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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Eighth Circuit Finds That "Torture" Requires Specific Intent To Cause Pain Or Suffering

In ***Cherichel v. Holder***, 591 F.3d 1002 (8th Cir. 2010) (Melloy, Smith, *Shepherd*), the Eighth Circuit denied the petition for review of a citizen from Haiti who sought deferral of removal under CAT on grounds that, as a criminal deportee who lacked family ties in Haiti, authorities would detain him indefinitely in substandard prison conditions upon his removal to that country.

The court held that "the definition of torture uner the CAT and its implementing regulations contains a specific intent element, which is satisfied only by a showing that a persecutor specifically intends to inflict severe pain or suffering upon his victim."

The petitioner entered the U.S. without inspection in 1982 or 1984. On April 18, 2000, he pled guilty to possession of marijuana in a Kentucky state court. On January 13, 2005, he was convicted in a Minnesota state court of criminal vehicular homicide and criminal vehicular operation resulting in substantial bodily harm, for which he received and served a 48-month sentence. Initially, the IJ, while finding petitioner deportable, granted his application for deferral of removal under the CAT, ruling that he had met his burden of proving that, as a criminal deportee, it was more likely than not that he would be tortured if removed to Haiti.

(Continued on page 2)

Conviction for indecent exposure under California law is not categorically a CIMT as it encompasses nude dancing

In ***Ocegueda Nunez v. Holder***, __ F.3d __, 2010 WL 446485) (9th Cir. February 10, 2010) (*Reinhardt*, Smith; Bybee (dissenting)), the Ninth Circuit, held that petitioner, who had been convicted of indecent exposure under California Penal Code § 314, had not been categorically convicted of a CIMT because that provision covers a broader range of offenses than the generic definition of a CIMT. In particular, the court found that § 314 encompasses nude dancing and that although "erotic, completely nude dancing is offensive to many people, [i]t is not so 'base, vile, and depraved' that it shocks the conscience."

The petitioner, who entered the U.S. without inspection in 1993, was placed in removal proceedings on the alleged grounds that he had been convicted of two CIMTs: petty theft in 1995, and indecent exposure in 2003. The IJ upheld the charges and pretermitted petitioner's application for cancellation. On appeal, the BIA in an unpublished order also held that indecent exposure under § 314 was a CIMT.

The Ninth Circuit noted, preliminarily, that what is moral turpitude is a "nebulous question," and that its answer must be based on "judicially established categories of criminal conduct," because an answer based on other consideration "could well divide residents or red states from

(Continued on page 2)

Torture requires specific intent

(Continued from page 1)

The BIA granted DHS's appeal from the IJ's decision, vacated the grant of deferral under the CAT, and ordered petitioner removed to Haiti. The BIA found that the record did not reflect "that Haitian authorities specifically intend to inflict severe physical or mental pain or suffering to criminal deportees such as [petitioner]." Following a remand from the Eighth Circuit on a procedural matter, the BIA again held that petitioner had failed to meet his burden of proof under the CAT and ordered him removed to Haiti.

The court preliminarily reviewed the ratification history of the CAT, and concluded that "the three important documents – the United States' understandings of the CAT, the law giving the CAT domestic effect [FARRA], and the regulations implementing that effect in the immigration context [8 C.F.R. §§ 208.16 (c)-.18(a)] – incorporate the understandings of the President and the Senate that, in order to constitute torture, an act must be specifically intended to inflict severe pain or suffering."

The Eighth Circuit held that the U.S. ratification of the CAT required proof of specific intent, that is, the actor must intend both the prohibited act and its prohibited consequences – to inflict extreme harm that rises to the level of torture. "We hold that the phrase 'specifically intended' contains a specific intent standard, as that standard is used in American criminal law. This means that a petitioner may not obtain relief under the CAT unless he can show that his prospective torturer has the goal or intent of inflicting severe physical or mental pain or suffering upon him," said the court.

The court also rejected petitioner's reliance on *Habtemicael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004), for the proposition that foreseeability was sufficient to satisfy intent, and held that its discussion of specific intent in that decision is non-binding dicta.

"Without expressing an opinion as to the amount of weight or deference due to the 2004 OLC Memorandum, we decline to adopt its reasoning."

The court similarly rejected petitioner's contention that because a 2004 opinion from the Office of Legal Counsel (OLC) suggested that specific intent to torture in the domestic context can be proved by showing that severe pain or suffering was the foreseeable consequence of a deliberate act, a similar definition should apply in the immigration context. "Without expressing an opinion as to the amount of weight or deference due to the 2004 OLC Memorandum, we decline to adopt its reasoning," said the court. The court explained that its holding was based on the plain language of the CAT, the understandings of the CAT expressed by the President and the Senate, and the language of the implementing regulations.

The court then concluded that since petitioner had "failed to prove that Haitian authorities have the specific intent to inflict severe pain or suffering when imprisoning criminal deportees, he cannot prove that it is more likely than not that he will be tortures if returned to Haiti."

Finally, the court noted that nothing in its holding was meant "to minimize the deplorable, often inhuman conditions that exist in many Haitian prisons and police stations. . . . We sympathize with [petitioner] an others who must face such terrible conditions."

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Indecent exposure is not a CIMT

(Continued from page 1)

residents of blue, the old from the young, neighbor from neighbor, and even males from females." The court then applied the categorical approach and considered the elements of the California statute to the generic definition of moral turpitude to determine "whether the conduct proscribed in the statute is broader than, and so does not categorically fall, within this generic definition."

The court noted an absence of "consistent or logical rules to follow" in determining whether a crime, other than one involving fraud, involves moral turpitude. The court found that under its case law, non-fraudulent CIMTs have almost always involved an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victims. The court acknowledged the existence of "older cases" that supported the principle that conduct could be "shocking" not by virtue of its impact on the victims, but by virtue of incompatibility with contemporary sexual attitudes. However, said the court, since those cases were decided we "have moved away from rigid imposition of austere moral values on society as a whole."

The court then determined it would not defer to the BIA's interpretation in petitioner's case because the BIA's order had been unpublished and its analysis that indecent exposure was a CIMT had not been persuasive but "cursory" and "conclusory." The court found that although California courts had limited §314 to "sexually

(Continued on page 13)

Matter Of Rajah–A Look Back And Beyond

In *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009), on remand from the Second Circuit, the Board articulated the factors to be considered in determining whether an alien has established good cause warranting the grant of a continuance to apply for adjustment of status based on a pending application for labor certification or employment-based immigrant visa petition. Notably, the Board's decision in *Matter of Rajah* resulted from one panel of the Second Circuit seemingly overruling the decision of another panel and considering extra-record evidence while doing so. Below is a very brief summary of the employment-based visa adjustment process, as well as the unusual procedural posture that ultimately resulted in the Board's recent precedent decision, and a brief discussion of issues that may follow.

The Adjustment Of Status Process Generally

Adjustment of status is a discretionary immigration benefit that affords qualifying aliens the procedural opportunity to obtain lawful permanent resident status from within the United States rather than having to leave the United States to adjust from abroad. Specifically, 8 U.S.C. § 1255(a) provides that the status of an alien lawfully admitted into the United States may be adjusted to that of an alien admitted for permanent residence if: (1) the alien makes an application for such adjustment; (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (3) an immigrant visa is immediately available to him at the time his application is filed. Additionally, certain aliens who have not been lawfully admitted, may still seek adjustment of status if they meet additional requirements set forth in 8 U.S.C. § 1255(i).

In order to adjust status based on employment an alien must go through a lengthy and often speculative process. First, an alien's prospective employer must petition the Department of Labor for a Labor Certification on the alien's behalf. If that application meets certain requirements, it is then "certified" and constitutes a valid Labor Certification. Next, the alien's prospective employer must file the Labor Certification along with an Immigrant Visa Petition for Alien Worker ("Form I-140") with the Department of Homeland Security ("DHS"). The filing of Form I-140 constitutes a request to DHS that the alien named in the Labor Certification be classified as eligible to apply for designation within a specified visa preference employment category. If DHS approves the Visa Petition and classifies the certified alien as so eligible, the alien is assigned an immigrant visa number by the Department of State. After that, if the alien presently resides in the United States, the alien must file with the DHS an Application to Register Permanent Residence or Adjust Status ("Form I-485"). DHS then considers Forms I-140 and I-485 to determine whether to adjust the alien's status to lawful permanent resident. *See generally Lendo v. Gonzales*, 493 F.3d 439, 441-42 (4th Cir. 2007) (describing the process) (citations omitted); see also *Matter of Rajah*, 25 I&N Dec. at 130-133 (providing a more detailed explanation of the process). However, because all employment-based categories are subject to annual numerical limits, a visa may not be immediately available to the alien. In order to adjust status, a visa must be immediately available and this occurs when the alien's priority date is earlier than the date for the specified preference category shown on the current State Department Visa Bulletin. See 8 C.F.R. §§ 245.1(g)(1), 1245.1(g)(1).

In order to adjust status based on employment an alien must go through a lengthy and often speculative process.

The Second Circuit's Decision In Elbahja v. Keisler

In *Elbahja v. Keisler*, the Second Circuit "join[ed] the Third, Fifth, and Eleventh Circuits" in holding that an immigration judge does not abuse his or her broad discretion in denying an alien's request for a continuance to await the adjudication of an unapproved labor certification. 505 F.3d 125, 129 (2d Cir. 2007) (*citing Khan v. Att'y Gen.*, 448 F.3d 226, 235 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 438-39 (5th Cir. 2006); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1366-67 (11th Cir. 2006)). Relying on past precedent in cases dealing with family-based visa petitions, the court explained that an alien who was not eligible for adjustment of status at the time of his hearing, had no right to delay his immigration proceedings in an effort to attempt to become eligible for such relief. *Elbahja v. Keisler,* 505 F.3d at 128-29 (*citing Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006)). As such, the court wrote "to clarify that it is not an abuse of discretion for an IJ to decline to grant multiple continuances in order to permit processing of a removable alien's pending labor certificate application." *Id*. at 126.

The Second Circuit's Decision In Rajah v. Mukasey

Following the Second Circuit's decision in *Elbahja*, a different Second Circuit panel issued a decision in *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008). Although the alien in Rajah similarly challenged the Board's affirmance of an immigration

(Continued on page 4)

Beyond Matter of Rajah

judge's denial of his request for a continuance to await the adjudication of a labor certification, the panel nevertheless remanded the matter to the Board, seeking "a quantum by which better to measure the reasonableness of a petitioner's request for a continuance, and a clearer demarcation of the range of permissibility to be exercised by the IJ." Rajah, 544 F.3d at 450. In so remanding, the court ostensibly distinguished its decision in *Elbahja*, by limiting *Elbahja* to the facts of that particular case. Id. at 454. Yet, the court observed that the *Elbahja* panel was "undoubtedly correct" in emphasizing that other circuits had determined that, "because any eventual adjustment of status would be 'speculative' in the absence of an approved labor certification, as the 'mere filing of a labor certificate does not make an alien eligible for adjustment of status under § 1255 (i).'" *Id.* Nevertheless, the court concluded that "the reasoning of the Eleventh Circuit, and our own positive description of it in *Elbahja*," left open the question of "whether a system that specifically provides for cancellation of removal [or adjustment of status] on the basis of employment certification can escape being arbitrary and capricious where it does not afford adequate time for a petitioner to obtain such labor certification, or where there is no reasoned standard for what length of time would be adequate." *Id.* (*quoting Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2006)). The court further stated that remand was appropriate in *Rajah*'s case because his labor certification was approved not long after the Board's decision, thereby making his case "an especially apt one" for the Board "to identify the boundaries of the discretion that its judges may exercise." Id. at 456; but see 8 U.S.C. § 1252(b)(4)(A) ("the court of appeals shall decide the petition only on the administrative record on which the order of removal is based").

The Board emphasized in *Rajah* that to determine whether good cause exists for a continuance for employment-based adjustment of status, the alien's place in the process must first be determined.

The Board's Decision On Remand In Rajah

On remand from the Second Circuit, the Board followed the Second Circuit's instructions and set forth standards for granting continuances to permit adjudication an alien's employment-based visa petition or to give the Department of Labor the opportunity to adjudicate a labor certification. *Matter of Rajah*, 25 I&N Dec. at 128. The Board noted that immigration judges derive their broad discretionary authority over continuances from the regulations, which provide that "'[t]he Immigration Judge may grant a motion for continuance for good cause shown.'" *Id.* at 129-30 (quoting 8 C.F.R. § 1003.29); see also 8 C.F.R. § 1240.6. The Board emphasized that to determine whether good cause exists for a continuance for employment-based adjustment of status, the alien's place in the process must first be determined. Id. at 137. The Board explained that, outside of certain special cases, immigration judges should balance all of the factors articulated in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), and any other relevant considerations, with particular focus on the ultimate likelihood of success on the adjustment application. Id. The Board further held that the pendency of a labor certification generally will not be sufficient to grant a continuance in the absence of additional persuasive factors, such as the demonstrated likelihood of its imminent adjudication or DHS support for the motion. *Id.* at 137. In a footnote, the Board also encouraged DHS "to consider agreeing to administrative closure in appropriate circumstances, such as where there is a pending prima facie approvable visa petition." *Id*. at 139 n.10 (citing *Matter of Hashmi*, 24 I&N Dec. at 791 n.4). At the direction of the Second Circuit, the Board also explained that the approval of a labor certification while an alien's case is pending judicial review in the Circuit Court, "might affect the case on remand or in the context of a motion to reopen and would need to be reviewed on a case-by-case basis." *Id*. at 137. Applying this newly articulated standard to Rajah's case, the Board again dismissed Rajah's appeal because although his labor certification was approved while his case was pending before the Second Circuit, his labor certification is no longer valid because it expired. *Id*. at 137, 138.

Looking Beyond The Board's Decision In Matter Of Rajah

Since its recent decision in *Matter of Rajah*, the Board has remanded at least four cases to immigration judges for reconsideration of the aliens' requests for continuances in light of the newly articulated standards. Presumably, these aliens, and others, whose cases may eventually reach the appellate courts, will not be permitted to simply mention extra-record evidence, such as the approval of a Labor Certification or visa petition, during the pendency of their petitions for review, and instead will be required to file motions to reopen with the Board. In light of the Second Circuit's handling of *Rajah*'s case, the fact that Rajah has now filed a new petition for review in the Second Circuit, and the variety of issues that may potentially arise during these future motions to reopen, the Second Circuit's decision in Rajah likely will not be the last time the Board is "directed" to set standards in the employment-based adjustment context.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony – Second or Subsequent State Controlled Substance Conviction

The Supreme Court has calendared argument in ***Carachuri-Rosendo v. Holder*** (Sup.Ct. No. 09-60) for March 31, 2010. In the government's response to the petition for writ of certiorari, the Solicitor General agreed that certiorari is appropriate in view of an inter-circuit split regarding the circumstances under which an alien's state conviction for illegal possession of a controlled substance qualifies as an "aggravated felony." Defending the judgment below (570 F.3d 263 (5th Cir. 2009)), the Solicitor General argued, contrary to the interpretation of the Board of Immigration Appeals (***Matter of Carachuri-Rosendo***, 24 I&N Dec. 382 (BIA 2007) (*en banc*)), that such a conviction constitutes an aggravated felony if the conduct occurred after a prior illegal drug conviction has become final, regardless of whether the recidivist nature of the crime was established in the prosecution.

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Aggravated Felony — Term of Imprisonment

On January 7, 2010, the government filed a petition for rehearing en banc in ***Shaya v. Holder***, 586 F.3d 401 (6th Cir. 2009), challenging the court's holding that Shaya's conviction was not an aggravated felony crime of violence, which requires that the term of imprisonment be at least one year. The court held that the language of 8 U.S.C. § 1101(a)(43)(F) is ambiguous and that its application to an indeterminate sentence was primarily a function of state law. The government argues that the panel ignored the federal statutory definition of "term of imprisonment" contained in 8 U.S.C. § 1101(a)(48)(B), and failed to defer to the Board's reasonable interpretation of the immigration statute.

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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 court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. 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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VWP — Waiver, Due Process Particularly Serious Crimes

In June 2009, the government filed a petition for panel rehearing and opposed petitioner's petition for rehearing and rehearing en banc 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 Board 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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Withholding of Removal—Particularly Serious Crime

The Tenth Circuit has ordered a response to petitioner's request for rehearing en banc of ***N-A-M- v. Holder,*** 587 F.3d 1052 (10th Cir. 2009). The questions raised by the petitions are: May a non-aggravated felony be counted as a particularly serious crime for purposes of the bar to withholding of removal? Is a separate dangerousness assessment necessary for an offense to be a particularly serious crime?

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Jurisdiction—Criminal Alien

In ***Turcios v. Holder***, 582 F.3d 1075 (9th Cir. 2009), the government has filed its opposition to *en banc* rehearing. The question presented is whether the court properly dismissed criminal alien's petition seeking review of BIA's denial of the motion to reconsider the dismissal of his untimely appeal on the grounds that the BIA's denial was an exercise of routine discretion.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That Applicant's Testimony That Is Inconsistent With Earlier DHS Interviews Goes To The Heart Of An Asylum Claim

In ***Weng v. Holder***, 593 F.3d 66 (1st Cir. 2010) (*Lynch*, Torruella, Stahl), the First Circuit held that the agency's rejection of petitioner's explanation for failing to raise her religious persecution claim during her credible fear and earlier interviews – that she feared deportation and did not know that DHS would not disclose to her statements to the Chinese government – was supported by substantial evidence because the petitioner's explanation was directly contradicted by the credible fear worksheet and information provided by both immigration officers.

The petitioner, a Chinese citizen, entered the United States from Calexico, Mexico, on July 16, 2004. At the border, DHS officials found her in the trunk of a car and detained her. An immigration officer then interviewed petitioner under oath through a Mandarin translator. She told the officer that the reason she had come to the United States and feared returning to China was that she and her family were poor and she needed work. She also said she feared harm in China, but could not name anyone who would harm her. Later that day, an asylum officer conducted a credible-fear interview where petitioner raised additional reasons why she did not want to return to China, none of which involved religious persecution.

Once in removal proceedings, however, petitioner claimed for the first time that she was fleeing religious persecution in China for practicing Zun Wang, a banned religion in China. The IJ determined that petitioner was not credible because her prior, sworn interview statements were inconsistent in several respects with her hearing testimony and denied asylum. On appeal the BIA concluded that petitioner's inconsistencies undermined her credibility and went to the heart of her claim.

On petition for review, the court affirmed the adverse credibility finding. The court explained that, "despite being told to tell DHS officers why she feared returning to China, [petitioner] repeatedly failed to mention religious persecution and offered a host of alternative explanations. The IJ fairly weighed this inconsistency against [her] explanation for why she lied on several points and found her explanation unpersuasive. We cannot say the record compels a contrary conclusion," said the court. The court noted that the petitioner was informed in her primary language of her rights and that DHS could not disclose her statements, which she affirmed in writing.

The court held that the BIA's conclusion that an involuntary IUD insertion is not an involuntary sterilization was a permissible interpretation of the statute.

The court further found that the IJ need not have discussed all of the documentary evidence in depth so long as he gave a reasoned consideration of the evidence as a whole.

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SECOND CIRCUIT

■ Second Circuit Upholds BIA's Determination That Forced Insertion Of Intrauterine Device Is Not Involuntary Sterilization And Therefore Not Per Se Qualification For Granting Asylum

In ***Huang v. Holder***, 591 F.3d 124 (2d Cir. 2010) (Feinberg, Walker, Katzmann) (*per curiam*), the Second Circuit held that the BIA's prior decision in *Matter of M-F-W & L-G*, 24 I&N Dec. 633 (BIA 2008), which held that the forced insertion of an intrauterine device is not an involuntary sterilization, and therefore not a per se ground for granting asylum, is a permissible interpretation of the statute and therefore entitled to deference.

The petitioner, an asylum applicant from China, claimed persecution, *inter alia* on the basis that she had an IUD forcibly inserted after the birth of her only child. The IJ and subsequently the BIA, concluded a forced IUD insertion does not constitute persecution absent aggravating circumstances, which were not present in petitioner's case.

The Second Circuit, applying step one of the *Chevron* analysis, determined that Congress had not spoken on the issues of whether a person who has been forced to have an IUD inserted is a refugee, whether an IUD insertion constitutes sterilization, or whether a forced IUD insertion constitutes persecution. Applying step two of the *Chevron* analysis, the court then held that the BIA's conclusion that an involuntary IUD insertion is not an involuntary sterilization was a permissible interpretation of the statute. "The BIA's reasoning that sterilization makes one permanently incapable of having children, whereas an IUD is a temporary measure, is reasonable," said the court.

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■ Second Circuit Remands Petitioner's Naturalization Proceedings For Proper Adjudication Of His Claims

In ***Azize v. Bureau of Citizenship and Immigration Services***, __ F.3d __, 2010 WL 336750 (2d Cir. February 1, 2010) (Jacobs, *Newman*, Trager), the Second Circuit remanded the case to

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

the district court to make factual determinations on petitioner's claim that the former INS improperly handled his naturalization proceeding over twenty years ago when he attended a preliminary naturalization hearing but failed to surrender his green card at that time. Judge Jacobs dissented, stating that the INS did not act improperly in adjudicating the alien's naturalization application, and based on the alien's negative equities, he did not warrant *nunc pro tunc* relief.

The IJ's rejection of the corroborating evidence because, *inter alia*, the medical record was not written on clinic letterhead was "manifestly contrary to the law and an abuse of discretion."

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FOURTH CIRCUIT

■ **Fourth Circuit Holds That IJ's Rationale For Rejecting Asylum Applicant's Corroborating Evidence Was Legal Error**

In *Marynenka v. Holder*, 592 F.3d 594 (4th Cir. 2010) (*Michael*, Gregory, Legg (District Judge)), the Fourth Circuit held that the IJ had committed "substantial legal error" in rejecting petitioner's corroborating evidence of persecution in Belarus on account of her political activities.

The petitioner entered the United States on May 29, 2003, as a J-1 exchange visitor visa. She overstayed her visa and, on March 2, 2004, was placed in removal proceedings. She then sought asylum claiming that as a member of Zubr, a Belarusian youth organization that opposes the government and works to promote democracy and freedom in Belarus, she had been beaten and detained by the police. The IJ denied asylum finding no "persuasive corroborating evidence that she was a Zubr member, that she was politically active, that she was arrested, that she was harmed and that she fled Belarus in fear for her life." The BIA affirmed the IJ's decision.

The Fourth Circuit preliminarily determined that, because neither the IJ nor the BIA made an express adverse credibility determination "we presume that [she] testified credibly." The court then ruled that the IJ's rejection of the corroborating evidence on the bases that (1) the medical record was not written on clinic letterhead, (2) the petitioner failed to establish a chain of custody for the document, and (3) the corroborating evidence could not be corroborated, rendered her decision "manifestly contrary to the law and an abuse of discretion."

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That § 212(c) Waiver Is Not Available To Alien Convicted After Trial, And Affirms Finding That Convictions Constitute CIMTs And Aggravated Felonies**

In *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010) (Norris, Cole, *Adams*), the Sixth Circuit, affirmed the BIA's ruling that the alien's convictions under 18 U.S.C. §§ 371 and 1001 for making a fraudulent statement and conspiring to make a fraudulent statement and to defraud the United States, constituted crimes involving moral turpitude under the modified categorical approach. The petitioner, who has a Ph.D. in biochemistry, had been convicted by a jury of making false statements to an agency of the United States, and conspiring to provide inaccurate financial records in connection with a grant he received from the government.

The court joined the majority of circuits in declining to extend *INS v. St. Cyr*, 533 U.S. 289 (2001), to aliens who, prior to the repeal of INA § 212(c), were convicted after a trial, and held that the alien's convictions constituted aggravated felonies as defined at INA § 101(a)(43)(M)(i).

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Petitioner's Motion to Reopen Constitutes a Second Application for a Certificate of Citizenship, Eliminating the Jurisdictional Bar INA § 360 (a)**

In *Ortega v. Holder*, __ F.3d __, 2010 WL 137089 (7th Cir. January 15, 2010) (Flaum, *Ripple*, Sykes), the Seventh Circuit held that the district court had jurisdiction over petitioner's request for a declaration of nationality pursuant to INA § 360(a), 8 U.S.C. 1503(a), where petitioner sought reopening of the denial of her application for a certificate of citizenship with the AAO, after an IJ had concluded that she had acquired derivative citizenship and terminated her removal proceedings.

The petitioner, who was placed in removal proceedings in 2001, claimed that she was a national of the United States. While those proceedings were pending, petitioner applied for a certificate of citizenship. When that application was denied by the INS's Chicago office, petitioner filed an appeal with the AAO. On May 7, 2002, one day after her appeal was filed, the IJ terminated the removal proceedings finding that petitioner had acquired U.S. citizenship through her father under INA § 301(g). On February 2003, the AAO denied petitioner's appeal. On March 28, 2003, petitioner filed with the AAO a motion to reopen and reconsider the denial in light of the IJ's

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

ruling. The AAO, however, returned the motion, indicating that it had to be filed with the local district office. Petitioner then filed the motion with the district office with an explanation that it had been timely but incorrectly filed with the AAO. Over four years later, on August 7, 2007, the AAO denied the motion as untimely. The AAO treated the motion as a motion to reconsider, reasoning that petitioner had not provided any new facts, and held that because it was untimely it was without discretion to grant it.

The court held that the definition of "aggravated felony," which distinguishes domestic convictions from foreign felony convictions, is accorded a strong presumption of validity and need only be supported by a rational basis.

Petitioner then instituted an action in the district court seeking a declaration of nationality under INA § 360(a). The court, however, granted the government's motion to dismiss, finding that petitioner's claim arose in removal proceedings prior to her application for citizenship and therefore, under the plain meaning of § 360(a), it lacked jurisdiction. Petitioner then appealed to Seventh Circuit.

The Seventh Circuit construed § 360(a) as precluding an alien from instituting a declaratory action while removal proceedings are ongoing. These exceptions, said the court, "are designed to protect removal proceedings from judicial interference and preserve 8 U.S.C. §1252 as the exclusive means of challenging a final order of removal." However, in petitioner's case, the removal proceedings had been terminated, and the court found it unlikely that Congress intended for aliens, such as the petitioner in this case, to be without a remedy. The parties agreed that the appropriate course here would be for petitioner to begin the process of establishing her nationality anew. The government proposed that petitioner could file a new application for citizenship by filing a motion to reopen. The court, however, found that the regulations limited the circumstances under which USCIS could consider a second application. Instead, the court found that under 8 C.F.R. § 341.6, petitioner's motion to reopen and reconsider was a "correct substitute" for a second application for citizenship. Accordingly, the AAO's denial of that motion removed any jurisdictional impediments under § 360(a), and therefore the district court could consider the declaratory judgment action.

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■ **Seventh Circuit Holds That "Aggravated Felony" Definition Does Not Violate Equal Protection And That § 212 (c) Is Not Impermissibly Retroactive Where Alien Was Convicted By Jury Trial**

In ***Canto v. Holder***, 593 F.3d 638 (7th Cir. 2010) (Easterbrook, *Williams*, Tinder), the Seventh Circuit held that the definition of "aggravated felony," which includes all domestic aggravated felony convictions, but only those foreign felony convictions for which the alien completed his term of imprisonment during the fifteen years prior to the commencement of removal proceedings, did not violate the equal protection clause. The court said that since this classification involves "neither a fundamental right nor a suspect classification, it is accorded a strong presumption of validity and need only be supported by a rational basis." The court found that Congress could have had several rationales for exempting older foreign convictions from the INA removability grounds. For example, it said that "Congress may have been concerned about the legal protections afforded to defendants in other countries. Congress cannot know how reliable a foreign country's justice system is." Accordingly, the court found it "perfectly rational that Congress might not want to prevent an alien from seeking a waiver because of a foreign conviction based on different laws without analogous constitutional guarantees."

The court also held that the repeal of INA § 212(c) was not impermissibly retroactive to aliens, like Canto, who were convicted by a jury trial. The court rejected Canto's claim that he detrimentally relied on the availability of § 212(c) relief in forgoing an appeal of his conviction. "Our precedent has already addressed this question and found that aliens who went to trial did not forgo any rights in reliance on the continued existence of section 212 (c), so it was not impermissibly retroactive," said the court.

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EIGHTH CIRCUIT

■ **Eight Circuit Affirms Adverse Credibility Finding Based on Inconsistencies, Omissions, and Implausibilities of Asylum Applicant's Story**

In ***Damkam v. Holder***, __ F.3d __, 2010 WL 135211 (8th Cir. January 15, 2010) (Bye, Smith, *Colloton*), the Eighth Circuit affirmed the denial of asylum where the IJ had concluded that the applicant, a citizen of Cameroon, was not credible. The petitioner entered the United States in October 2003 on a visitor's visa but did not depart when his authorized stay expired. Petitioner claimed that because of his active involvement in the Social Democratic Front (SDF), an opposition party in Cameroon, he had been tortured and his family had been threatened. The IJ denied the application on credibility grounds finding that petitioner's testimony lacked details and was inconsistent with his own application, supporting documents, and the testimony of his witness. The BIA affirmed the decision finding that the adverse credibility determination was supported by the record and also finding that petitioner had failed to provide corroborative evidence.

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

The Eight Circuit denied the petition for review, concluding that no record evidence compelled reversal of the BIA's adverse credibility finding. The court particularly noted that the IJ reasonably relied upon several inconsistencies and omissions in the record, the alien's implausible testimony, and an absence of corroborating evidence. The court further found that without credible testimony the denial of the asylum claim dictated the same outcome for petitioner's claims for withholding and CAT, which were "based on the same underlying factual allegations."

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■ Eighth Circuit Holds That Applicant for Cancellation of Removal Failed To Establish Ten Years Of Continuous Physical Presence

In ***Sanchez-Velasco v. Holder***, 593 F.3d 733 (8th Cir. 2010) (*Murphy*, Bye, Goldberg), the Eighth Circuit held that petitioner had failed to establish the requisite ten years of continuous physical presence for cancellation of removal. When placed in removal proceedings in October 26, 2007, petitioner applied for cancellation of removal. He testified that he, his sister, and his mother had entered the United States without admission or parole on or about December 17, 1996. He submitted school records which indicated that he had attended an elementary school in Collinsville, Illinois, from March 5, 1998 through 2000, and that he had attended junior high school there in 2001. He also testified that although his parents lived in Illinois and could attest to his 1996 entry, they refused to testify for fear of being subjected to removal proceedings.

The IJ determined that petitioner had failed to prove that he had been present in the country since October 26, 1997. In particular, the IJ noted that although corroborating evidence was available through petitioner's parents, he failed to use it. The BIA affirmed the IJ's findings.

The court held that the IJ did not hold petitioner to an impermissibly high burden of proof by requiring corroboration of his testimony that he had entered the country on or before October 26, 1997. The court noted that petitioner's "parents were living in Illinois at the time of the hearing and could corroborate his testimony. They could therefore have testified or submitted affidavits on his behalf." The court also held that petitioner lacked a liberty interest in the discretionary relief of cancellation of removal and therefore he could not claim a due process violation.

The court held that petitioner lacked a liberty interest in the discretionary relief of cancellation of removal and therefore he could not claim a due process violation.

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■ Eighth Circuit Holds That Using A Fraudulently Obtained Social Security Number, In Violation of 42 U.S.C. § 408(a)(7)(A), Is A CIMT

In ***Lateef v. Holder***, 592 F.3d 926 (8th Cir. 2010) (*Murphy*, Bye, Goldberg (District Judge)), the Eighth Circuit denied the petition for review of an alien who had been convicted of using a fraudulently obtained social security number to obtain a state-issued identification card. The alien argued that his conviction did not involve moral turpitude and qualified for exemption under 42 U.S.C. § 408(e) on two grounds: first, because he became a lawful permanent resident under the Special Agricultural Workers legalization program; and second, based on the Ninth Circuit's decision in *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000). The court held that the exemption did not apply because the alien's use of the social security number occurred after January 4, 1991, and it further declined to follow the Ninth Circuit on the ground that its expansion of the limited exemption was contrary to the language of 42 U.S.C. § 408(e).

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Eighth Circuit Declines To Direct The BIA To Consider An Untimely Motion To Reopen For Adjustment

In ***Tebyasa v. Holder***, 593 F.3d 707 (8th Cir. 2010) (*Loken*, Arnold, and Benton), the Eighth Circuit denied petitioner's motion to remand to adjust status. The court noted that the BIA will grant a motion to reopen if an unadjudicated visa petition was filed while the alien's appeal of the removal order was pending before the BIA, but ruled that petitioner's pending motion to reopen before the BIA was untimely and the visa petition was filed after the BIA issued the removal order. The court also affirmed the denial of asylum, withholding of removal, and CAT protection, because petitioner's treatment in Uganda fell short of past persecution and the credibility determinations were supported by specific, cogent reasons.

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NINTH CIRCUIT

■ Ninth Circuit Holds That Record Compelled Conclusion That Armenian Asylum Applicant Was A Whistle-Blower Who Was Harmed on Account of His Political Opinion

In ***Baghdasaryan v. Holder***, 592 F.3d 1018 (9th Cir. 2010) (*Pregerson*, Reinhardt, Wardlaw), the Ninth Circuit held that a reasonable factfinder would be compelled to conclude that an Armenian citizen who publicly criti-

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)
cized a government official's extortion scheme was a whistle-blower.

The petitioner entered the United States with a fraudulent visa on October 22, 2001, and days later was placed in removal proceedings. The petitioner claimed that he had been threatened, harassed, fined, detained, and beaten because he opposed the systemic government corruption, including the extortion of bribes perpetrated by General H. Hakopian, a powerful politician and government official. According to petitioner, as a small business owner he had refused to pay bribes allegedly demanded by Hakopian and had organized the other business owners to fight against the corruption. He claimed that several days before a planned anti-corruption rally, Hakopian's militia men came to his house and detained him for twenty days without charge. During his detention he was beaten and told to stop defaming Hakopian.

The Ninth Circuit held that the BIA's conclusion was contrary to the record and to its case law, which establishes that opposition to government corruption is an expression of political opinion.

The IJ did not find petitioner credible and alternatively held that he had not established a nexus to a protected ground. On appeal, the BIA reversed the IJ's adverse credibility determination, but nevertheless dismissed the appeal for failure to establish a nexus to a protected ground. The BIA found "very little indication" that the Armenian government was imputing any political opinion to petitioner and that petitioner was merely the "victim [of] criminal misconduct."

The Ninth Circuit held that the BIA's conclusion was contrary to the record and to its case law, which establishes that opposition to government corruption is an expression of political opinion. Citing *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007), the court reasoned that petitioner was threatened, harassed, arrested, and beaten after filing a complaint and publicly protesting the government sanctioned extortion practiced by Hakopian. The court noted that while petitioner was beaten in detention, a top law enforcement official told him that he was 'defaming' and 'raising his head' against General Hakopian. "This is direct and concrete evidence that [petitioner] was beaten because of his opposition to the government corruption perpetrated by General Hakopian," said the court. Because the BIA "ignored this compelling evidence of nexus," the court found that the BIA's conclusion that petitioner had failed to establish a nexus was not supported by substantial evidence.

The court, applying pre-REAL ID Act standards, further concluded that, while some of the harm that petitioner experienced may have been motivated by the personal greed of Hakopian, the harm at least in part was also on account of his political opinion. Accordingly, the court remanded the case to the BIA to determine whether the harm that petitioner experienced rose to the level of persecution.

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■ **Ninth Circuit Rules That A Stipulated Plea Agreement As To Actual Tax Loss Is Permissible Document To Consider Under The Supreme Court's *Nijhawan* Decision And Remands To Determine Additional Types Of Evidence That Demonstrate Loss**

In ***Kawashima v. Holder***, 593 F.3d 979 (9th Cir. 2010) (*O'Scannlain*, Leavy, Callahan), the Ninth Circuit denied the government's petition for rehearing en banc as moot, denied the petition for review as to Mr. Kawashima, and granted the petition for review and remanded as to Ms. Kawashima. The court held that: (1) tax offenses other than tax evasion may qualify as aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i); (2) Mr. Kawashima's tax crime necessarily involved fraud or deceit and that use of his stipulated plea agreement of the actual tax loss was proper under the new standard announced by the Supreme Court in *Nijhawan v. Holder*, to determine that the loss exceeded $10,000 under subsection (M)(i); and (3) Ms. Kawashima's tax crime necessarily involved fraud or deceit. The court remanded Ms. Kawashima's case, however, in light of the holding in *Nijhawan*, so that the BIA could determine what types of evidence it may consider to determine the total loss suffered by the government as a result of Ms. Kawashima's crime.

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■ **Ninth Circuit Holds That An IJ May Consider Information Outside The Record Of Conviction In Determining Whether An Alien Has Been Convicted of A Particularly Serious Crime**

In ***Anaya-Ortiz v. Holder***, __ F.3d __, 2010 WL 252519 (9th Cir. January 25, 2010) (Berzon, *Ikuta*, Singleton), the Ninth Circuit, in denying the alien's petition for panel and en banc rehearing, withdrew its previous published opinion, and held that the BIA's decision in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), which allowed the introduction of extrinsic evidence in particularly serious crime determinations, was a reasonable interpretation of the withholding of removal statute. The court consequently held that the IJ's reliance on the alien's testimony was proper. In a contemporaneous unpublished decision, however, the court decided that the alien had failed to exhaust his administrative remedies with regard to whether he was removable as an aggravated felon under the modified categorical approach, thereby withdrawing its

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)
prior, published holding that an IJ may rely solely on an abstract of judgment in applying the modified categorical approach.

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■ **Ninth Circuit Transfers Case To Fifth Circuit To Comply With Venue Provision**

In ***Trejo Mejia v. Holder***, 593 F.3d 913 (9th Cir. 2010) (Cowen, Bybee, Graber) (*per curiam*), the Ninth Circuit held that venue was proper in the Fifth Circuit, because the immigration proceedings had taken place in that judicial district. The court stated that the petition for review, filed after the effective date of the REAL ID Act, was governed by its provisions despite the petitioner's argument that her final order of removal was in 1988. The court declined to decide "whether INA § 242(b)(2), 8 U.S.C. §1252(b)(2), is purely a venue statute or whether it also affects our subject matter jurisdiction."

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■ **Ninth Circuit Holds That Departure Bar Is Invalid When Applied To A Forcibly Removed Alien Whose Motion To Reopen Was Pending At The BIA**

In ***Coyt v. Holder***, 593 F.3d 902 (9th Cir. 2010) (Fernandez, *Thomas*, Aldrich (N.D. Ohio)), the Ninth Circuit held that the departure bar at 8 C.F.R. § 1003.2(d) cannot apply to withdraw a motion to reopen where that motion was filed by an alien before being forcibly removed from the United States. "It would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA," explained the court. Accordingly, the court determined that "the only manner in which we can harmonize the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen and requiring the alien's removal within ninety days is to hold, consistent with the other provisions of IIRIRA, that the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen."

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■ **Ninth Circuit Affirms That Status As A Former Material Witness For the Government Does Not Constitute A Particular Social Group**

In ***Velasco-Cervantes v. Holder***, 593 F.3d 975 (9th Cir. 2010) (*Beezer*, Gould, Tallman), the Ninth Circuit denied asylum to a Mexican citizen who claimed that she had been forced to serve as a material witness on behalf of the United States against illegal smugglers.

The court held that petitioner failed to demonstrate that former material witnesses for the government constitute a particular social group.

The petitioner had been found in a small compartment under the back seat of a car crossing the Southern border and was subsequently detained as a material witness to testify against the driver of the vehicle. After the alien's release, she contended that she had been threatened by smugglers for assisting the prosecution. The IJ found no evidence that petitioner had suffered past persecution on account of a protected ground nor any evidence that she had a well-founded fear of future persecution. Likewise, the IJ held that petitioner had failed to demonstrate the requisite nexus between the feared harm and one of the five protected grounds. The BIA dismissed the appeal holding, among other things, that former material witnesses for the government do not constitute a particular social group.

The court noted that, under its precedents, a "particular social group" is "one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000). In making this determination, we look to 'whether a group's shared characteristic gives members social visibility and whether the group can be defined with sufficient particularity to delimit its membership.' Arteaga v. Mukasey, 511 F.3d 940, 944 (9th Cir. 2007)."

The court held that petitioner failed to demonstrate that former material witnesses for the government constitute a particular social group. The court explained that "[g]overnment material witnesses are often involuntarily recruited for the task. Moreover, former government material witnesses cannot be defined with 'sufficient particularity,' because any person of any origin can be involuntarily placed in that role in any type of legal proceeding."

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■ **Ninth Circuit Affirms Denial Of Adjustment Of Status Based On A Disqualifying Criminal Offense Despite An Inconclusive Conviction Record**

In ***Esquivel-Garcia v. Holder***, __ F.3d __, 2010 WL 309030 (9th Cir. January 28, 2010) (*Thompson*, Silverman, Bolton), the Ninth Circuit affirmed the BIA's denial of petitioner's adjustment of status claim, but remanded the petition for further consideration of his cancellation of removal claim. The court held that an inconclusive record of conviction (a

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

"criminal history transcript"), which did not identify the controlled substance that he unlawfully possessed, failed to demonstrate that petitioner was criminally ineligible for cancellation. However, the court found that the record supported the IJ's finding that petitioner was ineligible for adjustment of status based on his testimony that he thought that the controlled substance was heroin.

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■ **Ninth Circuit Grants Government's Petition For Rehearing En Banc In A Criminal Sentencing Case Challenging The Court's Use Of The "Missing Element" Rule**

In ***United States v. Aguila-Montes***, __ F.3d __, 2010 WL 431919 (9th Cir. February 3, 2010) (Kozinski, Chief Judge), the Ninth Circuit issued an order granting the government's rehearing *en banc* petition and ordering that the three-judge panel opinion reported at 553 F.3d 1229 (9th Cir. 2009) is not to be cited as precedent in the Ninth Circuit. In that decision, the panel, after holding there was not a categorical match, held that, consistent with *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc), the modified categorical approach may not be applied to determine whether the defendant's prior burglary conviction constitutes a "crime of violence" for sentence enhancement because California burglary is missing an element of "generic" burglary ("unlawful or unprivileged" as to the entry) altogether. In its *en banc* petition, the government argued that the Ninth Circuit's "missing element" rule is erroneous and is inconsistent with the Supreme Court caselaw in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). The same week that the Criminal Division filed the *en banc* petition in *Aguila-Montes*, the Civil Division filed a petition for *en banc* rehearing in the immigration case, *Aguilar-Turcios v. Holder*, 582 F.3d 1093 (9th Cir. 2009). In that case, the government requested en banc review of the panel majority's holding that the alien's military conviction for using a computer to access pornography could not be used to remove the alien for an offense relating to child pornography. The panel made this ruling because the statute of conviction did not contain the element of "child" as to the pornography, and thus the agency was precluded from referring to the conviction record to determine whether the crime involved child pornography as required by the immigration ground of removal. The government, in line with arguments made in the en banc petition filed by the Criminal Division in *Aguila-Montes* (No. 05-50170), argued that the Ninth Circuit's "missing element" rule is erroneous and is inconsistent with the *Taylor* and *Shepard*, and First Circuit precedent. The petition remains pending.

"The reading of the statute adopted by the immigration judge and the BIA violates basic principles of common sense and fairness."

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■ **Tenth Circuit Holds that a K-2 Visa Holder Is Eligible to Adjust Status Even If He Is Over Twenty-One and No Longer a "Minor Child"**

In ***Carpio v. Holder***, 592 F.3d 1091 (10th Cir. 2010) (*Henry*, Murphy, and Tymkovich), the Tenth Circuit ruled that an alien who entered the United States on a K-2 visa, as the child of the fiancé of a U.S. citizen, can adjust status after his twenty-first birthday.

The petitioner entered the U.S. in 2002, along with his mother and sister, on a K visa, which permits alien fiancées and fiancés (K-1 visa holders) and their children (K-2 visa holders), to enter the United States to marry U.S. citizens. Upon his mother's marriage and over six months prior to his twenty-first birthday, petitioner applied for a conditional adjustment of status under 8 U.S.C. § 1255(d). On September 23, 2005, USCIS denied his request on the grounds that he was no longer under age twenty-one. An IJ agreed with that conclusion and the BIA affirmed.

The court rejected the BIA's interpretation that 8 U.S.C. § 1255(d) bars adjustment for K-2 aliens who are not "minor child[ren]" at the time that their adjustment application is adjudicated. Preliminarily, the court held that the BIA's interpretation was only due deference under *Skidmore*, because its order was issued by a single Board member and did not rely on prior BIA decisions that establish binding precedent. The court acknowledged that it had occasionally afforded *Chevron* deference to unpublished, single-member decisions by the BIA, but distinguished that those single member decisions themselves involved applications of BIA precedent.

The court applied a "holistic" approach to its interpretation of the adjustment statute and determined that the "time-specific description of the qualifying status supports the view that the K-2 visa applicant's age should be determined at the time he or she seeks to enter the country." In the court's view, "the reading of the statute adopted by the immigration judge and the BIA violates basic principles of common sense and fairness." Accordingly, the court held that a K-2 visa holder who applies for an adjustment of status must be under twenty-one at the time he or she "seeks to enter the United States" as the child of "the fiancee or fiance of a

(Continued on page 13)

Indecent exposure is not a CIMT

(Continued from page 2)

motivated" exposure it still proscribed conduct that was not morally turpitudinous and therefore did not categorically meet the federal standard. The court cited as an example that exposing oneself in a public place is not necessarily "lewd" or "base, vile and depraved." The court also explained that nude dancing, being the "prototypical victimless crime," is "simply not base, vile, and depraved." Because the accused under these examples have been convicted under § 314, said the court, there is a "realistic probability, not a theoretical possibility" that California would apply the indecent exposure statute to conduct that fall outside the generic definition of moral turpitude. Accordingly, the court reversed the BIA's that indecent exposure was a CIMT.

Judge Bybee filed a dissenting opinion arguing that the majority failed to follow the Supreme Court's admonition in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87, 127 S. Ct. 815, 166 L.Ed.2d 683 (2007), that there be a "reasonable probability" that the state would apply the statute to conduct that falls outside the generic definition of the crime. He said that "'legal imagination' and theoretical possibilities' [were] the warp and woof of the majority's decision."

The dissent would have found that petitioner's conviction was a CIMT, because it was clear that California law punishes persons who "willfully and lewdly . . . expose [their] private parts." He disagree with the majority's reasoning that there were convictions under California law that did not involve lewd conduct, such as the nude dancing case.

"Whatever [petitioner] did to get himself convicted of indecent exposure, we can be fairly confident that it involved more than being a nude dancer at a bar or a 'tasteless prank,'" said Judge Bybee.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

citizen of the United States." The court further found that date that the individual "seeks to enter the United States" may be plausibly read as either (1) the date that the U.S. citizen files a petition for K-1 and K-2 visas with DHS or the date that the K-1 and K-2 visa applications are filed with the consular officer. Here, the court did not need to decide the controlling date because petitioner was under 21 when he entered the United States and therefore he is eligible for adjustment.

Finally, the court found that under *Chenery*, it could not consider the government's contention that the denial of adjustment should be affirmed because no immigrant visa is "immediately available" to petitioner and because the BIA had not decided that issue.

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DISTRICT COURTS

■ Southern District Of Texas Declares Removed Alien To Be U.S. Citizen Since Birth

In *Gilberto Ibarra v. Holder*, No. 08-00513 (Tagle, J.) (S.D. Tex. January 28, 2010), the district court declared after trial, in a case transferred from the Fifth Circuit when the alien raised a material issue of fact concerning his citizenship, that an alien born in Mexico–who had been previously removed–was a U.S. citizen since birth. Plaintiff had the burden of proving that his father was physically present in the United States for at least ten years, from his father's birth in the United States in 1933 until plaintiff's birth in 1961, at least five of which accrued after the father turned fourteen in September 1947. Plaintiff provided testimony from his uncles that the father had always lived and worked in the United States. Plaintiff's brother testified that he had previously been granted U.S. citizenship through his father by the same physical presence requirement.

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INSIDE OIL

OIL welcomes the following two new Trial Atorneys:

Bernard Joseph (Barney) received a BS in Finance and a BS in Marketing from the University of Maryland in 1988 and his JD from Howard University in 1994. Prior to joining OIL, Barney was in-house counsel at Marriott International, Inc.

Matthew A. Connelly joined OIL after working for over 17 years with the Aviation and Admiralty Section in the Torts Branch. Matt received his B.A. in Philosophy from the University of Dallas in 1983, served six years as a naval intelligence officer, and received his J.D. from George Washington University in 1992.

Matthew Connelly, Bernard Joseph

MARK YOUR CALENDARS

■OIL's 14th Annual Immigration Litigation Conference will be held at the National Advocacy Center in Columbia, South Carolina on September 27—October 1, 2010. This is an advanced immigration law conference intended for experienced attorneys who are litigating in the federal courts or advising their client agencies on immigration matters that may lead to litigation.

■OIL's 16th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC on November 15-19, 2010. 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.

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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.

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