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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Supreme Court Strikes Down Much of Arizona Immigration Law on Preemption Grounds

In *Arizona v. United States*, __ U.S. __, 2012 WL 2368661 (June 25, 2012), the Supreme Court invalidated under the Supremacy Clause three of the four provision of an Arizona statute, S.B. 1070, which sought to regulate certain aspects of immigration, and reaffirmed the long-standing principle that the "Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."

In 2010, Arizona enacted a statute called the Support our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address pressing issues related to the large number of undocumented foreign workers within its state. The United States sought to enjoin the law as preempted by federal law. The district court preliminarily enjoined four of its provisions from taking effect. Arizona appealed and the Ninth Circuit affirmed. Arizona then brought the matter before the Supreme Court.

The Supreme Court preliminarily stated that the "the federal power to determine immigration policy is well settled." In particular, the Court said that such power rested on the Naturalization Clause and "the inherent power as sovereign to control and conduct relations with foreign nations." The Court said that "[i]mmigration policy can effect trade, investment, tourism and diplomatic relations for the entire Nation," and

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DHS Announces Deferred Action for Certain Individuals Who Came to The United States as Children

On June 15, 2012, DHS Secretary Janet Napolitano announced that effective on that date, certain young people who were brought to the United States as children, do not present a risk to national security or public safety, and meet several key criteria will be considered for relief from removal from the country or from being placed into removal proceedings. Those who demonstrate that they meet the criteria will be eligible to receive deferred action for a period of two years, subject to renewal, and will be eligible to apply for work authorization.

The President, in announcing the new policy in the White House Rose Garden, said that "these are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents, sometimes even as infants, and often have no idea that they're undocumented until they apply for a job or a driver's license or a college scholarship."

"Our nation's immigration laws must be enforced in a firm and sensible manner," said Secretary Napo-

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that "foreign countries concerned about the status safety, and security of their nationals in the United States must be able to confer and communicate with one national sovereign, not the 50 separate States." In particular, the Court noted that "the dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with the Nation's foreign policy."

The Court next stated that although under federalism "both the National and State Government have elements of sovereignty the other is bound to respect," under the Supremacy Clause, "Congress has the power to preempt state laws." There are three circumstances under which state laws may give way to federal law. First, Congress may preempt state laws by enacting a statute containing an express preemption provision. Second, "States may be precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive Governance." Third, state laws are preempted when they conflict with federal laws.

The court then applied these preemption principles to the four Arizona provisions that were being challenged.

The Registration Provision

Section 3 of S.B. 1070 created a new state misdemeanor for "failure to complete or carry an alien registration document." Under INA § 264(e), the failure to carry registration papers may be punished by a fine, imprisonment, or a term of probation.

The Court determined, as it had previously done in *Hines v. Davidowitz*, 312 U.S. 52 (1940), that the Federal Government had occupied the field of alien registration. "Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible," said the Court. Moreover, permitting a State to impose its own penalties for violating the registration provision "would conflict with the careful framework Congress has adopted." Additionally, the court said that § 3 further "intruded upon the federal scheme" by creating a conflict with the federal framework of sanctions. Accordingly, the Court held that § 3 was preempted by federal law.

The Unauthorized Work Provision

Section 5(C) of the Arizona law makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or in-dependent contractor" in Arizona. Violations can be punished by a $2,500 fine and incarceration for up to six months.

"§ 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government."

The Court preliminarily noted that in *De Canas v. Bica* 424 U.S. 351 (1976), it had upheld the authority of State to regulate employment of unauthorized aliens. Since that decision, however, Congress enacted the Immigration Reform and Control Act of 1986, a comprehensive framework to combat the employment of unauthorized aliens. The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. IRCA imposes civil penalties on aliens who seek or engage in unauthorized work. Indeed, said the Court, it was Congress considered judgment that "making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives." Accordingly, the Court determined that the criminal penalty imposed by Arizona for unauthorized work stands as an obstacle to the federal scheme and therefore is preempted by IRCA.

Arresting Aliens Based on Suspicion of Removability

Section 6 of the Arizona law provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States."

The Court held that this provision creates an obstacle to federal law by infringing on the removal process which is entrusted to the sole discretion of the federal government. The Court explained that, first it is not a crime for a removable alien to remain present in the United States. Second, under the federal framework, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention pending a decision of whether an alien is to be removed. If no warrant has been issued, DHS officers can arrest an alien for violation of any immigration laws but only where the alien is likely to escape before a warrant can be obtained. The Court noted that section 6 provides Arizona state officers "even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." This provision, said the Court, "would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed." Therefore, said the Court, "§ 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government." The Court rejected Ari-

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zona's argument that under INA § 287(g), Arizona state officers were permitted to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." The Court pointed to guidance issued by DHS giving examples of what would constitute "cooperation" under federal law, noting that the "unilateral state action to detain authorized by § 6 goes far beyond these measures, defeating any need for real cooperation."

Immigration Status Check Provision

Section 2(B) of the Arizona law, requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." The accepted way to perform these checks is to contact ICE, which maintains a database of immigration records. Section 2(B) limits the circumstances when a detainee is presumed not to be an alien, and precludes officers from using race, color and national origin, except as permitted by the United States and Arizona's constitution. The law must also be implemented in a manner consistent with federal immigration regulations.

The government argued that making status verification mandatory interferes with the federal immigration scheme. The Court found that, under INA § 287(g)(10)(A), Congress has encouraged the sharing of information about possible immigration violations. Therefore this scheme "leaves room for a policy requiring state officials to contact ICE as a routine matter," said the Court. Because, however, "there is a basic uncertainty about what the law means and how it will be enforced," it would be inappropriate "without the benefit of a definitive interpretation from the state courts . . . to assume § 2(B) will be construed in a way that creates a conflict with federal law."

Accordingly, the Court held that, "at this stage" it was improper for the lower courts to enjoin this provision.

Conclusion

In closing, the Supreme Court offered some advice about immigration policy. Justice Kennedy, who wrote the opinion, said noting a naturalization ceremony that took place at the Smithsonian, that these ceremonies "bring together men and women of different origins who now share a common destiny. They swear a common oath to renounce fidelity to foreign princes, to defend the Constitution, and to bear arms on behalf of the country when required by law. [ ] The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here." Justice Kennedy then wrote,

> The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

"The sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse."

The Dissenters

In separate opinions, Justice Scalia, Alito, and Thomas concurred and dissented from the majority opinion. Justice Scalia would have found that federal law did not preempt any of the challenged provisions of S.B. 1070. He would have held that § 6 was not preempted because a "State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax enforcement does not constitute such a prohibition." Justice Scalia would also have found that § 3 was not preempted because "'field preemption' cannot establish a prohibition of additional state penalties in the area of immigration." Similarly, he would have upheld § 5C because Congress' decision to sanction employers implied the lack of preemption for laws punishing "those who seek or accept employment."

Justice Thomas would have upheld all the provisions "for the simple reason that there is no conflict between the 'ordinary meanin[g]' of the relevant federal laws and that of the four provisions of Arizona law at issue here."

Justice Alito agreed with the majority conclusion about § 2(B) and § 3, but would have upheld § 5(C) and § 6.

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USCIS to Centralize Filing and Adjudication for Certain Waivers of Inadmissibility

Beginning June 4, 2012, individuals abroad who have applied for certain visas and have been found ineligible by a U.S. Consular Officer, will be able to mail requests to waive certain grounds of inadmissibility directly to a USCIS Lockbox facility. This change affects where individuals abroad, who have been found inadmissible for an immigrant visa or a nonimmigrant K or V visa, must send their waiver applications.

Currently, applicants experience processing times from one-month to more than a year depending on their filing location. This centralization will provide customers with faster and more efficient application processing and consistent adjudication. It is part of a broader agency effort to transition to domestic filing and adjudication; it does not reflect a change in policy or the standards by which the applications are adjudicated. Individuals filing waiver applications with a USCIS Lockbox will now be able to track the status of their case online. The change affects filings for:

- Form I-601, Application for Waiver of Grounds of Inadmissibility
- Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal
- Form I-290B, Notice of Appeal or Motion, (if filed after a denial of a Form I-601 or Form I-212).

Applicants who mail their waiver request forms should use the address provided in the revised form instructions on the USCIS website. Applicants who wish to receive an email or text message when USCIS has received their waiver request may attach Form G-1145, E-Notification of Application/Petition Acceptance, to their application.

During a limited six-month transition period, immigrant visa waiver applicants in Ciudad Juarez, Mexico, will have the option to either mail their waiver applications to the USCIS Lockbox in the United States or file in-person at the USCIS office in Ciudad Juarez. USCIS has already begun to test this process and has transferred applications from Ciudad Juarez to other USCIS offices in the United States.

This change is separate and distinct from the provisional waiver proposal published in the Federal Register on Mar. 30, 2012.

Deferred Action Available to Certain Individuals who Came to U.S. as Children

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litano. "But they are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Discretion, which is used in so many other areas, is especially justified here."

Under the June 15 DHS directive, individuals who demonstrate that they meet the following criteria will be eligible for an exercise of discretion, specifically deferred action, on a case by case basis:

- Came to the United States under the age of sixteen;
- Have continuously resided in the United States for a least five years preceding the date of this memorandum and are present in the United States on the date of this memorandum;
- Are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety;
- Are not above the age of thirty.

According to DHS, only those individuals who can prove through verifiable documentation that they meet these criteria will be eligible for deferred action. Individuals will not be eligible if they are not currently in the United States and cannot prove that they have been physically present in the United States for a period of not less than 5 years immediately preceding today's date. Deferred action requests are decided on a case-by-case basis.

DHS indicated that it cannot provide any assurance that all such requests will be granted. The use of prosecutorial discretion confers no substantive right, immigration status, or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.

For individuals who are in removal proceedings and have already been identified as meeting the eligibility criteria and have been offered an exercise of discretion as part of ICE's ongoing case-by-case review, ICE will immediately begin to offer them deferred action for a period of two years, subject to renewal.

FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On April 2, 2012, the Supreme Court granted a writ of certiorari over government opposition in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. The Second and Third Circuits require that the government make these showings, because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution. *Moncrieffe's* merits brief was filed on June 22; the government response is sue August 31, 2012.

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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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Asylum — Particular Social Group

During the March 20, 2012, *en banc* argument in ***Henriquez-Rivas v. Holder***, the *en banc* panel requested that the government determine whether the BIA would make a precedent decision on remand in *Valdiviezo –Galdamez v. Attorney General*, 663 F.3d 582 (3d Cir. 2011). The BIA declined to comment on its pending case. The now-withdrawn unpublished *Henriquez-Rivas* decision, 2011 WL 3915529, 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 BIA precedent.

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Retroactivity — Judicial Decisions

The Ninth Circuit granted rehearing *en banc*, vacating its prior opinion, ***Garfias-Rodriguez v. Holder***, 649 F.3d 942 (9th Cir. 2011), in which the court had held that an alien inadmissible for reentering after accruing unlawful presence may not adjust his status under 8 U.S.C. § 1245(i). The court permitted supplemental briefing for the parties to address whether the court's decision, deferring to an agency precedent decision rejecting a prior circuit precedent, should be applied retroactively to cases pending at the time of the agency decision. The court also invited the parties to discuss whether the *en banc* court should overrule *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010). Oral argument was held on June 20, 2012.

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Asylum — Corroboration

On May 3, 2012, the Ninth Circuit granted a *sua sponte* call for en banc rehearing, and withdrew its opinion in ***Oshodi v. Holder***, previously published at 671 F.3d 1002, which declined to follow, as dicta, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). Supplemental briefing was ordered for en banc rehearing, calendared for oral argument the week of December 10, 2012.

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Aggravated Felony — Missing Element

On March 21, 2012, a panel of the Ninth Circuit heard argument on rehearing in ***Aguilar-Turcios v. Holder.*** The panel had withdrawn its prior opinion, published at 582 F.3d 1093, 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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Asylum – Particular Social Group

On May 31, 2012, the Seventh Circuit granted en banc rehearing and vacated its prior published opinion in ***Cece v. Holder***, 668 F.3d 510, which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Upholds Finding of No Past Persecution or Well-Founded Fear of Persecution in Moldova

In *Gilca v. Holder*, __F.3d__, 2012 WL 1867125 (1st Cir. May 23, 2012) (Howard, Lipez, *Selya*), the First Circuit upheld the BIA's finding that an asylum applicant from Moldova did not suffer past persecution on account of his Roma ancestry or political opinion, where the past harm was limited to unfulfilled anonymous threats and random violence by strangers.

The petitioner entered the United States on July 12, 2006, pursuant to a non-immigrant J–1 cultural exchange visa, which authorized him to remain until August 10, 2006. Instead of departing, he applied for asylum, citing his Roma descent and his membership in Moldova's pro-democratic political party. His affirmative application for asylum was not granted and he was referred to the immigration court. Following an evidentiary hearing, the IJ concluded that, although petitioner was generally credible, he had not carried his burden of proving either past persecution or a well-founded fear of future persecution on account of a statutorily protected ground. The BIA affirmed the decision.

The First Circuit determined that petitioner's verbal harassment during his youth, threats of scholastic discipline (e.g., expulsion and grade-reduction), and telephone calls predicting disagreeable consequences should the petitioner not modify his behavior, did not amount to past persecution. Similarly, petitioner's detention by the police on one occasion did not amount to persecution because it "was short in duration, did not involve any significant use of physical force, did not result in overnight incarceration, and terminated in the petitioner's prompt release."

The court also determined that petitioner did not have a well-founded fear of future persecution given that he held a steady job, his Roma family members continue to live and work without incident in Moldova, and the mistreatment of Roma and political dissidents in Moldova is not systematic or pervasive.

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First Circuit Affirms that Parent's Period of Residence Need Not Be Imputed to Child, Remands to Address Other Issues

In *Aponte v. Holder*, __F.3d__, 2012 WL 2369581 (1st Cir. June 21, 2012) (Boudin, Souter, *Thompson*), the First Circuit held that under *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), the BIA need not impute an alien's father's period of continuous residence to the alien for cancellation of removal purposes.

"While we suspect the BIA's compact decision was a direct result of Aponte's own less than thorough request for relief . . . we cannot turn a blind eye to the inadequacy of the decision."

The petitioner, a citizen of the Dominican Republic, was admitted to the United States as an LPR on February 2, 1996. A few years later, in 1999, she pled guilty to Criminal Possession of a Controlled Substance in the Fifth Degree in New York. Petitioner was subsequently placed in removal proceedings, and following a BIA decision and remand by the First Circuit, petitioner moved to reopen to apply for cancellation, asylum, withholding, and CAT protection.

The First Circuit determined that petitioner's imputation claim was controlled by the court's decision *Martinez Gutierrez*. "The BIA's rebuff of Aponte's bid to impute her father's years in the United States was based on a permissible construction of § 1229b(a). Without the benefit of her father's years in the United States, Aponte fell well short of the seven years of continuous residence required for cancellation of removal," said the court.

However, the court concluded that the BIA had not adequately explained its determination that petitioner failed to show prima facie eligibility for asylum, withholding and protection under the CAT. The court said that the BIA "made no findings, relied on no case law, and engaged in no analysis. Moreover, it offered up no rationale for the decision it reached (e.g., Aponte did not demonstrate that she is a member of a legally cognizable social group, or Aponte cannot prove that it is more likely than not that she will be tortured). While we suspect the BIA's compact decision was a direct result of Aponte's own less than thorough request for relief, and we are not suggesting that the BIA should have dedicated pages upon pages to hashing out its merits, we cannot turn a blind eye to the inadequacy of the decision." Accordingly, it remanded the case, for the second time, with instructions to issue an order of clarification explaining the rationale behind its determination that petitioner did not establish prima facie eligibility for asylum, withholding of removal, and CAT protection.

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First Circuit Holds That a Conviction with a Vacated Fine Is Still a "Formal Judgment Of Guilt" Satisfying The INA's Definition of "Conviction"

In *Viveiros v. Holder*, __F.3d__, 2012 WL 2369579 (1st Cir. June 25, 2012) (Lynch, Boudin, *Selya*), the First Circuit held that petitioner, who had been convicted of shoplifting and fined $250, was "convicted" under the INA

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Act even though the fine was later vacated.

The petitioner entered the United States in 1984 as a lawful permanent resident. Roughly a quarter-century later, Massachusetts authorities charged him with shoplifting, and larceny. The petitioner pleaded guilty to the shoplifting charge in a Massachusetts state court and was fined $250. He pleaded guilty to the larceny charge in the same court and was sentenced to 18 months of probation. The shoplifting fine was never paid. Some five months after the fine was imposed, a probation officer requested that it be waived, and the court thereupon vacated it. According to the docket, the ultimate disposition was a "guilty finding with no fines or costs."

The First Circuit agreed with the BIA and held that "[t]he finding of guilt coupled with the imposition of a pecuniary sanction constituted a formal judgment of guilt."

Subsequently, DHS commenced removal proceedings on the basis that petitioner had been convicted of two independent crimes of moral turpitude. An IJ found petitioner removable as charged. On appeal, the BIA affirmed and also held that petitioner had been convicted of shoplifting because a "formal judgment of guilt" had been entered against him.

The First Circuit agreed with the BIA and held that "[t]he finding of guilt coupled with the imposition of a pecuniary sanction constituted a formal judgment of guilt." The court explained that the subsequent *vacatur* of the fine for reasons unrelated to procedural or substantive error did "not dissipate the underlying conviction."

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SECOND CIRCUIT

■ Second Circuit Holds That K-1 Visa Holder Can Only Adjust Status Pursuant to INA § 245(d) by Marrying the K-1 Visa Sponsor

In *Caraballo-Tavera v. Holder*, __F.3d__, 2012 WL 2213662 (2d Cir. June 15, 2012) (Calabresi, Cabranes, Lohier) (*per curiam*), the Second Circuit held that a person who originally was admitted to the United States as a K-1 nonimmigrant visa holder can only adjust status under INA § 245 (d) to a conditional lawful permanent resident after marrying his or her U.S. citizen spouse.

The petitioner, a citizen of the Dominican Republic, entered the United States in July 1998, with a K-1 visa, as the fiancé of a U.S. citizen. He complied with the terms of his visa and married his fiancé within the 90-days prescribed by INA § 214(d). Based on that marriage, in December 1999, petitioner adjusted his status to conditional permanent resident status (CLPR). However, the couple divorced in March 2001. When petitioner filed his petition to remove the condition on his residence, seeking a waiver of the joint petition on the basis that his marriage had been entered in good faith, DHS denied it concluding that he had not met his burden to prove the bona fides of his marriage. Consequently, petitioner's CLPR status was terminated and on March 2, 2006, he was placed in removal proceedings. Petitioner then sought to adjust his status based on an approved immigrant visa petition filed by his U.S. citizen daughter. The IJ and the BIA found him statutorily ineligible for adjustment.

The Second Circuit rejected petitioner's contention that he was not subject to the terms of INA § 245(d) because he ceased to be a nonimmigrant when he obtained CLPR in December 2009. The court explained that Congress had devised a "specific restrictive process" for K-1 visa holders. "As an 'out of status' K-1 visa admittee who has failed to follow the required statutory process, [petitioner] remains subject to the restrictions in § 245(d)," and therefore "ineligible to adjust his status to LPR on any basis other than marriage to his K-1 visa sponsor," said the court. Moreover, the court concluded that "the plain language of the governing regulations at 8 C.F.R. § 245.1(c)(6) clearly applies the § 245(d) bar to an alien who was *originally admitted* to the United States on a K-1 visa."

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FIFTH CIRCUIT

■ Fifth Circuit Holds That "Particularity" And "Social Visibility" Criteria for "Particular Social Group" Asylum Claims Are Reasonable And Entitled to *Chevron* Deference

In *Orellana-Monson v. Holder*, __F.3d__, 2012 WL 2369575 (5th Cir. June 25, 2012) (Higgenbotham, Garza, *Clement*), the Fifth Circuit held that the BIA's definition of "particular social group," requiring "social visibility" and "particularity," rests on a permissible construction of the statute and concluded that the proposed groups of Salvadoran youths recruited by gangs and their family members lacked the requisite "social visibility" and "particularity" to meet the definition of a "particular social group."

The court stated that the "particularity and social visibility test is not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA's prior decisions on similar cases."

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SIXTH CIRCUIT

Sixth Circuit Affirms That Alien Who Remained Outside the United States for Over a Year Abandoned her LPR Status

In ***Lateef v. Holder***, __F.3d__, 2012 WL 2379231 (6th Cir. June 26, 2012) (McKeague, Stranch, *Siler*), the Sixth Circuit held that an alien abandoned her lawful permanent resident status where she made seven return trips to Pakistan and spent only thirty-five percent of her time in the United States after she obtained LPR status. The court determined that her last trip, which lasted a year and three months, showed that she had abandoned her LPR status because it exceeded the 180-day period specified by statute and its duration was not due to reasons beyond her control.

"The mere fact that a statute is not categorically a violent felony does not preclude it from categorically qualifying" as a crime involving moral turpitude.

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Sixth Circuit Concludes That Felony Flight Is Categorically a Crime Involving Moral Turpitude

In ***Ruiz-Lopez v. Holder***, __F.3d__, 2012 WL 2291132 (6th Cir. June 19, 2012) (Rogers, Griffin, *Moore*), the Sixth Circuit upheld the BIA's published decision in *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011), and determined that a conviction under Washington Revised Code § 46.61.024 (1997) for driving and eluding the police with the "wanton and willful disregard for the lives or property of others" categorically constitutes a crime involving moral turpitude.

The petitioner, a Mexican citizen, entered the country illegally in 1991. He is married and has three children. In 1997, petitioner, who was then living in Washington state, pleaded guilty to one count of felony flight after attempting to elude a police officer who had signaled him to stop. Although the statute under which he was convicted carried a maximum term of five years in prison, petitioner, who was a first-time offender, received a sentence of only forty days in prison and twenty-four months of community supervision.

Petitioner was subsequently placed in removal proceedings. An IJ determined that petitioner was ineligible for cancellation because his driving offense was categorically a CIMT. On appeal, the BIA, in a published opinion, also determined as a categorical matter, that "[t]he offense of driving a vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle in violation of section 46.61.024 of the Revised Code of Washington is a crime involving moral turpitude."

Preliminarily, the court questioned the extent to which *Chevron* deference applied to the BIA's decision, explaining that whether a particular crime is a CIMT may require some interpretation of both the criminal statute and the INA term "crime involving moral turpitude." However, the court found it unnecessary to reach this issue because its "independent analysis" agreed with the BIA's determination.

The court rejected petitioner's contention that the disjunctive nature of the Washington statute—namely, that it prohibited conduct that manifests a "wanton or willful disregard for the lives or property of others," renders the categorical analysis impossible because only endangering life would constitute a CIMT. The court concluded that "the mere fact that a statute is not categorically a violent felony does not preclude it from categorically qualifying" as a crime involving moral turpitude. The court noted that the BIA had not specifically addressed, in a published decision, the question whether a crime akin to attempting to elude a pursuing police vehicle constitutes a CIMT, but two other circuits had addressed analogous statutes, and both affirmed the BIA's unpublished determinations that the relevant offenses qualified as CIMTs.

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SEVENTH CIRCUIT

Seventh Circuit Grants En Banc Rehearing to Address Independent Existence Requirement for a Particular Social Group for Asylum

In ***Cece v. Holder***, the Seventh Circuit on May 31, 2012, granted en banc rehearing, and vacated its prior published opinion, 668 F.3d 510, which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Seventh Circuit Reaffirms That BIA Decisions Declining to Reopen Sua Sponte Are Unreviewable

In ***Anaya-Aguilar v. Holder***,__F.3d__, 2012 WL 2149562 (7th Cir. June 14, 2012) (Rovner, Coleman, *Manion*), the Seventh Circuit reaffirmed *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003), and held

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that the BIA's decision declining to reopen *sua sponte* remains unreviewable after *Kucana v. Holder*, 130 S. Ct. 827 (2010), as there is no meaningful standard by which to judge the BIA's exercise of discretion.

The petitioner, a Mexican citizen, was ordered removed in 2005. In 2007 he moved to reopen the proceedings based in large measure on his counsel's alleged ineffective assistance. On October 31, 2007, the BIA held that petitioner's motion to reopen proceedings was time-barred. Two weeks after the decision, petitioner filed a motion to reconsider with the BIA and attached new evidence that supported an equitable tolling argument. The BIA denied that motion on January 16, 2008. It found that the new evidence he submitted was insufficient to allow it to equitably toll the statutory 90–day filing period. Alternatively, construing the motion as a motion to reopen, the BIA said that it would be procedurally and numerically barred. Petitioner then sought review of the BIA's decision but the Seventh Circuit dismissed the appeal for lack of jurisdiction. *Anaya–Aguilar v. Mukasey*, 302 Fed. Appx 481, 482 (7th Cir. 2008). Petitioner then petitioned for certiorari. His case was subsequently vacated and remanded in light of *Kucana v. Holder*, __U.S.__, 130 S. Ct. 827 (2010). On remand, the court examined the BIA's denial of petitioner's motion to reopen on the merits and held that the BIA did not abuse its discretion. *Anaya–Aguilar v. Holder*, Nos. 07–3701, 08–1367 (7th Cir. Sept. 22, 2010). Undaunted, petitioner moved the BIA to reopen the proceedings under its *sua sponte* authority. The BIA denied the motion finding no "exceptional circumstances" to reopen the case.

"The regulation's permissive language makes clear that the Board is never obligated to exercise its sua sponte authority; therefore, any review of the Board's refusal to exercise such authority would be inappropriate."

The Seventh Circuit held that the denial of *sua sponte* reopening was an unreviewable discretionary decision. It explained that the BIA "has not established any sort of comprehensive standard or list of factors in its case law that it considers when determining whether an extraordinary situation exists in a particular case." Even if there were such a standard, said the court, "the regulation's permissive language makes clear that the Board is never obligated to exercise its *sua sponte* authority; therefore, any review of the Board's refusal to exercise such authority would be inappropriate."

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EIGHTH CIRCUIT

■ **Eighth Circuit Denies Rehearing of Challenge to "Particularity" and "Social Visibility" Criteria in Resistance-to-Gang-Recruitment Asylum Case**

In ***Gaitan v. Holder***, __F.3d__, 2012 WL 2036972 (8th Cir. June 7, 2012) (Wollman, Bye, Shepherd), the Eighth Circuit denied panel and en banc rehearing of its decision (reported at 671 F.3d 678) upholding a determination by the BIA that a group comprised of young male Salvadorans who resist gang recruitment is not a cognizable "particular social group" for asylum purposes.

Judge Colloton separately concurred in the order, stating that he believed the panel erred in refusing, on *stare decisis* grounds, to decide whether "social visibility" and "particularity" are valid elements of the "particular social group" asylum eligibility standard but found *en banc* rehearing nonetheless not warranted because, among other things, the BIA could further address the matter and the court could revisit the issue when its resolution is likely to affect the outcome of a future case.

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■ **Eighth Circuit Holds That It Lacks Jurisdiction to Review a Discretionary Decision Not To Grant Cancellation Of Removal Under The Violence Against Women Act**

In ***Hamilton v. Holder***, __F.3d__, 2012 WL 1987846 (8th Cir. June 5, 2012) (Benton, Shepherd, *Murphy*), the Eighth Circuit held that it lacked jurisdiction to review the agency's determination that a citizen of Kenya did not demonstrate that she would suffer extreme hardship for cancellation of removal pursuant to the Violence Against Women Act (VAWA).

The petitioner entered the United States in the early 1990s and through mutual friends met a United States citizen. The two married in December 1995, but the marriage deteriorated quickly because her husband used alcohol and drugs and subjected her to verbal abuse. He moved out in 1998, and the couple divorced in 2004. Prior to their divorce petitioner twice applied for lawful permanent resident status through her marriage to a United States citizen, but USCIS denied both applications. The second application was denied after petitioner indicated that she would abandon it because the marriage was "not going forward." When petitioner was placed in removal proceedings she applied for cancellation under VAWA. The IJ denied the application because she had not shown that she had been

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battered or subjected to extreme cruelty by her husband or that her removal would result in extreme hardship. On appeal, the BIA upheld the IJ's denial of her application and petitioner subsequently departed the United States as required by the removal order.

The Eight Circuit rejected petitioner's contention that she was making a legal argument by arguing that the BIA had applied the wrong legal standard in determining harship. The court determined that her argument was essentially a challenge to the agency's weighing of the evidence over which the court lacked jurisdiction under INA § 242(a)(2)(B)(i).

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■ **Eighth Circuit Approves *Silva-Trevino* Methodology for Determining When Alien's Conviction Involves Moral Turpitude, but Holds that a Conviction for Providing a False Name to a Police Officer Is Not Categorically a CIMT**

In ***Bobadilla v. Holder***, __F.3d__, 2012 WL 1914068 (8th Cir. May 29, 2012) (Wollman, *Loken* (Gruender, J., dissenting)), the Eighth Circuit approved the methodology in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), for determining whether a crime involves moral turpitude as reasonable, but held that the BIA erred in finding that a conviction for giving a false name to a peace officer in violation of Minnesota law is categorically turpitudinous. The court identified a "realistic probability" that the statute would apply to conduct that does not involve moral turpitude and ruled that the agency should have applied additional steps of the *Silva-Trevino* methodology.

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NINTH CIRCUIT

■ **Ninth Circuit Affirms Western District of Washington Grant of Summary Judgment in Favor of USCIS**

In ***Rijal v. USCIS***, __F.3d__, 2012 WL 2130884 (9th Cir. June 13, 2012) (Murguia, Gee, *Silverman*), the Ninth Circuit affirmed the judgment of the United States District Court for the Western District of Washington granting summary judgment in favor of the government. The court "adopt[ed] as [their] own the well-reasoned published opinion of the district court, *Rijal v. United States Citizenship & Immigration Servs.*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011)." The district court, relying on *Kazarian v. USCIS*, 596 F.3d 1115, 1120 (9th Cir. 2010), had affirmed USCIS' denial of Rijal's petition for an immigration visa preference as an alien of "extraordinary ability" under 8 U.S.C. § 1153(b)(1)(A).

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■ **Ninth Circuit Denies Alien's Petition for Rehearing of Holding that an Alien's Direct Appeal of a Conviction Need Not Have Concluded Before Conviction Counts for Immigration Purposes**

In ***Planes v. Holder***, __F.3d__, 2012 WL 1994862 (9th Cir. June 5, 2012) (Pregerson, Callahan, Ikuta), the Ninth Circuit denied the alien's petition for rehearing en banc. In an opinion concurring in the denial of rehearing, Judge Ikuta, for herself and three other judges, noted that the panel had decided the issue before it – whether the definition of "conviction" in 8 U.S.C. § 1101(a)(48) requires that all appeals of right have been exhausted – in a manner consistent with the plain language of the statute and with all other circuits that have ruled on the issue. Judge Reinhardt, for himself and six other judges, dissented from the denial of rehearing en banc, asserting that the statute expresses a congressional intent that a conviction is not final for immigration purposes until the alien has exhausted or waived his appeal as of right.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit, in a Case of First Impression, Invalidates the Departure Bar**

In ***Lin v. Holder***, __F.3d__, 2012 WL 1860686 (11th Cir. May 23, 2012) (Anderson, Higginbotham, *Wilson*), the Eleventh Circuit joined the Third, Fourth, Ninth, and Tenth Circuits in holding that the Illegal Immigration Reform and Immigrant Responsibility Act guarantees an alien the right to file one motion to reopen, and that the Attorney General's regulatory departure bar impermissibly undercuts that right. The Immigration and Nationality Act states that there is no time limit on a motion to reopen filed by an alien asserting that a change in country conditions warrants reopening proceedings to apply for asylum. The court rejected the BIA's application of the departure bar to deny petitioner's motion to reopen, where Lin alleged changed Chinese country conditions and filed the motion before being removed from the United States.

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■ **Eleventh Circuit Reverses Agency's Denial of Criminal Alien's Inadmissibility Waiver Application**

In ***Makir-Marwil v. U.S. Att'y Gen.***, __F.3d__, 2012 WL 1841321 (11th Cir. May 22, 2012) (Cox, Walter, *Hull*), the Eleventh Circuit held that in assessing whether an alien should be granted an inadmissibility waiver, the BIA properly applied *Mat-*

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ter of Jean, 23 I&N Dec. 373 (A.G. 2002), to find that the alien's robbery, grand theft, and burglary convictions rendered him a violent or dangerous individual, but erred by refusing to consider the hardship his removal would cause given that the BIA deferred his removal under the Convention Against Torture. The court remanded for consideration of whether Sudanese country conditions establish "exceptional and extremely unusual hardship" under 8 U.S.C. § 1159(c), and whether the alien warrants a discretionary inadmissibility waiver.

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■ Ninth Circuit Denies Government's Rehearing Petition Challenging Court's Rejection of BIA Precedent That Misprision of a Federal Felony Is a Crime Involving Moral Turpitude

In ***Robles-Urrea v. Holder***, __F.3d__, 2012 WL__ (9th Cir. June 21, 2012) (Schroeder, Reinhardt), the Ninth Circuit denied a government petition for panel rehearing arguing that the court misstated the BIA's decision, *Matter of Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006), and violated the ordinary remand rule in its April 23, 2012 opinion. In that opinion (published at 678 F.3d 702), the court held that the BIA's conclusion that knowingly concealing any federal felony is categorically turpitudinous leads to absurd results and remanded for consideration of whether the alien's conviction record established that his particular conviction involved turpitude.

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■ Ninth Circuit Rejects Due Process Challenge to Cancellation Hearing By Video Conference

In ***Vilchez v. Holder***, __F.3d__, 2012 WL 2306975 (9th Cir. June 19, 2012) (Farris, Korman, *W. Fletcher*), the Ninth Circuit held that a hearing by video conference does not necessarily deny due process.

The petitioner, a citizen of Peru, first came to the United States in 1990 when he was twelve. He became a lawful permanent resident in 1995. He subsequently was convicted of various criminal offenses including violating a restraining order. In 2008, DHS charged him with removability under INA § 237(a)(2)(E)(i) as an alien convicted of a crime of domestic violence. Petitioner sought cancellation of removal. Following a hearing by video conference, an IJ found him statutorily eligible for cancellation but denied it as a matter of discretion in light of petitioner's substantial criminal record. The BIA affirmed the decision, and also found no due process violation in the IJ's decision to hold petitioner's hearing by video-conference. The BIA noted that the INA expressly allows hearings by video conference, even without the alien's consent, and that petitioner neither requested an in-person hearing nor explained how the video-conference hearing prejudiced him.

"Whether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference."

The court held that hearing by video conference does not necessarily deny due process. The court explained that "whether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice suffered by the petitioner." The court then ruled that petitioner's video-conference hearing did not violate due process because he was represented by counsel, testified at length, and had three witnesses speak on his behalf. The court noted that he also failed to establish that the fact that the hearing was by video-conference may have affected the outcome of his hearing.

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D.C. CIRCUIT

■ D.C. Circuit Reverses State Department's Denial of Certificate of Loss of Nationality for Lack of Reasoned Decision-Making

In ***Fox v. Clinton***, __F.3d__, 2012 WL 2094410 (D.C. Cir. May 12, 2012) (Garland, Williams, *Edwards*), the D.C. Circuit Court of Appeals reversed in part and affirmed in part the State Department's decision to deny a United States citizen a certificate of loss of nationality (CLN).

Section 349 of the INA provides that a native-born or naturalized U.S. citizen can lose his or her nationality by voluntarily performing certain enumerated acts. The plaintiff sought a CLN claiming that he had acquired Israeli citizenship through Israel's law of return and argued that he had committed an expatriating act by obtaining naturalization in a foreign country upon his own application under § 349(a)(1) and, independently, by taking an oath of allegiance to Israel under § 349(a)(2).

The Department denied plaintiff's request in an informal letter decision, explaining that plaintiff's acts did not satisfy the INA because under Israeli law, the conferral of nationality by naturalization occurs

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"upon . . . application" as the INA requires, whereas the conferral of nationality by Israel's law of return occurs automatically by operations of law. The letter also stated that there was no evidence that plaintiff had sworn a meaningful oath of allegiance to Israel.

Following an unsuccessful informal administrative appeal, plaintiff filed suit challenging the Department's final decision. The district court dismissed the action and plaintiff appealed. The D.C. Circuit upheld the lower court's decision finding that plaintiff was not eligible for a CLN under § 349(a)(2) because, as the Department had determined, plaintiff had not submitted objective and independent evidence that he had actually taken an oath of allegiance to Israel.

"In the field of immigration generally, and expatriation more specifically, there may be sensitive issues lurking that are beyond the ken of the court."

The court, however, reversed the lower court's dismissal of plaintiff's contention that he was eligible for a CLN under § 349(a)(1). The court first determined that the statutory interpretation rendered in the Department's letter was not entitled to *Chevron* deference, because "there are no agency regulations at issue in this case." Moreover, it found under *Skidmore* "the letter's persuasive power is virtually nil." Second, the court found that the Department's denial under § 349(a)(1), which found that plaintiff was obliged to obtain Israeli citizenship "by naturalization" and not "by return," "failed to provide any coherent explanation for its decision regarding the applicability of Section 1." The Department's conclusion, said the court, "appears to be based on an unpersuasive view of the requirement of the INA, some seemingly faulty assumptions about the requirements of Israeli law, and possible misunderstandings of the material facts in this case." Accordingly, the court found that the denial was "arbitrary and capricious for want of reasoned decision-making."

Finally, the court declined to grant plaintiff's requested relief, because "in the field of immigration generally, and expatriation more specifically, there may be sensitive issues lurking that are beyond the ken of the court." Therefore, the court said that it would pursue a course of prudence and remand the case to district court with instructions to remand the case to the Department for reconsideration of plaintiff's claim under § 349(a)(1).

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DISTRICT COURTS

■ **Eastern District of Pennsylvania Affirms State Department's Denial of Request for a Waiver of a Two-Year Foreign Residency Requirement**

In ***Volynsky v. Clinton***, No. 10-cv-4695 (E.D. Pa. June 21, 2012) (Padova, J.), the Eastern District of Pennsylvania granted the government's motion to dismiss the plaintiff's challenge to the Department of State's waiver denial. The plaintiff, a Fulbright Scholar, originally entered the United States as a non-immigrant exchange visitor. Because the United States government helped fund her program, the plaintiff was subject to a two-year foreign residency requirement upon completion of her exchange program. Rather than returning home, the plaintiff married a United States citizen and sought a waiver of the foreign residency requirement. After the court found limited jurisdiction in a decision last year, the Department of State gave the plaintiff an opportunity to update her application. The application was then re-adjudicated and denied. The plaintiff amended her complaint to challenge this decision as arbitrary and capricious. The court rejected her challenge, holding that the State Department reviewed all of the requisite regulatory factors, issued a reasoned decision, and sufficiently explained its reasoning.

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■ **Court Rules Applicant Ineligible for *Nunc Pro Tunc* Adjustment Relief Despite Agency Error**

In ***Moreno-Gutierrez v. Napolitano***, No. 10-cv-00605 (D. Colo. June 12, 2012) (Martinez, J.), the District Court for the District of Colorado determined that an alien applying for adjustment of status is ineligible for *nunc pro tunc* relief despite agency error in denying her immigrant petition. In an APA-review case, the alien sought declaratory and mandamus relief following the erroneous denial of her I-360 petition for immigrant classification under the Violence Against Women Act. After USCIS re-opened and granted the petition almost five years after the denial, the government moved for dismissal of the suit based on mootness, and the alien sought to amend the complaint to seek *nunc pro tunc* adjustment once her adjustment application is adjudicated. The court denied the alien's motion for summary judgment as moot, granted the government's motion to dismiss for mootness, and denied the alien's motion to amend the complaint as futile. The court concluded that the alien is ineligible for *nunc pro tunc* relief because the agency error merely delayed the alien's ability to apply for naturalization and did not foreclose it. The court did not decide the issue of whether USCIS has the authority to backdate an adjustment application.

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This Month's Topical Parentheticals

ADJUSTMENT OF STATUS - LPR

■ *Matter of Fernandez Taveras*-, 25 I.&N. 834 (BIA June 21, 2012) (holding that Section 101(a)(13)(C) of the INA, which relates to returning LPRs seeking admission at a port of entry, is not applicable to an alien applying for adjustment of status, who has the burden to prove admissibility; further holding that an LPR who was granted cancellation of removal in prior removal proceedings based on a drug conviction has the burden to prove that he is not inadmissible on the basis of the conviction when applying for adjustment in a subsequent removal proceeding)

■ *Lateef v. Holder,* __ F.3d __, 2012 WL __ (6th Cir. June 26, 2012) (holding that substantial evidence supported the BIA's finding that petitioner abandoned her LPR status where she spent the "vast majority" of her time as an LPR in Pakistan with her husband and daughter, she remained in Pakistan for approximately a year and three months prior to her last attempted reentry in 2001, and she did not own property or have a job in the US)

■ *Caraballo-Tavera v. Holder,* __ F.3d __, 2012 WL 2213662 (2d Cir. June 18, 2012) (affirming BIA's denial of adjustment of status and holding that section 245(d) of the INA bars an alien admitted to the United States on a K-1 fiance visa from obtaining LPR status on any basis other than marriage to the K-1 visa sponsor)

ADMISSION

■ *Matter of C. Valdez*-, 25 I.&N. 824 (BIA June 13, 2012) (holding that an alien's pre-November 28, 2009 admission to the Commonwealth of the Northern Mariana Islands ("CNMI") by the CNMI Immigration Service does not constitute an inspection and admission or parole "into the United States" for purposes of adjustment of status pursuant to section 245(a) of the INA)

Matter of Guzman Martinez, 25 I.&N. 845 (BIA June 29, 2012) (holding that an LPR may be treated as an applicant for admission in removal proceedings if DHS proves by clear and convincing evidence that the returning resident engaged in "illegal activity" at a United States port of entry)

ASYLUM

■ *Annachamy v. Holder*, __ F.3d __, 2012 WL __ (9th Cir. June 3, 2012) (holding that an alien from Sri Lanka was ineligible for asylum and withholding of removal due to his material support for the Liberation Tigers of Tamil Eelam, a terrorist group for purposes of INA § 212(a)(3)(B)(vi)(III), and that the bar does not include an implied exception for individuals who provide support to groups engaged in legitimate political violence or who provide support under duress)

■ *Gaitan v. Holder*, __ F.3d __, 2012 WL 2036972 (8th Cir. June 7, 2012) (denying rehearing en banc of panel decision which relied on prior circuit precedent to hold that "young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang" is a not a "particular social group;" prior decision reasoned that the proposed group does not meet the "social visibility" and "particularity" criteria because it is "not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society") (Judge Colloton concurred in the denial of rehearing noting that the circuit does not have binding precedent on the validity of the BIA's social group criteria)

■ *Cece v. Holder,* __ F.3d __, 2012 WL __ (7th Cir. May 31, 2012) (granting petition for rehearing en banc and vacating divided panel decision which had held that "young Albanian women targeted for prostitution by traffickers" are not a "particular social group" because a PSG cannot be defined by the past, or feared future, persecution or the "shared characteristic of facing danger," and young Albanian women who fear being trafficked for prostitution have "little or nothing in common beyond being targets")

■ *Orellana-Monson v. Holder,* __ F.3d __, 2012 WL 2369575 (5th Cir. June 25, 2012) (in a gang recruitment case, (1) joining the First, Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits in upholding that the BIA's "social visibility" and "particularity" criteria for "particular social group" (PSG) and according them *Chevron* deference; (2) concluding that the "social visibility" criterion is not arbitrary or capricious but has evolved out of the Board's precedents; (3) describing "social visibility" as referring, *inter alia*, to the "extent to which members of a society perceive those with the characteristic in question as members of a social group" and "particularity" as referring to "whether the group can be defined with sufficient particularity to delimit its membership" or is "too amorphous . . . to create a benchmark for determining group membership;" (4) affirming that the following alleged groups lack the requisite particularity or social visibility to qualify as a PSG: "Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang because of their principal opposition to the gang and what they want;" "young Salvadoran males who are siblings of a member of the aforementioned social group" or "family member[s] of [Jose Orellana-Monson")

BIA

■ *Aponte v. Holder,* __ F.3d __, 2012 WL 2369581 (1st Cir. June 21, 2012) (holding that the BIA abused its discretion in concluding that petitioner failed to establish a prima facie case for asylum where it issued a

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"summary" decision and "made no findings, relied on no case law, and engaged in no analysis")

■ *Rodriguez v. Holder*, __ F.3d __, 2012 WL 2401984 (9th Cir. June 27, 2012) (holding that the BIA erred by: (1) engaging in fact-finding when it accepted the CBP officer's opinions as true even though the IJ did not make such findings; (2) finding a contradiction in the alien's testimony by drawing factual inferences from that testimony; and (3) making its own credibility determination)

CANCELLATION

■ *Matter of Isidro*, 25 I.&N. 829 (BIA June 15, 2012) (holding that a cancellation applicant whose son or daughter met the definition of a "child" when the application was filed but turned 21 before the IJ adjudicated the application on the merits no longer has a qualifying relative under section 240A(b)(1)(D) of the INA) (clarifying *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006))

CHILD STATUS PROTECTION ACT

■ *Matter of O. Vasquez-*, 25 I.&N. 817 (BIA June 8, 2012) (holding that an alien may satisfy the "sought to acquire" provision of section 203(h)(1)(A) of the INA (which was enacted as part of the Child Status Protection Act and provides a mechanism for an applicant who has aged out to nevertheless maintain the status of a "child" under the INA) by filing an application for adjustment or by showing that there are other extraordinary circumstances in the case, particularly those where the failure to timely file was due to circumstances beyond the alien's control)

CRIMES

■ *Planes v. Holder,* __ F.3d __, 2012 WL __ (9th Cir. June 5, 2012) (denying petitioner's request for rehearing en banc where the panel held that under section 101(a)(48)(A) of the INA, there is a "conviction" for immigration purposes when the trial court enters a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived) (seven judges dissented)

■ *United States v. Leal-Vega*, __ F.3d __, 2012 WL 1940217 (9th Cir. May 30, 2012) (holding that court could consider the minute order and abstract of judgment under a modified categorical analysis to conclude that defendant was convicted of possession of tar heroin, and thus was convicted of a "drug trafficking offense" warranting an enhancement under the sentencing guidelines)

■ *Bobadilla v. Holder*, __ F.3d __, 2012 WL 1914068 (8th Cir. May 29, 2012) (approving AG's three-part test in *Matter of Silva-Trevino* for determining whether a crime involves moral turpitude, but reversing BIA's finding that a conviction for giving a false name to a peace officer is categorically a CIMT, and reasoning that there was a "realistic probability" that the statute of conviction would apply to conduct that does not involve moral turpitude, and thus, the agency should have applied the second [or third] step of the *Silva-Trevino* test)

■ *Viveiros v. Holder,* __ F.3d __, 2012 WL 2369579 (1st Cir. June 25, 2012) (deferring to the BIA and holding that petitioner was "convicted" of shoplifting because there was a "formal judgment of guilt" (guilty plea) and a $250 fine, and noting that there is no indication in the record that the subsequent vacatur of the fine was on account of either a procedural or substantive error)

■ *United States v. Ramos-Medina,* __ F.3d __, 2012 WL 2354446 (9th Cir. June 21, 2012) (following prior immigration precedent and holding that burglary under Cal. Pen. Code § 459 qualified as a crime of violence for purposes of the sentencing guidelines)

■ *Ruiz-Lopez v. Holder,* __ F.3d __, 2012 WL __ (6th Cir. June 19, 2012) (affirming BIA's conclusion that a conviction for felony flight under Washington law -- which requires driving a vehicle in a manner indicating "a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle" -- is categorically a CIMT because it involves "reprehensible" conduct with "some form of scienter")

DUE PROCESS - FAIR HEARING

■ *Vilchez v. Holder,* __ F.3d __, 2012 WL 2306975 (9th Cir. June 19, 2012) (holding that conducting a removal hearing by video conference does not violate due process per se but depends on "the degree of interference with the full and fair presentation of petitioner's case caused by the video, and on the degree of prejudice suffered;" rejecting petitioner's due process claim)

EAJA

■ *Abdur-Rahman v. Napolitano,* __ F.3d __, 2012 WL 2212510 (W.D. Wash. June 13, 2012) (granting EAJA fees and rejecting argument that government's position was substantially justified where petitioners departed the U.S. pursuant to a grant of advance parole, but three days after departure their approved immigrant worker petitions were revoked, and they were subsequently denied reentry into the United States despite the advance parole)

EXTRADITION

■ *Trinidad Y Garcia v. Thomas,* __ F.3d __, 2012 WL 2054636 (9th Cir. June 8, 2012) (en banc) (holding that neither the REAL ID's jurisdictional bars or FARRA preclude habeas review over petitioner's claim that his extradition would violate due process and his right under CAT; reasoning that the REAL ID Act does not apply

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because petitioner does not have a final order of removal; further finding that petitioner has a "narrow liberty interest" in CAT protection and thus the Secretary of State must make a torture determination before surrendering an extraditee to a foreign power, but that under the "rule of non-inquiry," once such determination is made, the court may not inquire further)

FEDERAL POWER

■ *Arizona v. United States*, __ U.S. __, 2012 WL 2368661 (June 25, 2012) (holding that three of the four Arizona provisions at issue are preempted by federal law: (1) the registration requirement (§ 3) intrudes on the field of alien registration in which Congress has left no room for states to regulate; (2) the criminal penalty for unauthorized work (§ 5(C)) stands as an obstacle to the federal scheme which, under IRCA, provides only for civil penalties; (3) the arrest authority for aliens suspected of being removable (§ 6)) creates an obstacle to federal law by infringing on the removal process which is entrusted to the sole discretion of the federal government))

FOIA

■ *National Immigration Project of the Nat. Lawyers Guild v. DHS*, __ F.3d __, 2012 WL 2371459 (S.D.N.Y. June 25, 2012) (granting plaintiffs' summary judgment motion in FOIA action in which plaintiffs sought disclosure of portions of emails containing factual descriptions of the putative policy which the Office of Solicitor General asserted in *Nken*, namely, how removed aliens who have prevailed in their PFRs are returned to the U.S.; rejecting government's claims of deliberate process, work-product and attorney-client privilege in communications between ICE OPLA attorneys and DOJ attorneys and ordering disclosures)

JURISDICTION

■ *Hamilton v. Holder*, __ F.3d __, 2012 WL __ (8th Cir. June 5, 2012) (holding that court lacked jurisdiction to review the BIA's discretionary denial of cancellation where petitioner challenged the BIA's weighing of the relevant factors in its hardship determination)

■ *Anaya-Aguilar v. Holder*, __ F.3d __, 2012 WL 2149562 (7th Cir. June 14, 2012) (concluding that prior precedent holding that the BIA's failure to reopen *sua sponte* is an unreviewable discretionary decision survives the Supreme Court's decision in *Kucana* and therefore requires dismissal of the PFR)

■ *Wahid v. Gates*, __ F. Supp.2d __, 2012 WL 2389984 (D.D.C. June 26, 2012) (applying the *Boumediene* analysis, and holding that the Suspension Clause does not allow an Afghani citizen detained by the US in Afghanistan to challenge his custody through a habeas corpus petition)

NATIONALITY

■ *Fox v. Clinton,* __ F.3d. __, 2012 WL 2094410 (D.C. Cir. June 12, 2012) (remanding to agency and holding that State Department letter denying a request for a Certificate of Loss of Nationality to Jewish American by birth who had lived in Israel as an Israeli national for over a decade was not entitled to *Chevron* or *Skidmore* deference, and was arbitrary and capricious for "want of reasoned decisionmaking")

TERRORIST

■ *In re People's Mojahedin Organization of Iran*, __ F.3d __, 2012 WL 1958869 (D.C. Cir. June 1, 2012) (ordering the Secretary of State to either deny or grant the petition to remove the State Department's designation of petitioner as a Foreign Terrorist Organization no later than four months from the date of the opinion)

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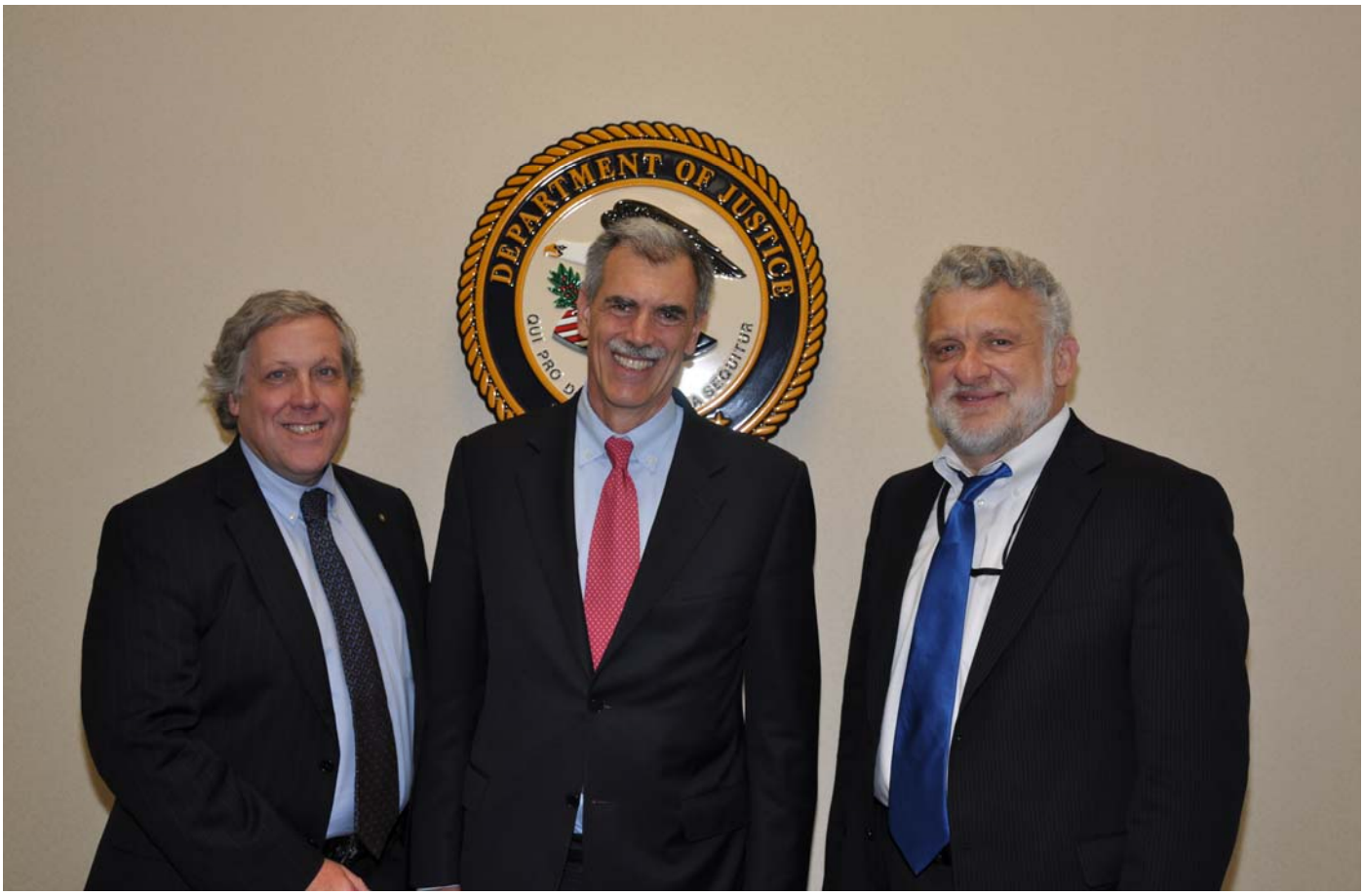
VISAS

■ *Rijal v. USCIS,* __ F.3d __, 2012 WL 2130884 (9th Cir. June 13, 2012) (affirming and adopting the district court's decision which upheld USCIS's denial of an I-140 visa petition filed by a Nepalese alien who claimed "extraordinary ability" as a producer of film and television programming)

■ *Matter of Sanchez-Sosa*, 25 I.&N. 807 (BIA June 7, 2012) (in determining whether good cause exists to continue removal proceedings to await the adjudication of an alien's pending U nonimmigrant visa petition, an IJ should consider: (1) DHS's response to the alien's motion to continue; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors; an alien who has filed a prima facie approvable petition for a U visa will ordinarily warrant a favorable exercise of discretion for a continuance for a reasonable period of time)

INSIDE OIL



On July 11-13 OIL held its immigration litigation seminar at the National Advocacy Center in Columbia, South Carolina. Among the many speakers who participated at the seminar was the Solicitor General Donald Verrilli, pictured above with OIL's Directors, David McConnell and David Kline.

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

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

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

Office of Immigration Litigation

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