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Immigration Litigation Bulletin

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Sixth Circuit Finds That DHS Failed to Provide Clear and Convincing Evidence of Removability

In *Hassan v. Holder* , 604 F.3d 915 (6th Cir. 2010) (*Kennedy*, Cole, Jordan), the Sixth Circuit reversed the BIA's finding that the petitioner was removable as an alien who was inadmissible at the time of entry, and who had falsely claimed citizenship under INA §§ 237(a)(1)(A) and 237(a)(3)(D), respectively.

The petitioner and his wife, were born and raised in Israel and identified themselves as Palestinians. They have four children. The husband, Mr. Hassan, entered the United States on March 25, 1995, with an immigrant visa as the unmarried child of a lawful permanent resident. The wife also entered the United States on the same date but with a nonimmigrant visitor's visa. On April 10, 1995, the two of them had a small wedding ceremony at a mosque in Michigan and signed documents to certify their marriage. A month later Mr. Hassan filed a visa petition on behalf of his wife and an application to adjust her status. On August 11, 1995, the government granted the request.

On December 29, 1999, Mr. Hassan filed an application for naturalization. Eventually, an INS investigator conducted an in-person interview and an investigation. The investigator concluded that the petitioners were already married when they entered the United States. Consequently, the naturalization application was denied and in May 2002 both husband and wife were placed in removal proceedings. The government subsequently lodged an additional charge alleging that Mr.

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Are The Attorney General's Discretionary Waiver Decisions Under INA § 216(c)(4) Non-Reviewable Under *Kucana*?

Under INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4), the Attorney General has the discretion to grant waivers to aliens who seek to remove the conditions on their lawful permanent resident status procured through marriage to a United States citizen, but cannot meet the joint petition requirement for removing those conditions. There has been a circuit split for several years over whether a "decision or action" pursuant to that statute "is specified . . . to be in the discretion of the Attorney General . . ." and, therefore, non-reviewable under INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

The Second, Third, Fifth and Eighth Circuits have held that the Attorney General's discretionary waiver decisions under § 216(c)(4) are non-reviewable. *See, e.g., Urana-Thieveries v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004); *Contreras-Salinas v. Holder*, 585 F.3d 710 (2d Cir. 2009); *Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004); and *Yohannes v. Holder*, 585 F.3d 402 (8th Cir. 2009). However, the First and Ninth Circuits have held that jurisdiction exists to review the Attorney General's § 216 (c)(4) waiver decisions. *See, e.g., Cho v. Gonzales*, 404 F.3d 97 (1st Cir.

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Probability of torture is a question of fact

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Hassan had falsely claimed U.S. citizenship when he applied for an SBA loan

At the removal hearing, the government presented the testimony of the INS investigators and a letter from the U.S. Embassy in Tel Aviv which indicated petitioners had been married on February 24, 1995, a month prior to their entry into the United States. Another Embassy letter was subsequently admitted into the record indicating that a copy of the petitioner's marriage contract was available from the Israeli Ministry of Interior but could not be released. The Embassy investigator added, however, that he could obtain a copy of the contract from the Sharia court and would fax it once he obtained a copy. Apparently, no copy was ever received by the government. The petitioners, in addition to their testimony, also presented the testimony of an Imam, the testimony of Mrs. Hassan's brothers, and Mrs. Hassan. They also introduced documentary evidence showing that an Islamic marriage consists of four steps all of which must be completed before a marriage is finalized. Petitioners sought to prove that the last step in the marriage process had taken place in Michigan.

The IJ, relying on the Embassy letters, the testimony of the INS investigators, and her conclusions that petitioners were not credible, determined that petitioners had been married prior to entering the United States, and ordered them removed as charged. Petitioners appealed to the BIA and at the same time sought to remand the case claiming that the IJ, as a former government attorney, should have recused herself, and that they were eligible for waivers of inadmissibility. The BIA, reviewing the record de novo, also concluded, relying on the Israeli documents, that petitioners were married prior to their entry into the United States, and that their testimony was not credible. The BIA also noted that petitioners had not provided a copy of the Israeli marriage certificate or contradicted the official record of the February 24, 1995 marriage. The BIA also found Mr. Hassan removable for having claimed U.S. citizenship on the SBA loan, and denied the motion to remand finding no evidence of improper conduct on the part of the IJ.

The court faulted the BIA for improperly shifting the burden to petitioners to require them to submit their marriage contract.

The Sixth Circuit affirmed the BIA's denial of the motion to remand, but found that the government had failed to prove by clear, convincing, and unequivocal evidence, that Mr. Hassan was married prior to his admission as the unmarried child of a LPR. In particular, the court found that, assuming the admissibility and reliability of the two Embassy letters, Mr. Hassan had filed a marriage certificate in Israel, but that this was only the third of four steps in a valid Sharia marriage. The court faulted the BIA for improperly shifting the burden to petitioners to require them to submit their marriage contract. "The absence of the government contract does not help the government meet its affirmative burden of proving the completion of the marriage," explained the court. Additionally, the court said that "the lack of credibility of the testimony offered by petitioners, even if assumed, does not help the government's case."

Finally, the court also held that the government failed to prove the "purpose or benefit" loans element of the false claim to citizenship charge because Mr. Hassan had been granted two SBA loans as an LPR and, thus, he did not seek a benefit from the citizen claim on a subsequent application.

Accordingly, the court remanded the case to the BIA to quash the removal order and terminate proceedings against the petitioners.

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"Green Card" To Be Green Again

USCIS has announced that it has redesigned the Permanent Resident Card - commonly known as the "Green Card" - to incorporate several major new security features and to make it once again "green" colored in keeping with its nickname.

The enhanced security features will better serve law enforcement, employers, and immigrants, all of whom look to the Green Card as definitive proof of authorization to live and work in the United States. Among the benefits of the redesign: Secure optical media will store biometrics for rapid and reliable identification of the card holder. Holographic images, laser engraved fingerprints, and high resolution microimages will make the card nearly impossible to reproduce. Tighter integration of the card design with personalized elements will make it difficult to alter the card if stolen. Radio Frequency Identification (RFID) capability will allow Customs and Border Protection officers at ports of entry to read the card from a distance and compare it immediately to file data. Finally, a preprinted return address will enable the easy return of a lost card to USCIS.

Review of AG's Discretionary Waiver Decisions

(Continued from page 1)

2005); *Oropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005). The Supreme Court's recent decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010), could provide a vehicle for urging the First and Ninth Circuit to revisit their jurisdictional holdings, and follow the majority review that § 242(a)(2)(B)(ii), forecloses review of discretionary waiver decisions under § 216(c)(4).

The issue in *Kucana* was whether agency discretionary decisions authorized by regulation, such as motions to reopen pursuant to 8 C.F.R. § 1003.2(a), fall within the jurisdictional bar of § 242(a)(2)(B)(ii), The Supreme Court held that motions to reopen do not. It held that § 242(a)(2)(B)(ii) exempts from judicial review only decisions committed to the discretion of the Attorney General *by statute*, whereas a regulation gives the Board discretion to grant or deny a motion to reopen. 130 S. Ct. at 835. The Court reasoned that each of the jurisdictional bars added by IIRIRA, including section § 242(a)(2)(B)(ii), relate to other *statutory* provisions in the Immigration and Nationality Act that confer discretion on the Attorney General, and do not refer to authority granted by regulation. 130 S. Ct. at 839.

Although the underlying issue in *Kucana* was jurisdiction to review denials of motions to reopen, the Supreme Court necessarily had to interpret section § 242(a)(2)(B)(ii), as well as the other IIRIRA sections prohibiting review of certain categories of final removal orders. For purposes of the jurisdictional split over § 216(c)(4), the question is whether *Kucana* implicitly held that, if a statute expressly grants the Attorney General discretion, § 242(a)(2)(B)(ii) bars judicial review of decisions made pursuant to the statute.

Section § 216(c)(4) was added to the INA by the Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537 (1986). An alien who enters the United States as the spouse of a United States citizen must serve a two-year period of conditional permanent residence status. 8 U.S.C. § 1186a(a)(1); *see, e.g., Agyeman v. INS*, 296 F.3d 871, 880 n.3 (9th Cir. 2002). To lift the condition, the United States citizen and the alien spouse must jointly file a petition, 8 U.S.C. § 1186a(c)(1)(A), at least 90 days before the second anniversary of the date on which the alien received conditional LPR status. 8 U.S.C. § 1186a(d)(2)(A). Aliens who, through no fault of their own, cannot file a joint petition, may seek a waiver of the joint petition requirement pursuant to § 216(c)(4). The statute provides that "[t]he Attorney General, *in the Attorney General's discretion*, may remove the conditional basis of the permanent resident status for an alien who fails to meet" the joint petition requirement, INA § 216(c)(4), (emphasis added), and demonstrates either that: (1) the alien's removal would result in extreme hardship; or (2) the alien entered into the qualifying marriage in good faith, but the marriage has been terminated other than by death of the citizen spouse, and the alien is not at fault in failing to meet the joint petition requirements; or (3) the alien entered the marriage in good faith, but the alien or a child was subjected to extreme cruelty during the marriage, and the alien is not at fault in failing to meet the joint petition requirements. INA §§ 216(c)(4)(A)-(C).

Under INA § 216(c)(4) the determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion of the Attorney General*."

Section 216(c)(4) further provides that, for waiver requests based on extreme hardship, the Attorney General must consider evidence relating to the period during which the alien had conditional LPR status. For *all* waiver applications, the Attorney General must consider any credible relevant evidence, and the determination of what evidence is credible and the weight to be given that evidence "shall be *within the sole discretion of the Attorney General*." § 216(c)(4) (emphasis added). At a glance, that language appears to be precisely the type of statutory provision covered by section § 242(a)(2)(B)(ii).

However, in *Cho v. Gonzales*, the First Circuit held that it had jurisdiction to review denial of a § 216(c)(4), waiver request based on a hardship claim. 404 F.3d at 99. The decision essentially circumvented § 216(c)(4)(A), holding that the rationale for Cho's final removal order was not denial of her waiver request as a matter of discretion, but its view that the agency found that "Cho is ineligible as a *matter of law* for the hardship waiver under 8 U.S.C. § 1186a(c)(4)(B) because she failed to establish that she married in good faith." *Id.* (emphasis added). The First Circuit nonetheless analyzed § 216(c)(4), noting that "if Congress had intended to preclude all court review of agency decisions involving hardship waiver applications, it is hard to see why it would not have said so more clearly and categorically" (suggesting language such as "[t]here shall be no appeal . . ."). 404 F.3d at 100.

In *Oropeza-Wong v. Gonzales*, the Ninth Circuit, addressing jurisdiction under § 216(c)(4) for the first time, held that it had jurisdiction to review a waiver denial, but ultimately upheld the agency's waiver denial, on the grounds that it was supported by substantial evidence. 406 F.3d at 1138-39. That court held that § 242(a)(2)(B)(ii) barred judicial review

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Review of AG's Discretionary Waiver Decisions

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only if the underlying statute specified that "the right or power to act is *entirely* within [the Attorney General's] judgment or conscience." 406 F.3d at 1142 (quoting *Spencer Enterprises*, 345 F.3d at 690 (internal quotation marks omitted) (parenthetical in quoting language) (emphasis added)), and that § 216(c)(4) waivers "are not purely discretionary . . . ." 406 F.3d at 1142. The Ninth Circuit also held that "the statutory history of that section demonstrates unequivocally that Congress did *not* intend to strip courts of jurisdiction to review adverse credibility determinations in particular." *Id*. (emphasis in original). In the Ninth Circuit's view, that history "demonstrates beyond any question" that the "specific purpose" of the provision was "putting a stop to immigration officials' practice of employing overly-strict evidentiary rules when determining the credibility of battered women, and not in order to limit judicial review of credibility decisions." 406 F.3d at 1143 (citing law review articles regarding rights of immigrant women).

Most recently, however, in *Hammad v. Holder*, 603 F.3d 536 (9th Cir. 2010), in a footnote, the Ninth Circuit cited *Kucana*'s § 242 (a)(2)(B)(ii) interpretation, 130 S. Ct. at 834, and allowed that "[a] reasonable question can be raised as to whether we have jurisdiction to review adverse credibility determination under § 1186a," while maintaining that it has jurisdiction to review denials of waivers based on claims of extreme hardship. 2010 WL 1610713 at *6 n. 9. The court held that the burden was on Hammad to show the bona fides of his marriage, reviewed the agency's credibility findings underlying the good faith decision, and sustained the Board's final order of removal. *Id*. at *5-6.

Relying on *Kucana*, government litigators might assert that the initial question is whether the statute confers discretion on the Attorney General and, if the answer is affirmative, the court's inquiry is at an end.

Other than the *Kucana* footnote and its acknowledgment that other courts of appeals are split on the issue, the *Hammad* decision did not address jurisdiction to review waiver denials under § 216(c)(4). The footnote, thus, is not yet a harbinger of a shift in the position of the Ninth Circuit – or First Circuit – regarding jurisdiction under § 216(c)(4). In its *Kucana* footnote in *Hammad*, the Ninth Circuit noted that *Oropeza-Wong* has been criticized by other circuits, but declared that it is bound by its precedent. 2010 WL 1610713 at *6 n. 9. The same will be true in future First Circuit cases involving § 216(c)(4), unless we can present a reason for either circuit to reconsider its precedent.

Kucana may present just such a reason. For example, both the First and the Ninth Circuits have essentially held that they have jurisdiction in § 216(c)(4) cases because the statute is not "specific" enough to confer non-reviewable discretion on the Attorney General. It may be possible nonetheless to assert a lack of jurisdiction in another First or Ninth Circuit case by contending that *Kucana* shows that talismanic language is not necessary to bring discretionary decisions authorized by statute within the reach of § 242(a) (2)(B)(ii). Instead, the Supreme Court distinguished between those statutes that do confer discretion and are, therefore, covered by § 242 (a)(2)(B)(ii), from discretion conferred by regulation, which is not non-reviewable. Relying on *Kucana*, government litigators might assert that the initial question is whether the statute confers discretion on the Attorney General and, if the answer is affirmative, the court's inquiry is at an end. Indeed, even outside the § 216(c)(4) context, *Kucana* can be read to support a bright-line test of § 242(a)(2)(B)(ii)'s reach: if discretion is conferred by statute, the jurisdictional bar applies, without further inquiry into the basis for the agency's discretionary judgment.

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USCIS Seeks Increase In application Fees

USCIS has published a proposed rule which would increase overall fees by a weighted average of about 10 percent but would not increase the fee for the naturalization application. 7 *Fed. Reg*. 33446 (June 11, 2010).

USCIS is a fee-based agency with about 90 percent of its budget coming from fees paid by applicants and petitioners who obtain immigration benefits. However, the fee revenue in fiscal years 2008 and 2009 was much lower than projected by USCIS, and fee revenue in fiscal year 2010 remains low. According to USCIS although it did receive appropriations from Congress, the budget cuts of approximately $160 million have not bridged the remaining gap between costs and anticipated revenue. "We are mindful of the effect of a fee increase on the communities we serve and have worked hard to minimize the size of the proposed increase through budget cuts and other measures," said USCIS Director Alejandro Mayorkas.

Among the proposed fee increases, a Petition for Alien Relative (I-130) increases from $355 to $420, and Petition for Alien Worker increases from $475 to $580. The rule also proposes to reduce some of the fees.

The Adverse Credibility Project Update

Six years ago OIL established The Adverse Credibility Project as a means to track decisions issued by the courts of appeals that specifically make a ruling on the agency's adverse credibility determinations. The decisions include opinions, memorandum dispositions, and orders – that is, decisions that are unpublished and published, non-precedent and precedent. The "database" or source for obtaining these decisions are the paper copies of decisions that the Clerks' offices send to OIL and the electronic copies of adverse decisions that the Adverse Support Team (headed by Angela Green) obtains by searching the courts' electronic dockets.

The data compiled below reflects a tally of all decisions in which – regardless of the ultimate outcome of the petition for review – the appellate court has either approved of, or reversed, the adverse credibility holding reached by the immigration judge or Board of Immigration Appeals. Petitions for review decided wholly on non-credibility related issues are not counted, even though the immigration judge or Board of Immigration Appeals made an adverse credibility determination. So, for example, cases in which the court upheld the agency's adverse credibility determination, but nevertheless granted the petition for review on a different issue, would be included in this project. However, a petition denied because of a failure to demonstrate the requisite nexus, without involving any credibility issues, would not.

The following chart reflects relevant decisions issued by the courts of appeals in 2009, the most recent year for which complete data is available. Overall numbers of adverse credibility related decisions have increased 17% since last year. The adverse credibility win percentage in 2009 roughly parallels the overall OIL win/loss trends from that year, though the overall numbers are slightly less favorable across the board.

Overall win percentage for 2009 was 92%, ranging from 88% in the Third Circuit to 98% in the Fourth Circuit. In both the adverse credibility decisions and overall statistics, the Third, Eighth, and Ninth Circuits represent the lowest significant win percentages, while the highest came from the Second, Fourth, and Fifth Circuits.

In 2009, the Second and Ninth Circuits again issued the highest numbers of cases addressing the agency's credibility finding (288 and 236, respectively). Reflected in the 2009 statistics is the continued rise in win percentage within the Second Circuit. This percentage has risen steadily, from 14% in 2006 to 54% in 2007 to 90% in 2008 to 96% in 2009. Ninth Circuit win percentage, historically close to 60%, has risen in 2009 to 73%. This increase may be due, in part, to a greater percentage of post-REAL ID cases on the docket in 2009.

Previous uses for this project's results include support for the REAL ID Act's amendments regarding the agency's credibility determinations and the Department's ongoing efforts to challenge the Ninth Circuit's pre-REAL ID Act adverse credibility rules.

The "win" column refers to decisions in which the court has upheld or affirmed the agency's adverse credibility finding, regardless of whether the petition for review was granted or denied. The "loss" column refers to decisions in which the court has rejected or reversed the agency's adverse credibility finding, regardless of whether the petition for review was granted or denied.

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2009

Circuits	Win	(number)	Loss	(number)
1st	0%	0	100%	1
2nd	96%	278	4%	10
3rd	74%	39	26%	14
4th	96%	27	4%	1
5th	95%	21	5%	1
6th	100%	58	0%	0
7th	0%	0	100%	1
8th	86%	6	14%	1
9th	73%	173	27%	63
10th	0%	0	0%	0
11th	96%	66	4%	3
Total	***87%***	***668***	***13%***	***95***

2008

Circuits	Win	(number)	Loss	(number)
1st	80%	4	20%	1
2nd	90%	236	10%	27
3rd	92%	23	8%	2
4th	100%	19	0%	0
5th	100%	5	0%	0
6th	92%	48	8%	4
7th	75%	12	25%	4
8th	93%	14	7%	1
9th	62%	106	38%	66
10th	100%	6	0%	0
11th	96%	54	4%	2
Total	**83%**	**527**	**17%**	**107**

FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Second or Subsequent State Controlled Substance Conviction

On June 14, 2009, the Supreme Court (S. Ct. 09-60) reversed the decision in Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir. 2009), and effectively abrogated *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), when it ruled consistently with *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008), *Rashid v. Mukasey,* 531 F.3d 438, 447-48 (6th Cir. 2008), and *Matter of Carachuri-Rosendo,* 24 I&N Dec. 382 (BIA 2007) (en banc), that a second drug possession conviction is usually not an aggravated felony under INA § 101(a)(43)(B). Instead, to constitute recidivist drug possession within the meaning of the aggravated felony statute, a second conviction actually must be based on the prior conviction. Merely proving after the fact that an alien has two drug possession convictions is insufficient.

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A full review of the case will appear in the next issue of *the Immigration Litigation Bulletin.*

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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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Aggravated Felony — Missing Element

In ***Turcios v. Holder***, the panel has withdrawn its prior opinion, 582 F.3d 1075, in order to file a new opinion at a later date. The government had opposed a rehearing petition that challenged whether the court properly dismissed a 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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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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Derivative Citizenship Equal Protection

On March 22, 2010, the Supreme court granted certiorari in ***Flores-Villar v. United States,*** 130 S.Ct. 1878. The Court will consider the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection and give defendant a defense to criminal prosecution for illegal reentry under 8 USC 1326? The decision being reviewed is *U.S.v. Flores-Villar,* 536 F.3d 990 (9th Cir.2008).

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BIA Jurisdiction - Deference

In ***Irigoyen-Briones v. Holder***, the panel has withdrawn its prior opinion, 582 F.3d 1062, in order to file a new opinion at a later date. The government had opposed a rehearing petition that argued that the panel erred in giving Auer deference to the BIA's *Matter of Liadov* interpretation of its jurisdiction to consider late filings under 8 C.F.R. § 1003.38.

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Due Process– Duty to Advise

In ***U.S. v. Lopez-Velasquez***, 568 F.3d 1139 (9th Cir. 2009), the court held that defendant's due process rights were violated when the IJ did not inform him that he was eligible for discretionary relief even though defendant was indeed not eligible under the law as it then existed. On March 8, 2010, the Ninth Circuit granted rehearing en banc and vacated the panel's opinion. The question presented is: Whether an illegal reentry defendant had a due process right to be advised in his underlying deportation proceeding of his potential eligibility for discretionary relief under INA 212(c) , where the defendant was not then eligible for that discretionary relief, but there was a plausible argument that the law would change in defendant's favor.

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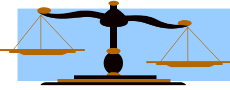

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That An Alien May Not "Skirt" The Statutory Deadline For Filing A Motion To Reopen An In Absentia Order By Claiming Lack Of Notice

In *Vaz Dos Reis v. Holder*, __ F.3d __, 2010 WL 2011544 (*Selya*, Lipez, Howard) (1st Cir. May 21, 2010), the First Circuit held that an alien may not "skirt the statutory 180-day deadline" for filing a motion to reopen an *in absentia* order by simply "relabeling his claim as one based on lack of notice" where the claim – arguing ineffective assistance of counsel – is really based on exceptional circumstances, and is therefore untimely.

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SECOND CIRCUIT

■ Second Circuit Holds that Alien Failed to Comply with *Lozada* and Demonstrate Substantial Prejudice

In *Debeatham v. Holder,* 602 F.3d 481 (2d Cir. 2010) (Miner, Cabranes, Wesley) (*per curiam*), the Second Circuit upheld the BIA decision denying petitioner's motion to reopen based on ineffective assistance of counsel. The petitioner, a citizen of Jamaica, was found removable in 2005, for having being convicted of a controlled substance violation and for his conviction of two or more crimes involving moral turpitude under INA §§ 237(a)(2)(B)(i) and 237(a)(2)(B)(A)(ii), respectively. The IJ denied his application for a § 212(c) waiver and also found him ineligible for cancellation of removal as a matter of law because he had been convicted of an aggravated felony, and in the alternative, as a matter of discretion. Subsequently, the IJ denied petitioner's motion to reconsider that he had been convicted of an aggravated felony. On appeal, the BIA found that petitioner was statutorily eligible for cancellation of removal but affirmed the IJ's decision on the alternate ground that the circumstances did not warrant granting cancellation of removal as a matter of discretion.

On June 9, 2008, petitioner sought to reopen his removal proceedings, arguing in ineffective assistance of counsel because his prior attorney had failed to appeal the 212(c) denial, and failed to inform him of the BIA's decision thereby depriving him of the opportunity to appeal that decision. The BIA denied the motion to reopen and petitioner filed a timely appeal.

The court held that the petitioner had failed to comply with any of the requirements of *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), as to his claim of ineffectiveness concerning § 212(c) relief, and thus had waived that claim. The court further held that the alien had failed to demonstrate that he was substantially prejudiced by the alleged errors of his prior counsel as to his application for cancellation of removal for lawful permanent resident.

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THIRD CIRCUIT

■ Third Circuit Rejects Intoxicated Alien's Assertion that His Admission Under the Visa Waiver Program Was Unknowing

In *Bradley v. Attorney General of the United States,* __ F.3d __, 2010 WL 1610597 (3d Cir. April 22, 2010) (Ambro, Smith, *Aldisert*), the Third Circuit, held that there was sufficient evidence that the petitioner, a citizen from New Zealand, who had been admitted into the United States under the Visa Waiver Program, had waived his right to a hearing in immigration court despite the absence of the actual, signed Form I-94W in the record.

The petitioner, entered the U.S. on August 28, 1996, under the VWP program and married a U.S. citizen on July 29, 2006. On December 2007, petitioner's wife applied for an immediate relative visa petition and filed for adjustment of status on behalf of petitioner. However, when the couple failed to appear for a scheduled interview, USCIS denied the visa petition. On October 8, 2008, petitioner was arrested and ordered removed under INA § 217(b) 8 U.S.C. § 1187(b). Petitioner filed a timely petition for review of the administrative order of removal.

> **The court noted that the government was entitled to a presumption of regularity, and that petitioner had only been admitted after presenting a completed I-94W.**

The court preliminarily rejected petitioner's contention that the government had not proved its burden of proof. The court explained that petitioner's admission that he had signed the I-94W and presented it to a customs officer, was sufficient to overcome the burden. Additionally, the court noted that the government was entitled to a presumption of regularity, and that petitioner had only been admitted after presenting a completed I-94W. The court then rejected the assertion that petitioner's waiver, when he allegedly was intoxicated, was not knowing or voluntary because he was not substantially prejudiced under the reasoning of the Seventh Circuit in *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (*en banc*). The court explained that petitioner's consequence he now faces – "summary removal – is the same consequence

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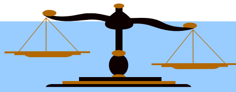

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he would have faced had he known of the waiver and refused to sign." Finally, the court rejected petitioner's argument that he was entitled to pursue his adjustment of status under the reasoning of the Ninth Circuit's opinion in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The court explained that even if it were to adopt *Freeman* "that decision would be unavailing to [petitioner] who petitioned for an adjustment of status years beyond the expiration of his authorized stay."

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FIFTH CIRCUIT

■ **Fifth Circuit Holds that Federal Courts Lack Jurisdiction to Compel Adjudication of Applications for Adjustment of Status in the Absence of an Available Visa Number**

In *Fei Bian v. Clinton,* __ F.3d __, 2010 WL 1671910 (5th Cir. April 27, 2010) (King, *Weiner*, Denis, JJ.), the Fifth Circuit held that federal courts lack jurisdiction to review the pace of USCIS adjudication of an application for adjustment of status when USCIS acts in compliance with a regulation established pursuant to statutorily specified discretion.

The plaintiff, a Chinese national with a Ph.D. in chemical engineering, applied for adjustment in September 2005 based on a EB-2 visa application. In September 2008, plaintiff filed suit seeking to compel USCIS to adjudicate her application. The USCIS conceded that plaintiff was eligible for adjustment but that if were forced to rule on the application it would have no choice but to deny it because there was no visa number currently available. USCIS also contended that the court lacked jurisdiction to compel adjudication of the application. Ultimately the district court ruled that it had jurisdiction to review the pace of the adjudication but lacked jurisdiction to review the ultimate decision. Nonetheless, the court ruled that even if plaintiff were entitled to relief there were no visa numbers available and the action had to be dismissed.

On appeal, the Fifth Circuit held that the jurisdictional bar under INA § 1252 applies to "any other decision or action within the USCIS's discretion." The court explained that "if Congress had intended for only the USCIS's ultimate decision to grant or deny an application to be discretionary – as distinguished from its interim decisions made during the adjudicative process – then the word 'action' would be superfluous." Because USCIS had discretionary authority to promulgate a regulation requiring that a visa number be available before it approves an application, the court held that USCIS could not be compelled to adjudicate an application in violation of this regulation.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Under EAJA the Agency's Decision and Position Taken on Judicial Review Constitute the "Position of the United States"**

In *Gatimi v. Holder*, __ F.3d __, 2010 WL 1948351 (*Posner*, Ripple, Wood) (7th Cir. May 17, 2010), the Seventh Circuit, deciding an issue of first impression, held that in determining whether the government's position was "substantially justified" under the EAJA, it would consider both the position taken by the government in judicial review proceedings as well as the underlying decision by the agency, namely that of the BIA.

In the underlying case the Seventh Circuit reversed the BIA's ruling that the petitioners had to show that their "social group" was "socially visible" and held that Mrs. Gatimi's fear of female genital mutilation was supported by the record and relevant to the asylum claim.

In the instant petition for review, the court found that, although it had rejected the BIA's "use of 'social visibility' to determine membership in a social group because it was inconsistent with the BIA's basic test for a social group and with our decisions," the government's position on that issue was "substantially justified." However, the court found that the government was not substantially justified in defending the IJ's conclusion that because Mrs. Gatimi had not applied for asylum herself the only basis on which she could obtain asylum was persecution of her husband.

> **The court held that since the social-visibility issue "was the more prominent issue and the government's position on that issue was substantially justified," the government's position was "substantially justified as a whole."**

The court then held that since the social visibility issue "was the more prominent issue and the government's position on that issue was substantially justified," that the government's position was "substantially justified as a whole," and on that basis denied the motion for attorneys' fees

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■ **Seventh Circuit Holds No Pattern or Practice of Persecution of Tamils, Upholds REAL ID Corroboration Requirement**

In *Raghunathan v. Holder,* 604 F.3d 371 (7th Cir. 2010) (Easterbrook, *Kanne*, Kennelly, D.J.), the Seventh Circuit, affirmed the BIA's denial of petitioners' applications for

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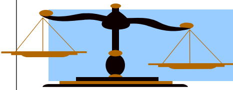

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asylum and withholding of removal, as well as their reconsideration motion.

The petitioners, husband and wife, are citizens of Sri Lanka and ethnic Tamils. In June 2007, following their attempted entry into the United States by using fraudulent Canadian passports, they were placed in removal proceedings for violating INA §§ 212 (a)(6)(C)(i) and 212(a)(7)(A)(i)(I). Petitioners conceded removability but also stated their intentions to apply for asylum, withholding of removal, and CAT based on the claim that they had suffered persecution because of their ethnicity. The IJ denied their applications, finding that they had failed to meet their burden of proof. The IJ additionally found that the wife, Thevarajah, who had worked as a journalist for a newspaper which is under the control of the Liberation Tigers of Tamil Eelam (LTTE),was ineligible for asylum and withholding of removal because she had provided material support to a foreign terrorist organization, the LTTE.

The BIA affirmed the IJ's decision. Petitioners then filed a motion for reconsideration, in which they argued for the first time that Thevarajah's duties for the newspaper were protected by the First Amendment and international law, and therefore did not constitute material support to a terrorist organization. The BIA denied the motion because it found that she had failed to argue it adequately in her initial appeal.

The Seventh Circuit held that there was an insufficient evidence of a pattern or practice of persecution of Tamils in Sri Lanka. "The threshold for establishing a practice or pattern is high because a successful showing means that, in theory, every other person belonging to that same protected group would be entitled to asylum in the United States. We therefore require evidence of a 'systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group,'" said the court. The court also agreed with the IJs finding that their persecution claim was uncorroborated. "Despite the fact that both petitioners have family who remain in Sri Lanka, they presented no corroborative evidence from similarly situated family members showing that as Tamils, they are subject to persecution," noted the court. Finally, the court also rejected Thevarajah's challenges to the material support bar, raised for the first time in the reconsideration motion.

"The threshold for establishing a practice or pattern is high because a successful showing means that, in theory, every other person belonging to that same protected group would be entitled to asylum in the United States."

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■ Seventh Circuit Holds that the BIA Failed to Consider Whether Parents' Family Planning Policy Resistance Could Be Imputed to Unregistered Chinese Child

In *Chen v. Holder*, 604 F.3d 324 (7th Cir. 2010) (Rovner, Wood, *Sykes*), the Seventh Circuit held that the BIA failed to address petitioner's claim of past persecution based on an imputed political opinion arising from his parents' resistance to China's family planning policy. The court ruled that, while the sterilization of petitioner's mother did not entitle him to a finding of past persecution, it may rise to the level of persecution when considered in conjunction with the family's resistance to the population control policy.

The court further held that the BIA failed to consider the cumulative significance of the hardship on petitioner's family, or adequately address his claims that his status as a "blacklisted" child subjected him to past and likely future persecution.

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■ On Remand from the Supreme Court, Seventh Circuit Affirms Denial of Motion to Reopen Based on Changed Country Conditions

In *Kucana v. Holder*, (7th Cir. May 4, 2010) (*Easterbrook*, Cudahy, Ripple, JJ.), the Seventh Circuit, on remand from the Supreme Court denied petitioner's appeal of the BIA denial of his second, untimely motion to reopen. The court, recognizing that it now has jurisdiction to consider the BIA denial of a motion to reopen, held that the BIA did not abuse its discretion when it determined that country conditions in Albania did not excuse the motion's untimeliness and declined to explicitly discuss an expert affidavit the alien submitted with his motion.

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EIGHTH CIRCUIT

■ Eighth Circuit Holds that Substantial Evidence Supports a Finding of Past Persecution Based on the Nature of Incidents

In *Bracic v. Holder*, __ F.3d __, 2010 WL 1707609 (8th Cir. April 29, 2010) (*Wollman*, Gibson, Murphy), the Eighth Circuit, held that the record compelled reversal of the BIA finding that the alien was not eligible for asylum. The court concluded that the alien, an ethnic Albanian, was persecuted in the former Yugoslavia based on his failure to join the Serbian Army, where the army made credible threats against him, and the alien endured harassment and one beating resulting in the loss of consciousness. The court also held that the government failed to rebut the presumption of future persecution by

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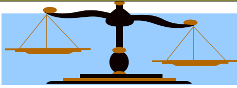

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showing that conditions in Montenegro had changed.

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■ Eighth Circuit Affirms BIA's Conclusion That Asylum Applicant With Altered ID Card Was Not Credible

In *Azie v. Holder,* 602 F.3d 916 (8th Cir. 2010) (Murphy, *Smith*, Benton), the Eighth Circuit upheld an adverse credibility finding against an asylum seeker who sought to establish that she had suffered persecution in Cameroon because of her support and membership in the Social Democratic Front and the South Cameroon National Congress (SCNC). At her asylum hearing petitioner presented an altered fraudulent ID card showing her membership in the SCNC. The IJ was not convinced by the petitioner's explanation regarding the altered ID card and denied asylum based on adverse credibility. The BIA affirmed.

The court upheld the IJ adverse credibility finding holding that it was supported by specific, cogent reasons, and declined "petitioner's invitation to reweigh the evidence in her favor." The court also determined that petitioner had failed to exhaust her administrative remedies as to whether a forensics lab analysis was required to determine the validity of the ID card. Finally, the court also held that petitioner had failed to meet her burden of proof regarding her alleged lack of comprehension of the questions at her immigration hearing.

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■ Eighth Circuit Holds It Lacks Jurisdiction to Review Denial of *Sua Sponte* Reopening

In *Ochoa v. Holder*, __ F.3d __, 2010 WL 1780052 (8th Cir. May 5, 2010) (Bye, *Beam*, Colloton, JJ.), the Eighth Circuit held that it lacks jurisdiction to review the denial of a motion to reopen where the alien requested reopening *sua sponte*, even where the BIA adjudicates the motion to reopen pursuant to 8 C.F.R. § 1003.2(c).

The petitioner, a citizen of Mexico, entered the United States illegally on or about December 15, 1991. On July 26, 2004, when DHS initiated removal proceedings, petitioner conceded removability but filed an application for cancellation of removal. On January 9, 2006, the IJ denied cancellation for failure to show exceptional and extremely unusual hardship to her qualifying relatives, namely her two United States citizen children. The BIA affirmed this denial on May 25, 2007.

Although it was unclear whether the BIA had decided the motion under 8 C.F.R. 1003.2(a) (*sua sponte* reopening), the fact that petitioner had expressly relied on § 1003.2(a) throughout her filings and argument constrained the court to conclude, following *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir.2008) (*en banc*), that it lacked jurisdiction over the denial of the motion.

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NINTH CIRCUIT

■ Ninth Circuit Holds that "Admitted" Under § 1182(h) Refers to a "Procedurally Regular Admission"

In *Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010) (Wallace, Graber, *McKeown*), the Ninth Circuit held that an alien who had gained admission as a lawful permanent resident by fraud or misrepresentation and who had subsequently been convicted of an aggravated felony was statutorily ineligible for waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h).

Section 212(h) expressly bars from relief an alien who has "previously been admitted to the United States as an alien lawfully admitted for permanent residence" and later is convicted of an aggravated felony. Petitioner contended that he had never been legally "admitted" because he had procured his LPR status by fraud and therefore was eligible for the § 212(h) waiver. The court held that "the plain meaning of the term 'admission' in § 101(a)(13)(a), and thus the term 'previously been admitted' in § 212(h), refers to a procedurally regular admission and not a substantively lawful admission." The court acknowledged that "it may seem at first blush, an oxymoron to be 'admitted' to the United States and yet be 'inadmissible' at the same time. But such is the text of the INA and the often opaque world of the immigration statute," noted the court.

> **"It may seem at first blush, an oxymoron to be 'admitted' to the United States and yet be 'inadmissible' at the same time. But such is the text of the INA and the often opaque world of the immigration statute."**

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■ Ninth Circuit Holds that Wife's Withdrawal Dooms Waiver of Joint Petition Requirement

In *Hammad v. Holder*, 603 F.3d 536 (9th Cir. 2010) (Goodwin, Berzon, *Ikuta*), the Ninth Circuit held that the IJ had properly placed the burden of establishing good faith marriage on petitioner after his United States citizen wife retracted her support for their petition to remove conditions on his status.

The petitioner was admitted to the United States in 1993 as a nonimmigrant student. In 1994 he married Veronica Fierro, a United States citizen. Fierro then filed for adjustment for her spouse and petitioner was granted permanent resident status on a conditional basis for two years.

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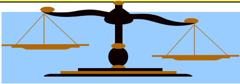

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When the couple appeared for an interview to remove the condition, INS officials discovered that the marriage had been entered into solely for immigration purpose. Fierro then withdrew her petition and petitioner was placed in removal proceedings. Before his removal hearing commenced, petitioner filed a petition under § 1186a (c)(4)(C), asking the INS to waive the joint petition requirement based on having been battered or the subject of extreme cruelty perpetrated by his spouse during the good faith marriage. However, during another interview with the INS he retracted his initial assertion and instead sought a waiver based on having entered into a good faith marriage that ended in divorce. The INS denied the petition finding, *inter alia* inconsistencies in his testimony. Petitioner challenged the INS's denial at the removal hearing. After considering all the evidence, the IJ concluded that petitioner had not carried his burden of proving that his marriage was entered into in good faith and that given a series of inconsistencies between his testimony and that of his witness and Fierro, petitioner was not credible. The BIA affirmed.

Preliminarily, the Ninth Circuit held that the IJ and BIA had not erred in determining that petitioner bore the burden of proof. Under § 1186a(c)(4), the court explained it was petitioner's "burden to demonstrate, to the satisfaction of the Attorney General, that 'the qualifying marriage was entered into in good faith.'" Correspondingly, the court rejected petitioner's contention that the government had an obligation to prove that his marriage with Fierro was not bona fide. The court also found that substantial evidence supported the BIA's conclusion that petitioner's marriage to Fierro was fraudulent and therefore was not entitled to a waiver of the joint petition requirement.

Under § 1186a(c)(4), the court explained it was petitioner's "burden to demonstrate, to the satisfaction of the Attorney General, that 'the qualifying marriage was entered into in good faith.'"

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■ Ninth Circuit Holds that BIA Misinterpreted 8 C.F.R. § 1003.31(c) in Deeming Petitioner's § 212(c) Application Abandoned for Failure to Timely Submit Court-Requested Documentation

In *Casares-Castellon v. Holder*, 603 F.3d 1111 (9th Cir. 2010) (Kleinfeld, Thomas, Stafford, JJ.) (*per curiam*), the Ninth Circuit held that 8 C.F.R. § 1003.31(c) plainly limits any waiver to the actual application or document not timely filed, and not supplemental documentation.

Under 8 C.F.R. § 1003.31(c), an IJ "may set and extend time limits for the filing of applications and related documents and responses thereto, if any. If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived." The court concluded that "the regulation's language plainly limits any waiver to the actual application or document not timely filed."

Here, because the petitioner's application was itself timely filed, the court determined that the BIA had erred in holding petitioner's failure to timely submit subsequent documentation "allowed the IJ to deem his entire timely-filed, statutorily authorized application abandoned." "The IJ's authority under that regulation is limited to the terms of the regulation, which do not authorize an IJ to deem an entire timely-filed application abandoned for failure to file a supplemental document within a specified time. Under the regulation, the IJ is authorized only to deem the opportunity to file the specific documents subject to the order as waived," held the court.

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■ Ninth Circuit Holds Alien's Under-the-Influence Conviction May Not be Treated as Conviction After State Court Expungement

In *Nunez-Reyes v. Holder,* 602 F.3d 1102 (9th Cir. 2010) (Fletcher, Canby, Graber) (*per curiam*), the Ninth Circuit held that a Mexican citizen's conviction under California law for possession and being under the influence of methamphetamine was eligible for Federal First Offender Act treatment. The court noted that, under *Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010), an individual convicted for the first time in state court of using or being under the influence of a controlled substance was eligible for the same immigration treatment as an individual convicted of drug possession under FFOA. As a result, the court held that petitioner's conviction could be used to render him ineligible for cancellation of removal.

In a concurring opinion, Judge Graber expressed her disagreement with the underlying rule that equal protection principles require Congress to treat aliens subject to state expungement identically to aliens subject to a federal expungement. She noted that the seminal decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), where the court had held that the FFOA had not been repealed by Congress' new definition of the term "conviction," had been rejected by seven circuits and the BIA. Accordingly, Judge Graber suggested that the court revisit its current rule.

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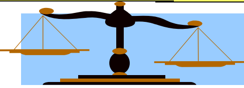

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■ Ninth Circuit Upholds Removability of Aliens Who Received Fraudulent Green Cards From a Corrupt INS Agent

In *Kim v. Holder*, 603 F.3d 1100 (9th Cir. 2010) (*Mckeown*, Wallace and Graber), the Ninth Circuit held that the circumstantial evidence submitted by the government was sufficient to show that aliens, who received fraudulent green cards from a corrupt INS agent, were removable under INA § 237(a)(1)(A). The petitioners belong to a group of hundreds of persons of Korean descent who received fraudulent green cards through the criminal conspiracy of a former officer of the INS, Leland Sustaire. Between 1986 to 1994, Sustaire conspired with several middlemen in the Korean-American and overseas Korean community, who paid bribes to Sustaire to obtain fraudulent Form I-551 Alien Registration Cards, or "green cards," for their clients. Sustaire and his collaborators were ultimately convicted. Petitioners' names and alien numbers appeared on a list that Sustaire submitted to law enforcement authorities identifying the non-citizens who obtained LPR status through the conspiracy.

Circumstantial evidence submitted by the government was sufficient to show that aliens, who received fraudulent green cards from a corrupt INS agent, were removable under INA § 237(a)(1)(A).

The court further upheld the BIA's denial of petitioners' request for a INA § 212(k) waiver, holding that they lacked standing to raise an equal protection claim because they do not belong to the class of returning lawful permanent residents who are allegedly similarly situated to applicants for admission. Because they were improperly granted their green cards, petitioners' permanent resident status was void *ab initio*.

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■ Ninth Circuit Grants Government's Motion to Amend Erroneous Statement About BIA's Capacity to Receive Factual Evidence

In *Cruz Rendon v. Holder*, __ F.3d __, 2009 WL 4282016 (9th Cir. December 2, 2009) (Pregerson, Thompson, *Fogel*), the Ninth Circuit held that the IJ violated petitioner's due process rights by precluding him from testifying and abused her discretion in denying a request for continuance to obtain additional evidence. In its analysis, the court erroneously stated that it would have been inappropriate for the petitioner to submit new factual evidence to the BIA because it cannot do fact finding. On May 3, 2010, the Ninth Circuit, upon a motion to amend the decision, deleted that statement, because the BIA does consider and treat new facts as a motion to remand.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Remands After Determining that Agency Failed to Give Reasoned Consideration to Petitioner's Asylum Claim

In *Ayala v. U.S. Att'y Gen*, __F.3d __, 2010 WL 1816683 (11th Cir May 7, 2010) (*Pryor*, Fay, Quist, JJ.), the Eleventh Circuit held that the BIA had failed to give "reasoned consideration" to petitioner's application for asylum and withholding and that its decision was "riddled with errors."

The petitioner, a citizen of Venezuela, claimed that he was a homosexual and that he opposed the Chavez government. He alleged that he had suffered past persecution on account of his sexual orientation and political opinion. He testified, *inter alia*, that in December 2004 several Venezuelan police officers assaulted him after he left a gay nightclub in Caracas. The police officers hit him, robbed him, handcuffed him, detained him in a patrol car, placed a hood over his head, and forced him to perform oral sex on one of the officers. The police officers threatened to arrest petitioner for being homosexual and told him "[t]hey could incarcerate [him] or plant drugs in [his] house and that was all as a result of being queer." The IJ and later the BIA credited petitioner's testimony.

Initially, the IJ concluded that Ayala was a member of a particular social group-that of HIV-positive homosexual men. However, he denied petitioner's application because he had not established past persecution on account of a protected ground or a well-founded fear of future persecution. The IJ concluded that the incident with the police officers was a "criminal act[ ] perpetrated by individuals" and it "d[id] not appear to be the policy or process of a legitimately established government." The IJ also rejected the allegation that HIV-positive homosexuals are denied medical treatment and found instead that "the gay community in Venezuela is, in fact, the recipient of free medical treatment, however uneven that treatment may be."

The BIA agreed with the IJ that petitioner had failed to prove a well-founded fear of future persecution on account of his sexual orientation, HIV status, or political opinion. The Board explained, "[T]he background evidence indicates that Venezuela's gay community is a robust group that frequently marches without disruption or disturbance, and that tolerance and respect for the gay community in Venezuela is improving." The BIA also concluded that the evidence Ayala had presented did not support a finding that Ayala "would be denied medical care in Venezuela."

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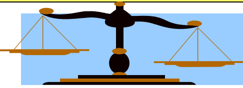

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The Eleventh Circuit found the BIA and the IJ failed to give reasoned consideration "or make adequate findings" as to whether Petitioner had suffered past persecution. In particular, the court noted that the BIA had stated that it agreed with the decision of the IJ that the mistreatment Ayala suffered did not rise to the level of persecution, but the immigration judge made no such ruling. The court also noted that the BIA also found that petitioner had failed to prove that the police officers who sexually assaulted him acted on account of a protected ground, "but neither the BIA nor the immigration judge even mentioned the police officers' slurs about petitioner's homosexuality," said the court. Additionally, the court noted that the BIA had also found that petitioner failed to prove that the government was unable to protect him even though petitioner "suffered mistreatment at the hands of police officers, not private actors."

Accordingly, the court vacated the BIA's decision and remanded the case for further proceedings. The court did not address petitioner's arguments about future persecution and his claim for withholding.

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■ Ninth Circuit Holds that Unborn Child Does Not Meet Statutory Definition of Child

In *Partap v. Holder*, 603 F.3d 1173 (9th Cir. 2010) (Fernandez, Thomas, Callahan, JJ.) (*per curiam*), the Ninth Circuit held that petitioner's unborn daughter did not meet the statutory definition of "child" in § 101 (b)(1) at the time of his hearing before the IJ, and that the BIA therefore did not err in determining that the unborn child was not a qualifying relative for purposes of cancellation of removal.

The court also ruled that the BIA properly denied a motion to reopen filed after the child's birth, because the petitioner failed to tender any evidence of exceptional or extremely unusual hardship to the child and therefore failed to establish prima facie eligibility for cancellation of removal.

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DISTRICT COURTS

■ Northern District of Texas Denies Habeas Petition for Alien Challenging Conditions of Confinement

In *Lemus v. United States Attorney General, et al.*, No 09-cv-209 (N.D. Tex. April 16, 2010) (Cummings, J.), the district court denied a habeas petition and ruled that the alien had no protected property interest or due process right to being categorized as a citizen while in federal criminal custody. The alien filed the petition claiming he was a derivative citizen and was entitled to the same treatment as fellow citizens (*e.g.* vocational and rehabilitation options). The court ruled that: (1) the alien failed to exhaust; and (2) he had no such constitutionally protected right.

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■ Southern District of California Grants Government's Motion for Summary Judgment Because Renewed Visa Petition Cannot Relate Back Under Child Status Protection Act

In *Gonzalez v. Napolitano, et al.*, No. 09-cv-2481 (S.D. Cal. May 6, 2010) (*Hayes, J.*), the district court ruled that plaintiff's renewed visa petitions cannot "relate back" to his 1995 petitions. The court determined that a renewed visa application cannot relate back to a prior application terminated and revoked under the Child Status Protection Act by the Immigration and Naturalization Service prior to August 6, 2002. The court said that plaintiff must remain in the visa process queue until visa numbers become available.

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■ Central District of California Denies Challenge to DOMA as Applied to Immigration and Nationality Act Brought by Married Same-Sex Couple Seeking Visa Petition

> **The court held that the DOMA, which defines marriage as between a man and a woman, controlled the agency's interpretation of marriage in the INA .**

In *Barragan, v. Holder*, No. 09-cv-8564 (C.D. Cal. April 30, 2010) (*Klausner, J.*), the district court granted the government's motion to dismiss plaintiffs' challenge to U.S. Citizenship and Immigration Services' denial of an alien relative visa petition filed by Luis Barragan on behalf of his same-sex alien partner, to whom he is married under California law. The court held that the DOMA, which defines marriage as between a man and a woman, controlled the agency's interpretation of marriage in the INA and that interpretation did not violate plaintiffs' due process or equal protection rights under Ninth Circuit precedent. The court further determined that the agency's decision was not arbitrary or capricious because it followed the clear mandate of Congress, and did not violate the INA's prohibition on sex discrimination because the decision was based on plaintiffs' sexual orientation rather than their sex.

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INSIDE OIL

Rebekah Raber, Danielle Schuessler, Caitlyn Walters

A warm welcome to our first group of Summer Law Interns: *Alexandra Nunes* (American University, Washington College of Law), *Caitlyn Walters* (George Washington University Law School), *Rebekah Raber*, (Washington University in St. Louis), and *Danielle Schuessler* (Catholic University).

TRAINING CALENDAR

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

■OIL's 16th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC on November 15-19, 2010. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

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

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"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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