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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Criminal Defendants Constitutionally Entitled to Immigration Law Advice

The Supreme Court in ***Padilla v. Kentucky,*** 559 U.S. __, 2010 WL 1222274 (March 31, 2010), held that in a criminal proceeding, the Sixth Amendment obligates counsel to affirmatively advise an alien defendant whether a plea carries the risk of deportation. Writing for the 5-4 majority on this issue, Justice Stevens said that "It is our responsibility under the Constitution to ensure that no criminal defendant -- whether a citizen or not -- is left to the mercies of incompetent counsel." In a concurring opinion, Justice Alito and the Chief Justice would not have imposed on counsel an affirmative duty to advise, while in a dissenting opinion Justice Scalia joined by Justice Thomas, called the majority's ruling "overkill."

Padilla, an LPR, was subject to removal from the United States after pleading guilty to drug-distribution charges in Kentucky, a deportable offense. In his post-conviction proceedings, Padilla claimed that he was not advised by his counsel about the immigration consequences of pleading guilty, but instead was told not to worry because he had been lawfully living in the United States for many years. Had he known otherwise, claimed Padilla, he would have gone to trial. The Kentucky Supreme Court denied

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Supreme Court to consider constitutionality of former citizenship statute

The Supreme Court has granted certiorari in ***Flores-Villar v. United States,*** No. 09-5801 (cert. granted March 22, 2010), to consider the constitutionality of two former sections of the INA, 8 U.S.C. §§ 1401(a)(7) and 1409 (1974), which impose a ten-year physical presence requirement, after the age of fourteen, on United States citizen fathers — but not on United States citizen mothers- before they may transmit citizenship to a child born out of wedlock abroad to a non-citizen. The law has since changed to reduce the residency requirement to five years, at least two of them after the age of 14.

Petitioner contends that these former provisions which were applied to him to deny him citizenship, violate the guarantee of Equal Protection contained in the Due Process Clause of the Fifth Amendment, and that the Court's decision in *Nguyen v. INS*, 533 U.S. 53 (2001), is distinguishable because that case approved distinctions that were biologically based.

Flores-Villar was born in Tijuana, Mexico on October 7, 1974. His father, a United States citizen, who was sixteen at the time – his mother was a Mexican citizen. Petitioner's father had been issued a Certificate of Citizenship on May 24, 1999, based on the fact that petitioner's paternal

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post-conviction relief on the ground that the Sixth Amendment's effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

The Court cited the increasing complexity of our immigration laws and how Congress has effectively imposed the penalty of deportation on alien defendants who plead guilty to specified crimes. "Although removal proceedings are civilian in nature [ ], deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context," said the Court. Consequently, explained the Court, because it is difficult to qualify whether deportation is a direct or collateral consequence of a criminal conviction, the test suggested by *Strickland v. Washington*, 466 U. S. 668 (1984), applies. The Court rejected Kentucky's view that the risk of deportation was a collateral consequence outside the scope of representation required by the Sixth Amendment.

Applying *Strickland,* the Court then determined that "the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." In Padilla's case, the Court said that the relevant immigration statute was clear and explicit in defining the removal consequences of his guilty plea. However, it further explained that given the complexity of immigration law there will "undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." In those cases, said the Court, a criminal defense attorney "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." Accordingly, the Court found that Padilla had satisfied the first prong of *Strickland*, namely that his counsel was constitutionally deficient, and that it would be up to the Kentucky courts in the first instance to determine whether he can satisfy *Strickland*'s second prong, prejudice.

"A criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise."

The Court declined the suggestion of the Solicitor General that *Strickland* only applied to the extent that Padilla alleged affirmative misadvice. The Court acknowledged that the lower court had followed this rule. However, the adoption of such rule, explained the court would give counsel an incentive to remain silent on "matters of great importance . . . . When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all." Second, the Court said that it "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." The Court rejected the notion that its ruling would undermine the finality of conviction causing a flood of litigation.

Justice Alito in his concurrence, while agreeing with the outcome of the case disagreed with the majority for imposing a "vague, halfway test" that requires defense attorneys to provide immigration advice where the law is "succinct and straightforward" – but not perhaps in other situations where the law is not so clear. This, he predicted, "will lead to much confusion and needless litigation." He would have read the Sixth Amendment as not requiring criminal defense lawyers to provide immigration advice. "A criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise." Instead, he would have found that "an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject."

Justices Scalia in the dissenting opinion wrote that statutory provisions could have remedied the majority's concerns in a "more targeted fashion, and without producing permanent, and legislatively irreparable, overkill." In his view, the Sixth Amendment had no application in this case because the subject of the misadvice was not the prosecution for which Padilla was entitled to effective assistance of counsel. "In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised," Scalia wrote. "The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world."

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The Viability of "Exceptions" to the INA's Exhaustion Requirement After the Supreme Court's Decision in *Bowles*

The federal circuit courts have unanimously agreed that the exhaustion requirement in 8 U.S.C. § 1252(d)(1) is a mandatory prerequisite to judicial review. In addition, most circuits, either in dicta or otherwise, have explicitly deemed exhaustion to be both mandatory and "jurisdictional." *See, e.g.*, *Sousa v. INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Khan v. Att'y Gen. of U.S.,* 448 F.3d 226, 236 n.8 (3d Cir. 2006*); Massis v. Mukasey*, 549 F.3d 631, 638 (4th Cir. 2008); *Heaven v. Gonzales*, 473 F.3d 167, 177 (5th Cir. 2006); *Hassan v. Gonzales,* 403 F.3d 429, 432-33 (6th Cir. 2005); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004); *Amaya-Artunduaga v. U.S. Att'y Gen.,* 463 F.3d 1247, 1250 (11th Cir. 2003); *see also Etchu-Njang v. Gonzales,* 403 F.3d 577, 583 (8th Cir. 2005) (viewing exhaustion as jurisdictional without tying requirement to § 1252 (d)); *but see Korsunskiy v. Gonzales*, 461 F.3d 847 (7th Cir. 2006) (§ 1252(d)(1) is not jurisdictional because it does not limit the set of cases that the judiciary is authorized to resolve); *Lin Zhong v. U.S. Dep't of Justice,* 480, F.3d 104, 107 (2d Cir. 2007) (§ 1252(d)(1) is jurisdictional only insofar as a petitioner must file an appeal with the BIA, but not with respect to issue exhaustion).

Despite the characterization of § 1252(d)(1) as "jurisdictional" and the recognition that exhaustion is mandated by statute, courts have felt unconstrained in establishing "exceptions" pursuant to which the exhaustion requirement may be excused. This article discusses: 1) the primary circumstances under which courts have excused the exhaustion requirement; 2) the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007) (holding that a statutory time limit for the filing of a notice of appeal was jurisdictional and that courts lacked authority to create equitable exceptions to jurisdictional requirements); and 3) court decisions that have applied *Bowles* to invalidate judicially-established exceptions to the exhaustion requirement.

A. Established "Exceptions" To The Exhaustion Requirement

1. Administrative Remedies Do Not Exist

Given the express language in § 1252(d)(1) requiring an alien to exhaust administrative remedies "available . . . as of right," it is not surprising that courts have ruled that the exhaustion requirement does not apply if there are no administrative remedies to exhaust. Thus, in *Schmitt v. Maurer*, 451 F.3d 1092 (10th Cir. 2006), an alien who had been admitted to the United States through the Visa Waiver Program and had overstayed his visa, alleged that DHS erred in issuing a removal order against him in light of a pending I-130 self-petition for change of status. *Id.* at 1095-96.

Most circuits, either in dicta or otherwise, have explicitly deemed exhaustion to be both mandatory and jurisdictional.

The court rejected the government's argument that the court lacked jurisdiction to entertain the alien's claim because he had not exhausted his administrative remedies by presenting the self-petition and associated claims to the agency. *Id.* at 1095. The court noted that, as a condition for being granted a visa under the VWP, the alien had waived his right to challenge his removability other than on the basis of an asylum request, and that the governing regulation provided for removal without a determination regarding removability by an immigration judge. *Id.* at 1096 (citing 8 C.F.R. § 217.4 (b)(1)). Accordingly, the Court held that the exhaustion requirement was inapplicable "[b]ecause there were no administrative remedies for [the alien] to exhaust . . . ." *Id.*

2. Available Administrative Remedy Is Inadequate Or Not Available "As Of Right"

All circuits deem an appeal to the BIA to be an available and adequate remedy for purposes of § 1252(d)(1). Courts have also applied § 1252(d)(1) to expedited administrative removal proceedings conducted by DHS. *See, e.g, Gonzalez v. Chertoff*, 454 F.3d 813 (8th Cir. 2006) (alien who failed to file timely objection to charging document issued by DHS pursuant to § 1228(b) failed to exhaust his administrative remedies). However, in order for the exhaustion requirement to apply, the agency must have adequate mechanisms to address and remedy the alien's claim. *See Sun v. Ashcroft,* 370 F.3d 932, 942 (9th Cir. 2004); *Gunsuwan v. Ashcroft*, 252 F.3d 383, 389 (5th Cir. 2001).

Thus, many courts have opined that exhaustion of an issue is not required if the agency lacks the power to resolve the issue in the alien's favor. *See, e.g., Sundar v, INS*, 328 F.3d 1230 (11th Cir. 2003) (citing cases expressing the view that certain constitutional and due process claims need not be exhausted because the BIA lacks authority to adjudicate them); *Sousa v. INS*, 226 F.3d 28, 32 (1st Cir. 2000) (same); *Bangura v. Hansen*, 434 F.3d 487, 494 (6th Cir. 2006) (collecting cases). This principle was applied by the Eighth Circuit in *Gon-*

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zalez, where the court adjudicated the alien's claim that § 1228(b) was unconstitutional as applied despite the alien's failure to raise the issue with the BIA. *See* 454 F.3d at 817; *but see Theodoropoulos v. INS*, 358 F.3d 162, 172 (2d Cir. 2004) (refusing to excuse failure to exhaust because, although BIA had no jurisdiction to review constitutional issue, it could have addressed whether the immigration judge properly interpreted statute as applying to alien). Similarly, courts have held that an alien is not generally required to file a motion to reopen or for reconsideration with the BIA before seeking judicial review. *See Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (motions to reopen or reconsider are not remedies available "as of right" within the meaning of § 1251(d)(1)); *Ramirez-Osorio v. INS*, 745 F.2d 937, 940 (5th Cir.1984) (declining to apply exhaustion requirement in former INA § 106(c) on the ground that a motion to reopen was not a sufficiently effective remedy for pro se alien's claim that the immigration judge improperly failed to inform him of his right to apply for asylum); *but see Omari v. Holder*, 562 F.3d 314, 320 (5th Cir. 2009) (where BIA's decision itself results in a new issue, alien must exhaust by filing a motion for reconsideration).

3. BIA Addresses Issue *Sua Sponte*

With the exception of the Eleventh Circuit, every circuit to have addressed the issue has held that an alien's failure to exhaust an issue is excused if the BIA *sua sponte* addresses the merits of the issue notwithstanding the alien's failure to present the issue to the BIA. *Compare Amaya-Artunduaga v. Att'y Gen. of U.S.*, 463 F.3d 1247, 1250 (11th Cir. 2006) *with Johnson v. Ashcroft*, 378 F.3d 164, 170 (2d Cir. 2004); *Lin v. Att'y Gen. of U.S.*, 543 F.3d 114, 122 (3d Cir. 2008); *Hassan v. Gonzales*, 403 F.3d 429, 433 (6th Cir. 2005); *Pasha v. Gonzales*, 433 F.3d 530, 532-33 (7th Cir. 2005); *Abebe v. Gonzales*, 432 F.3d 1037, 1044 (9th Cir. 2005); *Sidabutur v. Gonzales*, 503 F.3d 1116, 1119-20 (10th Cir. 2007); *see also Zine v. Mukasey*, 517 F.3d 535, 540 (8th Cir. 2008) (finding exhaustion was not required under the specific circumstances of the case and specifically reserving judgment on the issue of whether the BIA's *sua sponte* treatment of issue excuses exhaustion); *Omari v. Holder*, 562 F.3d 314, 317 (5th Cir. 2009) (finding that court lacks authority to create exceptions to the exhaustion requirement but stating that its analysis might be different had the BIA addressed the unexhausted issue *sua sponte*); *cf. Singh v. Gonzales*, 413 F.3d 156, 160 n.3 (1st Cir. 2005) (holding that exhaustion was not required if the BIA summarily affirms the immigration judge's decision). Courts have justified excusing the exhaustion requirement in these circumstances on the theory that the BIA has the authority to waive the regulatory requirement that an alien specifically identify the issues presented in an appeal, and does so when it undertakes to review the merits of the claim rather than dismissing the appeal for failure to comply with the specificity requirement. *See, e.g. Sidabutur v. Gonzales*, 503 F.3d 1116, 1119-20 (10th Cir. 2007).

With the exception of the Eleventh Circuit, every circuit to have addressed the issue has held that an alien's failure to exhaust an issue is excused if the BIA *sua sponte* addresses the merits of the issue.

4. To Prevent "Manifest Injustice" or a "Miscarriage of Justice"

Courts have also excused a failure to exhaust when they have deemed it necessary to prevent a "bizarre" or "extreme" miscarriage of justice. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004). In *Marrero Pichardo*, the petitioner, a lawful permanent resident who had been convicted of DUI eleven times, was ordered removed as an aggravated felon on the ground that his convictions were crimes of violence. The alien, proceeding pro se, failed to appeal to the BIA. Approximately eleven months after entry of the deportation order, the Second Circuit invalidated a BIA decision that a conviction under the relevant state statute was a crime of violence. *See Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001). After the decision in *Dalton*, the petitioner obtained counsel and filed a *habeas* petition, but did not contend that *Dalton* had nullified his deportation order until he filed an untimely motion to reconsider the denial of *habeas* relief. *See Marrero Pichardo*, 374 F.3d at 50. The Second Circuit recognized that § 1252 (d)(1) required the petitioner to exhaust his administrative remedies. However, the court held that, in the unusual circumstances of the case, an exception was necessary to prevent manifest injustice. The court noted that courts historically had interpreted procedural rules to prevent a fundamental miscarriage of justice and cited immigration cases suggesting that exhaustion may be excused in certain circumstances. *Id.* (citing *Singh v. Reno*, 182 F.3d 504, 510-11 (7th Cir. 1999) (declining to require exhaustion of constitutional claim that BIA could not address dispositively), and *Sousa v. INS*, 226 F.3d 28, 32 (1st Cir. 2000) (opining that exhaustion can be excused under miscarriage of justice standard but finding that standard was not met)). Thus, having been "animated by this line of authority," the Second Circuit found it appropriate to apply a "narrow exception" to the exhaustion requirement to consider claims as necessary to prevent manifest injustice. *Marrero Pichardo*, 374 F.3d at 50.

Relying on *Marrero Pichardo*

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and other circuit cases where the court "stated or implied that exceptions to § 1252(d)(1) might exist in extreme cases," the Tenth Circuit excused an alien's failure to exhaust his administrative remedies in similar circumstances. *See Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1209-10 (10th Cir. 2007) (excusing exhaustion where the settled law that alien's conviction was an aggravated felony was subsequently altered by an intervening Supreme Court decision).

In *Batrez Gradiz*, the petitioner was ordered removed under § 1228 (b) for a drug conviction DHS determined to be an aggravated felony. Petitioner did not challenge the designation of his conviction as an aggravated felony at the administrative level, which the court attributed to the clarity of then-existing and binding legal authority. However, after the Supreme Court's intervening decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), petitioner argued on appeal that the evidence was insufficient to establish that his conviction was for an aggravated felony. In holding that the petitioner's failure to exhaust this issue did not bar its review, the Tenth Circuit applied a modified version of the "miscarriage of justice" standard, which it determined the Supreme Court had used in making exceptions to the exhaustion bar for *habeas* claims under 28 U.S.C. § 2254. *Id.* Thus, rather than determining whether the petitioner had demonstrated actual or factual innocence because "no reasonable juror would have convicted" him in light of all of the evidence, which was the relevant inquiry in cases under § 2254, the court held that the issue was whether the crime at issue was in fact an aggravated felony, and if it was not, the alien was "in effect, actually innocent." *Id.* However, after reviewing the merits, the Court ultimately determined that the petitioner's conviction was for an aggravated felony and upheld the removal order.

B. The Supreme Court's Decision In *Bowles*

In *Bowles*, a state prisoner who failed to file a timely notice of appeal of a district court's denial of *habeas* relief thereafter moved to reopen the period for filing his appeal. Pursuant to 28 U.S.C. § 2107(c) and Fed. R. App. R. (4)(1)(A), the district court was authorized to reopen the time for filing a notice of appeal for a period of 14 days from the entry date of the order to reopen. However, the district court erroneously issued an order granting the petitioner a 17-day extension. The petitioner filed the notice of appeal within the time limit authorized by the district court, but beyond the time limit imposed by statute. The Sixth Circuit ruled that it lacked jurisdiction and a divided Supreme Court affirmed. *See Bowles*, 551 U.S. at 205-15. The Supreme Court began its analysis by noting that long standing precedent established that a time limit for the taking of an appeal is "'mandatory and jurisdictional.'" *Id.* at 209-10. The Court acknowledged that its decisions had not always used the term "jurisdictional" appropriately and that its recent decisions had attempted to clarify the distinction between "claims-processing rules" and "jurisdictional rules." *Id.* at 210-11. However, the Court stated the none of its recent decisions had called into question the longstanding rule that statutory time prescriptions for taking an appeal are jurisdictional, and that its recent cases had also recognized the jurisdictional significance of the fact that the time limit is set forth in a statute. *Id.* The Court distinguished a case involving a statutory requirement for employee numerosity because it did not involve a time limit, and held that a case involving attorney's fees under EAJA concerned "'a mode of relief . . . ancillary to the judgment of courts that already had plenary jurisdiction." *Id.* at 212. Although the Court agreed that the concept that subject matter jurisdiction extends to classes of cases falling within a court's adjudicatory authority, it held that it is no less jurisdictional when Congress precludes a court from adjudicating an otherwise legitimate class of cases after a prescribed time period has elapsed. *Id.* at 213.

In *Bowles* the Court ruled that the time limit for appeal at issue was jurisdictional and that courts consequently lacked authority to excuse a petitioner's untimely filing.

Thus, the Court ruled that the time limit for appeal at issue was jurisdictional and that courts consequently lacked authority to excuse a petitioner's untimely filing. In the Court's view, jurisdictional treatment of statutory time limits made sense because Congress decides both whether courts can hear cases at all, as well as when and under what circumstances a court may hear them. *Id.* at 213-14. The Court overruled its decision in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), where the Court had previously used the "unique circumstances" doctrine to excuse noncompliance with a statutory time limit for filing a notice of appeal. *See Bowles*, 551 U.S. at 214. The Court concluded that to the extent that inequities might arise from the Court's strict application of statutory time limits, Congress was free to authorize courts to promulgate rules that excuse noncompliance with governing time restrictions. *Id.* at 214-15.

The dissent agreed that when a time limit is jurisdictional, it may not be waived no matter how meritorious or extenuating the circumstances. However, in the view of the dissenting Justices, the time limit at issue was not jurisdictional. The minority opined that the Court was not being

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faithful to its recent decisions that sought to distinguish claims-processing rules from jurisdictional rules -- the latter of which delineate the class of cases within a court's adjudicatory authority. The dissent viewed the filing deadline as "the paradigm of a claim-processing rule" and was more akin to a statute of limitations, which courts have found may be waived. Thus, the dissent held that the Court had the authority to recognize an equitable exception to the 14-day time limit for reopening the period for filing appeals and found that it was appropriate to excuse the untimely filing in that particular case. *Id.* at 215-23.

C. Cases Interpreting *Bowles*

All of the circuits that have addressed the issue have applied *Bowles* to hold that a court lacks authority to create equitable exceptions to the exhaustion requirement in § 1252(d)(1). Thus, in *Bah v. Mukasey*, 521 F.3d 857, 859 (8th Cir. 2008), the court determined that it lacked jurisdiction on multiple grounds including the petitioner's failure to exhaust his administrative remedies, and held that *Bowles* required rejection of petitioner's argument that his failure to exhaust should be excused as futile because the agency had already rejected an identical argument in an earlier appeal. In *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008), the court held that, after *Bowles*, a petitioner could not rely on decisions excusing exhaustion under the "miscarriage of justice" exception to revisit his concession of removability, despite the petitioner's contention that the unfavorable law governing his removability at the time of his concession was subsequently changed by an intervening Supreme Court decision. However, it appears that *Bowles* will not affect decisions in circuits where § 1252(d)(1) is not jurisdictional. Thus, while the Second Circuit held that *Bowles* required it to overrule its decision in *Marrero Pichardo*, which had recognized an exception to § 1252(d)(1) to prevent "manifest injustice," it also reaffirmed its conclusion in *Lin Zhong* that the exhaustion requirement in § 1252(d)(1) was not jurisdictional with respect to issue exhaustion. *See Grullon v. Mukasey*, 509 F.3d 107, 108, 115-16 (2d Cir. 2007). Hence, the *habeas* petitioner's failure to exhaust administrative remedies deprived the Court of subject matter jurisdiction in *Grullon* because the petitioner had not filed *any* appeal with the BIA before seeking appellate court review. *See Grullon*, 509 F.3d at 108.

Bowles does not appear to abrogate all circumstances under which exhaustion has been excused, even in circuits where § 1252(d)(1) is deemed jurisdictional."

In addition, the Second Circuit specifically reserved the question of whether there exists a constitutional claim exception to § 1252(d)(1), as the issue was unnecessary for resolution of the case. *Id.* at 114. Similarly, while the Fifth Circuit in *Omari* relied on *Bowles* in holding that it lacked authority to excuse a petitioner's failure to exhaust certain issues, the court noted that certain purported "exceptions" to exhaustion, such as where administrative remedies are inadequate, are more appropriately characterized as situations where § 1252(d)(1) is not even implicated because no remedies are "available . . . as of right." *Omari*, 562 F.3d at 323. Accordingly, *Bowles* does not appear to abrogate all circumstances under which exhaustion has been excused, even in circuits where § 1252(d)(1) is deemed "jurisdictional."

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EOIR Director Responds To Latest TRAC Report

Excerpts from a March 12 letter from EOIR Director Thomas Snow to the Transactional Records Access Clearinghouse.

I am writing in response to latest report, "Backlog in Immigration Cases Continues to Climb." . . . this new report has let its constituents down. The report is unbalanced and fails to acknowledge the effort and progress that the Executive Office for Immigration Review (EOIR) has made, and continues to make, to address the immigration caseload.

Filling vacant immigration judge positions is the most important priority for EOIR. EOIR has undertaken a bold immigration judge hiring initiative with the emphasis on filling these important public service positions as expeditiously as possible and with the most highly qualified applicants. In fact, EOIR received 28 new immigration judge positions with the passage of the FY 2010 budget in December 2009. As a result, EOIR has already reviewed over 1,750 applications and completed 125 interviews of the most highly rated candidates. When the Attorney General makes his final selections, this initiative will bring the judge corps to 280 authorized positions.

The picture TRAC paints fails to reflect the positive trajectory the agency is on to dramatically increase the number of immigration judges by later this year, which will help mitigate our pending caseload.

FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Second or Subsequent State Controlled Substance Conviction

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

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Aggravated Felony — Term of Imprisonment

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

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Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction. The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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VWP — Waiver, Due Process Particularly Serious Crimes

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

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Withholding — Particularly Serious Crime

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

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Jurisdiction — Criminal Alien

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

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Affirms Adverse Credibility Determination Based On Alien's "Virtually Inexplicable" Information Omission From Her Credible Fear Interview

In *Villa-Londono v. Holder*, __ F.3d __, 2010 WL 850190 (1st Cir. March 12, 2010) (*Selya*, Lynch, Boudin), the First Circuit affirmed the agency's adverse credibility determination in a pre-REAL ID Act asylum case, because of the petitioner's "virtually inexplicable" omission of her core claim from her credible fear interview.

The petitioner, a Colombian citizen, sought to enter the United States on June 30, 2002, with a fraudulent passport. Petitioner was detained, questioned, and, several days later given a "credible fear" interview. Petitioner claimed that she left Colombia because her boyfriend who was in drug rehabilitation had threatened her. She also claimed fear of persecution based on her employment as a secretary to the mayor of Copacabana in Colombia. The Asylum Office did not grant asylum and petitioner was placed in removal proceedings. In 2005 at petitioner's request, the case was transferred from Miami to Boston. Petitioner then sought asylum claiming that she had been targeted by the guerrillas as the "secretary of the mayor" and alleging, for the first time, that she had received directs threats, and threatening phone calls.

The IJ did not find petitioner credible and rejected her post-hoc explanations why she had failed to relate her story during the credible fear interview. Accordingly, the IJ denied asylum, withholding and CAT. The BIA affirmed the adverse credibility finding and noted that there was no evidence of Columbian government involvement for the purpose of CAT protection.

The First Circuit upheld the IJ's credibility finding that the IJ had appropriately rejected her explanation that the material omission from the credible fear interview were the result of hypertension and her poorly controlled diabetes. The count found that petitioner's prior claim that she had no prior contact with guerillas was irreconcilable with her nascent allegations of personally-experienced violence. "What we have here is not a simple failure to recollect a trivial detail. The omitted material comprises the centerpiece of the petitioner's case," said the court.

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First Circuit Holds That Alien Cannot Rely On Previously Filed And Used Petition For Alien Relative To Adjust Status

In *Castro-Soto v. Holder*, 596 F.3d 68 (1st Cir. 2010) (Boudin, Gibson, *Howard*), the First Circuit held that a previously filed I-130 Petition for Alien Relative, from which an alien had already derived an immigration benefit cannot be re-used to adjust status under INA § 245(i). Section 245(i) permits grandfathering of aliens for adjustment of status if they filed an I-130 before April 30, 2001. The alien argued that he was eligible to adjust based on an I-130 filed in 1992 from which he derived conditional resident status. The BIA held that his I-130 had been extinguished when he was granted conditional resident status.

The court deferred to the BIA's decision, concluding that its interpretation was not inconsistent with the regulations. It also cited a USCIS interoffice memorandum which had reached the same conclusion on grandfathering to be persuasive.

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What we have here is not a simple failure to recollect a trivial detail. The omitted material comprises the centerpiece of the petitioner's case."

SECOND CIRCUIT

Second Circuit Remands For Consideration Of Whether Petitioner's Action Of Reporting Corruption To An External Human Rights Group Constitutes A Political Opinion

In *Castro v. Holder*, __ F.3d __, 2010 WL 698294 (2d Cir. March 2, 2010) (Levall, Hall, *Lynch*), the Second Circuit found that the agency erred by concluding that the danger the petitioner encountered in Guatemala lacked a political nexus.

The court explained that substantial evidence did not support the determination that the alien's act of reporting official corruption to an external human rights group, did not amount to an expression of political opinion because the agency failed to properly consider the relevant context of the alien's actions and, in so doing, misconstrued the concept of political opposition.

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Second Circuit Holds That Reinstatement Provision Is Not Impermissibly Retroactive

In *Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010) (Miner, Cabranes, *Straub*), the Second Circuit held that reinstatement of removal under INA § 241(a)(5) was not impermissibly retroactive as applied to an alien who married a United States citizen before the statute's enactment. The court also held that the statute rendered petitioner ineligible for any relief other than withholding of removal, and that the administrative procedures for reinstatement of removal orders did not deprive the alien

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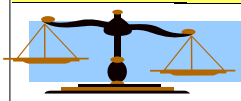

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of due process.

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■ **Second Circuit Creates Per Se Rule That Voluntary Returns To Home Country Do Not Undermine Persecution Claim**

In *Kone v. Holder*, 596 F.3d 141 (2d. Cir. 2010) (Calabresi, Cabranes, *Lynch*), the Second Circuit held that the asylum applicant's multiple voluntary returns to her home country from the United States were alone insufficient to rebut the regulatory presumption that she possessed a well-founded fear of persecution based on her childhood female genital mutilation. "Nothing in the regulations requires an applicant to show that she would be immediately persecuted upon return, that persecution would be likely to occur within some short time span, or that it would occur in regular intervals," said the court. To the contrary," added the court, "the regulations speak broadly of the future; 'to rebut the regulatory presumption, the government must show that changed conditions obviate the risk [of future persecution] related to the original claim.'"

The court also held that those "return trips alone are insufficient to establish lack of credibility" with regard to a separate claim of past persecution based on her political activity.

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■ **Second Circuit Remands Case To Agency For Precedential Opinion Addressing Whether A Government's Inability To Prevent Torture Constitutes Acquiescence**

De La Rosa v. Holder, __ F.3d __, 2010 WL 653471 (2d Cir. February 25, 2010) (Pooler, Calabresi, *Kahn*), the Second Circuit vacated and remanded to the BIA for the issuance of a "precedential opinion on whether, as a matter of law, a government may acquiesce to a person's torture where (1) some officials attempt to prevent that torture (2) while other officials are complicit, and (3) the government is admittedly unable to actually prevent the torture from taking place."

The petitioner, an LPR and a professional baseball player, was placed in removal proceedings in December of 2001 after he pled guilty in to the crime of conspiracy to distribute and possessing, with intent to distribute, cocaine and heroin. Petitioner sought protection under the CAT and gave testimony in support of that application to the IJ. Petitioner claimed that he cooperated with federal prosecutors following his arrest for involvement in a drug trafficking conspiracy. By assisting the government, petitioner obtained a significant downward departure in his own sentencing and facilitated the conviction of other individuals, including a Dominican national named Jonas Brito. Petitioner claimed that given Brito's connections he will more likely than not be tortured or killed if removed to the Dominican Republic. The IJ granted him deferral of removal pursuant to 8 C.F.R. §§ 1208.16(c)(4) and 1208.17 (a). The BIA reversed and remanded the IJ's decision with the instruction to issue an order of removal. Following the IJ's compliance with that instruction, the BIA dismissed petitioner's appeal.

"Torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."

Initially, the court noted that, under its precedents "torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." The court explained that, here, the BIA implied that the existence of some government actors attempting to prevent torture was sufficient to negate the fact that other government actors would be complicit in that torture, even when evidence strongly indicated that the government as a whole would be unable to prevent the torture from occurring. However, the court found that it was not entirely clear, " to what extent the BIA order fully adopts this view or rests its outcome upon it."

The court also held that the BIA erred by deviating from its clear error standard of review and may have engaged in de novo fact finding when reversing the IJ's grant of deferral under CAT. "It is apparent that, as a matter of law, the BIA's 'weight of the evidence' review of the IJ's findings does not conform to the dictates of 8 C.F.R. § 1003.1(d)(3)(i)," said the court.

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■ **Alien's Departure Following Conviction For Illegal Entry Constituted A Formal, Documented Process Terminating His Continuous Physical Presence**

In *Ascencio-Rodriguez v. Holder*, 595 F.3d 105 (2d Cir. 2010) (Walker, *Cabranes*, Wallace), the Second Circuit ruled that an alien's conviction for illegal entry constituted a formal, documented process pursuant to which an alien is determined to be inadmissible. "To allow an alien to plead guilty to illegal entry, be convicted of the crime, leave the country, and yet continue to accrue 'continuous physical presence time' within the meaning of our immigration laws would be contrary to the objectives of those laws and the BIA's relevant decisions," explained the court. The court also held that the alien's departure from the United

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States following such process terminated his continuous physical presence for purposes of cancellation of removal eligibility.

The court deferred to the BIA's decisions in *Matter of Romalez- Alcaide*, 23 I&N Dec. 423 (BIA 2002) (holding that a voluntary departure under the threat of deportation also breaks an alien's continuous physical presence), and *Matter of Avilez-Nav,* 23 I&N Dec. 799 (BIA 2005) (holding that being turned back at the border without formal acceptance of the terms 'voluntary return' or 'voluntary departure' does not break an alien's continuous physical presence") .

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FOURTH CIRCUIT

■ **Fourth Circuit Holds That It Lacks Jurisdiction Over Petitioner's Withholding Claim Because He Is A Criminal Alien And CAT Claim For Failure To Exhaust**

In ***Kporlor v. Holder,*** 597 F.3d 222 (*Wilkinson*, Niemeyer, Michael) (4th Cir. 2010), the Fourth Circuit held that it lacked jurisdiction over petitioner's withholding claim because he admitted that he had been convicted of a crime involving moral turpitude (procuring a vehicle with intent to defraud under Va. Code. Ann. § 18.2-206). Further, the court held it lacked jurisdiction over the alien's claim for CAT protection because the alien had failed to exhaust this claim. The court held that appealing an IJ's adverse credibility determination with regard to withholding of removal is insufficient to exhaust CAT, because an IJ cannot rely solely on an adverse credibility finding to deny CAT and because the two forms of relief carry different burdens.

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Fourth Circuit Rejects Petitioners' Claim Of Derivative Late-Initial Registration For Temporary Protected Status

In ***Cervantes v. Holder***, __ F.3d __, 2010 WL 774179 (4th Cir. March 8, 2010) (Traxler, *King*, Gregory), the Fourth Circuit held that four sibling citizens of Honduras were ineligible for Temporary Protected Status as derivative beneficiaries of their parents, who are recipients of TPS.

Petitioners, who sought TPS, were required to independently establish eligibility and could not satisfy the "continuous physical presence" and the "continually resided" by imputation.

The petitioners' parents became the beneficiary of a TPS grant when the Attorney General on January 5, 1999, designated Honduras for the TPS program. Petitioners entered the United States illegally on September 9, 2004. When DHS placed them in removal proceedings, they sought to file a "late initial registration" under TPS. A "late initial registration" allows the child of a person who was eligible for TPS during the initial registration period to apply for TPS during a subsequent extension thereof. See 8 C.F.R. § 1244.2(f)(2)(iv).

The IJ, however, denied the application finding that the petitioners could not satisfy the "continuous physical presence" and "continuous residence" requirements because they did not enter the United States until September 2004. In so ruling, the IJ rejected their effort to "have [TPS] imputed to them." The BIA affirmed that decision.

The Fourth Circuit held that petitioners were required to independently establish eligibility and could not satisfy the "continuous physical presence" and the "continually resided" requirements of INA § 244. Applying *Skidmore* deference, the court also held that "continuous physical presence [since] . . . the most recent designation of that state" in INA § 244(a)(1)(A)(i) refers to the initial designation of a country for TPS and not subsequent extensions of that designation.

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■ **Alien Cannot Use Motion To Reopen To Apply For Asylum From Outside The United States**

In ***Sadhvani v. Holder***, 596 F.3d 180 (Niemeyer, *Gregory*, Davis) (4th Cir. March 9, 2010), the court held that the BIA properly denied a motion to reopen seeking asylum based on changed circumstances because the petitioner had been removed pursuant to a valid removal order and the asylum statute requires that an applicant be present in the United States to be eligible for asylum.

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Ed. Note: This opinion issued on December 31, 2009, was not originally designated for publication.

FIFTH CIRCUIT

■ **Fifth Circuit Holds That The Decision To Issue A Law Enforcement Certification Is Discretionary**

In ***Ordonez-Orosco v. Napolitano***, __ F.3d __, 2010 WL 702635 (5th Cir. March 2, 2010) (*Garwood*, Wiener, Benavides), the Fifth Circuit held that the district court did not err when it dismissed the alien's petition for a writ of habeas corpus and for relief pursuant to the Declaratory Judgment Act, Mandamus Act, Federal Question Statute, and Administrative Procedure Act. The alien sought to compel the defendants to issue him a law enforcement certification, confirming that he was helpful to the investigation or prosecution of the crime, so he could apply for

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a U visa. In refusing to overturn the district court, the Fifth Circuit concluded that "the language of § 1184 (p) makes it abundantly clear that the decision to issue a law enforcement certification is a discretionary one."

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SIXTH CIRCUIT

■ **Sixth Circuit Gives Split Decision On Claim That Former Honduran Gang Members Are A Particular Social Group**

In ***Urbana-Mejia v. Holder,*** __F.3d __, 2010 WL 743845 (6th Cir. March 5, 2010) (*Martin*, Siler, Moore) the Sixth Circuit, in a published decision, held that the BIA properly denied an alien's withholding of removal application on the ground that he failed to sufficiently corroborate his testimony, and because he also failed to demonstrate that he had not committed a serious nonpolitical crime while a gang member. The court also held that the BIA erred by finding that the alien was not a member of a particular social group of former Honduran gang members, because it was impossible to leave the group other than by rejoining the gang.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That IJ Did Not Abuse His Discretion In Denying A Motion for Continuance**

In ***Juarez-Meono v. Holder***, __ F.3d __, 2010 WL 936166 (7th Cir. March 12, 2010) (Easterbrook, Williams, *Sykes*), the Seventh Circuit held that the IJ did not abuse his discretion in denying a motion for continuance where petitioners, although given ample time, failed to file their applications for relief and provide biometrics information by the immigration court's deadline, and where they made no claim to have good cause for the delay.

The petitioners, mother and son Guatemalan citizens, entered the United States illegally in 1989 and 1997, respectively. The mother requested asylum shortly after she arrived, but the son did not. DHS initiated removal proceedings against them in 2004. At the hearing, they indicated that they would file applications seeking various forms of relief. However, they filed their applications 14 months late and never provided the required biometrics. They later moved for a continuance to comply with the requirement but the IJ denied the motion, ruling that they had abandoned their applications for reliefs, and ordered them removed. The BIA affirmed.

Aliens subject to the ground of inadmissibility at 8 U.S.C. § 1182(a)(9)(C)(i)(II) are ineligible to seek retroactive permission to reenter the country for ten years after the date of their last departure.

The Seventh Circuit preliminarily held that in light of *Kucana v. Holder*, it now had plenary jurisdiction to review the denial of a motion to reopen. The court then found that it was well within the discretion of the IJ to deny the requests for continuances because the petitioners had conceded before the IJ that they had no good cause for their failure to timely file the applications. Moreover, before the court they only argued that the regulations requiring biometrics information were ultra vires, an argument which the court found "frivolous."

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■ **Aliens Inadmissible For Illegally Reentering After Removal Are Ineligible To Adjust Status**

In ***Gonzalez-Balderas v. Holder***, -__ F.3d __, 2010 WL 743947 (7th Cir. March 5, 2010) (*Posner*, Tinder, & Hamilton), the Seventh Circuit held that the BIA properly concluded that aliens inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II) are ineligible to seek retroactive permission to reenter the country for ten years after the date of their last departure. In so holding, the court joined the Second and Ninth Circuits in upholding the BIA's published decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

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EIGHTH CIRCUIT

■ **Eighth Circuit Affirms Dismissal Of Challenge To Execution Of Removal Order Under The Visa Waiver Program**

In ***Lang v. Napolitano***, __ F.3d __, 2010 WL 681305 (8th Cir. March 1, 2010) (*Loken*, Arnold, Benton), the Eighth Circuit affirmed the decision of the Eastern District of Missouri dismissing, for lack of jurisdiction, an alien's challenge to the execution of his administrative removal order issued under the Visa Waiver Program. The court held that the district court lacked jurisdiction because petitioner failed to file a petition for review of his final order of removal in accordance with 8 U.S.C. § 1252(a)(5), and that 8 U.S.C. § 1252(g) barred review of Lang's challenge to the execution of his removal order. The court agreed with the district court and numerous other circuits that relief was also unavailable to petitioner because he filed for adjustment of status based on his marriage to a U.S. citizen after the expiration of the 90-day visa waiver period.

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■ **Eighth Circuit Upholds BIA's Adverse Credibility Determination For Burmese Asylum applicant**

In ***Thu v. Holder***, __ F.3d __, 2010 WL 772131 (Wollman, *Riley*, and Melloy) (8th Cir. March 9, 2010), the Eighth Circuit upheld the IJ's finding that the petitioner, an asylum applicant from Burma, was not credible.

The petitioner entered the United States as a student in 2001. Following his graduation in 2004, he applied for asylum alleging that he had been detained a year due to participating in a political demonstration. While a student in the U.S. petitioner became involved in the United States Campaign for Burma. He participated in a videotaped demonstration and appeared in a newspaper photograph which was sent to Burma, and he also signed a petition to the Burmese government requesting the release of political prisoners. In 2005 petitioner was interviewed by an Asylum Office who found his story incredible.

When petitioner was placed in removal proceedings, he renewed his application for asylum. The IJ did not believe petitioner's claim, pointing to the fact that during the year that petitioner claimed he was detained by the Burmese government as a political dissident, that government issued him a passport and separately endorsed his passport to permit his travel. The IJ found these facts were particularly suspicious in light of evidence that the Burmese government "restricted travel for political opponents." The BIA affirmed, and denied petitioner's request to supplement the record.

The Eight Circuit affirmed the IJ's credibility findings and also upheld the denial by the BIA's denial of a motion to remand to consider new evidence because the evidence would not have changed the IJ's decision.

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■ **Eighth Circuit Holds That The Record Did Not Compel The agency's Reversal Of The Finding Of Changed Country Conditions In Bangladesh**

In ***Karim v. Holder***, __ F.3d __, 2010 WL 724625 (*Melloy*, Beam, Gruender) (8th Cir. March 4, 2010), the Eighth Circuit held that the evidence in the record did not compel reversal of the agency's finding of changed country conditions in Bangladesh. The court noted that while there was sporadic violence, the Jatiya party was in a coalition government with the Bangladesh Nationalist Party, the party that would allegedly persecute the alien.

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■ **Eighth Circuit Holds That Waiver Of Inadmissibility For Purposes of Adjustment Does Not Affect Alien's Removability As A Criminal Alien**

In ***Freeman v. Holder***, 596 F.3d 952 (8th Cir. 2010) (Colloton, Beam, *Benton*), the Eighth Circuit held that the DHS's grant of a waiver of inadmissibility under INA § 209(c), 8 U.S.C. § 1159(c), did not affect petitioner's removability based on a criminal ground, but merely waived a ground of inadmissibility for the purpose of adjustment of status eligibility. "Since a 209(c) waiver only deals with waiving grounds for inadmissibility for the purpose of seeking adjustment of status, the waiver [petitioner] placed in the record has no bearing on whether he was removable for his conviction," said the court.

The court further held that the criminal alien review bar precluded the court from reviewing the IJ's factual determination that the alien did not file a change of address form.

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NINTH CIRCUIT

■ **Ninth Circuit Holds That A Conviction Under California Penal Code § 532a(1) Is Categorically A Crime Involving Moral Turpitude**

In ***Tijani v. Holder*** , __ F.3d __, 2010 WL 816973 (*Noonan*, Callahan (concurring in part, dissenting in part), Tashima (concurring in part, dissenting in part)) (9th Cir. March 11, 2010), the Ninth Circuit held that a conviction under CPC § 532a(1) for obtaining credit by false pretenses categorically constituted a CIMT. The petitioner, a native and citizen of Nigeria, had been convicted on four separate occasions for crimes of dishonesty and financial fraud: in 1986 for perjury, in 1987 for passing fraudulent checks, in 1991 for providing false information to obtain credit cards in violation of CPC § 532, and in 1999 on twelve counts of again violating § 532(a)(1) by providing false information to obtain credit cards and using the cards to obtain goods.

A conviction under CPC § 532a(1) for obtaining credit by false pretenses categorically constitutes a CIMT.

The court rejected the petitioner's claim that, because CPC § 532a(1) did not expressly require "intent to defraud," it did not categorically constitute a CIMT. The court further determined that the conviction was a CIMT under the modified categorical approach because the conviction records indicated that petitioner's conduct was "inherently fraudulent." However, the court remanded because the IJ required corroborating evidence for the alien's pre-REAL ID asylum application without rendering an explicit adverse credibility finding.

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Judge Tashima would have found that petitioner had not been convicted of a CIMT. "Contrary to the majority's *ipse dixit*, intent to defraud is not an explicit or implicit requirement of § 532a(1). Moreover, the BIA has reasonably determined in a precedential decision that this crime is not morally turpitudinous and, under *Marmolejo-Campos*, we owe deference to the BIA's determination." Judge Callahan agreed with the majority but would also have affirmed the denial of asylum, withholding and CAT, finding substantial evidence to support the IJ's adverse credibility determination.

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■ **IJ's Pre-REAL ID Adverse Credibility Finding Properly Relied On An Omission In Written Applications And On Inconsistencies Among Different Testimonies And Affidavits**

In ***Kin v. Holder***, 595 F.3d 1050 (9th Cir. 2010) (Kleinfeld, *Tallman*, Lawson), the Ninth Circuit, held that an IJ's adverse credibility finding properly relied on: (1) a significant omission in the separate written asylum applications filed by husband and wife aliens; and (2) inconsistencies among various testimonial and written accounts rendered by different witnesses and affiants.

The court also held that it was unnecessary to provide aliens an opportunity to explain the inconsistencies among the various accounts. "When inconsistencies exist between the testimony of multiple witnesses and documentary evidence, however, it is not a matter of a communication problem requiring clarification, but of determining how the evidence fits together. Hence, it is not improper for the BIA to consider such inconsistencies when making credibility determinations," said the court.

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■ **Receipt Of Stolen Vehicle Is Aggravated Felony, But Not A Crime Involving Moral Turpitude**

In ***Alvarez-Reynaga v. Holder***, 596 F.3d 534 (9th Cir. 2010), (Silverman, *Clifton*, Smith) the Ninth Circuit held that a felony conviction for receipt of a stolen vehicle in violation of section 496d(a) of the California Penal Code categorically qualified as a conviction for an aggravated felony, but that it did not categorically qualify as a crime involving moral turpitude under its recent decision in *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009).

A felony conviction for receipt of a stolen vehicle in violation of section 496d(a) of the California Penal did not categorically qualify as a crime involving moral turpitude.

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■ **BIA Properly Denied An Iranian Alien's Motion To Reopen Based On Changed Country Conditions**

In ***Najmabadi v. Holder*** , __ F.3d __, 2010 WL 774252 (9th Cir. March 9, 2010) (Pregerson, Bybee, *M.D. Smith*), the Ninth Circuit held that the BIA properly denied an Iranian asylum applicant's motion to reopen because she failed to provide previously unavailable, material evidence.

The petitioner was admitted to the United States on October 5, 1986, as a non-immigrant visitor with authorization to remain in the United States until April 5, 1987. On October 27, 1998, the former INS charged her with removability as an overstay. Petitioner then filed an asylum application on November 18, 1998. While the IJ found petitioner's testimony to be credible, he concluded that she had not established past persecution or a well-founded fear of future persecution. After the BIA affirmed, the Ninth Circuit denied the petition for review and rejected petitioner's claim that she has a well-founded fear of future persecution "based on her refusal to conform to the social norms of Iran if returned to that country." 107 Fed.Appx. 98 (9th Cir. 2004).

On December 14, 2004, petitioner filed a motion to reopen based on changed circumstances in Iran, arguing in particular, that the relationship between Iran and the United States changed significantly after September 11, 2001. She pointed, *inter a alia*, to the reported arrest of the editor of a women's rights journal, and greater restrictions on women's attire and social freedoms. In her affidavit accompanying her renewed asylum application, petitioner claimed that the Iranian government would perceive her as being "pro-U.S. and pro-Western"; and that she "will be active in trying to change Iran and the situation for women." The BIA denied the motion to reopen, concluding that petitioner did not establish changed circumstances. The BIA noted that the 2003 Country Report she had submitted with her motion to reopen was not "qualitatively different" than the 1999 Report she had previously submitted.

The court found that the BIA properly denied the motion because the evidence submitted by petitioner in her motion to reopen was not qualitatively different from the evidence presented at the original hearing. The motion simply recounted generalized conditions in Iran that failed to demonstrate "that her predicament is appreciably different from the dangers faced by her fellow citizens," said the court. The court declined to address petitioner's contention that she was a member of a disfavored group, namely "westernized "women forcibly removed from the United States to Iran. The court found that because the BIA had denied the motion on failure to introduce unavailable evidence it did not need to reach the disfavored

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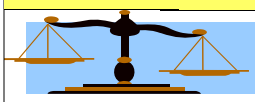

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group question. Nonetheless, the court noted that even if petitioner were a member of a disfavored group there was no evidence of an individualized threat to persecute her.

In a dissenting opinion, Judge Pregerson would have found that petitioner had shown a prima facie case for reopening based on her "Western appearance and affiliation."

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■ **Ninth Circuit Extends Federal First Offender Act To First-Time Offenders Convicted In State Court Of Controlled Substance Violations**

Rice v. Holder, __F.3d __ , 2010 WL 669262 (9th Cir. February 26, 2010) (Noonan, *Berzon*, Ikuta), the Ninth Circuit held that first-time offenders convicted of using or being under the influence of a controlled substance under California law, where such offenders are subsequently granted relief under California Penal Code § 1203.4, are eligible for the same immigration treatment as those convicted of simple drug possession whose convictions are expunged under the Federal First Offender Act because the "use of drugs has generally been considered a less serious crime than possession." The court also held that the alien's prior state convictions cannot serve as a bar to proving good moral character.

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■ **Christians In Indonesia Constitute A Disfavored Group**

In ***Tampubolon v. Holder*** , __ F.3d __, 2010 WL 774310 (9th Cir. March 9, 2010) (B. Fletcher, *Pregerson*, Graber), the Ninth Circuit held that the BIA erred by failing to apply the disfavored group analysis to the petitioners' applications for withholding of removal because the record compelled the conclusion that Christians in Indonesia are a disfavored group.

The petitioners, now husband and wife, entered the United States as tourists in 1989 and in 1992, respectively. They overstayed their visas and in 1995, they got married. And had two U.S. citizen children. In 2003 and 2004, DHS placed petitioners in removal proceedings charging them as overstays. They both applied for cancellation, asylum, withholding and CAT. An IJ denied their request for cancellation for failure to demonstrate the requisite hardship. The IJ denied asylum for failure to timely file an application and denied withholding because neither petitioner had suffered past persecution or otherwise had been mistreated while in Indonesia. The BIA adopted and affirmed the IJ's decision.

The Ninth Circuit held that it lacked jurisdiction to review the denial of cancellation based on "exceptional and extremely unusual hardship" determination.

First, the Ninth Circuit held that it lacked jurisdiction to review the denial of cancellation based on "exceptional and extremely unusual hardship" determination citing *Romero-Torres v. Ashcroft*, 327 F.3d 88, 888 (9th Cir. 2003). Next, the court affirmed the IJ's denial of asylum as untimely. However, the court then determined that, based on the record, Christian Indonesians are mistreated, and some are subject to persecution. "Accordingly, any reasonable fact-finder would be compelled to conclude on this record that Christian Indonesians are a disfavored group," said the court. Accordingly, the court remanded the case to the BIA to determine whether, in light of the disfavored group evidence and the evidence of individualized risk of persecution, the aliens met their burden of proving their eligibility for withholding of removal.

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■ **Ninth Circuit Holds That It Lacks Jurisdiction To Review For Abuse Of Discretion The BIA's Discretionary Denial Of A Motion To Accept An Untimely Brief**

In ***Zetino v. Holder***, 596 F.3d 517 (9th Cir. 2010) (Hall, *Tallman*, Lawson), the Ninth Circuit held that it lacked jurisdiction to review the BIA's denial of an alien's motion to accept an untimely brief. The regulation, 8 C.F.R. § 1003.3(c)(1), and the relevant BIA case law do "not provide any guidance to the BIA regarding when it should exercise its discretion to accept an untimely appellate brief," said the court. Accordingly, the court held that because "we cannot discover a sufficiently meaningful standard' for evaluating the BIA's decision rejecting an untimely brief, we lack jurisdiction to review [petitioner's] claim that the BIA abused its discretion in doing so."

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■ **Ninth Circuit Holds That It Lacks Jurisdiction Over An Alien's Eligibility For Special Rule Cancellation Under NACARA § 203**

In *Samayoa Lanuza v. Holder*, __ F.3d __, 2010 WL 744710 (9th Cir. March 5, 2010) (Wardlaw, Callahan, Sedwick) (*per curiam*), the Ninth Circuit dismissed the petition for review in part, because under IIRIRA § 309 (c)(5)(C)(ii), it lacked jurisdiction to review petitioner's eligibility for special rule cancellation of removal under NACARA § 203.

The court also denied the petition, in part, because petitioner's due process claim – alleging deprivation

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of a full and fair hearing because the IJ made his determination prior to hearing petitioner's testimony – was meritless.

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■ USCIS's Denial Of "Extraordinary Ability" Visa Was Not Arbitrary

In ***Kazarian v. USCIS***, 580 F.3d 1030 (9th Cir. 2010) (*Nelson*, Thompson, Pregerson), the Ninth Circuit withdrew the opinion with dissent filed on September 4, 2009 (published at 580 F.3d 1030), and issued a new opinion affirming the denial of plaintiff's "extraordinary ability" visa. The court determined that plaintiff did not meet the requisite number of regulatory criteria to qualify for an "extraordinary ability" visa. Plaintiff had filed an application for an employment-based immigrant visa for "aliens of extraordinary ability" pursuant to 8 U.S.C. § 1153(b)(1)(A), contending that he was an alien with extraordinary ability as a theoretical physicist.

Plaintiff did not meet the requisite number of regulatory criteria to qualify for an "extraordinary ability" visa.

The court held that although the agency erred by reading additional requirements into two of the ten regulatory criteria types of evidence set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x), the errors were harmless because plaintiff nonetheless failed to establish his eligibility for an "extraordinary ability" visa. The court also concluded that, even if plaintiff had established his eligibility for an "extraordinary ability" visa by demonstrating that he met the minimum number of regulatory criteria, the agency retained the power to ultimately decide whether an alien had demonstrated that his or her abilities are indeed extraordinary.

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ELEVENTH CIRCUIT

■ "Lawful" Residence Begins When The Alien Actually Obtains LPR Status

In ***Vila v. U.S. Atty Gen.***, __ F.3d __, 2010 WL 786605 (11th Cir. March 10, 2010) (*Pryor*, Edmondson and Camp (District Judge)), the Eleventh Circuit considered whether an alien living in the United States with an approved I-140 visa petition is "lawfully resid[ing] . . . in the United States" under § 212(h) of the INA, 8 U.S.C. § 1182(h), which grants the Attorney General the discretion to waive the removal of an alien who has been convicted of a crime of moral turpitude.

The petitioner, a citizen of Peru, entered the United States without inspection on October 25, 1988 and was placed in removal proceedings on October 4, 1989. Because petitioner did not appear at his hearing, the government administratively closed the proceedings. In 1994, an employer filed on petitioner's behalf an I-140 visa petition. The INS approved the petition on September 12, 1994. On November 7, 1994, petitioner filed an application for adjustment under INA § 245(i). On August 21, 1996, INS reopened petitioner's removal proceedings to allow him to pursue his adjustment application. The INS approved the I-485 application, and petitioner became a lawful permanent resident on June 21, 2000.

On July 22, 2003, petitioner sought admission to the United States as a returning lawful permanent resident. On October 28, 2003, DHS issued petitioner a notice to appear that charged him with inadmissibility because of a prior conviction for a crime of moral turpitude. The government determined that petitioner was inadmissible because on September 14, 2000, he had pleaded *nolo contendere* to a charge of burglary in Dade County Florida. Petitioner argued that he was eligible for a waiver, under § 212(h), because he had lawfully resided in the United States for at least the seven years before the initiation of his removal proceedings. The IJ granted the waiver, reasoning that petitioner had lawfully resided in the United States since September 12, 1994, when the government approved his I-140 visa petition. However, on appeal, the BIA held, based on its decision in *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008), that petitioner was statutorily ineligible for a section 212(h) waiver because he had not lawfully resided in the United States until he became a lawful permanent resident on June 21, 2000.

The Eleventh Circuit, following its precedent in *Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255 (11th Cir. 2008), where it had ruled that the decision of the BIA in *Rotimi* was entitled to *Chevron* deference, held that an approved I-140 visa petition did not make petitioner a lawful resident and that petitioner began "lawfully" residing in the United States only once his application for adjustment of status was formally approved.

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■ A Credible Death Threat Made In Person By One With The Ability To Carry Out That Threat Rises To The Level Of Persecution

In ***Diallo v. United States Attorney General***, __ F.3d __, 2010 WL 569911 (11th Cir. February 19, 2010) (Tjoflat, Barkett, Kravitch) (*per curiam*), the Eleventh Circuit held that a credible death threat made in person by one with the ability to carry out that threat rises to the level of persecution.

The petitioner entered the United

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States from the Netherlands in 2004 under the Visa Waiver Program. In 2005, he was referred to the IJ for an "asylum only" determination after he violated the terms of the VWP . Petitioner alleged in his asylum application and at the hearing that he and his father were arrested at a meeting of the Ready People of Guinea ("RPG"), and detained eleven hours before petitioner was able to escape, his brother was killed by soldiers, and his father's whereabouts were unknown. The IJ denied relief, finding, *inter alia,* that the single incident of a brief detention and minor beating did not rise to the level of persecution. The IJ then found that petitioner did not have an objectively reasonable well-founded fear of future persecution because he could have relocated internally. The BIA affirmed the decision without addressing the IJ's relocation finding.

The court concluded that, under the circumstances of this case, the death threat by Guinean armed forces against the petitioner was persecution. "We can see no reason why [petitioner] should have had to stay in his country -- awaiting his death at the hands of the soldiers who killed his brother -- to succeed on his claim of past persecution," said the court. The court found that the government's failure to carry out its credible death threat did not defeat petitioner's claim of past persecution. Accordingly, the court remanded the case to the BIA to consider whether DHS could rebut the presumption of future persecution with evidence of changed country conditions or the alien's ability to relocate.

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DISTRICT COURTS

■ District Court Lacks Jurisdiction To Review National Interest Labor Certification Waiver Denial

In ***Lahiri v. DHS***, No. 2:09-cv-04489 (E.D. La. March 3, 2010) (*Lemelle, J.*), the Eastern District of Louisiana concluded that it lacked jurisdiction to hear claims involving a denial of a waiver of the labor certification requirements necessary to receive an employment-based visa. Plaintiff, a leprosy researcher, sought classification as an advanced degree professional for a national interest waiver of the labor certification and job offer requirements. Among other reasons, the court dismissed the case for lack of jurisdiction, holding that 8 U.S.C. § 1153, the statute under which plaintiff applied for immigration benefits, delegated action to the discretion of the agency. Accordingly, the APA and § 1252(a)(2)(B)(ii) specifically precluded judicial review of the agency's waiver denial.

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■ District Court Dismisses Lawsuit Challenging Denial Of Visa To Prominent Academic

In *American Sociological Assn. v. Clinton*, No. 07-11796 (D. Mass. March 11, 2010) (*O'Toole*, J.), the parties filed a stipulated dismissal, ending two and a half years of litigation concerning a challenge to the denial of a visa for Professor Adam Habib, Deputy Vice Chancellor of the University of Johannesburg in South Africa. Defendants initially denied Habib a visa on the ground that he was inadmissible for engaging in terrorism. Plaintiffs, academic organizations in the United States represented by the ACLU, sued claiming that the visa denial infringed their First Amendment right to hear Habib lecture to them in person in the United States. On January 15, 2010, Secretary Clinton exercised her discretionary authority to exempt Habib from terrorism related inadmissibility bars. As a result, plaintiffs agreed to a stipulated dismissal with each side bearing its own fees and costs.

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■ District of Columbia District Court Rules That United States Is In A "State Of War" For Purposes Of Renunciation Of Citizenship

In *Kaufman v. U.S. Dep't of Homeland Security*, No. 05-cv-1631 (D.D.C. February 24, 2010) (*Roberts, J.*), the district court partially granted plaintiff's motion for summary judgment. Plaintiff sought to renounce his citizenship under 8 U.S.C. § 1481(a)(6), which permits renunciation of United States citizenship by persons located within the United States if the United States is in a "state of war." USCIS had declined to consider the request because the U.S. was not in a "state of war" for purposes of this 1944 statute. The court held that, under the statute's plain meaning, it did not require a Congressional declaration of war, the United States was in a "state of war," and the agency action violated the Administrative Procedure Act. Accordingly, the court remanded the matter to USCIS for adjudication.

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■ USCIS Did Not Abuse Discretion By Denying Employment-Based Visa Petition

In *Taco Especial v. Napolitano* No. 09-cv-10625 (E.D. Mich. March 15, 2010) (Cohn, J.) Plaintiff Taco Especial, a Mexican restaurant, filed an I-140 Petition on behalf of Plaintiff Prospero Galeana, seeking to employ him as a chef. In its approved labor certification, Taco Especial stated it would pay Galeana $25 an hour, 40 hours a week. After providing Taco Especial with several opportunities to submit evidence, USCIS denied the petition, finding that the restaurant failed to show that it would pay the proffered wage. The court ruled that, although net income alone could be a poor indicator of an employer's ability to pay, USCIS's denial was not arbitrary and capricious, and granted judgment in favor of defendants.

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EOIR Releases 2009 Statistics

EOIR has released its Fiscal Year 2009 Statistical Year Book. "It is our hope that the publication of this data, which illustrates the work that is central to our mission, will provide the public with a window into the agency's operations," said EOIR Acting Director Thomas Snow. The following are some of the Report's highlights:

- Immigration court receipts increased by six percent between FY2005 (370,007) and FY 2009 (391,829). Receipts in FY 2009 increased by 11 % from FY 2008.
- Immigration court completions decreased by less than one percent between FY 2005 (353,082) and FY 2009 (352,233). However, completions in FY 2009 increased by four percent from FY 2008.
- IJ decisions decreased by 12% between FY 2005 (264,785) and FY 2009 (232,212).
- Mexico, Guatemala, El Salvador, Honduras, and China were the leading nationalities of immigration court completions during FY 2009, representing 69 % of the total caseload. Spanish was the most frequently spoken language for immigration court case completions during FY 2009 at over 68%.
- Thirty-nine percent of aliens whose cases were completed in immigration courts during FY 2009 were represented. The representation rate for FY 2005 and FY 2006 would be 48% if failure to appear completions were removed from the data.
- The failure to appear rate decreased to 11% in FY 2009.
- Asylum applications filed with the immigration courts decreased by 27% from FY 2005 to FY 2009. Affirmative receipts decreased by 19% while defensive receipts decreased by 45%.
- In FY 2009, the New York; Los Angeles; San Francisco; Miami; and Atlanta, immigration courts received 54% of the total asylum applications filed with the courts.
- Six nationalities were among the top 10 nationalities granted asylum each year during the five-year period FY 2005-09: China, Ethiopia, Haiti, Colombia, India, and Albania.
- The grant rate for asylum applications was 47 percent in FY 2009. The grant rate was 55% for affirmative applications and 36% for defensive applications.
- In FY 2009, the percentage of cases in which either asylum or withholding of removal was granted was 56%.
- In FY 2009, 24% of proceedings completed at the immigration courts had an application for relief.
- BIA had a 23% decrease in receipts between FY 2005 (42,725) and FY 2009 (32,859) and a 29% decrease in completions during the same period.
- In FY 2009, 8% of immigration judge decisions were appealed to the BIA.

Supreme Court to Hear Citizenship Case

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grandmother is a United States citizen by birth. The petitioner was brought by his father and grandmother to the United States for medical treatment when he was two months old.

Petitioner grew up in San Diego. In 1997 he was convicted of drug offenses and was subsequently removed — on at least on six occasions — from the United States. In 2006, petitioner was arrested and charged with being a deported alien found in the United States after deportation. During the trial, he sought unsuccessfully to present evidence that he was a U.S. citizen. The district court found him guilty and he appealed to the Ninth Circuit.

The court of appeals rejected petitioner's argument, relying in part on *Nguyen*. The court reasoned that the differential treatment of citizen fathers and citizen mothers in cases such as petitioner's was substantially related to the important government interest in avoiding stateless children because many countries confer citizenship based on bloodline rather than on place of birth. Thus, the court held, applying a more lenient residency rule to unwed citizen mothers than to fathers survived intermediate scrutiny.

By Francesco Isgro
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INDEX TO CASES SUMMARIZED IN THIS ISSUE

INSIDE OIL

BASEBALL—May 5, while most commonly celebrated as Mexico's Independence Day Cinco de Mayo, actually figures to be a day of great importance. 795 years ago on this day, the beginnings of what we now know as democracy are set in place when Saxon Barons rebel, demanding rights, laws, and limits to the power of the then King, John of England. This leads to the signing of the Magna Carta, a legal document that became the basis for many of the laws we follow to this day.

Not 45 years later, on the other side of the globe, Kublai Kahn becomes leader of what is perhaps the largest empire in history, the Mongol empire. In 1494, Christopher Columbus lands on Jamaica, conquering the island with the cunning use of flags. In 1789, the French Estates-General convenes for the first time in over 150 years, paving the way for the French revolution. Napoleon I dies on St. Helena 32 years later and, oddly enough, the first Memorial Day is celebrated in the United States at Waterloo, NY in 1866! In 1864, Ulysses S. Grant leads his first battle against his arch-nemesis Robert E. Lee in Spotsylvania, Virginia in the "Battle of the Wilderness". May 5 also commemorates the birth of some of history's most famous (and infamous) persons: Leopold II, Holy Roman Emperor; philosophers Søren Kierkegaard and Karl Marx; James Beard, chef and author; John "Gimli" Rhys-Davies; music writer and MTV news anchor Kurt Loder; and Tina Yothers.

Yes, May 5 is indeed a day worth noting, but perhaps more important than, say, the decline of sovereignty, exploration of new lands, or the establishment of governmental systems, your OILers will make a triumphant return to the National Mall in what is sure to be a legendary game against Civil Frauds "Treble Damage"! We expect there to be much wailing and gnashing of teeth, but we will not hear them over our cheers of victory. Should you wish to engage in our cause, please contact James Lindahl at 202-305-2040.

OIL welcomes back Trial Attorney **Margot Nadel** who had left OIL in mid-2006, to work for Northrop Grumman and most recently the United States Department of State where she served an overseas tour at the U.S. Embassy in Kabul, Afghanistan.

INSIDE EOIR

EOIR's General Counsel, Robin M. Stutman, has announced that **Rico M. Sogocio** has joined the Office of General Counsel as Chief of the Immigration Unit. Mr. Sogocio most recently practiced immigration law with a firm in Miami, Florida, and has practiced before the Immigration Courts, U.S. District Court, and the 6th, 9th and 11th Circuit Courts of Appeals. He previously served as a SAUSA prosecuting criminal violations of the immigration laws and as an Assistant District Counsel with the former INS. He is a graduate of the Columbus School of Law at Catholic University of America and received his undergraduate degree from Northwestern University in Chicago, Illinois.

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.
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Office of Immigration Litigation

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