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Immigration Litigation Bulletin

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Board Sets Legal Standards For Administrative Closure of Removal Proceedings

In ***Matter of Avetisyan***, 25 I&N Dec. 688 (BIA 2012), the Board held that "the Immigration Judges and the Board may, in the exercise of independent judgment and discretion, administratively close proceedings under the appropriate circumstances, even if a party opposes." The Board overruled *Matter of Gutierrez*, 21 I&N Dec. 479 (1996)(*en banc*), and its predecessors, where it had held that a case may not be administratively closed if opposed by either of the two parties.

The case involves Bavakan Avetisyan, a citizen of Armenia who entered the United States as a J-1 exchange visitor. When her participation in the program ended in March 2003, she did not depart. DHS thereafter instituted removal proceeding against Avetisyan on the basis that she had failed to comply with the terms of her admission as a nonimmigrant. At the commencement of the hearing on June 3, 2004, Avetisyan conceded removability but indicated her intention to apply for relief. When the hearing resumed more than two years later, in November 15, 2006, Avetisyan stated that she had recently married, that she and her husband had a U.S. citizen child, that her husband was in the process of becoming a naturalized citizen, and that he would be filing a visa petition on her behalf. Avetisyan's husband subsequently became a

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Is INA § 242(b)(9) A True Zipper Clause Or Is The Zipper Broken?

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Supreme Court coronated section 242(b)(9) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(b)(9), as the "the unmistakable 'zipper' clause" that "says 'no judicial review in deportation cases unless this section [1252] provides judicial review.'" *Id.* at 483. Section 242(b)(9) was so coined because "it consolidates or 'zips' judicial review of immigration proceedings into one action in the court of appeals." *Morales–Izquierdo v. DHS*, 600 F.3d 1076, 1082 (9th Cir. 2010).

To emphasize the point, Congress amended § 242(b)(9) in the REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) ("REAL ID Act"), by adding specific language precluding district court review, including habeas review, over claims "arising from any action taken or proceedings brought to remove an alien . . . ." REAL ID Act § 106(a)(2), 119 Stat. at 311.

Has § 242(b)(9) lived up to its billing as "the unmistakable 'zipper' clause?" As set forth below, the results are mixed. A majority of circuits have refused to credit § 1252 (b)(9) with having any more preclusive effect than simply barring dis-

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Is the zipper clause broken?

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trict court review of challenges to removal orders. But Congress accomplished that goal by enacting INA § 242(a)(5) (placing "sole and exclusive" jurisdiction of removal orders in the courts of appeals) through the REAL ID Act. What then does § 242(b)(9) add under this interpretation? Does such a reading make (b)(9) a nullity?

As explained below, at a minimum, (b)(9) is best read as reaching not only challenges to removal orders, but to all removal-related claims which may be raised in immigration proceedings. The statute mandates consolidation of review of all such claims at one time in the courts of appeals through a petition for review. This reading best effectuates Congress's intent to avoid bifurcated and piecemeal review of immigration claims. *See* H.R. Rep. No. 109-72, at 175-76 (2005), as *reprinted* in 2005 U.S.C.C.A.N. 240, 300-01.

Background

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, Div. C, 110 Stat. 3009 (1996). As part of IIRIRA's jurisdictional reforms to the INA, Congress created § 1252(b)(9), entitled "Consolidation of questions for judicial review."

In 2005, Congress amended (b)(9) through the REAL ID Act to clarify that aliens cannot seek district court review of claims that fall within the scope of that section. The statute, as amended, reads in relevant part:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law or fact.

INA. § 242(b)(9). The first sentence of the statute contains § 242(b)(9)'s "channeling machinery," *see Aguilar v. U.S. ICE*, 510 F.3d 1, 16 (1st Cir. 2007), directing that all removal-related claims be raised in the removal process. Furthermore, judicial review of such claims is channeled to the courts of appeals through Congress's statutorily-prescribed procedure, *i.e.*, petitions for review of final orders of removal issued by the Board of Immigration Appeals (BIA). The statute's second sentence reaffirms this point by barring district court review over such claims.

A challenge to the BIA's grant of reopening in a removal proceeding "aris[es] from" DHS' efforts to remove an alien and thus falls within the language of § 242(b)(9).

Scope of 242(b)(9)'s channeling provision

Courts have disagreed over § 242(b)(9)'s scope. Most recently, in *Chehazeh v. Att'y Gen. of United States*, __ F.3d __, 2012 WL 77881 (3d Cir. Jan. 11, 2012), a divided panel of the Third Circuit held that (b)(9) did not bar district court review of the BIA's decision to grant DHS's motion to reopen in removal proceedings because that decision did not constitute a final order of removal. *Id.* at *9. Thus, the Third Circuit interpreted (b)(9) as applying only to claims challenges orders of removal. *Id.*

Two other circuits have issued decisions, which the *Chehazeh* Court relied upon, holding that § 242(b)(9) is applicable only to final orders of removal. In *Singh v. Gonzalez*, 499 F.3d 969 (9th Cir. 2007), the Ninth Circuit held that the INA's jurisdictional statutes (including (b)(9)) did not preclude habeas review over an alien's claim that his attorney was ineffective in failing to file a timely petition for review of a removal order. The court reasoned that this type of "post-order" ineffective assistance claim did not implicate a challenge to the removal order, and therefore was reviewable in habeas. *Id.* at 979.

In *Madu v. Att'y Gen.*, 470 F.3d 1362 (11th Cir. 2006), the Eleventh Circuit held that an alien's claim that he had left the country and reentered, thereby executing his removal order, was a question collateral to review of the merits of the removal order, and thus (b)(9) did not bar district court review. *Id.* at 1368.

The analysis of these courts are inconsistent with the language of § 242(b)(9)'s channeling provision, which applies to claims "arising from any action taken or proceeding brought to remove an alien from the United States." Considering the claim in *Chehazeh*, clearly, a challenge to the BIA's grant of reopening in a removal proceeding "aris[es] from" DHS' efforts to remove an alien and thus falls within the language of § 242(b)(9).

Additionally, the decisions discussed above are inconsistent with (b)(9)'s bar in the last sentence of the statute which expressly precludes district court review over "such an order *or such questions of law or fact*." (Emphasis added). The statute's language suggests that the bar precludes more than just review of removal orders; it extends to "questions of law and fact" referenced in the preceding sentence of (b)(9), *i.e.*, questions of law and fact "arising from any action taken or proceeding brought to remove an alien . . . ." The courts' reading renders the "or such questions of law or fact" clause superfluous.

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Is the zipper clause broken?

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For that matter, under the interpretation of these courts, (b)(9) as a whole is rendered mere surplusage in light of Congress's other amendments to INA § 242. If all that (b)(9)'s jurisdictional bar accomplished was to eliminate district court jurisdiction over removal orders, it would add nothing to Congress's review scheme given that a separate jurisdictional provision, § 242(a)(5), specifically eliminated district court review over removal orders by making the courts of appeals the "sole and exclusive means for judicial review" of such orders.

In support of its holding in *Chehazeh*, the majority relied on *INS v. St. Cyr*, 533 U.S. 289 (2001), reasoning that in that decision, "the Supreme Court . . . noted that § 1252(b)(9) is subject to the limitations of § 1252(b), and, therefore, 'applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'" *Chehazeh*, *supra* at *8 (quoting *St. Cyr*, *supra* at 313).

But this line of argument reads to much into the *St. Cyr* opinion. In referring to § 242(b), the Supreme Court focused on the meaning of the term "review," not the phrase "order of removal," and the Court's pronouncements as to the meaning of (b)(9) were directed at the question of whether the phrase "judicial review" encompasses "habeas review." 533 U.S. at 311-14. Thus, the Supreme Court was in no way limiting (b)(9)'s reach to orders of removal. *Id.* at 313-14. It should also be noted that *St. Cyr* was decided *prior* to the REAL ID Act, and thus did not have occasion to interpret (b)(9)'s bar on district court review.

Moreover, the Third, Ninth and Eleventh Circuits' reliance on the introductory language in § 242(b) is flawed. These decisions fail to consider the specific language of § 242 (b)(9) -- "such an order *or* such questions of law or fact" -- which, as discussed above, clearly covers a category of claims *broader* than challenges to removal orders. (Emphasis added). The more specific language found within (b)(9) should take precedence over the general and ambiguous language in § 242 (b) even if there were a conflict between the two provisions.

The more specific language found within (b)(9) should take precedence over the general and ambiguous language in § 242(b) even if there were a conflict between the two provisions.

In any event, no such conflict exists. The introductory language at § 242(b) speaks of "requirements" not "sections or subsections." In the subsections that follow the introduction, not every subsection sets forth a "requirement." For instance, subsection 242(b)(8) contains a number of provisions that are not requirements for review of a final order.

Instead, these subsections provide certain rules of construction relating to the Attorney General's detention authority and an alien's statutory obligations. Likewise, the last section of § 242(b)(9) is not a "requirement" of review of removal orders in the courts of appeals. Rather, it is a *preclusion of review* in district courts. Thus, the introduction in § 242(b) does not restrict it.

In contrast to the Third, Ninth and Eleventh Circuits, the First Circuit has interpreted § 242(b)(9) more broadly, referring to the statute as "breathtaking" in its "expanse," and noting its "vise-like grip" over removal-related claims. *See Aguilar v. U.S. ICE*, 510 F.3d 1, 9 (1st Cir. 2007).

In *Aguilar*, illegal aliens brought suit in district court claiming DHS violated their statutory and constitutional rights in connection with detaining, and then transferring them following a work-place raid. The First Circuit concluded that the district court properly dismissed most of the aliens' claims based on the REAL ID Act's jurisdictional provisions, particularly focusing on § 242(b)(9). *Id.* at 9-19.

Specifically, the court found that plaintiffs' claim that ICE's actions during and after the work-place raid violated their right to counsel could be adequately heard in removal proceedings. *Id.* at 13-18. Thus, the court concluded that § 242(b)(9) required plaintiffs to exhaust their remedies in those proceedings rather than seek review in district court, even though such proceedings had not yet commenced against plaintiffs. *Id.* at 18.

Notably, the court reasoned that "[t]he reach of section 1252(b)(9) is *not* limited to challenges to singular orders of removal or to removal proceedings simpliciter." *Aguilar*, *supra* at 9 (emphasis added). The court construed (b)(9)'s "arising from" language to apply broadly to all removal-related claims unless such claims are "independent of, or wholly collateral to, the removal process." *Id.* at 11.

The court also found significant the underlying purpose of (b)(9): "Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings." *Id.* at 9.

In sum, despite the adverse case law, we have a strong argument that § 242(b)(9) applies to a category of removal-related claims broader than merely challenges to final orders of removal.

Can § 242(b)(9) be applied as a bar only?

A related issue raised by § 242

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The Zipper Clause Unzipped

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(b)(9)'s language is whether the bar on district court review, operates independently or only in *conjunction with* § 242(b)(9)'s channeling provision. In other words, does § 242(b)(9) bar district court review of removal-related claims even when aliens cannot raise such claims in their removal proceedings, and thus cannot seek judicial review of those claims directly with the courts of appeals?

The argument is a difficult one for the government because it is essentially asking the courts to hold that judicial review is unavailable in any court. *See St. Cyr*, 533 U.S. at 314 (suggesting that foreclosing all judicial review to a legal challenge to deportation would raise "serious constitutional questions").

In *Madu*, the government acknowledged that the alien could not obtain judicial review directly in the court of appeals. 470 F.3d at 1366 n.2. The reason for this was that his time for petitioning for review had long passed and, in any event, he was not seeking to challenge the merits of the removal order, but rather was claiming that no such order existed because it had been executed when he departed the country, a claim DHS disputed.

The government nevertheless argued that § 242(b)(9)'s bar operated independently of the channeling provision to preclude district court review over the alien's claim. As noted above, the court rejected the government's argument. Even in *Aguilar*, where the First Circuit interpreted (b)(9) favorably for the government, the court went out of its way to emphasize that "section 1252(b)(9) is a judicial channeling provision, not a claim-barring one." 510 F.3d at 11.

The court explained that while (b)(9) is not limited to review of orders of removal, it would be "perverse" to read the statute as encompassing claims that, "by reason of the nature of the right asserted, cannot be raised efficaciously within the administrative proceedings delineated in the INA." *Id.* at 11; *see also Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 626 (6th Cir. 2010) ("We, like the First Circuit in *Aguilar*, cannot endorse an interpretation of the 'arising from' language in § 1252(b)(9) that 'swallow[s] all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien.'") (quoting *Aguilar*, *supra*, at 10).

The language of § 242(b)(9), the structure of § 242, and the intent behind Congress's enactment of IIRIRA and the REAL ID Act warrant reading (b)(9) to apply to a category of removal-related claims broader than just challenges to removal orders.

The *Aguilar* Court thus viewed the "most salient" questions as follows: "whether the underlying claims are cognizable within the review process established by Congress, and if so, whether enforcement of the exhaustion requirement will allow meaningful judicial review without inviting an irreparable injury." *Supra*, at 17.

In *Chehazeh*, the Third Circuit acknowledged that its reading of § 242(b)(9) was narrower than that of the court in *Aguilar*. 2012 WL 77881, at *9. The *Chehazeh* Court nevertheless noted in a footnote that *Aguilar* supported its decision because Chehazeh's claim could not be "'raised efficaciously'" through a petition for review in the court of appeals. *Id.*, n.19 (quoting *Aguilar*, *supra*, at 11).

But *Chehazeh* was not a case that raised the specter of judicial review being entirely foreclosed by § 242 (b)(9). In that case, the BIA granted DHS's motion to reopen and sent the case back to the IJ for a new asylum hearing. *Supra*, at *15. Once the IJ and BIA issue decisions on the merits (and assuming they are adverse to the alien), the alien may file a petition for review seeking judicial review of both the BIA's grant of reopening and its denial of the merits of his asylum claim.

Thus, in *Chehazeh*, unlike in *Madu*, precluding district court review does not bar all judicial review, but rather delays it until the case winds its way back to the BIA. And that is precisely the result that Congress intended when it enacted § 242(b)(9); to avoid piecemeal and scattershot review between different courts by consolidating review at one time in one place. The government is currently considering whether to seek further review in *Chehazeh*.

Conclusion

To conclude, the language of § 242(b)(9), the structure of § 242, and the intent behind Congress's enactment of IIRIRA and the REAL ID Act warrant reading (b)(9) to apply to a category of removal-related claims broader than just challenges to removal orders. Attorneys should continue to advocate for this interpretation in circuits where the issue is open. Additionally, it is important to remember that courts are less likely to adopt our reading of § 1252(b)(9) where the alien cannot raise his or her claim in removal proceedings and has no judicial remedy through a petition for review in the courts of appeals. Accordingly, in litigating these jurisdictional questions, attorneys should not only vigorously argue for applicability of § 1252(b)(9) to removal-related claims raised in district court, but should also explain what alternative remedies are available to the alien, *i.e.*, how they may obtain judicial review of a legal claim in the courts of appeals after exhausting their administrative remedies in removal proceedings.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Retroactivity – "admission" definition

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

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Cancellation - Imputation

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

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Aggravated Felony - Tax Fraud

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

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Asylum—Particular Social Group

Over government opposition, the Ninth Circuit has ordered en banc rehearing of its prior unpublished decision in ***Henriquez-Rivas v. Holder***, 2011 WL 3915529, which upheld the agency's ruling that El Salvadorans who testify against gang members does not constitute a particular social group for asylum. Concurring judges on the panel, and the subsequent petition for rehearing, suggested en banc rehearing to consider whether the court's social group precedents, especially regarding "visibility" and "particularity," are consistent with each other and with Board precedent.

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Aggravated Felony — Missing Element

In ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the Ninth Circuit has withdrawn its decision and received supplemental briefing on the effect of its *en banc* decision in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (2011), which overruled the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). The government *en banc* petition challenged the missing element rule.

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Conviction – Conjunctive Plea

An *en banc* panel of the Ninth Circuit, following December 12, 2011, oral argument on rehearing in ***Young v. Holder***, has requested supplemental briefing on whether it should overrule *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007). The panel decision, originally published at 634 F.3d 1014 (2011), ruled that where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. In its en banc petition, the government argued that the panel's opinion is contrary to the court's *en banc* decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

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TPS Extended for Salvadorans

DHS has extended Temporary Protected Status (TPS) for eligible nationals of El Salvador for an additional 18 months, beginning March 10, 2012, and ending Sept. 9, 2013.

Current Salvadoran TPS beneficiaries seeking to extend their TPS status must re-register during the 60-day re-registration period that runs through March 12, 2012. U.S. Citizenship and Immigration Services (USCIS) encourages beneficiaries to register as soon as possible within the 60-day re-registration period. Although the Federal Register notice erroneously states that re-registration applications must be filed January 9, 2012 through March 9, 2012, USCIS will accept applications filed January 9, 2012 through March 12, 2012. USCIS is working to correct the public information on the re-registration filing dates.

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

Second Circuit Adopts Third Circuit's Method of Determining "Legal Custody" for Purposes of Derivative Citizenship

In *Garcia v. Holder*, __F.3d__, 2011 WL 6825581 (2d Cir. December 29, 2011) (Miner, Chin, *Wesley*), the Second Circuit followed *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2004), which holds that for purposes of former INA § 321(a)(3), "legal custody" is defined by federal law, which looks to the law of the state having personal jurisdiction over the custody determination in question. The court determined that New York, the alien's home state, would not have enforced an order from the Dominican Republic awarding custody to the alien's non-naturalizing parent. Thus, under INA § 242(b)(5), the court remanded to the district court to determine which parent had "actual, uncontested custody" of the alien.

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THIRD CIRCUIT

Third Circuit Holds Ineffective Assistance in Pre-Hearing Collateral Proceedings Did Not Compromise Fundamental Fairness of Removal Proceedings

In *Contreras v. Att'y Gen. of the United States*, __F.3d__, 2012 WL 10930 (3d Cir. January 4, 2012) (Rendell, *Ambro*, Jones), the Third Circuit held that counsel's failure to timely file the aliens' visa petitions did not result in fundamentally unfair proceedings because counsel's malfeasance occurred prior to the commencement of removal proceedings.

The petitioners Margarito Contreras and his wife, both natives and citizens of Mexico, entered the United States unlawfully in 1993 and 1998, respectively. Since 2000, Margarito has been seeking employment-based permanent residency in the United States. According to the court's finding, his original attorney provided incompetent, and at times ethically questionable, representation throughout Margarito's visa petition process, including his failure to file a timely appeal from a denial of an I-140 and the untimely filing of a motion to reconsider. Subsequently, petitioners were placed in removal proceedings where an IJ ordered them removed. Petitioners then hired another attorney who filed a motion to reopen claiming ineffective assistance of counsel. The IJ denied that motion.

"Navigating the legal complexities and administrative quagmires of our immigration system is difficult enough even with the benefit of the most zealous advocacy."

On appeal to the BIA petitioners pressed their ineffective assistance of counsel claim. The BIA determined that it did not have jurisdiction over the claim of ineffective assistance which had occurred before DHS several years before the initiation of the removal proceedings and that petitioners did not receive ineffective assistance from their former attorney during the course of the removal proceedings.

The Third Circuit concluded that an alien's right under the Fifth Amendment to the effective assistance of counsel during removal proceedings did not extend to pre-proceeding attorney conduct in connection with the visa petition process. Nonetheless, the court determined that attorney representation during the visa petition process "fell well short of the decency and professionalism we expect from the immigration bar. Navigating the legal complexities and administrative quagmires of our immigration system is difficult enough even with the benefit of the most zealous advocacy. As this case painfully demonstrates, attorney incompetence -- whether the result of carelessness or dishonesty -- can make those difficulties insurmountable. Regrettably, however, because counsel's substandard performance occurred before the removal proceedings were instituted, we are unable to provide a remedy." The court also determined that the BIA did not abuse its discretion in finding that petitioners did not receive ineffective assistance of counsel.

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Divided Third Circuit Panel Holds District Court May Review BIA's Decision to *Sua Sponte* Reopen Removal Proceedings for Abuse of Discretion Under the APA

In *Chehazeh v. Att'y Gen. of the U.S.*, __F.3d__, 2012 WL 77881 (3d Cir. January 11, 2012) (Chagares, *Jordan*, Greenaway (*dissenting*)), the Third Circuit held that an alien whose removal proceedings have been reopened *sua sponte* by the BIA following a motion by DHS presenting new evidence regarding removability may challenge that reopening in district court under the APA. The majority held that prior BIA decisions stating that reopening will not be granted absent "exceptional circumstances" provided sufficient law to review the agency's decision to reopen for an abuse of discretion. The majority also held that no statutory provision, including INA § 242(b)(9) and (g), barred judicial review. Finally, the majority held that that the decision to reopen was reviewable under the collateral order doctrine. The majority reasoned that, absent review, the public's substantial interest in preventing the government from re-litigating removal proceedings would be imperiled.

In a dissenting opinion, Judge Greenaway would have found

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"Congress, by enacting the REAL ID Act, vested courts of appeals with jurisdiction to review orders reopening removal proceedings. INA § 242(b)(6). This specific statutory authority overrides the application here of the provisions of the Administrative Procedures Act ("APA"), and undermines the majority's reasoning."

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■ Third Circuit Holds Minnesota Predator Registration Conviction Is Not a Crime Involving Moral Turpitude

In ***Totimeh v. Att'y Gen. of the U.S.***, __F.3d__, 2012 WL 89580 (3d Cir. January 12, 2012) (McKee, *Ambro*, Rendell), the Third Circuit concluded that the alien's 1998 conviction for failure to register as a sex offender under Minnesota law lacked the necessary *mens rea* to constitute a second crime involving moral turpitude under INA § 237(a)(2)(A)(ii). The court further held that the BIA abused its discretion in refusing to reopen proceedings to allow the alien to offer evidence of an earlier admission date to recalculate whether the alien's 1988 sex crime conviction was a CIMT committed within five years of admission under § 237(a)(2)(A)(i).

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FOURTH CIRCUIT

■ Fourth Circuit Denies Asylum and Withholding, Distinguishing *Crespin-Valladares*, but Remands CAT Claim on Acquiescence Issue

In ***Zelaya v. Holder***, __F.3d__, 2012 WL 76059 (4th Cir. January 11, 2012) (Davis, Floyd, *Hamilton*), the Fourth Circuit upheld the denial of asylum and withholding based on a claim of persecution on account of membership in a particular social group, but remanded the case to the BIA to give a reasoned explanation as to the denial of CAT protection.

The petitioner was a Honduran man who entered the U.S. illegally in 2007 at the age of sixteen. When placed in removal proceedings, he applied for asylum, withholding, and CAT protection. He claimed that he feared persecution if returned to Honduras on account of his membership in a group consisting of young Honduran males who (1) refused to join the Mara Salvatrucha 13 gang (MS-13), (2) have notified the authorities of MS-13's harassment tactics, and (3) have an identifiable tormentor within MS–13.

The court found that the purported social group failed the particularity requirement did not have the immutable characteristic of family bonds nor the "self-limiting feature of the family unit."

At the asylum hearing petitioner testified that the MS-13 sought to recruit him since he was 11 years old, and beat him and threatened to kill his brother because of his continued refusal to join. Petitioner reported a particular beating incident to the police but was told that they could not help him because the gang members would hurt them as well.

The IJ determined that, although petitioner was credible, he was ineligible for asylum and withholding because he had not established that he was a member of a particular social group. The IJ also denied CAT because he had not shown that he would be tortured if returned to Honduras. The BIA dismissed petitioner's appeal, finding that petitioner's social group argument was foreclosed by *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

The Fourth Circuit agreed with the BIA's assessment that the particular social group propounded by petitioner was not materially distinguishable from the one it had rejected in *Matter of S-E-G.* The court specifically rejected petitioner's contention that his group was similar to the one it had accepted in *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (holding that family members of people in El Salvador who agree to be prosecutorial witnesses against gangs qualify as a particular social group). The court explained that petitioner's purported group did not have the immutable characteristic of family bonds nor the "self-limiting feature of the family unit," unlike in *Crespin-Valladares* where the group had "particular and well-defined boundaries, such that it constituted a discrete class of persons." Therefore, petitioner's proposed group "fails the BIA's particularity requirement," said the court.

The court, however, did not accept the BIA's finding that petitioner was ineligible for CAT protection. The court explained that evidence in the record reflected that the police refused to help petitioner in any way. Because the BIA did not articulate why the police refusal to help was insufficient to establish the regulatory definition of aquiescence of a public official, the court remanded to allow the BIA to meaningfully explain its decision.

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FIFTH CIRCUIT

■ Fifth Circuit Holds that Montana Law Prohibiting Sexual Intercourse Without Consent Is Not Categorically an Aggravated Felony for Rape

In ***Perez-Gonzalez v. Holder***, __F.3d__, 2012 WL 94333 (5th Cir. January 12, 2012) (Jones, Stewart, *Southwick*), the Fifth Circuit held that a conviction under Montana law for sexual intercourse without consent is not categorically an aggravated felony crime for "rape" because the statute of conviction covers "digital penetra-

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tion," which is conduct broader than the generic definition of rape.

In 1986, petitioner pled guilty in Montana state court to sexual intercourse without consent, a felony, pursuant to Mont. Code Ann. § 45–5–503(1). The formal allegation was that petitioner "did knowingly have sexual intercourse without consent with a person of the opposite sex, not his spouse." The trial judge accepted petitioner's guilty plea, and because of the facts alleged and lack of any criminal history, he was sentenced only to probation for one year. Two decades later, while seeking renewal of his permanent resident alien card in San Antonio, petitioner was told by ICE that he would be removed due to the 1986 conviction. Following a hearing, the IJ, and later the BIA ruled that petitioner's rape conviction rendered him removable as an alien who had been convicted of aggravated felony.

The court held that regulations pertaining to the timeliness of motions to reopen do not apply to cases where the order of removal predated the issuance of those regulations.

The Fifth Circuit determined that because the Montana statute includes a provision that does not fall within the general meaning of the term "rape" as understood in 1996, namely digital penetration, there was a realistic possibility that petitioner pled guilty to a crime that would not be considered rape under federal law. Consequently, the court applied the modified categorical approach to determine "whether the conviction was 'necessarily' for a particular crime defined by the statute that meets the aggravated felony criterion." The court found by reviewing the charging document and the trial judge's order accepting petitioner's guilty plea, that it was impossible to know whether petitioner had pled guilty to a crime that falls within the generic definition of "rape." Accordingly, the court remanded for further proceedings.

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■ **Fifth Circuit Finds Abuse of Discretion in Denying Motion to Reopen Order That Predated Timeliness Regulations**

In ***Rodriguez-Manzano v. Holder***, __ F.3d__ 2012 WL 34070 (5th Cir. January 9, 2012) (Wiener, Clement, *Elrod*), the Fifth Circuit held that the BIA, while properly denying the alien's first motion to reopen an *in absentia* order for failure to comply with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), abused its discretion in denying the alien's second motion. The court determined that the alien complied with *Lozada* before filing that motion and also held that regulations pertaining to the timeliness of motions to reopen do not apply to cases where the order of removal predated the issuance of those regulations.

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SIXTH CIRCUIT

■ **Pre-REAL ID Act Adverse Credibility Determination Is Supported by Substantial Evidence**

In ***Abdurakhmanov v. Holder***, __F.3d__, 2012 WL 171360 (6th Cir. January 23, 2012) (Batchelder, McKeague, *Stranch*), the Sixth Circuit held that substantial evidence supported a pre-REAL ID Act adverse credibility determination where at least one of the discrepancies identified by the agency went to the heart of the petitioner's asylum claim.

The petitioner, a citizen of Uzbekistan and a surgeon, alleged that he was targeted for investigation and beaten by Uzbeki police because of his membership in the Dungan ethnic minority. He also alleged that if he is returned to Uzbekistan, he will face the same fate as his late wife, who died of injuries inflicted on her by Uzbeki police during a three-day detention. The IJ denied relief based on petitioner's lack of credibility and a lack of corroborating evidence. The BIA upheld the IJ's decision, finding several inconstancies including a discrepancy between the asylum application and the hearing testimony about the circumstances under which he had left his job as a surgeon.

Although the court agreed that the discrepancy about the reasons as to why he had left the job went to the heart of petitioner's asylum claim, the court disagreed with several of the inconsistencies identified by the BIA. The court also faulted the BIA's decision regarding petitioner's lack of corroborating evidence, finding its analysis contrary to the law.

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SEVENTH CIRCUIT

■ **Seventh Circuit Remands Legalization Decision, Holds that Pre-IIRIRA Definition of "Conviction" Must Be Used**

In ***Siddiqui v. Holder***, __F.3d__, 2012 WL 130447(7th Cir. January 12, 2012) (Posner, *Flaum*, Sykes), the Seventh Circuit, overturned the decision of the USCIS Administrative Appeals Office ("AAO") denying the petitioner's legalization applications and reversed the removal order.

The petitioner first entered the United States from Pakistan on a visitor's visa in December 1979,

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when he was thirteen years old. Although his visa expired in April 1980, he never departed. In July 1987, petitioner sought to apply for legalization under IRCA, but the INS refused to allow him to submit an application as a result of a brief trip to Pakistan that he had taken. This INS practice, known as "front-desking," was eventually found invalid and unenforceable. In a resulting settlement (CSS), INS agreed not only to adjudicate amnesty applications from front-desked applicants, but also to adjudicate them in accordance with the law as it existed in 1987–1988.

Petitioner ultimately filed an application for legalization in 1990. In 1992, while that application was pending, petitioner was convicted in Missouri on a concealed weapon charge. In 1995 petitioner, who was a truck driver and ran a route between Ontario and Detroit or Buffalo, was denied admission while seeking to reenter the United States because he had presented himself to be a United States citizen as also reflected in his Illinois' voter registration. Based on that false claim petitioner was placed in removal proceedings and ultimately ordered removed by the BIA in June 2003. His petition for review was subsequently dismissed by the Sixth Circuit.

In December 2007, and following reopening in May 2009, the USCIS denied petitioner's application for legalization and his application under the LIFE Act. In November 2009, the AAO dismissed petitioner's appeal finding that he had failed to prove continuous residence for the requisite period and that he had been convicted of a felony. Petitioner then filed two separate petitions for review which were consolidated by the Seventh Circuit. Because under IRCA judicial review of an amnesty denial is only available as part of judicial review of a deportation order, the parties jointly asked the BIA to reissue the June 2003 order. On April 25, 2010, the BIA reissued its decision.

The Seventh Circuit first determined that the AAO had abused its discretion "by failing to conduct an individualized analysis and by disregarding probative evidence." In particular, the court was critical of the AAO use of boilerplate language in rejecting a number of affidavits that petitioner had submitted to show his continuous residence in the United States. According to the court, this "boilerplate dismissal" had been used verbatim by the AAO in at least 536 decisions. Second, the court determined that petitioner's crime in 1991, did not qualify as a deportable offense because the amended definition of "conviction" under IIRIRA did not apply to CSS class members. Consequently, the court remanded the case to the AAO to reconsider the denial of legalization applications "involving an individualized analysis of the evidence presented."

The court was critical of the AAO use of boilerplate language in rejecting a number of affidavits that petitioner had submitted to show his continuous residence in the United States.

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NINTH CIRCUIT

■ **Ninth Circuit Holds Ninety-Day Period for Adjudicating Conditions on Permanent Residency Starts Upon Completion of the Interview Process**

In ***Chettiar v. Holder***, __F.3d__ , 2012 WL 118573 (9th Cir. January 17, 2012) (*Thomas*, Clifton, Carr), the Ninth Circuit held that the ninety-day period under INA § 216(c)(3)(A), during which the government is to adjudicate a petition to remove conditions on permanent residency (I-751), starts with the completion of the interview process, not with the initial interview.

The petitioner, a citizen of India, was admitted in 2001 as a conditional LPR on the basis of his marriage to a U.S. citizen. On December 13, 2004, the couple was interviewed at a USCIS district office because the agency had concluded that petitioner had not provided adequate evidence to show a bona fide marital relationship. Following the interview, the office concluded that the documents were sufficient to demonstrate a valid marriage. On March 31, 2005, USCIS again requested that the couple appear for another interview in Reno, on April 8, 2005. Petitioner then requested to reschedule his interview to Fremont, California, where he had relocated, but the request was denied. When petitioner and his wife failed to appear at the April 8 interview, USCIS concluded that the marriage was fraudulent and denied petitioner's petition to remove the conditions on his residency.

Petitioner then moved to terminate his removal proceedings contending that USCIS had violated § 216(c)(3)(A) because it had not made a determination on his petition within 90-days. The IJ denied the motion, noting that petitioner had not requested the IJ to review the I-751. The IJ then ordered petitioner removed as charged. On appeal, the BIA rejected petitioner's argument and determined that the USCIS first scheduled interview was not intended to be the final interview for purpose of the 90-day period.

The Ninth Circuit agreeing with the BIA, concluded that the "most

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logical interpretation of this provision measures the 90–day period to render a decision on an I–751 petition as beginning from the conclusion of the interview process, rather than the commencement." The court also explained that holding otherwise would run contrary to the plain intent of the Immigration Marriage Fraud Amendments of 1986.

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TENTH CIRCUIT

■ **Tenth Circuit Holds Chinese Alien's Fine Did Not Constitute Past Persecution**

In ***Pang v. Holder***, __F.3d __, 2012 WL 28950 (10th Cir. January 6, 2012) (Kelly, *Silder*, Matheson), the Tenth Circuit held that petitioner who resisted China's coercive population control policy did not suffer economic persecution despite being fined the equivalent of five years' wages. The court held that the penalty did not jeopardize the petitioner's life or freedom, and his family appeared to have maintained their standard of living as rice farmers because they continue to farm their state-owned plot of land.

The court distinguished the cases of *Li v. Attorney General of the United States*, 400 F.3d 157 (3d Cir. 2005), and *Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010), where the courts had held that the cumulative economic and non-economic sanctions constituted persecution, by explaining that the economic hardships and circumstances in petitioner's case did not rise to the levels found in those two cases.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds Government Can Charge Alien as Removable as an Aggravated Felon for the Second Time on the Same Criminal Conviction**

In *Maldonado v. U.S. Att'y Gen.*, __ F.3d __, 2011 WL 6439350 (11th Cir. December 22, 2011) (Hull, *Marcus*, Black), the Eleventh Circuit held that *res judicata* did not preclude DHS from charging an alien convicted of child molestation as removable as an aggravated felon (sexual abuse of a minor) because an intervening change in the law had provided a wholly new legal basis for removal that could not have been raised in the prior proceedings which had been terminated in petitioner's favor.

The unambiguous intent to apply the new definition of aggravated felony retroactively reflects 'Congress' policy decision that aliens convicted of sexual abuse of a minor merit removal regardless of when their convictions occurred.'"

In 1994, the government charged petitioner with removability under former INA §§ 241(a)(2)(A)(ii) and (iii), based on multiple convictions for child molestation in 1993. An IJ terminated those proceedings after finding that petitioner's convictions did not fall within the INA's definition of "aggravated felony." Subsequently, in 1996 Congress changed the law, codifying an expanded definition of aggravated felony to include "sexual abuse of a minor."

In February 2009, DHS again charged petitioner with removability based on his 1993 convictions, this time alleging under the new law that they were qualifying aggravated felonies. Petitioner moved the IJ to terminate the 2009 removal proceedings claiming that they were barred by the doctrine of *res judicata* because the government had already sought removal based on the same 1993 convictions, and the IJ in that case terminated the proceedings after finding that the convictions did not justify removal under either of the grounds charged. Ultimately, the BIA determined that *res judicata* did not bar the new removal proceedings because they were based on a ground for removal that did not exist when the prior proceedings were terminated, namely, that petitioner was an aggravated felon on account of his convictions for sexual abuse of a minor.

The Eleventh Circuit agreed with the BIA and, under the facts and circumstances of this case, declined to apply the doctrine of res *judicata* to bar new removal proceedings. The court explained that an intervening change in the law brought about by IIRIRA had provided a wholly new legal basis for removal that could not have been raised in the prior proceedings. In particular, the court noted that "when Congress changed the definition of aggravated felony, it took the very unusual step of explicitly making the new definition retroactive, by which it meant to cover a large number of aliens who otherwise could not be reached. The unambiguous intent to apply the new definition of aggravated felony retroactively reflects 'Congress' policy decision that aliens convicted of sexual abuse of a minor merit removal regardless of when their convictions occurred.'"

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DISTRICT COURTS

■ Southern District of California Dismisses Complaint Seeking Records Related to Visa Denial

In *Perez-Basurto v. Clinton*, No. 11-cv-1775 (S.D. Cal. January 19, 2012) (Sammartino, J.), the District Court for the Southern District of California dismissed a complaint seeking to compel the State Department and DHS to disclose the State Department's reasons for denying the alien's visa application and the basis for the agencies' belief that he had earlier attempted immigration fraud. The government argued that the doctrine of consular nonreviewability insulated the visa denial from review and a statute prohibited the release of records related to that denial. In addition, the plaintiffs had failed to file a Freedom of Information Act request for the alien's immigration records. Upon review of the government's motion to dismiss, plaintiffs consented to dismissal. Citing the government's administrative exhaustion argument and plaintiffs' consent to dismissal, the court dismissed the complaint without prejudice.

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■ District of Maryland Grants Government's Motion for Summary Judgment in INA § 310(c) Case

In *Injeti v. USCIS*, No. 11-cv-584 (D. Md. January 6, 2012) (Titus, J.), the District Court for the District of Maryland granted summary judgment in favor of the government, upholding USCIS's decision to deny plaintiff's application for citizenship. The court held that an applicant for an immigration benefit who signs her application under penalty for perjury has an absolute duty to volunteer relevant information, including the fact and identity of her first husband. The court ruled that plaintiff's failure to do so on her adjustment application meant she was never lawfully accorded status and therefore was ineligible for naturalization. The court also held that plaintiff's failure to reveal her first marriage constituted "false testimony for the purpose of obtaining an immigration benefit" pursuant to 8 U.S.C. § 1101(f)(6), thus precluding plaintiff from demonstrating good moral character.

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■ Central District of California *Sua Sponte* Dismisses Challenge to Terrorism-Related Inadmissibility Delay for Lack of Subject Matter Jurisdiction

In *Khanzratyan v. Holder*, No. 11-cv-10620 (C.D. Cal January 10, 2012) (Fischer, J.), the District Court for the Central District of California *sua sponte* dismissed a terrorism-related inadmissibility delay case for lack of subject matter jurisdiction. The court held that INA § 242(a)(2)(B)(ii) prohibited it from reviewing the agency's discretionary decision concerning the pace of adjudication. Noting that courts have differed on the issue, the court adopted the approach of those courts that have held that the pace at which applications are adjudicated – not just the ultimate decision – is discretionary and therefore unreviewable under § 242(a)(2)(b)(ii).

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■ Southern District of Florida Grants Motion to Dismiss *Bivens*/ FTCA Case Brought by Derivative U.S. Citizen Arrested by ICE and Placed in Removal Proceeding

In *Belleri v. United States*, No. 10-cv-81527 (S.D. Fla. January 17, 2012) (Dimitrouleas, J.), the District Court for the Southern District of Florida granted the government's motion to dismiss *Bivens* and FTCA claims brought by a derivative U.S. citizen detained by ICE for an eight-month period. At his arrest, the individual had claimed that he derived citizenship through his mother as a minor; after removal proceedings were administratively closed, USCIS granted his application for certificate of citizenship. The individual then brought suit for damages, alleging that his detention and the institution of removal proceedings against him as a citizen violated the Fourth and Fifth Amendment amendments and various provisions of Florida state law.

The court rejected the government's argument that it lacked jurisdiction over the case but dismissed the claims against the United States, holding that the individual had failed to state claims under the FTCA. The court also dismissed both *Bivens* claims against the ICE officer who had issued the Notice to Appear, holding that she was entitled to qualified immunity.

■ Northern District of California Grants Government's Motion to Dismiss Finding No Jurisdiction over Plaintiff's APA Action Challenging the Termination of His Asylum

In *Dhariwal v. Mayorkas*, No. 11-cv-2593 (N.D. Cal. December 27, 2011) (Grewal, M.J.), the District Court for the Northern District of California granted the government's motion to dismiss, finding that USCIS' decision terminating an alien's asylum was not a final agency action for purposes of the APA because the alien could renew his claim to asylum in removal proceedings. The court concluded that in the absence of a final agency action, it lacked subject matter jurisdiction under the APA and therefore granted the government's motion to dismiss.

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ASYLUM - WITHOLDING

■ *Garcia-Callejas v. Holder*, __F.3d __, 2012 WL 178381 (1st Cir. Jan. 24, 2012) (using case-comparison method to hold that alien failed to establish eligibility for withholding of removal on basis of social-group claims that he would be a target of gang recruitment in El Salvador or as a returnee perceived as wealthy)

■ *Carvalho-Frois v. Holder*, __F.3d __, 2012 WL 230023 (1st Cir. Jan. 26, 2012) (holding that alien failed to establish eligibility for asylum and withholding from Brazil based on a social-group claim of "witnesses to a serious crime whom the Brazilian government is unwilling or unable to protect," because the putative group is too amorphous, and has no common immutable characteristic, to meet the "social visibility" requirement; fact that murderers or gang members know alien's identity as a witness is irrelevant, because the relevant question is "not whether the alien herself is visible to the alleged persecutors," but whether the putative social group is "recognizable by the community")

■ *Oshodi v. Holder*, __F.3d__, 2012 WL 232997 (9th Cir. Jan. 26, 2012) (affirming IJ's and BIA's REAL ID Act adverse credibility finding in case of Nigerian man claiming persecution on account of political or religious persecution based on "totality of the circumstances," but declining to address whether the REAL ID Act or due process requires IJ to give prior notice and opportunity to provide corroboration)

■ *Abdurakhmanov v. Holder*, __F.3d__, 2012 WL 171360 (6th Cir. Jan. 23, 2012) (affirming a pre-REAL ID Act adverse credibility finding in case of Uzbeki man claiming past and future persecution on account of his Durgan ethnicity, based on a single inconsistency between the asylum application and applicant's testimony about whether he was fired from his job as a surgeon due to an alleged arrest by police in 1999, or he voluntarily quit his job due to discrimination; concluding that this inconsistency went to the "heart of the [asylum] claim" because it appeared to be an attempt to enhance the claim of persecution, thereby calling into question the veracity of the claim of past police arrest and mistreatment that was the basis of the asylum claim)

■ *Pang v. Holder*, __F.3d__, 2012 WL 28950 (10th Cir. Jan. 6, 2012) (holding that although the Board could have reached a different result, the evidence did not compel a conclusion of a "threat to . . . freedom or life" or "severe economic disadvantage" constituting past economic "persecution" under *Matter of T-Z-)*

■ *Zelaya v. Holder*, __F.3d__, 2012 WL 76059 (4th Cir. Jan. 11, 2012) (holding that a group of "young Honduran males who refuse to join MS-13, have notified the authorities of MS harassment tactics, and have an identifiable tormenter within MS-13" is not a PSG because it fails to meet the "particularity" and "social visibility" requirements; distinguishing the adverse *Crespin-Vellardes* decision as pertaining to a "self-limiting" "family unit" with the "easily recognizable innate characteristic of family relationship" meeting "particularity" and "social visibility" requirements)

■ *Matter of D-X- & Y-Z–*, 25 I&N Dec. 664 (BIA Jan. 6, 2012) (holding that a facially valid permit to reside in a third country constitutes prima facie evidence of an offer of firm resettlement even if the permit was fraudulently obtained; further holding that where an asylum applicant who has resettled in a third country travels to the US or the country of claimed persecution and then returns to the country of resettlement, he or she has not remained in that country "only as long as necessary to arrange onward travel" for purposes of establishing an exception to firm resettlement)

BIA – STANDARD OF REVIEW

■ *Turkson v. Holder*, __F.3d__, 2012 WL 234369 (4th Cir. Jan. 26, 2012) (relying on Third Circuit's *Kaplun* decision to reject the BIA's construction of its standard-of-review regulations and holding that BIA erred in reviewing *de novo* whether future torture is "more likely than not," because this is pure fact-finding for purposes of the BIA's review scheme; omitting and failing to address government's argument that "more likely than not" is a legal standard under Supreme Court case law, basic immigration law, and the Senate's ratification of the CAT, and that the BIA has de novo review over application of legal standards to facts)

CONSTITUTION

■ *United States v. Flores*, __F.3d __, 2011 WL__ (8th Cir. Dec. 16, 2011) (holding that the protections of the Second Amendment do not extend to aliens illegally present in this country)

CRIMES

■ *Prudencio v. Holder*, __F.3d__, 2012 WL 256061 (4th Cir. Jan. 30, 2012) (rejecting AG's framework in *Matter of Silva-Trevino*, and reasoning that the INA is not ambiguous, "but explicitly directs that . . . an adjudicator applying the moral turpitude statute may consider only the alien's prior conviction, and not the conduct underlying that conviction") (Judge Shedd dissented)

■ *Matter of J.R. Velasquez*, 25 I&N 680 (BIA Jan. 24, 2012) (holding generally that conviction records submitted by electronic means are conclusively admissible as evidence of a conviction if authenticated in the manner specified by INA § 240(c)(3)(C) and 8 C.F.R. § 1003.41(c), but those methods of authentication, which operate as "safe harbors," are not mandatory or exclusive, and documents that are authenticated in

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other ways may be admitted if they are found to be reliable; concluding in the instant case that a document ("Disposition Notice") that requires authentication but is not authenticated is not admissible as "other evidence that reasonably indicates the existence of a criminal conviction" within the meaning of 8 C.F.R. § 1003.41(d))

■ *Totimeh v. Att'y Gen. of United States*, __F.3d__, 2012 WL 89580 (3d Cir. Jan. 12, 2012) (holding that the BIA erred in concluding that petitioner's conviction under Minnesota's predatory offender registration statute was a CIMT because failure to register is not, as a category or a crime, an "inherently despicable act"; further holding that the BIA abused its discretion by refusing to allow petitioner an opportunity to supplement the record with evidence regarding when he was first admitted legally to the United States)

■ *Matter of U. Singh,* 25 I&N Dec. 670 (BIA Jan. 19, 2012) (holding that a decision by a federal court of appeals reversing a precedent decision of the BIA is not binding authority outside the circuit in which the case arises and that a stalking offense for harassing conduct in violation of section 646.9(b) of the California Penal Code is a crime of violence under 18 U.S.C. § 16(b) and is therefore an aggravated felony)

■ *Perez-Gonzalez v. Holder*, __F.3d __, 2012 WL 94333 (5th Cir. Jan. 12, 2011) (holding that a conviction under Montana law for sexual intercourse without consent is not categorically an aggravated felony crime for "rape" under the INA because the statute of conviction covers "digital penetration," which is conduct broader than the generic definition of rape) (Judge Jones dissented)

■ *Matter of R-A-M-,* 25 I&N Dec. 657 (BIA Jan. 3, 2012) (holding that the alien's conviction for possession of child pornography is for a particularly serious crime under section 241(b)(3)(ii) of the INA, based on the nature of the offense and the specific facts and circumstances of the crime)

CRIMINAL PROSECUTIONS

■ *United States v. Casasola*, __F.3d __, 2012 WL 255220 (9th Cir. Jan. 30, 2012) (affirming district court's denial of defendant's collateral attack in illegal reentry prosecution; finding that under the law then in effect, defendant did not automatically derive citizenship from his father's naturalization in 1997 because his mother did not naturalize until after defendant turned 18, and that such a result did not violate equal protection)

■ *United States v. Melendez-Castro*, __F.3d__, 2012 WL 130348 (9th Cir. Jan. 18, 2012) (holding, in an illegal reentry prosecution, that an IJ in 1997, violated the alien's due process rights under the 5th Amendment, because he was not "meaningfully advised" of his right to seek voluntary departure)

DUE PROCESS- FAIR HEARING

■ *Contreras v. Att'y Gen. of United States*, __F.3d__, 2012 WL 10930 (3d Cir. Jan. 4, 2012) (holding that aliens do not have a constitutional right to effective assistance of counsel in pre-removal visa petition process, and that counsel's "inept conduct" in the visa proceeding did not compromise the fundamental fairness of the subsequent removal proceedings)

■ *Rodriguez-Manzano v. Holder*, __F.3d__, 2012 WL__ (5th Cir. Jan. 9, 2012) (holding that the BIA erred in requiring petitioner to show due diligence in challenging his 1988 *in absentia* order based on ineffective assistance because under the governing regulations in place at that time (and applicable to this case), there was no time limitation for motions to reopen/reconsider)

JURISDICTION

■ *Mostofi v. Napolitano*, __F. Supp.2d__, 2012 WL 251922 (D.C.C. Jan. 27, 2012) (dismissing for lack of jurisdiction pursuant to the doctrine of consular nonreviewability, a suit by a United States citizen alleging that defendants' refusal to issue her alien husband an immigrant visa violated, *inter alia*, her First Amendment right to "freedom of personal choice in matters of marriage and family life")

■ *Chettiar v. Holder*, __ F.3d __, 2012 WL 118573 (9th Cir. Jan. 17, 2012)(holding that the 90-day jurisdictional clock under INA § 216(c)(3)(A) to adjudicate an I-751 (a petition to remove the conditions on residence) does not begin to run until the conclusion of the interview process)

■ *Ravulapalli v. Napolitano*, __ F. Supp.2d __, 2012 WL 35564 (D.D.C. Jan. 9, 2012) (holding that plaintiffs' challenge to the denial of their adjustment applications is moot in light of USCIS's subsequent reopening and ultimate approval of those applications).

■ *Maldonado v. Holder*, __F.3d__, 2011 WL 6439350 (11th Cir. Dec. 22, 2011) (refusing to apply the doctrine of *res judicata* to bar new removal proceedings where an intervening change in the law (1996 amendment to aggravated felony definition) provided a new legal basis for removal that could not have been raised in the prior proceedings, particularly when Congress clearly intended that new basis to apply retroactively)

■ *Chehazeh v. Att'y Gen. of United States*, __F.3d__, 2012 WL 77881 (3d Cir. Jan. 11, 2012) (holding that the BIA's decision to *grant* DHS's motion to reopen sua sponte upon finding "exceptional circumstances" is not a decision confined to the unfettered discretion of the agency and is thus reviewable; neither section 1252(b)(9) nor (g) bars district court

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review of the BIA's reopening grant because the decision under review was not a final order of removal, nor did it involve the exercise of prosecutorial discretion; further holding that a grant of reopening represented a reviewable "collateral order" because it is conclusive, resolved issues distinct from the merits of the asylum claim, and would otherwise be unreviewable in conjunction with the final disposition of petitioner's case) (Judge Greenaway Jr. dissented)

■ *O'Neil v. Cook*, __F. Supp.2d__, 2011 WL 6225195 (D. Del. Dec. 14, 2011) (holding that USCIS's decision to deny an I-601 waiver was unreviewable as an exercise of agency discretion; affirming agency's denial of I-212 application)

FOIA

■ *Judicial Watch, Inc. v. DHS*, __F. Supp.2d__, 2012 WL 251914 (D.D.C. Jan. 27, 2012) (granting in part and denying in part the government's motion for summary judgment in a Freedom of Information Act ("FOIA") action against DHS, seeking the disclosure of records relating to recent changes in federal immigration enforcement priorities and their implementation in Houston, Texas)

LEGALIZATION

■ *Siddiqui v. Holder*, __F.3d__, 2011 WL __ (7th Cir. Jan. 12, 2012) (holding that USCIS's Administrative Appeals Office (AAO) erred in concluding that petitioner failed to prove continuous physical presence for legalization eligibility because its decisions lacked individual analysis and disregarded probative evidence; further holding that AAO erred in retroactively applying IIRIRA's definition of "conviction" to a pre-IIRIRA conviction because Congress did not clearly express its intent to apply that definition to aliens like petitioner whose legalization applications would have been adjudicated prior to IIRIRA if the government had not unlawfully refused to accept the applications of applicants who had briefly left the country)

MOTION TO REOPEN

■ *Contreras-Bocanegra v. Holder*, __F.3d__, 2012 WL 255879 (10th Cir. Jan. 30, 2012)(en banc) (holding that the BIA's application of the departure bar to deny an alien's MTR, filed from abroad, "impermissibly interferes with Congress' clear intent to afford each noncitizen a statutory right to pursue a motion to reopen under 8 U.S.C. § 1229a(c)(7)")

NATIONALITY

■ *United States v. Arango*, __F.3d__, 2012 WL 89184 (9th Cir. Jan. 12, 2012) (holding that the district court erred in denaturalizing defendant by: (1) granting summary judgment to the government where there was a genuine issue of material fact as to the existence of a cooperation agreement permitting defendant to retain his LPR status and naturalize despite a fraudulent marriage; and (2) denying defendant's motion to dismiss for improper venue without allowing him an opportunity to rebut the presumption that his place of residence remained where he lived prior to his incarceration)

■ *Garcia v. USICE*, __F.3d__, 2011 WL 6825581 (2d Cir. Dec. 29, 2011) (holding that for purposes of former INA § 321(a)(3), "legal custody" is defined by federal law, which looks to the law of the state having personal jurisdiction over the custody determination in question; the court found that NY, the alien's home state, would not have enforced an order from the Dominican Republic awarding custody to the alien's non-naturalizing parent, and thus remanded to the district court to determine which parent had "actual, uncontested custody" of the alien)

■ *United States v. Suarez*, __F.3d __, 2011 WL 6382155 (7th Cir. Dec. 16, 2011) (holding that a naturalized citizen who committed a drug trafficking crime during the statutory period for good moral character – but was not convicted until after he naturalized – illegally procured his citizenship and was thus subject to denaturalization because the crime fell within the unlawful acts "catch-all" provision of the INA and its implementing regulations, making him ineligible for citizenship on account of lack of good moral character)

■ *Romero-Mendoza v. Holder*, __F.3d__, 2011 WL 6318336 (9th Cir. Dec. 19, 2011) (rejecting petitioner's contention that he obtained derivative citizenship from his mother's naturalization and reasoning that his paternity was legitimated under Salvadoran law, precluding a claim of derivative citizenship based on the naturalization of one parent)

VOLUNTAY DEPARTURE

■ *Bachynskyy v. Holder*, __F.3d__, 2011 WL 6287868 (7th Cir. Dec. 15, 2011) (holding that the notice requirements in the current voluntary departure regulations, which direct IJs to advise aliens of the amount of the bond and the duty to post the bond within five business days, do not apply retroactively prior to the effective dates of the regulations, January 20, 2009; further holding that lack of notice could not serve as the "defect" underlying a due process claim)

WAIVER

■ *Tyson v. Holder*, __F.3d__, 2012 WL 248001 (9th Cir. Jan. 27, 2012) (holding that for purposes of applying *St. Cyr*, the repeal of § 212(c) imposes an impermissible retroactive effect on aliens like petitioner, who in reliance on the possibility of discretionary relief, agreed to a stipulated facts trial and were convicted pursuant to such trial)

Administrative closure

(Continued from page 1)

U.S. citizen and the couple was interviewed in connection with the now filed visa petition on May 30, 2007. Following the interview, DHS requested additional documents which apparently were later provided by Avetisyan. Pending the adjudication of the petition, the IJ granted five additional continuances. On June 25, 2009, the IJ granted Avetisyan's request for administrative closure over the opposition of DHS counsel who had requested an additional continuance. DHS appealed the IJ's decision.

In explaining its decision, the Board said that "it was improper to afford absolute deference to a party's objection," to a request for administrative closure. Administrative closure, explained the Board, is a procedural tool created for the convenience of the immigration courts and the Board. The decision to close proceedings involves an assessment of factors that are "particularly relevant to the efficient management of the resources of the Immigration courts and the Board." Therefore, the rule set forth in *Matter of Gutierrez* is "troubling," because it invested DHS "with the absolute veto power over administrative closure." "More importantly . . . [it] directly conflicts with the delegated authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case."

The Board then set forth a list of factors that an immigration judge may consider when evaluating whether to administratively close a case. The factors include but are not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

In this case, the Board determined that administrative closure was appropriate because Avetisyan was the beneficiary of a prima facie approvable visa petition filed by her now United States citizen spouse. The Board further noted that the visa petition had been pending before the DHS for a significant and unexplained period of time and that DHS had not identified any obvious impediment to the approval of the visa petition or to the Avetisyan's ability to successfully apply for adjustment of status once the visa petition was approved.

By Francesco Isgro, OIL

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OIL TRAINING CALENDAR

February 21, 2012. Brown Bag Lunch & Learn with Stephen H. Legomsky, Chief Counsel, USCIS.

February 28, 2012. Brown Bag Lunch & Learn with Jim Stolley, Director, Field Legal Operations for the DHS ICE's Office of the Principal Legal Advisor.

President Establishes Task Force on Travel

On January 19, 2012, President Obama signed Executive Order 13597, "Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness". The purpose of the EO is to promote the economy through the tourism industry by streamlining the nonimmigrant visa process. An interagency Task Force on "Travel and Competitiveness" was created to develop strategies to promote travel to iconic American destinations.

The Task Force is charged with developing new policies and initiatives to increase international travel with a focus on travel from India, China, and Brazil. Additionally, the order requires the Department of Commerce to establish and maintain a public website with key information and statistics to help people understand the visa processes and entry times. Finally, in order to achieve the goal of increased international travel, the Secretaries of State and DHS will develop and implement a plan to (1) increase nonimmigrant visa processing capacity in Brazil and China by forty percent by the end of 2012, (2) interview eighty percent nonimmigrant visa applicants within three weeks of receipt of the application, (3) expand and promote travel through the Visa Waiver Program, (4) nominate Taiwan to be included in the Visa Waiver Program, and (5) expand reciprocal recognition programs such as the Global Entry program.

By Jasmin Tohidi, OIL

OIL Spring Associates

Front row: ***Michelle Latour*** (Deputy Director), ***Stephanie Wesley*** (Georgetown University Law Center, 3L), ***Andrea Sentenno*** (American University Washington College of Law, 2L), ***Alex Lutz*** (Wake Forrest University School of Law, 3L), ***Daniel Rifkin*** (Georgetown University Law Center, 2L), ***Kelly Morikone*** (University of Hawaii School of Law, 3L), ***Katelin Buell*** (George Washington University School of Law, 2L), ***Jasmin Tohidi*** (University of District of Columbia School of Law, 3L), ***Meagan Schronce*** (Georgetown University Law Center, 3L), ***Carissa Tyler*** (George Washington University School of Law, 2L), ***Amy Cheung*** (Georgetown University Law Center, 2L), ***David McConnell*** (Director). Back row: ***Emily Wu*** (Georgetown University Law Center, 2L), ***Mikhael Borgonos*** (Quinnipac University School of Law, 2L), ***Elizabeth Barnes*** (George Washington University School of Law, 2L), ***Sul Lee Kim*** (Georgetown University Law Center, 3L), Morgan Duncan (University of Georgia School of Law, 3L), ***Omar Yousaf*** (American University Washington College of Law, 3L), ***Ashlyn Marquez*** (American University Washington College of Law, 2L).

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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