d Cir. June 16, 2011) (holding that the BIA's determination that petitioners are ineligible for withholding because they present an actual and present danger to the US was not supported by substantial evidence; further finding that because the BIA had twice considered the record and failed to support its conclusion with substantial evidence, and there were no additional facts or evidence in the record to link petitioners to groups adverse to the United States, it was appropriate to direct the BIA to grant withholding rather than remand again)

CANCELLATION

■ ***Guevara v. Holder***, __ F.3d __, 2011 WL 2163964 (9th Cir. June 3, 2011) (holding that the grant of employment authorization pending adjudication of an adjustment application does not confer admission status on an undocumented alien for purposes of calculating the seven years of continuous residence required for an LPR to qualify for cancellation of removal) (Judge Fisher dissented)

■ ***Vasquez de Alcantar v. Holder,*** __ F.3d __, 2011 WL 2163965 (9th Cir. June 3, 2011) (holding that an approved Form I-130 Petition for Alien Relative does not confer admission status on an undocumented alien for purposes of calculating the seven years of continuous residence required for an LPR to qualify for cancellation of removal) (Judge Fisher concurred)

This Month's Topical Parentheticals

CITIZENSHIP

■ ***Flores-Villar v. United States,*** __ S. Ct. __, 2011 WL 2297764 (U.S. June 13, 2011) (an equally divided Supreme Court affirmed the Ninth Circuit's holding in a criminal-reentry prosecution case that the imposition of a shorter physical presence requirement on unwed citizen mothers than that applicable to unwed citizen fathers did not violate equal protection, and agreed with the district court that petitioner was therefore not a citizen)

■ ***Watson v. Holder,*** __ F.3d __, 2011 WL 2119768 (2d Cir. May 31, 2011) (addressing derivative citizenship claim and remanding for BIA to: (1) clarify precisely how it interprets the concept of "legitimation" as that term is used in INA § 101(c)(1); (2) justify how it arrived at that particular interpretation; and (3) analyze and explain how its understanding of "legitimation" applies to Jamaican law and the facts of the case)

CONVENTION AGAINST TORTURE

■ ***Omar v. McHugh,*** __ F.3d __, 2011 WL 2451016 (D.C. Cir. June 21, 2011) (holding that petitioner, a dual citizen of Jordan and the United States who the US has detained in Iraq for several years and intends to transfer to the Iraqi government based on his terrorist activities, does not have a right under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") to judicial review of conditions in the receiving country to which he may be transferred because a torture claim under FARRA may be raised only in a petition for review of a final order of removal)

CRIMES

■ ***Gil v. Holder,*** __ F.3d __, 2011 WL 2464782 (9th Cir. June 20, 2011) (affirming the BIA's determination that petitioner's conviction under California law for carrying a weapon concealed within a vehicle categorically constitutes a removable "firearms offense" disqualifying petitioner for cancellation of removal) (Judge Rymer concurred in part and dissented in part)

■ ***Waugh v. Holder***, __ F.3d __, 2011 WL 2464779 (10th Cir. June 22, 2011) (rejecting petitioner's argument that under the Supreme Court's decision in *Padilla v. Kentucky*, the government must prove as an element of removability that the underlying conviction comported with the Sixth Amendment's right to effective assistance of counsel)

■ ***Pagayon v. Holder***, __ F.3d __, 2011 WL 2508239 (9th Cir. June 24, 2011) (holding that an IJ may consider an alien's admissions regarding removability if they are corroborated by the "narrow, specified set of documents that are part of the record of conviction"; in this case, the court reasoned that the alien's admission to the drug involved in his conviction sustained his removability by providing the necessary connection between his inconclusive abstract of judgment and the charging document)

■ ***United States v. Sierra-Ledesma,*** __ F. 3d __, 2011 WL 2152076 (10th Cir. June 2, 2011) (holding that the district court should have made clear to the jury that, for purposes of a prosecution under 8 U.S.C. § 1326(a)'s "found in" language, the government must prove beyond a reasonable doubt that defendant reentered the United States with the intent to do so)

■ ***United States v. Portillo-Munoz,*** __ F.3d __, 2011 WL 2306248 (5th Cir. June 13, 2011) (holding that alien's conviction under 18 U.S.C. § 922(g)(5) for being an illegal alien in possession of a firearm did not violate the Second Amendment's right to bear arms because the protections contained in that Amendment do not extend to aliens illegally present in the United States) (Judge Dennis dissented)

FAIR HEARING – DUE PROCESS

■ ***Ali v. United States Att'y Gen.***, __ F.3d __, 2011 WL 2462560 (11th Cir. June 22 2011) (holding that substantial evidence supported BIA's finding that former attorney's decision to concede removability was a reasonable strategic decision and did not constitute ineffective assistance of counsel, especially given that any challenge to removability would be futile)

■ ***Turner v. Rogers,*** __ S. Ct. __, 2011 WL 2437010 (U.S. June 20, 2011) (holding that the "Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)" (emphasis in original); vacated and remanded, however, because the contempt proceeding did not include alternative procedural safeguards that would insure fundamental fairness) (Justices Thomas, Scalia, Alito and Roberts dissented).

■ ***Garcia v. Holder,*** __ F.3d __, 2011 WL 2149473 (S.D.N.Y. June 1, 2011) (holding that court lacks jurisdiction over petitioner's challenge to removal order; further finding that petitioner is being detained consistent with due process)

JURISDICTION

■ ***Irigoyen-Briones v. Holder,*** __ F. 3d __, 2011 WL 2119908 (9th Cir. May 31, 2011) (reconsidering its prior decision and holding that the BIA erred as a matter of law in concluding that it lacked jurisdiction over petitioner's one-day late notice of appeal because the 30-day appeal deadline is not jurisdictional; noting that *Brand X* deference is not warranted because the statute is not ambiguous)

■ ***Delgado v. Quarantillo*** __ F.3d __, 2011 WL 2418741 (2d Cir. June 17, 2011) (holding that pursuant to 8

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U.S.C. § 1252(a)(5) the district court lacked jurisdiction to review petitioner's request that the court compel adjudication of his I-212 application because it constituted an indirect challenge to her reinstated removal order)

■ ***Alli v. Decker,*** __ F.3d __, 2011 WL 2450967 (3d Cir. June 21, 2011) (holding that 8 U.S.C. § 1252(f)(1) – which precludes class actions that seek to "restrain or enjoin the operation of" several INA statutes – *does not* bar a class action seeking a declaratory judgment that the continued mandatory detention of class members under 8 U.S.C. § 1226(c) violates the INA and due process)

■ ***Ixcot v. Holder,*** __ F.3d __, 2011 WL 2138234 (9th Cir. June 1, 2011) (holding that application of the reinstatement statute is impermissibly retroactive when applied to aliens who filed for discretionary relief prior to IIRIRA's effective date; concluding that court lacked jurisdiction over the agency's factual determination that petitioner was ineligible for special rule cancellation under NACARA)

■ ***Roberts v. Napolitano,*** __ F. Supp. 2d, 2011 WL 2441375 (D.D.C. June 20, 2011) (holding that the district court was precluded from reviewing the petitioner's writ of mandamus to compel DHS to approve his application to participate in USCBP's Global Entry Program [a program that provides expedited clearance through U.S. customs to certain pre-approved low-risk travelers] because there were no judicially manageable standards for judging how and when an agency should exercise its discretion under the program)

■ ***Matter of E-R-M- & L-R-M-***, 25 I&N Dec. 520 (BIA June 3, 2011) (holding that section 235(b)(1)(A)(i) of the INA (expedited removal) does not limit the prosecutorial discretion of DHS to place arriving aliens in section 240 removal proceedings; further holding that the fact that an IJ has no jurisdiction over adjustment applications filed pursuant to the Cuban Refugee Adjustment Act does not negate his or her jurisdiction over the removal proceedings of arriving Cuban aliens)

STAY

■ ***Maldonado-Padilla v. Holder***, __ F.3d __, 2011 WL 2508234 (2d Cir. June 24, 2011) (Jacobs, C.J.) (on a single-judge motion for a stay, Judge Jacobs denied petitioner's motion for a stay of removal pending transfer of the petition for review to the Fifth Circuit (the proper venue) because petitioner failed to meet her burden of demonstrating that a stay should be granted)

TPS

■ ***Matter of Echeverria***, 25 I&N Dec. 512 (BIA June 1, 2011) (holding that a late initial registrant for TPS under 8 C.F.R. § 1244.2(f)(2) must independently meet all initial registration requirements of TPS, including showing that he or she is a national of a foreign state currently designated for TPS by the Attorney General)

■ ***Matter of N-C-M-***, 25 I&N Dec. 535 (BIA June 10, 2011) (holding that to be eligible for late initial registration for TPS an applicant filing as the "child of an alien currently eligible to be a TPS registrant" must establish only that he or she qualified as a "child" at the time of the initial registration period not at the time the application was filed)

WAIVERS

■ ***Sandoval v. Holder***, __ F.3d __, 2011 WL __ (8th Cir. June 14, 2011) (remanding to the BIA to clarify the standard it uses in applying section 212(a)(6)(C)(ii) (ground of inadmissibility for asserting a false claim of US citizenship) to unaccompanied alien minors and to articulate the reasons the minor deserves no relief under that standard)

National Initiative to Combat Immigration Services Scams

The U.S. government recently unveiled a multi-agency, nationwide initiative to combat immigration services scams. The Departments of Homeland Security (DHS) and Justice (DOJ) and the Federal Trade Commission (FTC) are leading this historic effort.

This initiative targets immigration scams involving the unauthorized practice of immigration law (UPIL), which occurs when legal advice and/or representation regarding immigration matters is provided by an individual who is not an attorney or accredited representative.

This initiative is set upon three pillars—enforcement, education and continued collaboration—designed to stop UPIL scams and prosecute those who are responsible; educate immigrants about these scams and how to avoid them; and inform immigrants about the legal immigration process and where to find legitimate legal advice and representation.

"This coordinated initiative targets those who prey on immigrant communities by making promises they do not keep and charging for services they are not qualified to provide," said Tony West, Assistant Attorney General for the Civil Division of the Department of Justice. "We are attacking this problem both through aggressive civil and criminal enforcement and by connecting qualified lawyers with victims who are trying to navigate a complicated immigration system."

Summer at OIL: Interns' Perspective

By Vanessa Molina

Spending the summer at OIL has served as the perfect complement to my legal education because it has solidified my immigration law foundation. I had the opportunity to hone my legal writing skills and learn about appellate practice and procedures working with Papu Sandhu and Jennifer Keeney. My experience at OIL will prove invaluable as I launch my career as an immigration attorney. The discussions with my mentor Papu have been particularly helpful in developing analytical skills through the "appellate practice lens." Additionally, I was exposed to the latest developments in immigration law through the wide variety of training seminars offered at OIL.

By Theresa Forbes

Over the summer, I have had the benefit of collaborating with the OIL's attorneys and staff and interns from the entire Civil Division. I have built relationships through weekly softball games at the National Mall, lunches with the interns, social gatherings, trivia nights, and the Bernal Team's Caribbean Calypso Party. Our class also visited the Supreme Court, met and talked to Justice Sotomayor, toured the Capitol, the Pentagon, the White House, Arlington Immigration Court, and the Secret Service.

Moreover, working at OIL has provided me with a broad range of opportunities to learn more about immigration law and the Department of Justice through the Tuesday meetings, criminal training seminars, films like *Sin Nombre* and *Well Founded Fear*, roundtables with various government agencies, resume clinics, lecture series, and Brown Bag Lunches with Attorney General Eric H. Holder, Assistant Attorney General Tony West, Deputy Assistant Attorney General Bill Orrick, and OIL's Director David M. McConnell. I also had the opportunity to meet OIL's wonderful support staff who have assisted with numerous tasks throughout the summer.

In short, my fellow interns and I have had many wonderful and valuable experiences this summer because OIL- Appellate invests resources, time, and effort into the Summer Legal Intern Program!

Timing of judicial review

(Continued from page 4)

Ventura, 537 U.S. 12, 16-17 (2002) (holding that a reviewing court may not conduct a de novo inquiry into a matter entrusted by law to an administrative agency, but must remand for the agency to decide the matter in the first instance). The optimal resolution to the "reconsideration quandary" is the bright line jurisdictional approach taken by the Sixth Circuit in *Mu Ji Li*.

However, given that other circuits have not jumped on board with *Mu Ji Li*, the only means of avoiding the murky law currently developing in the circuit courts may be for the Board to expressly vacate its prior decisions when it grants reconsideration, as all circuits recognize that an express vacatur defeats finality of the decision under review.

By Terri Scadron, Assistant Director, OIL
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INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

- **July 18, 2011.** OIL Brown Bag Lunch & Learn with DHS Senior Ombudsman, Wendy Kamenshine.

- **July 26, 2011.** Brown Bag Lunch & Learn with author and Professor Susan Martin of Georgetown University.

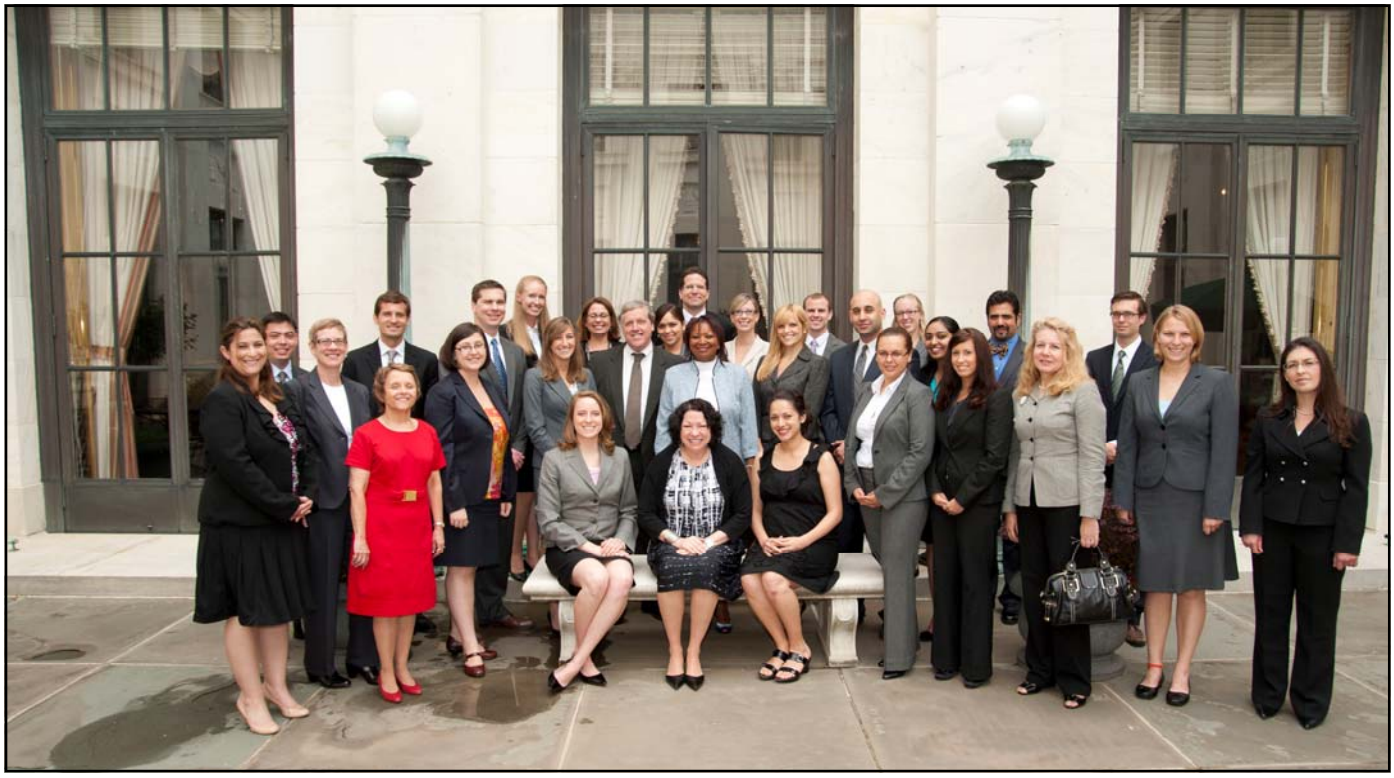
- **October 3-7, 2011.** OIL's 17th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

For additional information about these training programs contact Francesco Isgro at Francesco.Isgro@usdoj.gov.

INSIDE OIL

OIL's summer interns have spent the last few weeks collaborating with the OIL's attorneys and staff and interns from the Civil Division, and building relationships by participating in weekly softball games at the National Mall, attending lunches and social gatherings, trivia nights with interns from other components.

OIL's interns have visited the Supreme Court, met and talked to Justice Sotomayor (pictured below), toured the White House and observed hearings at the Arlington Immigration Court. The interns have attended lecture series and Brown Bag Lunches with Attorney General Eric H. Holder, Assistant Attorney General Tony West, Deputy Assistant Attorney General Bill Orrick, and OIL's Director David M. McConnell.



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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