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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Ninth Circuit Upholds Finding That Immigrant Seeking Admission Was Inadmissible Because He Was Likely To Engage In Terrorist Activity

In *Abufayad v. Holder,* __ F.3d __, 2011 WL 540545 (9th Cir. February 16, 2011) (*Gould*, Ikuta, Mahan), the Ninth Circuit held that substantial evidence supported the BIA's finding that Abufayad, an immigrant seeking admission, was likely to engage in terrorist activity upon his entry to the United States. The court found that despite his presentation of a valid visa, where the government provided "some evidence" of his inadmissibility, the burden shifted to Abufayad to prove "clearly and beyond a doubt" that he was not inadmissible.

Abufayad, is a Palestinian who was born in Saudi Arabia. He lived in Gaza from age six to about age eighteen, when he left to attend university in the West Bank. He later moved to Egypt. His father and siblings reside in the United States. In January 2007, Abufayad obtained an immediate relative immigrant visa, as the unmarried child under 21 years of age of a U.S. citizen. On February 17, 2007, he presented himself for admission to the United States at the San Francisco International Airport. However, a CBP agent suspicious of Abufayad "confrontational" attitude took him to secondary inspection where agents examined his luggage and computer, including an external hard drive. When the agents found "anti-American" materials in the com-

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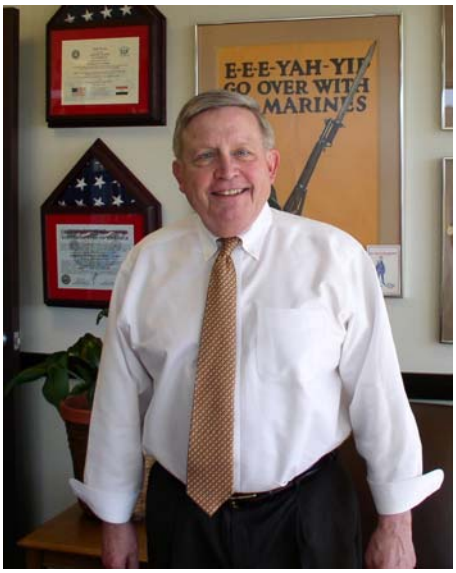
OIL Director Thomas W. Hussey Steps Down David McConnell Named Acting Director

Thomas Hussey, who has served as OIL's second Director since 1999, has stepped down to become Special Immigration Counsel in the Appellate Section. Deputy Director David McConnell has been named Acting Director.



Mr. Hussey joined OIL at its founding in 1983. A graduate of George Washington University, he served with the United States Marines in Vietnam in 1968-69. Mr. Hussey received his Juris Doctor from the University of Virginia in 1975, and clerked for Judge Stanley Harris on the District of Columbia

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Likely to engage in terrorist activity

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puter, Abufayad was detained for further questioning and his computer was seized for a detailed forensic analysis.

Following the examination of the computer data, a CBP agent concluded that a significant amount of the stored information was "jihadist material." The computer also contained hacking programs, stolen credit card numbers, and contact information on the defunct Islamic Association for Palestine, a designated terrorist organization. For several days, Abufayad was interviewed by Agent Mandoli, an ICE Special Agent assigned to the FBI JTTF. DHS then instituted removal proceedings alleging that Abufayad was inadmissible under INA § 212 (a)(3)(B)(i)(II) ("likely to engage after entry in any terrorist activity") and INA § 212(a)(3)(B)(i)(II) (affording material support to a terrorist organization).

At the removal hearing DHS presented the testimony of Mandoli, who testified about the computer's contents and his interview with Abufayad, and FBI Special Agent Miranda who testified as an expert witness. Abufayad also testified about the contents of his computer and his alleged connection to Hamas, and disclaimed any connection to any organization advocating violence. At the conclusion of the hearing, the IJ found Abufayad inadmissible as charged. Abufayad then sought deferral of removal under CAT, arguing that DHS's investigation into his background and his detention would subject him to torture if returned to the Palestinian territories. The IJ granted the request, finding it "highly probable" that Abufayad would face "detention and interrogation by use of torture as a suspected Hamas supporter." Both parties appealed to the BIA.

The BIA upheld the IJ's finding of inadmissibility under § 212(a)(3)(B)(i)(II), but declined to review the finding that Abufayad was inadmissible because he had given material support to a terrorist organization. The BIA noted that the IJ had properly concluded that there was "reasonable ground to believe" that Abufayad would engage in terrorist activity after entering the United States. However, the BIA reversed the IJ's grant of CAT protection, noting that the IJ's factual findings were not clearly supported by the record, including the finding that the Israeli authorities were aware of the accusations lodged against Abufayad as a Hamas supporter and potential terrorist.

The Ninth Circuit preliminarily determined that although an applicant for admission normally has the burden of establishing his admissibility, where an applicant possess a valid visa, constituting prima facie evidence of admissibility "the burden shifts to the Government to submit 'some evidence' that he is not admissible under the charged grounds." If the government meets its burden by introducing "reasonable, substantial, and probative evidence" of inadmissibility, the applicant bears the burden of rebuttal in proving that he is "clearly and beyond a doubt . . . not inadmissible."

Upon review for substantial evidence, the court ruled that the government "plainly" satisfied the "some evidence" standard when it submitted evidence of the large quantity of jihadist materials found on Abufayad's computer, Abufayad's inconsistent statements when confronted with it, and testimony of a terrorism expert opining that these facts supported a reasonable ground to believe Abufayad would engage in terrorist activity upon admission. Abufayad's failure to rebut this evidence "clearly and beyond a doubt" rendered him inadmissible and removable.

The court rejected Abufayad's contention that the absence of an adverse credibility finding against him required the BIA to accept his testimony as true. "There is no general requirement that the testimony of an applicant seeking admission to the United States outside of the asylum context be regarded as true," said the court. The court noted that in the asylum context the "deemed true" convention is justified in part because of the difficulty of proving threats by persecutors. "We decline to extend its application to contexts where such an adjustment to normal evidentiary burdens is not warranted," held the court.

The court also upheld the denial of CAT protection noting that under *Hosseini v. Gonzales*, 471 F.3d 953 (9th Cir. 2006), an applicant who claims that the outcome of is immigration proceedings have rendered him vulnerable to torture, "must show both that the authorities in the country of removal will know of those proceedings and that the petitioner will likely face torture as a result." The court agreed with the BIA's finding that objective evidence in the record did not support the IJ's "assumption[s]" that Israeli authorities would know about terrorist allegations against Abufayad" or that he would be torture by the Palestinian Authority. The court acknowledged that "reasonable factfinders could differ, as the experts did in this case, over whether Abufayad faces a more than fifty percent probability of torture upon return." But, "in light of the record, a reasonable factfinder would not be compelled to conclude that the BIA erred in its determination that the IJ's award of CAT protection was based on undue speculation," concluded the court.

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Defending Collateral Challenges To Executed Immigration Orders

Aliens increasingly challenge immigration orders that have been executed and reinstated pursuant to 8 U.S.C. § 1231(a)(5) (reinstatement statute). In many instances, they argue that their original removal proceedings violated due process or resulted in some other error of law. The government has made several arguments in response. This article provides a summary of some of these arguments and an overview of the developing case law.

While the article focuses on responding to collateral challenges in the courts of appeals, it is worth noting at the outset that the REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) ("REAL ID Act"), categorically precludes such challenges in district courts. Whereas some courts previously found habeas review available in district courts to review statutory and constitutional challenges to already-executed immigration orders, *see Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964 (9th Cir. 2004); *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002), the REAL ID Act clarified that district courts lack jurisdiction, in habeas or otherwise, to review such challenges. *See* 8 U.S.C. § 1252(a)(5).

The government also argues that there is no jurisdiction to review executed immigration orders in the courts of appeals. This issue often arises when an alien files a timely petition for review of a reinstatement order, but challenges the merits of the underlying order (the one that was reinstated) despite the fact that no timely petition for review of the underlying order has been filed.

At the heart of OIL's arguments is the principle of finality. Once an alien is ordered removed, has exhausted or waived his administrative and judicial remedies, and has been deported from the United States, the case is closed. He should not be able to gain a right to re-litigate his case by committing an illegal act – *i.e.*, illegally reentering the country. *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (en banc). As the First Circuit has stated, "[d]ue process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country." *Pena-Muriel v. Gonzales*, 489 F.3d 438, 443 (1st Cir. 2007).

Below are some of the specific arguments that litigators should consider making in these cases:

1. Failure to meet 30-day deadline for filing petition for review

An alien is required to seek judicial review of an immigration order by filing a petition for review within 30 days of the date of the order, *see* 8 U.S.C. § 1252(b)(1), and therefore most petitions which collaterally challenge executed orders will simply be untimely. Aliens have argued, however, that courts may review an executed order if the review petition is filed within 30 days of the *reinstatement order* even where the petition was filed well beyond the 30-day deadline with respect to the original order. The theory is that the purportedly invalid original order has tainted the reinstatement. That theory, however, circumvents Congress' exclusive procedure for judicial review and its strict 30-day deadline by allowing aliens to bootstrap review of the original order by simply filing a timely petition of the reinstatement order, which may be issued years after execution of the original order. *Cf. Stone v. INS*, 514 U.S. 386 (1995) (holding that a timely motion for reconsideration of the BIA's decision does not toll the running of the 90-day period for review of the underlying order).

Once an alien is ordered removed, has exhausted or waived his administrative and judicial remedies, and has been deported from the United States, the case is closed.

At first glance, a survey of reinstatement cases suggests that courts have ignored the 30-day deadline by asserting jurisdiction over executed orders in petition-for-review reinstatement cases. *See Garcia de Rincon v. DHS*, 539 F.3d 1133 (9th Cir. 2008); *Martinez-Merino v. Mukasey*, 525 F.3d 801 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278 (10th Cir. 2007); *Debeato v. Att'y Gen. of United States*, 505 F.3d 231 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006).

These cases are distinguishable, however, because the 30-day deadline was not at issue in any of them. *Debeato*, *Ramirez-Molina*, and *Martinez-Merino* involved habeas challenges to the aliens' executed orders, which were subsequently transferred to the courts of appeals following enactment of the REAL ID Act. Significantly, the 30-day deadline is waived in REAL ID transfer cases. *See* REAL ID Act § 106(c), 119 Stat. at 311. Furthermore, *Lorenzo* and *Garcia de Rincon* do not implicate the 30-day deadline because those cases involved reinstatement of expedited removal orders. Expedited removal orders are not governed by 8 U.S.C. 1252(a)(1)'s petition-for-review procedure, and the 30-day deadline therefore does not apply.

Accordingly, the government may and should pursue the timeliness argument in these cases.

2. Failure to exhaust administrative remedies

Litigators should also determine whether petitions may be dis-

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missed for failure to exhaust administrative remedies. 8 U.S.C. § 1252 (d)(1). The fact that a case involves a collateral challenge to an executed removal order does not excuse the alien from complying with the statutorily-mandated exhaustion requirement. Even if the alien can convince the court that his petition is not time-barred by § 1252(b)(1), the petition should be dismissed if the alien failed to raise his claim before the agency in the original proceedings. *See Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173 (9th Cir. 2001) (holding that, even if § 1231 (a)(5) permitted a collateral challenge to the underlying deportation order, Alvarenga-Villalobos could not succeed where, *inter alia*, he waived his appeal to the BIA); *Lema v. Holder*, 363 Fed. Appx. 88, 91, 2010 WL 323925 at *2 (2d. Cir. 2010) (noting that reinstated aliens must still meet the normal "jurisdictional hurdles," for petitions for review such as exhaustion of administrative remedies).

3. The reinstatement statute's jurisdictional bar and Morales-Izquierdo

The reinstatement statute specifically provides that "the prior order of removal is reinstated from its original date *and is not subject to being reopened or reviewed* . . . ." 8 U.S.C. § 1231(a)(5) (emphasis added). Accordingly, the statute precludes review of the original order. Nevertheless, under 8 U.S.C. § 1252(a)(2)(D) courts are not to interpret a jurisdictional bar in the Immigration and Nationality Act ("INA") to preclude review of questions of law or constitutional claims raised in a review petition. Thus, review over such claims remains available (*note*: § 1252(a)(2)(D), by its language, does not apply to restore review of such claims when a petition is untimely or unexhausted).

OIL has taken the position, however, that an alien who has been deported from the United States and illegally reenters the county cannot raise, *as a matter of law*, a cognizable legal claim through a collateral attack. The argument relies heavily on the Ninth Circuit's *en banc* decision in *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007), which held that "reinstatement of a prior removal order - *regardless of the process afforded in the underlying order - does not offend due process* because reinstatement of a prior order does not change the alien's rights or remedies." *Id.* at 497 (emphasis added); *accord Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008) (adopting Ninth Circuit's analysis); *Miller v. Mukasey*, 539 F.3d 159, 164-65 (2d Cir. 2008) (same).

We argue that in light of the holding in *Morales-Izquierdo*, an alien cannot raise a cognizable legal claim once he is deported and illegally reenters the United States.

In *Morales-Izquierdo*, the Ninth Circuit reasoned that an alien should not be able to gain a right or an advantage in challenging an already-executed removal order by committing an illegal act – *i.e.*, reentering the country unlawfully. *Id.* at 498. "While aliens have a right to fair procedures, they have no constitutional right to force the government to re-adjudicate a final removal order by unlawfully reentering the country." *Id.* After all, "an alien who respects our laws and remains abroad after he has been removed should have no fewer opportunities to challenge his removal order than one who unlawfully reenters the country despite our government's concerted efforts to keep him out." *Id.* The court concluded by noting that an alien who "has a legitimate basis for challenging his prior removal order . . . will be able to pursue it after he leaves the country." *Id.*

In relying on *Morales-Izqierdo*, litigators should be aware of two subsequent Ninth Circuit decisions that arguably cut back on its holding. In *Martinez-Merino*, 525 F.3d 801, the court noted that "*Morales-Izquierdo* did not consider or address the effect of 8 U.S.C. § 1252 (a)(2)(D)." *Id.* at 804. But the government does not dispute that § 1252(a)(2)(D) applies in the reinstatement context to allow the court to review legal claims. Instead, we argue that in light of the holding in *Morales-Izquierdo*, an alien cannot raise a cognizable legal claim once he is deported and illegally reenters the United States. In fact, the holding of *Martinez-Merino* itself supports this proposition by concluding that *Morales-Izquierdo* precludes any constitutional challenge to the underlying order. *Id.* ("*Morales-Izquierdo* cuts out the feet of Martinez's argument.").

Likewise, *Garcia de Rincon*, 539 F.3d 1133, is consistent with *Morales-Izquierdo*. There, the panel held that an alien had no forum to collaterally attack an expedited removal order which had been reinstated, and that such a result did not violate the Suspension Clause. 539 F.3d at 1140-42. While the court stated (arguably in dicta) that "§ 1252(a)(2)(D) permits some measure of review if the petitioner can demonstrate a 'gross miscarriage of justice' in the prior proceedings," *id.* at 1138, it ultimately found that petitioner failed to show such a miscarriage of justice, and dismissed the petition for lack of jurisdiction. *Id.* at 1242. Moreover, the two cases that the court primarily relied upon to support this statement were REAL ID Act transfer cases that pre-dated *Morales-Izquierdo*. *Id.* at 1138.

In sum, litigators can use the jurisdictional bar at § 1231(a)(5) in tandem with the holding of *Morales-Izquierdo* to argue that courts lack

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jurisdiction to review executed immigration orders that have been reinstated.

4. Failure to establish a gross miscarriage of justice

Alternatively, we should argue that an alien has failed to establish a "gross miscarriage of justice." Whereas an alien must establish a constitutional claim or question of law to trigger a court's subject-matter jurisdiction in light of the jurisdictional bar at 8 U.S.C. § 1231(a)(5), *see* 8 U.S.C. § 1252(a)(2)(D), a showing of a gross miscarriage of justice is a specific threshold requirement for collaterally attacking a previously-executed order, assuming such an attack is permissible. *See De Souza v. Barber*, 263 F.2d 470, 475 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959) (assuming without deciding that an executed immigration order may be collaterally attacked and applying the gross miscarriage of justice test).

In *De Souza*, 263 F.2d 470, the Ninth Circuit assumed such a collateral challenge was possible, but denied relief after finding no gross miscarriage of justice. *Id.* at 475-77. Subsequently, some cases have suggested that narrow review was available in habeas over collateral challenges if an alien could show a gross miscarriage of justice. *See, e.g., Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1256 (9th Cir. 1980). But these cases pre-date the 1996 enactment of the current reinstatement statute, which bars review of a reinstated order, and also pre-date the 2005 REAL ID Act, which eliminated habeas review over removal orders. It is the government's contention therefore that the *en banc* decision in *Morales-Izquierdo*, which post-dates these amendments, closes the door to collateral challenges in any court, regardless of whether a gross miscarriage of justice has been shown. *See discussion supra*.

Given the possibility, however, that courts may disagree, *see Garcia de Rincon, supra*, we should argue in the alternative that an alien must also show a gross miscarriage of justice. Most courts have treated the gross miscarriage requirement "not as a jurisdictional showing, but as a prerequisite to relief." *Debeato*, 505 F.3d at 235. At a minimum, an alien must establish prejudice to meet this standard. *See Briones-Sanchez v. Heinauer*, 319 F.3d 324, 328 (8th Cir. 2003).

Litigators should argue that, even if the court asserts jurisdiction over the underlying order, the petitioner's challenge should be rejected for failure to show a gross miscarriage of justice.

The gross miscarriage of justice standard is a rigorous one and such findings are "rare." *Lara v. Trominski*, 216 F.3d 487, 493 (5th Cir. 2000); *see, e.g., Debeato*, 505 F.3d at 236-37 (a change of law after alien's removal is not a basis to argue "gross miscarriage of justice"); *Ramirez-Molina*, 436 F.3d at 514-15 (no gross miscarriage of justice where alien had ample opportunity to contest his removal in the original removal proceeding and to seek judicial review in federal court); *Ramirez-Juarez v. INS*, 633 F.2d 174, 175-76 (9th Cir. 1980) (finding that alien was unable to demonstrate that prior proceeding involved a gross miscarriage of justice); *Sotelo Mondragon*, 653 F.2d at 1255-56 (same); *Hernandez-Almanza v. INS*, 547 F.2d 100, 102-103 (9th Cir. 1976) (same). In fact, the Fifth Circuit has noted that it "has never allowed an immigrant's collateral challenge to his prior deportation order on the basis of a gross miscarriage of justice." *Lara, supra*.

In sum, litigators should argue that, even if the court asserts jurisdiction over the underlying order, the petitioner's challenge should be rejected for failure to show a gross miscarriage of justice.

5. Rebutting claim that Constitution requires review of executed removal orders

Some aliens have argued that judicial review of executed immigration orders is required by the Constitution when the alien alleges a legal violation. In support of this argument, aliens have relied on the Supreme Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987), which held that due process requires an opportunity for collateral review of a deportation order in a subsequent criminal prosecution for unlawful reentry where the prior deportation is an element of the crime and where substantial defects in the underlying administrative proceedings foreclosed direct judicial review of those proceedings.

In responding to this argument, we should note that *Mendoza-Lopez* has no application in civil proceedings. Indeed, the Supreme Court went out of its way to emphasize that these collateral attacks are limited to criminal proceedings. *Id.* at 839 n.17. In *Alvarenga-Villalobos*, 271 F.3d 1169, the Ninth Circuit distinguished *Mendoza-Lopez* by noting that "the requirements are less stringent for orders used in non-criminal deportations." *Supra* at 1173; *see also Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1064 (10th Cir. 2004) (refusing to apply *Mendoza-Lopez* to civil proceedings).

Even more fundamentally, and as discussed above, the Ninth Circuit in *Morales-Izquierdo* held that "reinstatement of a prior removal order - regardless of the process afforded in the underlying order - does not offend due process because reinstatement of a prior order

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FURTHER REVIEW PENDING: Update on Cases & Issues

Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court heard arguments in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court is considering the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 U.S.C. § 1326. The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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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

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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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Asylum - Corroboration

On December 15, 2010, the Ninth Circuit en banc heard oral argument in ***Nirmal Singh v. Holder*** (08-70434) to address whether 8 U.S.C. § 1158(b)(1)(B)(ii) requires an immigration judge to take the following steps sequentially: (1) determine whether an asylum applicant has met his burden of proof; (2) notify the applicant that specific elements of his case require corroboration; and (3) provide the applicant an opportunity to explain why any evidence is unavailable. Although the issue was neither raised to the agency below, nor argued in the opening brief to the panel, in her dissent to the unpublished decision, Judge Berzon argued forcefully for such a process. The panel majority held that the plain language of the statute did not require a sequential process, and even if the statute had been ambiguous, the majority would defer to the agency's reasonable interpretation of the INA.

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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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In Absentia Reopening

On December 6, 2010, the government has filed a petition for rehearing en banc in ***Vukmirovic v. Holder,*** 621 F.3d 1043 (9th cir. 2010). The government argues that the panel majority opinion erred holding that the alien was entitled to rescission of the in absentia order where the alien did not miss the hearing due to extraordinary circumstances beyond his control, the facts are not compelling or unusual, relief is not virtually certain, and the alien has not shown diligence.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds That Departure Via Expedited Removal Order Halts Continuous Physical Presence

In ***Vasquez v. Holder***, __ F.3d __, 2011 WL 522843 (Lynch, Torruella, *Stahl*) (1st Cir. February 16, 2011), the First Circuit rejected petitioner's challenge to the BIA's determination that departure under an expedited removal order halts continuous physical presence in the United States for purpose of cancellation.

The petitioner, a Guatemalan citizen entered the United States illegally on April 1, 1992. Several months later he applied for asylum and pending the adjudication obtained work authorization. In September 1997, after more than five years in the United States, he returned to Guatemala . On October 22, 1997, he attempted to re-enter the United States at Miami International Airport using a Guatemalan passport that was not his own. In a sworn statement he admitted to paying $1,000 for the fraudulent document. The immigration officials found petitioner inadmissible and removed him under INA § 235(b)(1), an expedited order of removal. Later that same month, petitioner successfully re-entered the United States (without authorization), where he went on to secure consistent employment and purchase a home.

When DHS commenced removal proceedings against the petitioner, on September 30, 2006, he applied for cancellation. The IJ determined that Vásquez was ineligible for cancellation because the October 1997 expedited removal order had interrupted his continuous physical presence in the United States, and therefore he lacked the ten years of continuous physical presence required by INA § 240A(b)(1). The BIA affirmed citing *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005) (en banc).

The First Circuit, applying the *Chevron* two-step analysis, found INA § 240A(d)(1), the provision relating to the termination of continuous period, ambiguous, and deferred to the BIA's construction of this provision in *Avilez-Nava* and other precedent decisions.

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BIA's Denial Of Asylum And Finding That Conduct Complained Of Did Not Rise To Level Of Persecution Upheld

In ***Morgan Morgan v. Holder,*** __ F.3d __, 2011 WL 477722 (1st Cir. February 11, 2011) (Lipez, *Selya*, Howard), the First Circuit concluded that the alien's claims that private actors taunted, cut, detained, and threatened him did not compel the conclusion that he suffered harm rising to the level of past persecution.

The court determined the law at issue was a generally applicable law and the petitioner failed to establish a connection between prosecution under that law and his political opinion.

The court also concluded substantial evidence supported the BIA's conclusion that the alien failed to demonstrate that any harm he suffered was on account of his religious faith, as there was no evidence of religious animus other than that supported by the alien's speculation and conjecture.

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THIRD CIRCUIT

Third Circuit Denies Chinese Alien's Withholding Of Removal Claim Based On Smuggling North Koreans Into China

In ***Li v. Holder,*** __ F.3d __, 2011 WL 294037 (3d Cir. February 1, 2011) (*Rendell*, Scirica, Roth (dissenting)), the Third Circuit denied a Chinese applicant's request for withholding of removal for providing assistance to illegal immigrants from North Korea. The court determined the law at issue was a generally applicable law and the petitioner failed to establish a connection between prosecution under that law and his political opinion. The court stressed that petitioner had offered no specific evidence concerning his political opinions, the Chinese government's awareness of those political opinions, or the nature of the government's enforcement of the law that would raise suspicion that the prosecution of the alien for violating that law was related to a political opinion.

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Third Circuit Court Of Appeals Affirms Denial Of Nonimmigrant Change Of Status Application

In ***Grewal v. USCIS,*** 2011 WL 263268 (3d Cir. January 28, 2011) (Mckee, *Smith*, and Stearns), the Third Circuit affirmed the district court's grant of the government's motion to dismiss. Grewal, a citizen of India, who had entered the U.S. on April 12, 2001, sought to change her J-1 nonimmigrant status to F-1 student status. The change required Grewal to obtain SEVIS Form I-2 from the college where she had been accepted. However, she failed to attend the college and her SEVIS was terminated.

The court agreed with the trial court that Grewal was statutorily ineligible to change status because she lacked the required documentation from her educational institution during the pendency of the change of status application. The court also affirmed the district court's finding that USCIS did not err in denying Gre-

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Summaries Of Recent Federal Court Decisions

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wal's three motions to reopen and reconsider.

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FOURTH CIRCUIT

Fourth Circuit Exercises Jurisdiction Over BIA's Denial of MTR, Despite Lack of a PFR

In *Crespin-Vallardes v. Holder*, __ F.3d __, 2011 WL 546531 (4th Cir. February 16, 2011) (*Motz*, King, Gregory), the Fourth Circuit held that it had jurisdiction to review the substance of a motion to reconsider in the absence of a petition for review because literal adherence to *Chenery* would be absurd. On the merits, the court held the identified family ties satisfied the immutability, social visibility, and particularity tests for a particular social group. The court also held the BIA erred when it conducted a *de novo* review of the nexus finding and the finding that the El Salvadoran government was unwilling or unable to protect the alien, where the BIA's review of the IJ's factual findings are to be reviewed for clear error.

The court held the identified family ties satisfied the immutability, social visibility, and particularity tests for a particular social group.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds That The BIA Did Not Abuse Its Discretion By Declining to Abate Proceedings While Alien Sought Vacatur Of Criminal Conviction**

In ***Cabral v. Holder***, __ F.3d __, 2011 WL 311008 (5th Cir. February 2, 2011) (Jones, Dennis, *Clement*), the Fifth Circuit concluded that the BIA did not abuse its discretion in denying an alien's request to abate proceedings while he sought to collaterally attack a ten year old criminal conviction in state court.

The petitioner was admitted as an LPR in October 1992. In 1999, he was convicted in New York of two counts of sexual abuse in the third degree. DHS denied petitioner's application for naturalization in 2004 because the sexual abuse convictions, and later charged him with removability pursuant to INA § 237(a)(2)(A)(ii) (multiple CIMT convictions). Before the IJ, petitioner sought cancellation of removal arguing that his two sexual abuse convictions formed part of a single scheme of conduct, sought a § 212(h) waiver, and sought to terminate the removal proceedings.

The IJ found that the two offenses did not arise out of a single scheme of conduct and also denied petitioner's other requests. The IJ also found Cabral ineligible for a § 212(h) waiver. On appeal, petitioner requested that the BIA hold the proceedings in abeyance while he collaterally attacked his sexual abuse convictions in the New York state courts. The BIA rejected his request and dismissed his appeal and subsequently also denied his motion for reconsideration.

The Fifth Circuit determined that the BIA did not abuse its discretion in declining to stay the proceeding, noting that its ruling was consistent with its precedent that a pending collateral attack on a conviction does not disturb the finality of the conviction for immigration purposes. *See Matter of Abreu*, 24 I&N Dec. 795 (BIA 2009).

The court upheld the denial of a § 212(h) waiver of inadmissibility because it was not accompanied by an adjustment of status application. The court rejected as being "utterly without merit," his argument that he could apply for the waiver without the filing of the application for adjustment. Moreover, the court held that 212(h)'s applicability only to aliens seeking admission did not violate equal protection because only a rational basis review applies to Congress's plenary power to legislate the admission and exclusion of aliens. "In light of Congress's plenary power to pass legislation concerning the admission or exclusion of aliens, it is clear that no more searching review than that of rational basis is appropriate," said the court.

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SIXTH CIRCUIT

■ **Sixth Circuit Finds, For Withholding Of Removal Claim, The Record Compels The Conclusion That Burning Down Alien's House Was Persecution**

In ***Vincent v. Holder,*** __ F.3d __, 2011 WL 499278 (6th Cir. February 15, 2011) (*Merritt*, Rogers, White), the Sixth Circuit held substantial evidence did not support the BIA's finding that the burning down of the petitioner's house in Sierra Leone in 1999 and killing of his son did not constitute past persecution. The court explained that "the cumulative effect" of the two incidents rose to the level of persecution because "those incidents, in combination, 'constitute a level of punishment, suffering and infliction of harm sufficient to establish past persecution.'"

However, the court upheld the denial of the petitioner's claim for protection under the CAT, and affirmed that he did not timely file his asylum application or present extraordinary circumstances to excuse the late filing. The court remanded

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to the BIA for further proceedings on the withholding of removal claim.

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■ **Sixth Circuit Holds Regulatory Departure Bar Is Not Jurisdictional**

In ***Pruidze v. Holder***, __ F.3d __, 2011 WL 320726 (6th Cir. February 3, 2011) (Boggs, *Sutton*, Moore), the Sixth Circuit held that the BIA cannot dismiss a motion to reopen filed by an alien outside of the United States for lack of jurisdiction based on the regulatory departure bar. The court explained the INA does not give "the BIA authority 'to decline the exercise of jurisdiction which it is given.'" The court also clarified that the BIA cannot "assume[] authority" to interpret a mandatory regulation as a "jurisdictional rule." The court remanded the proceedings for the agency to consider the motion to reopen, including whether the motion was untimely and whether the departure bar "limits the BIA's authority to grant Pruidze relief."

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■ **Sixth Circuit Holds That Asylum Applicant From Guinea Did Not Establish Past Persecution Based On Purported Membership In A Particular Social Group**

In ***Kante v. Holder***, __ F.3d __, 2011 WL 63594 (6th Cir. January 7, 2011) (*Merritt*, Rogers, Kethledge), the Sixth Circuit upheld the BIA's determination that petitioner was not credible and did not establish a legally cognizable "particular social group."

The petitioner entered the United States in 2002 without documentation. On July 25, 2002, she filed an application for asylum claiming that in October 2001 "rebels" broke into her family compound and beat, raped, and tortured her and every member of her family. Her application did not claim the attacks had any politically-related motive or that the attackers were in any way affiliated with the government. When her case was referred to the Immigration Court, she filed a second application in which she claimed that she and her family were "attacked by rebels of unknown affiliation," but also targeted by government security forces due to her father's and brothers' support of the opposition RPG forces. The IJ denied her claims, finding first that her testimony at the hearing and the information supplied in the second asylum application were inconsistent with the first asylum application. Second, the IJ also found no nexus between the attack on petitioner in October 2001 and her or her family's political activity, rejecting petitioner's claim that she was "targeted for persecution" because she was part of a "particular social group," that is, females subject to sexual assault. The IJ explained that the record contained "no evidence" that women were a "disfavored group" in Guinea, or that there was a "pattern or practice" of persecution against them.

The proposed social group was "circularly defined by the fact that it suffers persecution," and did not share "any narrowing characteristic other than the risk of being persecuted."

The BIA dismissed the appeal finding among other grounds that petitioner had failed to establish that "females subject to sexual assault" was a readily-identifiable social group that could be defined "with sufficient particularity to delimit its membership."

The court held that substantial evidence supported the IJ's finding that petitioner failed to establish that the attack she suffered was caused by Guinea government forces motivated by retribution for her father's political activity with the RPG. The court also affirmed the adverse credibility findings explaining that because the discrepancies in petitioner's application and testimony went to the heart of her application "they could be characterized as relevant inconsistencies."

Further, the court also rejected petitioner's contention that she was a member of "a particular social group" of "women subjected to rape as a method of government control" because the attack was committed by members of the Guinean armed forces or political enemies of the RPG in retaliation for her father's support of the RPG. The court explained that the proposed group was "circularly defined by the fact that it suffers persecution," and did not share "any narrowing characteristic other than the risk of being persecuted." The court emphasized that petitioner did not show that government forces "used rape as a means of maintaining control or that the Guinean society viewed females as a group specifically targeted for mistreatment."

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Collateral Estoppel Precluded Denaturalized Alien In Removal Proceedings From Relitigating Issues Resolved in Previous District Court Proceedings**

In ***Firishchak v. Holder,*** __ F.3d __, 2011 WL 47482 (7th Cir. February 14, 2011) (*Flaum*, Ripple, Evans), the Seventh Circuit held that collateral estoppel precluded relitigation in removal proceedings of a determination of denaturalization previously concluded in district court proceedings. The alien argued that collateral estoppel was inapplicable in removal proceedings because he did not receive a full and fair hearing in the district court. Specifically, the alien argued that the district court judge was not randomly assigned, that the district court judge was biased, and that the

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district court incorrectly ruled against him. The court determined that the alien received a full and fair hearing in the district court, and, accordingly, concluded that collateral estoppel precluded the alien from relitigating in removal proceedings issues previously resolved in the district court.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds Substantial Evidence Indicates No Objectively Reasonable Fear Of Future Persecution**

In ***Quinonez-Perez v. Holder***, __ F.3d __, 2011 WL 589914 (8th Cir. February 22, 2011) (Riley, Gibson, *Murphy*), the Eighth Circuit concluded that regardless of whether initial threats petitioner received in the city of San Antonio Suchitepequez, Guatemala, for membership in a union amounted to persecution, substantial evidence supported the conclusion that he did not suffer persecution in Guatemala City where he lived for less than a year, and where he could safely relocate. The court also found that the evidence supported the IJ's conclusion that there was no objective basis for the petitioner's fear of future persecution. Finally, the court held substantial evidence supported the IJ's determination that it was "extremely unlikely" petitioner would be tortured if returned to Guatemala.

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NINTH CIRCUIT

■ **Ninth Circuit Rules That IJ Failed To Follow Guidelines In Denying Petitioner A Continuance**

In ***Malilia v. Holder***, __ F.3d __, 2011 WL 322383 (9th Cir. February 3, 2011) (*Beezer*, Graber, Kleinfeld), the Ninth Circuit held that the IJ failed to follow the BIA's guidelines in denying a request for continuance. The court upheld the BIA's determination that petitioner's conviction for delivering firearms in violation of 18 U.S.C. § 922(e) constituted a firearms offense under INA § 1227(a)(2)(C). The court also upheld the BIA's determination that petitioner's marriage during removal proceedings was presumptively fraudulent. Nevertheless, the court ruled the IJ's failure to consider the alien's motion for a continuance under the standard articulated in the BIA's intervening decision in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), constituted reversible error.

The IJ's failure to consider the alien's motion for a continuance under the standard articulated in the BIA's intervening decision in *Matter of Hashmi*, constituted reversible error.

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■ **Ninth Circuit Holds That The State's Decision To Try The Alien As An Adult Controls**

In ***Rangel-Zuazo v. Holder***, __ F.3d __, 2011 WL 285214 (9th Cir. January 31, 2011) (Graber, Smith, Benitez), the Ninth Circuit in a *per curiam* decision held that, although the alien was thirteen years old at the time he committed a rape offense, the Federal Juvenile Delinquency Act did not shield him from the immigration consequences of his conduct because he was charged and convicted as an adult after reaching the age of majority. The court also held it was not unconstitutional for the BIA to apply the comparability requirement articulated in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), *remanded on other grounds by Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), to the alien's application for a waiver of inadmissibility under former INA § 212(c), 8 U.S.C. § 1182(c) (1994).

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■ **Ninth Circuit Holds That Harm Inflicted To Induce Petitioner's Father To Abandon Politically-Charged Research Project Was Not Persecution On Account Of Imputed Political Opinion**

In ***Sharma v. Holder***, __ F.3d __, 2011 WL 294274 (9th Cir. February 1, 2011) (*Wallace*, Mills, Thomas (dissenting in part)), the Ninth Circuit held that substantial evidence supported the BIA's denial of asylum to an applicant who credibly testified that he was beaten by Indian police to force his father, a prominent professor, to cease work on a book detailing the Sikh separatist movement and related police misconduct.

The court found no compelling evidence that the police attributed any political views to the applicant, and accepted the BIA's conclusion that they were using him as a "tool" to influence his father. The court also affirmed the BIA's denial of petitioner's motion to reopen to apply for adjustment of status based on his post-order marriage to a United States citizen, given the paucity of evidence as to the alien's motivation for entering the marriage.

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■ **Ninth Circuit Holds Aliens Must Be Present In The United States For A Full Span Of Ten Years To Establish Statutory Eligibility For Cancellation Of Removal**

In ***Hernandez-Mancilla v. Holder***, __ F.3d __, 2011 WL 451943 (9th Cir. February 10, 2011) (Rawlinson, M. Smith, *Jones*), the Ninth Circuit principally held that aliens must be present in the United States for a span of ten

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years in order to establish statutory eligibility for cancellation of removal for non-permanent residents. In reaching this holding, the court rejected the aliens' contention that a lesser period of continuous presence could suffice in circumstances where the total number of aggregate days of presence was equal to the statutorily mandated ten-year period, minus the statutory allowance for 180 days of intermittent absences.

The distinction between aliens who have accrued ten years' continuous physical presence and those who have not, regardless of the total number of days present in the United States, was deemed rational by the court and thus survived the aliens' equal protection challenge. Accordingly, the court upheld the agency's decision denying the applications for cancellation of removal.

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■ **Ninth Circuit Denies Government Motion To Amend Language Reviewing A Frivolousness Finding Under A Preponderance Of The Evidence Standard**

In ***Khadka v. Holder***, (9th Cir. February 7, 2011) (Hall, Noonan, Thomas), the Ninth Circuit treated the government's motion to amend as a petition for panel rehearing, and summarily denied the petition. The court's August 18, 2010, published decision (618 F.3d 996) held, in part, that the immigration judge's frivolousness finding was not supported by a preponderance of the evidence because fabrication of material evidence does not necessarily constitute fabrication of a material element, and because the judge failed to inform the alien that he was considering making a frivolous finding. The motion to amend requested that the court alter language that indicated that a preponderance of the evidence standard had been applied to review of a factual determination for which substantial evidence review was required.

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■ **Ninth Circuit Reverses BIA's Denial Of Special-Rule Cancellation And Holds Battery Against Spouses Or Children Is Defined By Federal Law**

In ***Lopez-Birruet v. Holder***, __ F.3d __, 2011 WL 489693 (9th Cir. February 14, 2011) (*Graber*, Smith, Breyer (by designation)), the Ninth Circuit held the BIA erred in adopting an immigration judge's order denying special-rule (VAWA) cancellation of removal. The alien mother had petitioned for cancellation of removal based on alleged battery by the father against her children. The court held the BIA erred by accepting the immigration judge's ruling applying a state, rather than Federal, definition of battery and requiring proof of a "heightened level of violence." The court remanded for further consideration of special-rule cancellation, but did not reach the issue of extreme cruelty or eligibility for relief on four other grounds.

The court held the BIA erred by accepting the immigration judge's ruling applying a state, rather than Federal, definition of battery and requiring proof of a "heightened level of violence."

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That Bar To INA § 212(h) Extreme Hardship Waiver Does Not Apply To Aliens Who Adjusted Status After Entering the U.S.**

In ***Lanier v. U.S. Attorney General***, __ F.3d __, 2011 WL 338787 (11th Cir. February 4, 2011) (*Barkett*, Marcus, Fay), the Eleventh Circuit held the BIA erred in applying a bar to a waiver based on extreme hardship to an alien who originally entered the United States without inspection.

Petitioner entered the United States without inspection in 1992 and adjusted her status in 1996. In 2007, the DHS charged petitioner as removable for having committed an aggravated felony and a crime involving moral turpitude. She conceded that she was removable but sought to apply for a § 212(h) waiver on the grounds that her daughter, a U.S. citizen who suffers from sickle cell anemia, would suffer hardship if the United States removed her. The IJ did not address the merits of waiver, ruling instead that her conviction for an aggravated felony rendered her statutorily ineligible to apply for the waiver. The BIA affirmed.

Petitioner contended that because she adjusted to LPR after she had been living in the United States, she was not a person who has "previously been admitted to the United States as an alien lawfully admitted for permanent residence" under INA § 212(h). The court determined that by including the additional condition of having "previously been admitted" as a lawful permanent resident, Congress had narrowed the class of lawful permanent residents who are barred from seeking this waiver. The court explained that the plain language of § 212(h) required that a person must have physically entered the United States, after inspection, as an LPR in order to have "previously been admitted to the United States as an alien lawfully admitted for permanent residence." The court then held that "based on this unambiguous text, we find that the statutory bar to relief does not apply to those persons who, like [petitioner], adjusted to lawful per-

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manent resident status while already living in the United States."

The court remanded the proceedings to the BIA to consider the petitioner's request for a § 212(h) waiver.

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DISTRICT COURTS

District of Arizona, After A Two-Day Trial, Rules That Iranian Embargo Violator Is Ineligible For United States Citizenship

In *Khamooshpour v. Holder*, 2011 WL 662664 (D. Ariz. February 14, 2011) (Wake, J.), in a case of first impression the district court concluded that an Iranian citizen's conviction for violating the embargo against engaging in financial transactions with Iran bars him from establishing good moral character for the requisite statutory period and found him ineligible for naturalization.

The plaintiff, an LPR since 1981, had established without a license a money exchange business. During the course of its operation beginning in 1994, his business had facilitated the exchange of nearly thirty million dollars between Iran and the United States. Plaintiff was arrested and indicted in 2001, and in 2004 pled guilty to several charges stemming from his unlicensed money exchange business.

On March 9, 2010, USCIS denied plaintiff's application for naturalization on the basis that he could not establish the requisite good moral character because of his conviction in 2007 for the crimes underlying his 2001 arrest.

The court held that it is enough to bar a finding of good moral character if the conviction occurred during the statutory period even though the underlying crimes occurred prior to the statutory period. The court concluded that an unlawful act does not necessarily have to be a crime involving moral turpitude in order to reflect adversely on an applicant's moral character. Nor, said the court, do all felonies necessarily reflect adversely on an applicant's moral character. But the court concluded that in this case a conviction for willfully disregarding the Embargo Act did reflect adversely on the alien's moral character, and thus it precluded the alien from naturalizing.

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A conviction for willfully disregarding the Embargo Act did reflect adversely on the alien's moral character, and thus it precluded the alien from naturalizing.

Pennsylvania District Court Holds It Has Jurisdiction To Review Procedural Challenge To Denial Of A Waiver For The Foreign Residency Requirement For J-Visa Holders

In *Volynsky v. Clinton*, No. 10-4695 (E.D. Pa. January 31, 2011) (Padova, J.), the Eastern District of Pennsylvania held that the APA's proscription on judicial review over discretionary agency decisions did not preclude it from reviewing whether the Department of State actually considered the requisite regulatory factors when it recommended to USCIS the denial of an Application for Waiver of the Foreign Residence Requirement.

The plaintiff, who had entered the United States under a J-visa, sought a waiver of the two-year foreign residency requirement on the basis that compliance would impose an hardship on her U.S. citizen husband. Although the Department of State agreed that compliance would impose a hardship, it nonetheless recommended to USCIS to deny the waiver. Accordingly, under the regulatory scheme, USCIS declined to approve the waiver and necessarily denied the application for adjustment of status. The district court, finding that it had jurisdiction to review the Department of State's exercise of discretion under *Chong v Director, U.S. Information Agency*, 821 F.2d 171 (3d Cir. 1987), held that the State Department had failed to consider the regulatory factors under 22 C.F.R. § 41.63(b)(2)(ii) when it recommend the denial of the J-waiver.

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District Of Connecticut Denies Alien's Complaint For Naturalization

In *Khawatmi v. DHS,* (D. Conn. Feb. 9, 2011)(Kravitz, J.) the court entered judgment in favor of the government after determining the alien failed to prove he was eligible for naturalization. The alien sought an order declaring him eligible for U.S. citizenship after USCIS denied his two applications for naturalization and his administrative appeal of the second denial. The court held the alien made false statements under oath with the subjective intent of obtaining an immigration benefit during a naturalization interview wherein he failed to disclose his wife's illegitimate child, and told the immigration officer that his marriage ended because he was having financial issues. The court also held the alien made a false statement when he confirmed that he had never given false or misleading information to any U.S. Government official for the purpose of obtaining an immigration benefit. The court therefore determined that the alien was not eligible for naturalization because he failed to carry his burden of establishing that he has been and still is a person of good moral character.

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This Month's Topical Parentheticals

ADMISSION

■ ***Abufayad v. Holder,*** __ F. 3d __, 2011 WL 540545 (9th Cir. Feb. 16, 2011) (finding that petitioner is removable as an alien likely to engage in terrorist activity in light of jihadist materials found on his computer, his inconsistent statements, and testimony of a terrorism expert; further upholding BIA's denial of CAT protection and rejecting petitioner's claim that he would be tortured upon returning to Palestine as a consequence of being removed on terrorism-related grounds)

ASYLUM

■ ***Quinonez-Perez v. Holder,*** __ F.3d __, 2011 WL __ (8th Cir. Feb. 22, 2011) (holding that whether or not the initial threats that petitioner received in the city of San Antonio Suchitepequez, Guatemala for his membership in a union amounted to persecution, substantial evidence supported the IJ's conclusion that he did not suffer persecution in Guatemala City where he lived for less than a year, and could safely relocate)

■ ***Crespin-Valladares v. Holder,*** __ F.3d __, 2011 WL 546531 (4th Cir. Feb. 16, 2011) (holding that in reviewing the original removal order, the court may consider the BIA's reasoning in the denial of reconsideration (even where that denial is not before the court), because remand for BIA clarification would be pointless and cause further delay; further holding that the BIA erred by: (1) concluding that a group of "those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" does not qualify as a particular social group; (2) finding that petitioner did not establish a well-founded fear of persecution despite record evidence of three death threats; (3) failing to review the IJ's nexus finding for clear error where the specific inquiry focused on "the classic factual question" of the gang members' motivations; and (4) likewise using the incorrect standard in reviewing the IJ's finding as to whether the Salvadoran government is unable or unwilling to control MS-13's activities)

■ ***Morgan v. Holder,*** __ F.3d __, 2011 WL 477722 (1st Cir. Feb. 11, 2011) (affirming BIA's decision that harassment of Coptic Christian in Egypt: (a) did not rise to the level of past persecution; (b) was not linked to the Egyptian government; and (3) was not on "account of" petitioner's Coptic Christian faith)

■ ***Wong v. Holder,*** __ F.3d __, 2011 WL __ (2d Cir. Feb. 1, 2011) (deferring to BIA's interpretation that insertion of an IUD is not persecution absent aggravating circumstances, but concluding that the BIA did not sufficiently identify the standards it applied in determining that neither "aggravating circumstances" nor nexus was established)

■ ***Vincent v. Holder,*** __ F.3d __, 2011 WL __ (6th Cir. Feb. 15, 2011) (holding that the BIA erred in finding that petitioner failed to establish past persecution in Sierra Leone where he was targeted by rebels because of his political opinion resulting in the burning down of his house and murder of his son)

■ ***Li v. Att'y Gen. of United States,*** __ F. 3d __, 2011 WL 294037 (3d Cir. Feb. 1, 2011) (affirming denial of withholding because petitioner, a Chinese citizen who provided assistance to illegal immigrants from North Korea, failed to present evidence that his prosecution under Chinese law was connected to his political opinion, "such that the persecution [if shown] would be 'because of' that opinion")

■ ***Sharma v. Holder,*** __ F.3d __, 2011 WL 294274 (9th Cir. Feb. 1, 2011) (affirming BIA decision that the record evidence demonstrated the Indian police wanted to stop the publication of Sharma's father's book rather than persecute Sharma for his political beliefs; further sustaining agency's marriage-fraud finding) (Judge Thomas issued an opinion partially concurring and dissenting)

■ ***Kante v. Holder,*** __ F.3d __, 2011 WL __ (6th Cir. Jan. 7, 2011) (reissued on Feb, 2 as a published decision) (affirming asylum denial based on adverse credibility finding and failure to establish nexus between rebels' attack on petitioner and her family in Guinea and qualifying statutory ground; further rejecting claim of persecution based on membership in a social group of women subjected to rape as a method of government control)

■ ***Liu v. Holder***, __F.3d__, 2011 WL 635276 (9th Cir. Feb 23, 2011) (concluding that there is a distinction between an adverse credibility finding and a finding that an asylum application is frivolous due to deliberate fabrication of material aspects, and that the latter finding has heightened substantive and procedural requirements that must be met, including adequate notice and opportunity to address all aspects of the friviolousness finding except for obvious and glaring inconsistencies)

■ ***Korkis v. Holder***, __F.3d__, 2011 WL 678388 (7th Cir. Feb 28, 2011) (concluding that an alien's allegations that agency applied incorrect evidentiary standard to determine "well-founded fear" and failed to consider all factual claims raised by alien's asylum application are claims of legal error that court of may review notwithstanding criminal alien bar, but agency did consider the claims and did apply correct evidentiary standard)

CANCELLATION

■ ***Vasquez v. Holder,*** __ F.3d __, 2011 WL 522843 (1st Cir. Feb. 16, 2011) (affirming BIA's decision that an expedited removal order issued against petitioner interrupted his continuous physical presence in the United States, thereby rendering him ineligible for cancellation of removal)

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■ *Lopez-Birrueta v. Holder,* __ F.3d __, 2011 WL 489693 (9th Cir. Feb. 14, 2011) (holding that the IJ and BIA erred in finding that mistreatment of petitioner's children by their lawful-permanent resident father did not rise to the level of "battery" for purposes of special-rule cancellation of removal under VAWA)

■ *Matter of Nelson ,* 25 I.&N. 410 (BIA Feb. 17, 2011) (holding that once an alien has been convicted of an offense that stops the accrual of the 7-year period of continuous residence required for cancellation of removal, the Act does not permit such residence to restart simply because the alien has departed from and returned to the United States)

CRIME

■ *Cabral v. Holder,* __ F.3d __, 2011 WL 311008 (5th Cir. Feb. 2, 2011) (holding that the BIA properly exercised its discretion in refusing to stay petitioner's appeal while he pursued a motion to vacate his CIMT convictions; further affirming the IJ's determination that petitioner was ineligible for a § 212(h) waiver for failure to file a concurrent adjustment application)

■ *Malilia v. Holder,* __ F.3d __, 2011 WL 322383 (9th Cir. Feb. 3, 2011) (holding that petitioner's firearms offense renders him removable because delivery of a firearms necessary includes possession)

■ *Matter of Alyazji,* 25 I&N Dec. 397 (BIA 2011) (holding that, in general, an alien's conviction for a CIMT triggers removability only if the alien committed the crime within 5 years after the date of the admission by virtue of which he or she was then present in the United States)

■ *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011) (applying Brand X and holding that any intentional sexual conduct by an adult with a child involves moral turpitude as long as the perpetrator knew or should have known that the victim was under the age of 16; further holding that absent otherwise controlling authority, IJs and the BIA are bound to apply all three steps of the procedural framework set forth in Matter of Silva-Trevino for determining whether a particular offense constitutes a CIMT)

■ *United States v. Ortiz-Mendez*, __ F.3d __, 2011 WL 680228 (5th Cir. Feb. 28, 2011) (rejecting defendant's challenge to the district court's jury instructions regarding marriage fraud, and joining three other circuits that have held the government is not required to show that a defendant lacked the intent to establish a life with his spouse in order to prove a conviction for marriage fraud)

DUE PROCESS – FAIR HEARING

■ *Nolasco v. Holder,* __ F. 3d __, 2011 WL 668035 (2d Cir. Feb. 25, 2011) (holding that deficient service of the notice to appear on a minor did not implicate fundamental rights where the minor petitioner and her parents received actual notice of the contents of the NTA, and petitioner was given a fair hearing)

■ *Hernandez- Mancilla v. Holder,* __ F. 3d __, 2011 WL 451943 (9th Cir. Feb. 10, 2011) (holding that equitable tolling is not available for attorney ineffectiveness that occurred prior to removal proceedings even where that ineffectiveness led to the initiation of proceedings; rejecting equal protection challenge by alien who was ineligible for cancellation because he fell just shy of 10 years continuous physical presence)

■ *Firishchak v. Holder,* __ F.3d __, 2011 WL __ (7th Cir. Feb. 14, 2011) (holding that agency properly applied the doctrine of collateral estoppel, ruling that the district court's findings in petitioner's 2005 denaturalization case barred re-litigation of the same issues in his removal proceedings)

■ *United States v. Valdovinos-Mendez,* __ F.3d __, 2011 WL 505033 (9th Cir. Feb. 15, 2011) (holding that admission of the challenged A-file documents (IJ decision, warrant of removal and warning to alien deported) in criminal proceeding did not violate Sixth Amendment's Confrontation Clause because the documents were non-testimonial in nature)

JURISDICTION

■ *Pruidze v. Holder,* __ F.3d __, 2011 WL 320726 (6th Cir. Feb. 3, 2011) (holding that the BIA may not deny a motion to reopen for lack of jurisdiction based on an alien's removal from the country because the departure bar regulation is a claim-processing provision rather than a jurisdictional one)

■ *Lemus-Reyes v. Holder*, __ F.3d __, 2011 WL 679344 (5th Cir. Feb. 28, 2011) (affirming BIA's holding that IJ lacked jurisdiction over a second motion to reopen challenging an in absentia order because jurisdiction over the proceedings had vested with the BIA by virtue of an earlier appeal by petitioner from a prior IJ denial of reopening)

REINSTATEMENT

■ *Beekhan v. Holder,* __ F.3d __, 2011 WL 677346 (2d Cir. Feb. 25, 2011) (holding that reinstatement was properly applied to an alien who was deported and reentered the U.S. without the AG's express consent using someone else's passport)

WAIVER

■ *Lanier v. Holder,* __ F.3d __, 2011 WL 338787 (11th Cir. Feb. 4, 2011) (holding that the bar to § 212 (h) relief for LPRs who have been convicted of aggravated felonies does not apply to an alien like petitioner who adjusted to LPR status while in the U.S. because he is not an alien "who has previously been admitted to the U.S. as an alien lawfully admitted for permanent residence")

USCIS to Issue Employment Authorization and Advance Parole Card for Adjustment of Status Applicants

USCIS has announced that it is now issuing employment and travel authorization on a single card for certain applicants filing an Application to Register Permanent Residence or Adjust Status, Form I-485. This new card represents a significant improvement from the current practice of issuing paper Advance Parole documents.

The card looks similar to the current Employment Authorization Document (EAD) but will include text that reads, "Serves as I-512 Advance Parole." A card with this text will serve as both an employment authorization and Advance Parole document. The new card is also more secure and more durable than the current paper Advance Parole document.

An applicant may receive this card when he or she files an Application for Employment Authorization, Form I-765, and an Application for Travel Document, Form I-131, concurrently with or after filing Form I-485.

As with the current Advance Parole document, obtaining a combined Advance Parole and employment authorization card allows an applicant for adjustment of status to travel abroad and return to the U.S. without abandoning the pending adjustment application. Upon returning to the U.S., the individual who travels with the card must present the card to request parole through the port-of-entry.

The decision to parole the individual is made at the port-of-entry. Individuals who have been unlawfully present in the U.S. and subsequently depart and seek re-entry through a grant of parole may be inadmissible and ineligible to adjust their status.

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Collateral challenges to executed orders

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does not change the alien's rights or remedies." 486 F.3d at 497. In reaching this conclusion, the court reasoned that "[t]he *only* effect of the reinstatement order is to cause Morales' removal, thus denying him any benefits from his latest violation of U.S. law." *Id.* at 498 (emphasis in original). The only effect of the reinstatement is to put the alien into the same position he or she was in prior to the illegal reentry. *See id.* On this point, the court relied on the Supreme Court's decision in *Fernandez-Vargas*. *Id.* ("'[T]he [reinstatement] statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country.'") (quoting *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006)).

In conclusion, the list of arguments set forth above provides a basic checklist for the litigator who is responding to a collateral challenge in a reinstatement petition for review; however, the list is not exhaustive, and the reader should not take it as such. Some of these issues have not yet been addressed by courts in published decisions.

Accordingly, the litigator should take care to preserve the arguments discussed above, if applicable, and not rely exclusively on any one of them. And of course, the litigator should always consider addressing the merits in some way in the event the court rejects our jurisdictional and procedural arguments. Finally, the litigator should be aware that, in many of these cases, a motion to dismiss or motion for summary affirmance may be appropriate.

By Papu Sandhu, OIL
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Hussey Steps Down

(Continued from page 1)

Court of Appeals. He joined the Department in 1977 as a member of the Civil Division's Information and Privacy Section. From 1979 to 1983, Mr. Hussey was associated with McKenna, Conner & Cuneo, specializing in federal court litigation. He returned to the Civil Division in 1983, to serve as OIL team leader. Mr. Hussey was elevated to Deputy Director in 1987 and Director in 1999. In his new role, Mr. Hussey will focus on enhancing the advocacy skills of OIL attorneys.

Mr. McConnell, who joined OIL in 1990, and became an Assistant Director in June 1996. He was appointed Deputy Director for Operations in 1999. Mr. McConnell is an Adjunct Professor of Law at American University Washington School of Law.

INSIDE OIL

Seth Stern, co-author of the recently published biography of Justice Brennan, *Justice Brennan, Liberal Champion,* was the guest speaker at a February 28, Lunch & Learn Brownbag. Stern, a reporter for *Congressional Quarterly,* noted in his remarks the complexity of the Brennan's character. Brennan, who authored the *Pyler v. Doe* opinion among others related to immigration, apparently said that the biggest mistake of his entire tenure was his vote to uphold the denaturalization of an individual who had voted in a foreign election.

Seth Stern, Francesco Isgro

On February 18, Senior Litigation Counsel **Margaret Perry** provided training to more than 80 OIL attorneys on the topic of *Asylum: Particular Social Group.*

OIL TRAINING CALENDAR

- **March 31, 2011.** Finality of BIA orders" and other recent issues regarding the finality of removal orders for purpose of judicial review. LSB LL100 , 2:30-4:00 pm.
- **April 18, 2011.** Analyzing and briefing past persecution cases. LSB LL100, 10:00-11:30 am.
- **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.

INSIDE EOIR

Attorney General Eric Holder has appointed **Michael J. Creppy** to the Board of Immigration Appeals effective February 28, 2011.

Mr. Creppy has served as EOIR's Chief Administrative Hearing Officer since April 2006. From May 1994 to April 2006, he served as Chief Immigration Judge, overseeing the numerous immigration courts around the country. Prior to joining EOIR, he worked for the former INS in various capacities from 1981 to 1994. From 1983 to 1984, Mr. Creppy served as a trial attorney with the Office of Immigration Litigation. Mr. Creppy obtained a JD from the Howard University School of Law and a masters of law degree from Georgetown University Law Center.

Under the regulations, the BIA is authorized 15 Board Members, including a Chairman and Vice Chairman. **David Neal**, is currently the Acting Chairman of the BIA. He was appointed Vice Chairman in 2009. The other Board members are: Charles Adkins-Blanch, Patricia A. Cole, Lauri S. Filppu, Edward R. Grant , Anne J. Greer, John W. Guendelsberger, David B. Holmes, Garry D. Malphrus, Neil P. Miller, Hugh Mullane, Roger Pauley, and Linda S. Wendtland.

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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