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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

German Citizens Prosecuted for Homeschooling Their Children Are Not Eligible for Asylum

In ***Romeike v. Holder***, __ F.3d __, 2013 WL 1955679 (6th Cir. May 14, 2013) (Gilman, Rogers (concurring), *Sutton)*, the Sixth Circuit held that petitioners had "not shown that Germany's enforcement of its general school-attendance law amounts to persecution against them, whether on grounds of religion or membership in a recognized social group."

The petitioners, Uwe and Hannelore Romeike and their children, are German citizens. Rather than send their children to the local public schools, they would prefer to teach them at home, largely for religious reasons.

However, German law requires all children to attend public or state-approved private schools. The Romeikes feared that the public school curriculum would "influence [their children] against Christian values." When the parents chose to homeschool their children, the government imposed fines for each unexcused absence. When the fines did not bring the Romeikes in line, the police went to the Romeikes' house and escorted the children to school. That strategy worked—once. The next time, four adults and seven children from the Romeikes' homeschooling support group intervened, and the police, reluctant to use force, left the premises without the children.

The school district returned to a strategy of imposing fines rather than force. It prosecuted the Romeikes for, and a court found them guilty of, vio-

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Court of Appeals Adverse Credibility Project – Report for 2012

The Adverse Credibility Project was established nine years ago 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 The decisions include opinions, memorandum dispositions, and orders – that is, decisions that are unpublished and published, non-precedent and precedent.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 electronic copies of decisions obtained by OIL paralegals, including the electronic copies of adverse decisions that the Adverse Support Team (headed by Angela Green) obtains.

The data compiled in the table below reflect relevant decisions issued by the courts of appeals in 2012, the most recent year for which complete data are available. The table tallies 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

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Adverse Credibility Project –Report for 2012

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non-credibility related issues are not counted, even though the immigration judge or Board 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 addressing any credibility issues, would not.

This project's results are used to support OIL's efforts to challenge the Ninth Circuit's pre-REAL ID Act adverse credibility rules, and to monitor the effects of the REAL ID Act amendments regarding credibility determinations. The project's results were also used to support those REAL ID Act amendments.

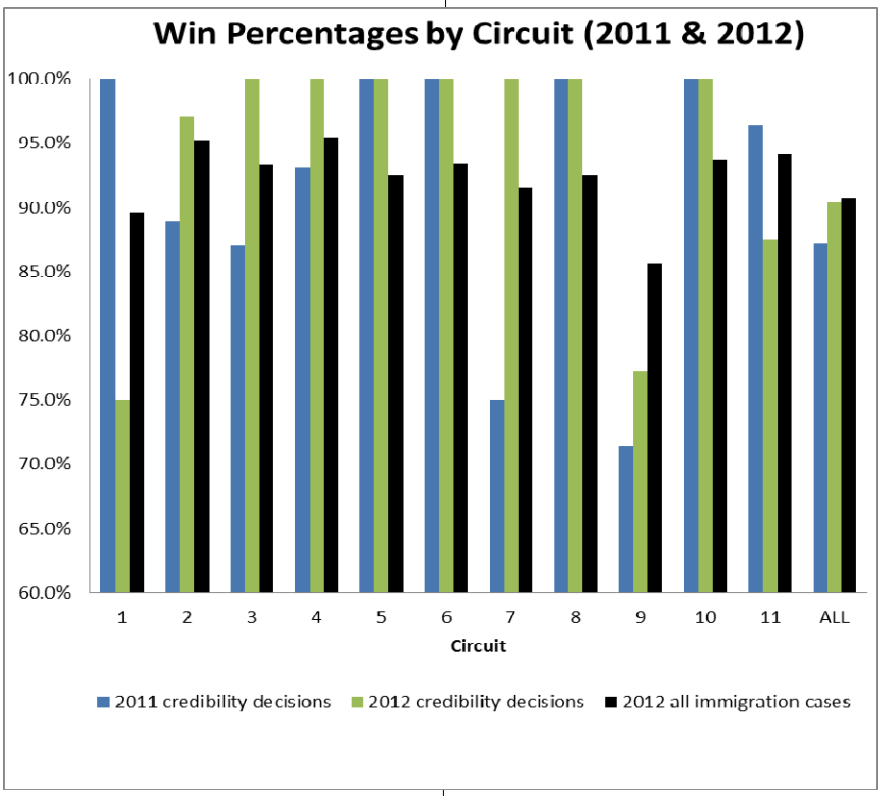
RESULTS

Total number of adverse credibility decisions remains level at almost 300

The chart shows that the number of relevant decisions leveled off in 2012, with the total number of adverse-credibility-related decisions the same at it was in 2011, at 293. By contrast, in 2010, there were 424 adverse-credibility-related decisions. As usual, the Ninth Circuit issued the highest number of decisions addressing the EOIR's credibility findings (101 in 2012, after 112 in 2011). The number of decisions issued by the second-place circuit, the Second Circuit, rose from 45 in 2011 to 68 in 2012. The Sixth Circuit again claimed third place, with 45 decisions in 2012 (all wins) after 33 decisions (also all wins) in 2011. Other circuits in double digits were (with 2011 numbers in parentheses) the Fourth Circuit with 23 (29), the Third Circuit with 19 (31), and the Eleventh Circuit with 16 (28) decisions.

Overall win percentage increases, tops 90%

The overall win percentage in adverse credibility cases in 2012 was 90.4%, up significantly from 84.6% in 2011. This win percentage is comparable to the overall win percentage in 2012 in all asylum cases (90.5%) as well as the 2012 overall win percentage in all immigration cases (90.7%).*



Adverse-credibility-related losses occur only in 1st, 2nd, 9th, and 11th Circuits; 2nd and 9th Circuits experience significant win-rate increases, to 97.1% and 77.2%, respectively

By circuit, 100% of the adverse credibility decisions in the following seven circuits were wins in 2012: the Third (19 cases in that circuit), Fourth (23 cases), Fifth (six cases), Sixth (45 cases), Seventh (four cases), Eighth (four cases), and Tenth (three cases) Circuits.

In other words, we lost adverse credibility decisions only in the First, Second, Ninth, and Eleventh Circuits. Among those four, the lowest win percentages were in the Ninth Circuit, at 77.2%, and the First Circuit, at 75% – however, the latter figure represented one loss out of only four cases. In between were the Second Circuit at 97.1% and the Eleventh Circuit at 87.5%.

Compared with the 2011 statistics, only the First and Eleventh Circuits experienced decreases in win rates in adverse credibility cases, and the First's numbers are based on only four cases in 2011 and three cases in 2010.

On the other hand, the Second, Third, Fourth and Ninth Circuits experienced increases in win rates. After several years of decreases (from 96% in 2009 to 93% in 2010 and then 89% in 2011), the Second Circuit's win rate rebounded to 97.1%. The Third and Fourth Circuits both achieved win rates of 100%. The Ninth Circuit's win percentage, recently hovering around the 70% mark (69% in 2010 and 71% in 2011) made a significant leap to 77.2%.

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2012 Credibility Decisions

Circuits	Wins (%)	Wins (#)	Losses (%)	Losses(#)	Overall win % (all immigr. cases)
1st/pre REAL ID	100.0%	1	0.0%	0	
1st/post REAL ID	66.7%	2	33.3%	1	
1st/total	75.0%	3	25.0%	1	89.6%
2d/pre REAL ID	100.0%	8	0.0%	0	
2d/post REAL ID	96.7%	58	3.3%	2	
2d/total	97.1%	66	2.9%	2	95.2%
3d/pre REAL ID	100.0%	4	0.0%	0	
3d/post REAL ID	100.0%	15	0.0%	0	
3d/total	100.0%	19	0.0%	0	93.3%
4th/pre REAL ID	100.0%	2	0.0%	0	
4th/post REAL ID	100.0%	21	0.0%	0	
4th/total	100.0%	23	0.0%	0	95.4%
5th/pre REAL ID	100.0%	1	0.0%	0	
5th/post REAL ID	100.0%	5	0.0%	0	
5th/total	100.0%	6	0.0%	0	92.5%
6th/pre REAL ID	100.0%	16	0.0%	0	
6th/post REAL ID	100.0%	29	0.0%	0	
6th/total	100.0%	45	0.0%	0	93.4%
7th/pre REAL ID	100.0%	2	0.0%	0	
7th/post REAL ID	100.0%	2	0.0%	0	
7th/total	100.0%	4	0.0%	0	91.5%
8th/pre REAL ID	100.0%	2	0.0%	0	
8th/post REAL ID	100.0%	2	0.0%	0	
8th/total	100.0%	4	0.0%	0	92.5%
9th/pre REAL ID	74.2%	46	25.8%	16	
9th/post REAL ID	82.1%	32	17.9%	7	
9th/total	77.2%	78	22.8%	23	85.6%
10th/pre REAL ID	100.0%	2	0.0%	0	
10th/post REAL ID	100.0%	1	0.0%	0	
10th/total	100.0%	3	0.0%	0	93.7%
11th/pre REAL ID	50.0%	1	50.0%	1	
11th/post REAL ID	92.9%	13	7.1%	1	
11th/total	87.5%	14	12.5%	2	94.2%
TOTAL	90.4%	265	9.6%	28	
Total/pre REAL ID	83.3%	85	16.7%	17	
Total/post REAL ID	94.2%	180	5.8%	11	
win percentage in all asylum cases circuitwide -- 90.5%					
win percentage in all immigration cases circuitwide -- 90.7%					

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Almost 2/3 of decisions are under the REAL ID Act, with a significantly higher win rate

The 2012 decisions were also categorized into whether they involved application of the changes introduced by the REAL ID Act. In 2012, 65.2% of the credibility-related decisions were decided under the REAL ID Act; in 2011, that percentage was 48.1%. The win percentage circuit-wide in 2012 was considerably higher for post-REAL ID Act determinations (94.1%) than for pre-REAL ID Act decisions (83.3%). The corresponding numbers in 2011 were 88.7% and 80.9%. In 2012, the Second Circuit again had the largest number of post-REAL ID Act decisions, with 60 (88.2% of all its credibility decisions) in 2012, after 37 (82.2%) in 2011. The Ninth Circuit was second in absolute numbers with 39 (38.6% of its credibility decisions) and the Sixth Circuit next had 29 (64.4%). The Ninth and the Eleventh Circuits had higher win percentages in post-REAL ID Act cases than in pre-REAL ID Act cases; the Ninth's win percentages were 82.1% and 74.2% respectively and the Eleventh's were 92.9% and 50% (the latter representing two cases, one a win and one a loss).

*The data for the overall win percentage and the win percentage in asylum cases was obtained from the January, 2013, issue of the Executive Office for Immigration Review's Immigration Law Adviser.

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2011 Credibility Decisions

Circuits	Wins (%)	Wins (#)	Losses (%)	Losses (#)	Overall win % (all immigr. cases)
1st/pre REAL ID	100.0%	1	0.0%	0	
1st/post REAL ID	100.0%	2	0.0%	0	
1st/total	100.0%	3	0.0%	0	81.0%
2d/pre REAL ID	100.0%	8	0.0%	0	
2d/post REAL ID	86.5%	32	13.5%	5	
2d/total	88.9%	40	11.1%	5	95.1%
3d/pre REAL ID	88.9%	8	11.1%	1	
3d/post REAL ID	86.4%	19	13.6%	3	
3d/total	87.1%	27	12.9%	4	88.7%
4th/pre REAL ID	87.5%	7	12.5%	1	
4th/post REAL ID	95.2%	20	4.8%	1	
4th/total	93.1%	27	6.9%	2	94.8%
5th/pre REAL ID	--	0	--	0	
5th/post REAL ID	100.0%	6	0.0%	0	
5th/total	100.0%	6	0.0%	0	97.1%
6th/pre REAL ID	100.0%	20	0.0%	0	
6th/post REAL ID	100.0%	13	0.0%	0	
6th/total	100.0%	33	0.0%	0	93.2%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	66.7%	2	33.3%	1	
7th/total	75.0%	3	25.0%	1	80.6%
8th/pre REAL ID	100.0%	1	0.0%	0	
8th/post REAL ID	--	0	--	0	
8th/total	100.0%	1	0.0%	0	92.5%
9th/pre REAL ID	71.0%	66	29.0%	27	
9th/post REAL ID	73.7%	14	26.3%	5	
9th/total	71.4%	80	28.6%	32	81.4%
10th/pre REAL ID	--	0	--	0	
10th/post REAL ID	100.0%	1	0.0%	0	
10th/total	100.0%	1	0.0%	0	90.5%
11th/pre REAL ID	100.0%	11	0.0%	0	
11th/post REAL ID	94.1%	16	5.9%	1	
11th/total	96.4%	27	3.6%	1	93.2%
TOTAL	84.6%	248	15.4%	45	
Total/pre REAL ID	80.9%	123	19.1%	29	
Total/post REAL ID	88.7%	125	11.3%	16	

win percentage in all asylum cases circuitwide -- 86.7%
win percentage in all immigration cases circuitwide -- B 87.2%

2010 Credibility Decisions

Circuit	Wins (%)	Wins (#)	Losses (%)	Losses (#)
1st	100.0%	6	0.0%	0
2d	93.5%	86	6.5%	6
3d	96.7%	59	3.3%	2
4th	86.4%	19	13.6%	3
5th	100.0%	8	0.0%	0
6th	100.0%	28	0.0%	0
7th	100.0%	6	0.0%	0
8th	100.0%	4	0.0%	0
9th	69.3%	104	30.7%	46
10th	100.0%	6	0.0%	0
11th	97.6%	40	2.4%	1
Total	86.3%	366	13.7%	58

win percentage in all asylum cases circuitwide -- 92%

win percentage in all immigration cases circuitwide B 93%

2009 Credibility Decisions

Circuit	Wins (%)	Wins ()#)	Losses (%)	Losses (#)
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 Credibility Decisions

Circuit	Wins (%)	Wins (#)	Losses (%)	Wins (#)
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

Convictions – Modified Categorical Approach

On January 7, 2013, the Supreme Court heard oral argument in ***Descamps v. United States***, a criminal sentencing case in which the question presented is whether the Ninth Circuit was correct in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach. Resolution of the case is expected to implicate the reasoning of *Aguila-Montes* and the "missing element" rule that it overruled. The government's brief was filed on December 3, 2012.

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Asylum – Particular Social Group

On September 27, 2012, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510 (2012), which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Asylum — Corroboration

On December 11, 2012, an *en banc* panel of the Ninth Circuit heard argument on rehearing in ***Oshodi v. Holder***. The court granted a *sua sponte* call for *en banc* rehearing, and withdrew its prior published opinion, 671 F.3d 1002, which declined to follow, as *dicta*, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed *en banc* supplemental briefs.

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Convictions – Modified Categorical Approach

On January 4, 2013, the government filed a petition for panel rehearing in ***Aguilar-Turcios v. Holder***, 691 F.3d 1025 (9th Cir. 2012), in which the Ninth Circuit applied *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), and held that the alien's convictions did not render him deportable. The rehearing petition argues that the court should grant rehearing and hold the case, and decide it when the Supreme Court rules in *Descamps v. United States*. The petition also argues that the court should permit the agency to address other grounds for removal on remand.

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Jurisdiction – Fact Issues regarding CAT

On March 4, 2013, the government filed a petition for *en banc* rehearing in ***Alphonsus v. Holder***, 705 F.3d 1031 (9th Cir. 2013), challenging the court's rule that the jurisdictional bar in INA § 242(a)(2)(C) does not apply to claims under the Convention Against Torture where the application was not denied based on a criminal offense specified in the jurisdictional bar. Judge Graber had dissented from the panel opinion, arguing that the court's rule is wrong as described in her concurring opinion in *Pechenkov v. Holder*, 705 F.3d 444, 449-52 (9th Cir. 2013), that the *Alphonsus* case squarely presents the jurisdictional question, and that the court should take the case *en banc*. The court has since ordered and received a response from *Alphonsus*.

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Convictions – Relating to a Controlled Substance

After oral argument before a panel of the Second Circuit in ***Rojas v. Holder***, No. 12-1227, the court *sua sponte* ordered *en banc* rehearing on January 23, 2013. The case presents the issue of whether a conviction for possession of drug paraphernalia under 35 Pa. Stat. Ann.780-113 (a)(32) categorically is a conviction of a violation of a law of a State relating to a controlled substance under INA § 237(a)(2)(B)(i). Oral argument before the panel suggests that the court's concern is whether possession of drug paraphernalia "relates to" a controlled substance. *En banc* oral argument was heard on May 29, 2013.

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Child Status Protection Act Aging Out

On January 25, 2013, the government filed in the Supreme Court a petition for a writ of certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio, et al., v. Mayorkas, et al***., 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argues that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the Board of Immigration Appeals reasonably interpreted INA § 203(h)(3).

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Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

■ **Second Circuit Holds "Voluntary Returns" Sever Continuous Physical Presence Accrual**

In ***Rosario-Mijangos v. Holder***, __ F.3d __, 2013 WL 2096588 (Walker, *Lynch*, Lojier) (2d Cir. May 16, 2013), the Second Circuit held that two "voluntary returns" were the result of a formal, documented process in which the alien was found inadmissible and therefore severed his continuous physical presence and rendered him ineligible for cancellation of removal.

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■ **Second Circuit Holds Alien's Conviction for Menacing Did Not Render Him Ineligible for NACARA Special Rule Cancellation of Removal**

In ***Reyes v. Holder***, __ F.3d __, 2013 WL 1846493 (2d Cir. May 3, 2013) (Cabranes, Livingston, Furman (by designation)) (*per curiam*), the Second Circuit held that the Board erred by concluding that the petitioner's conviction for menacing in the second degree, under N.Y. Penal Law § 120.14, rendered him ineligible for NACARA special rule cancellation of removal.

Petitioner, a native and citizen of El Salvador, entered the United States without inspection in 1986. Subsequently, petitioner pled guilty to menacing in the second degree, which carries a maximum prison sentence of one year. The IJ found petitioner ineligible based on his conviction but did not address the "petty theft exception." The BIA held that, even if petitioner's conviction fell within the "petty theft exception" under INA § 212, he was still ineligible for cancellation of removal because his conviction rendered him deportable under INA § 237.

The Second Circuit noted that petitioner was never admitted to the United States and, therefore, was not deportable under INA § 237. The court further held that, although petitioner's conviction, assuming it qualified for the petty offense exception, would have rendered him deportable under 8 U.S.C. § 1227(a)(2) had he been an admitted alien, it did not render him inadmissible under 8 U.S.C. § 1182(a)(2).

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■ **Second Circuit Remands for Agency to Define "Purpose or Benefit" Under 8 U.S.C. § 1182(a)(6)(C)(ii)(I)**

In ***Richmond v. Holder***, __ F.3d __, 2013 WL 1799950 (2d Cir. April 30, 2013) (*Calabresi*, Pooler, Raggi), the Second Circuit held that there is no authoritative determination whether avoiding removal proceedings qualifies as an immigration "purpose or benefit" under section 212(a)(6)(C)(ii)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(ii)(I). The court remanded for the BIA to define "purpose or benefit" in the first instance.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds Alien's Maryland Second Degree Assault Conviction Did Not Constitute an Aggravated Felony**

In ***Karimi v. Holder***, __ F.3d __, 2013 WL 1943791 (4th Cir. May 13, 2013) (King (dissenting), Wynn, *Diaz),* the Fourth Circuit held the conduct admitted in the alien's plea colloquy – grabbing a police officer's hand – did not constitute "physical force" under *Johnson v. United States*, 559 U.S. 133 (2010), when the record did not indicate the grabbing "was so forceful as to be capable of causing harm." The court held that although the police officer's statement of probable cause described conduct sufficient to constitute a crime of violence, and may have been properly considered under the modified categorical approach, reliance on the statement would be improper under the court's precedent.

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FIFTH CIRCUIT

■ **Fifth Circuit Concludes Petitioners Could Not Adjust Because They Were Out of "Lawful Status" for More Than 180 Days**

In ***Dhuka v. Holder***, __ F.3d __, 2013 WL 1859084 (5th Cir. May 3, 2013) (Jones, Barksdale, *Southwick*), the Fifth Circuit held that the BIA reasonably concluded that "lawful status" under INA § 245(c) is not synonymous with a "period of stay authorized by the Attorney General" under INA § 212(a)(9), and does not include the period when an application for adjustment of status is pending.

The petitioners, natives citizens of Pakistan, received permission to remain until August 2004 on an employment visa. Petitioners sought adjustment of status in 2003 and DHS denied that application in September 2005. In March 2006, Petitioners filed a second adjustment application that DHS denied because petitioners failed to demonstrate they remained in lawful status from August 2004 to March 2006. The IJ found that petitioners were out of status for at least 180 days and denied their application. The BIA determined that, while petitioners' time out of status pending DHS's decision on their first application would not have prevented their adjustment had that application been approved, the application was denied and nothing transformed petitioners' time out of status into "lawful status" for adjustment purposes.

In upholding the BIA's ruling that a pending application did not confer

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"lawful immigration status," the Fifth Circuit determined, in what appears to be a matter of first impression, that even though the BIA's decision was not designated as precedential under 8 C.F.R.1003.1(g), it would be accorded *Chevron* deference because it "largely relied upon precedential decisions of the BIA, the Supreme court, and this court."

However, the court applied a "more searching review" to the calculation of the 180 days period under INA § 245(k), because the BIA's analysis was "not moored to such precedents." Here, the BIA had relied on a memo from USCIS (Neufeld memo) explaining how to count the 180 days in situations where an alien in valid nonimmigrant status filed for adjustment, but nonimmigrant status expired pending the adjudication of the application.

Neufeld explained that although the expiration of the lawful status would not affect a pending adjustment application, if adjustment were denied, the end of the lawful status period would be when that status had actually expired. Therefore, under Neufeld's interpretation, and as adopted by the BIA, petitioners' status ended in August 2004 and therefore the application filed in March 2006 was a year late.

The Fifth Circuit found "reasonable" the BIA's interpretation, noting that "a different interpretation would extend almost indefinitely the 180-day grace period of being out of lawful status – as indefinite as is allowed by the speed with which a renewed application could be filed after the denial of a previous one."

Therefore, the court agreed that petitioners were ineligible for adjustment of status.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Petitioner Met Burden of Showing He Did Not Make False Claim of United States Citizenship**

In ***Munoz-Avila v. Holder***, __ F.3d __, 2013 WL 1846527 (7th Cir. May 3, 2013) (*Rovner*, Hamilton, Lefkow (by designation)), the Seventh Circuit held that a petitioner who presented someone else's baptismal certificate in an attempt to enter the United States is not inadmissible for having made a false claim of United States citizenship.

The Seventh Circuit held that the mere proffer of a baptismal certificate did not constitute as an assertion of citizenship.

In 1997, the petitioner, a native and citizen of Mexico, attempted to enter the United States by presenting someone else's baptismal certificate to a border guard and subsequently returned to Mexico in lieu of removal proceedings. Petitioner later entered without inspection and filed for adjustment of status based on his marriage to a United States citizen. The IJ found that petitioner was removable both because he was present without admission or parole and because he falsely represented himself as a United States citizen. The BIA affirmed. The BIA later denied petitioner's motion to reopen to apply for asylum because he failed to establish a nexus between any harm and a protected ground.

The Seventh Circuit held that the mere proffer of a baptismal certificate did not constitute as an assertion of citizenship, especially as the government records contained no evidence that petitioner made any oral statements claiming United States citizenship and the certificate only identified "Harbor City" as the place of birth without specifying a state or country. The court, however, upheld the BIA's denial of the later motion to reopen to apply for asylum.

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■ **Seventh Circuit Holds Compelling Evidence of Past Persecution Is the Standard for Judicial Review, Not for the Agency in the First Instance**

In ***Sirbu v. Holder***, __ F.3d __, 2013 WL 2149904 (Bauer, Williams, *Hamilton*) (7th Cir. May 20, 2013), the Seventh Circuit granted the aliens' petition for review and remanded the case for further proceedings. The IJ found that the facts did not compel a finding of past persecution. The court determined that the BIA had failed to note the error and relied on case law that applied the compelling evidence standard. Without reaching the merits, the court expressed confidence that being beaten "to the point of losing consciousness and suffering a concussion while in police custody" was sufficient to support a finding of persecution.

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■ **Seventh Circuit Holds that the BIA Inaccurately Represented the State Department Report and Failed to Consider Relevant Evidence**

In ***Chen v. Holder***, 715 F.3d 207 (7th Cir. 2013) (*Posner*, Kanne, Williams), the Seventh Circuit held that the BIA misinterpreted the Department of State's 2007 Country Profile in determining that petitioner did not establish her two United States-born children would be counted against China's family planning law.

The petitioner, a Chinese citizen from the Fujan province, is the mother

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of two children born to her in the United States. She sought asylum on the ground that she is likely to be forcibly sterilized if she returns to China. Petitioner testified that shortly after the birth of the second child the local authorities in the Chinese village from which she comes—who may have learned of the birth from her parents' having, as is customary, thrown a party to celebrate it — ordered her (via a letter to her father) to report within five days for sterilization; and that when she didn't report, the authorities revoked her village registration. Not being registered, she would if she returned to China be denied various government benefits, such as health care, and she might also face obstacles to employment. She further testified that the fact that her children, having been born in the United States, were U.S. citizens would not spare her from having to be sterilized for having violated China's one-child policy, since she and her husband are not U.S. citizens.

The IJ, and following an appeal, the BIA denied petitioner's application on the ground that she has no well-founded fear of sterilization.

The court opined that it had found no indication that the BIA "had attempted to marshal the considerable literature (academic, journalistic, diplomatic, judicial) on the nature and enforcement of the policy — that it has tried in other words to construct an empirical basis, however unavoidably crude rather than precise, for its skeptical attitude toward these applicants."

The court criticized the BIA, not only for ignoring portions of the Department of State Country Reports, but also for imposing "a pinched conception of 'authentication.'" The court explained that the BIA's regulations, though otherwise similar to Fed. R. Evid. 902, contain language implying that the method they specify is the only permissible method of establishing the admissibility of a foreign official document." However, said the court, "it's not" as held in *Liu v. Ashcroft*, 372 F.3d 529, 532–33 (3d Cir. 2004). In particular, the court pointed out that one of the documents that the BIA had refused to consider had been posted on a Fujian government website. The court said that a "document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself."

The court said that a "document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself."

Accordingly, the court concluded that the "combination of the BIA's inaccurate representation of the report on which it so heavily relied, disregard of other evidence, and erratic treatment of the documents submitted by the petitioner deprives the BIA's order denying asylum of a rational foundation," and therefore the order was vacated and the case remanded to the BIA.

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EIGHTH CIRCUIT

■ **Eighth Circuit Confirms that Criminal Alien Bar Forecloses Factual Challenges to Convention Against Torture Application**

In ***Gallimore v. Holder***, __ F.3d __, 2013 WL 2219858 (8th Cir. May 22, 2013) (*Riley*, Melloy, Shepherd), the Eighth Circuit confirmed again that it does not have jurisdiction to consider factual challenges to the denial of a CAT application by an alien convicted of an aggravated felony.

The petitioner, a Jamaican citizen, was sentenced to a term of imprisonment not to exceed ten years for burglary in the second degree. An IJ ordered him removed as an alien who had been convicted of an aggravated felony. The IJ also denied petitioner's request for CAT protection because he had failed to show that the mistreatment he had received amounted to torture and or that it was by or at the acquiescence of the Jamaican government. The BIA adopted and affirmed the IJ's decision.

In declining to exercise jurisdiction, the Eighth Circuit cited its recent precedent in *Brikova v. Holder*, 699 F.3d 1005 (8th Cir. 2012), where it had held that the criminal alien bar "precludes judicial 'review [of] any final order of removal,' including applications for CAT protection, 'against an alien who is removable by reason of having committed' an aggravated felony."

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■ **Eighth Circuit Rejects Asylum Claim Because Petitioners Could Relocate to Escape Religious Discrimination**

In ***Alavez-Hernandez v. Holder,*** 714 F.3d 1063 (8th Cir. 2013) (Murphy, *Bye,* Shepherd), the Eighth Circuit agreed with the BIA that threats, physical attacks, and deprivation of access to necessities did not rise to the level of persecution because there was no threat to the petitioners' life or freedom.

The petitioners claimed they had been persecuted in Mexico for their religion, nationality, and membership in a particular social group. They specifically alleged Catholics in their home village of San Miguel Aloapam (the Village) had persecuted them, believing they and their

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families were Evangelical Christians. Petitioners eventually left the Village and relocated to Oaxaca City where they claimed their families' ethnicity caused them to live in poverty.

The IJ denied the applications for withholding of removal, concluding neither the attacks in the village nor the economic hardship in Oaxaca City had been severe enough to constitute persecution. The IJ also concluded the couple could avoid any threat of future persecution by relocating to Oaxaca City. On appeal the BIA agreed with the IJ's conclusion.

The Ninth Circuit agreed with the BIA that petitioner's various proposed social groups were not particular because they described a large and disparate population.

Although the court noted that the BIA's reasoning was "flawed" because it had conflated the analysis of past persecution with that of reasonable relocation, it found that the "the record weighs against concluding the conditions in the Village were severe enough to constitute persecution." The court further noted that the petitioners previously had avoided religious discrimination by relocating within Mexico and could avoid future persecution in the same manner.

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NINTH CIRCUIT

■ **Ninth Circuit Holds Lack of Adequate Healthcare System Is Not Persecution on Account of a Protected Ground**

In ***Mendoza-Alvarez v. Holder***, __ F.3d __, 2013 WL 1846616 (9th Cir. May 3, 2012) (Tallman, M. Smith, Rosenthal (by designation)) (*per curiam*), the Ninth Circuit affirmed the Board's reversal of a grant of withholding of removal to an alien who feared persecution in Mexico because he would not have access to medication for either diabetes or a depressive disorder.

The petitioner entered the United States in 1994 and was later diagnosed with diabetes. The IJ denied petitioner's asylum application as untimely but granted him withholding of removal because of the "cumulative threat to his survival from poverty and the limiting effects of his disabilities on his employability, access to housing, necessary lifesaving medications, and physical and mental health treatment." On appeal, the BIA reversed and held that petitioner failed to demonstrate a clear probability of future persecution or that his particular social group, "insulin-dependent persons with mental-health problems," was cognizable.

The Ninth Circuit agreed with the BIA that petitioner's various proposed social groups were not particular because they described a large and disparate population. The court further concluded that petitioner failed to demonstrate a nexus between any social group and the harm he feared as a result of inadequate healthcare.

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■ **Ninth Circuit Rejects Third Step of *Silva-Trevino* Analysis**

In ***Olivas-Motta v. Holder***, __ F.3d __, 2013 WL 2128318 (9th Cir. May 17, 2013) (Hug, Kleinfeld (concurring), *Fletcher*), the Ninth Circuit disagreed with the Attorney General's decision in *Matter of Silva-Trevino,* 24 I&N Dec. 687 (AG 2008), and held that a crime involving moral turpitude is a generic crime whose description is complete unto itself, such that "involving moral turpitude" is an element of the crime and an IJ is limited to the record of conviction to determine whether an alien was "convicted of" such a crime.

The petitioner entered the United States when he was ten days old. At the time of his hearing before the IJ he was thirty-three years old, married, and a lawful permanent resident. In 2003, petitioner was convicted of facilitation of unlawful possession of marijuana under Arizona law. In 2007, he pled guilty to "endangerment" under Arizona law. Petitioner was then charged with removal under INA § 237(a)(2)(A)(ii), which provides that an alien who has been "convicted of two or more crimes involving moral turpitude . . . is deportable."

At the removal hearing, the government submitted the charging document, the written plea agreement for petitioner's endangerment conviction, and three police reports. Relying on the police reports pursuant to *Silva–Trevino*, the IJ concluded that petitioner had been "convicted of" a CIMT and was therefore removable. She denied cancellation of removal. The BIA dismissed the appeal also based on *Silva-Trevino*.

In disagreeing with *Silva-Trevino*, the court made the following three points. First, the court said that clarification of the CIMT definition was irrelevant to the question whether evidence outside the record of conviction can be used to determine whether an alien has been "convicted of" a CIMT. "There is nothing in the substantive definition of a CIMT, in either the BIA's definitions or the Attorney General's distillation, that permits an IJ to use a different procedure than it uses for other crimes in determining whether

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an alien has been convicted of such a crime," said the court.

Second, the court said that *Silva-Trevino's* definition of "convicted of" is erroneous because it "allows an IJ not only to consider the crimes of which an alien has been convicted, but also to consider crimes he may have committed but of which he was not convicted."

Silva-Trevino's definition of "convicted of" is erroneous because it "allows an IJ not only to consider the crimes of which an alien has been convicted, but also to consider crimes he may have committed but of which he was not convicted."

Third, the court said that with respect to the generic crime of "crime involving moral turpitude," *Nijhawan v. Holder*, 557 U.S. 29 (2009), compelled the conclusion that moral turpitude is an element of that crime. Therefore an adjudicator can consider only the conviction itself, and not any underlying conduct.

Accordingly, the Ninth Circuit joined the Third, Fourth, and Eleventh Circuits that the relevant provisions of the INA are not ambiguous and therefore the court did not owe *Chevron* deference to the Attorney General's opinion in *Silva-Trevino.* The Seventh and Eighth Circuits both permit the IJ to consider evidence outside the record of conviction to determine whether an alien has been convicted of a CIMT.

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■ **Ninth Circuit Holds BIA Erred by Considering Incidents of Mistreatment in Isolation in Determining the Persecutor, and by Focusing on the Mexican Government's Willingness, Not Ability, to Control Los Zetas**

In ***Madrigal v. Holder***, __ F.3d __, 2013 WL 1983882 (9th Cir. May 15, 2013) (*Fisher*, Fletcher, Dearie (by designation)), the Ninth Circuit held that the BIA erred by concluding that incidents occurring after the petitioner left the Mexican military did not rise to the level of persecution.

The petitioner joined the Mexican military at age 18. He was subsequently assigned to a military base in the state of Jalisco, where he spent the next two-and-a-half years conducting anti-drug activities such as destroying marijuana and poppy flower crops. In mid–2007, 10 members of the Los Zetas drug cartel were arrested, including at least one high-ranking member. Petitioner was not involved in the arrest, but he assisted in transferring the arrestees from the small town where they were apprehended to civil authorities in Guadalajara. The transfer was broadcast on national television because of the importance of some of the arrestees. The national broadcast provided a clear view of petitioner's face.

Shortly after, he was kidnapped by two men believed to be from Los Zetas and after receiving a beating was told to return to his military base and tell the commanding officer to release the arrestees or else all the people responsible for the arrest would be killed. Petitioner conveyed the message to his commander, who did not believe the story, and did not release the arrestees. After petitioner completed a three-month mission to destroy marijuana crops, he learned that all the soldiers who had arrested the 10 members of Los Zetas had been beheaded while on leave. Fearing for his safety, petitioner decided to leave the army. Although petitioner moved to another town, he testified that people believed to be with Los Zetas were looking for him and, on one occasion, he was shot at from a passing car while he was walking down the street in his new town.

The court initially upheld the BIA's conclusion that petitioner was not persecuted "on account of" an imputed political opinion, and that the mistreatment suffered while he was in the army could not support a claim of past persecution on account of a particular social group because he was not a former soldier at that time and his particular social group is comprised of only former soldiers. However, the court further determined that for the shooting and threats that petitioner experienced after leaving the military, if Los Zetas were responsible, the record compelled the conclusion that, even if partially motivated by revenge, Los Zetas' desire to intimidate "former Mexican army soldiers who participated in anti-drug activity" was "another central reason" for the persecution. The court remanded for the BIA to reconsider whether petitioner met his burden of establishing that Los Zetas were responsible where the "totality of circumstances" provided evidence to support his claim.

The court also remanded for the BIA to consider whether the Mexican government is able, rather than just willing, to control Los Zetas and whether "state and local" officials, as distinguished from the federal government, would likely acquiesce in any future torture. In its remand, the court noted that "an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that 'a public official' would so acquiesce."

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■ **Ninth Circuit Denies EAJA Fees Because Government's Position Was Substantially Justified**

In ***Sargsyan v. Holder***, __ F.3d __, 2013 WL 1912465 (9th Cir. May 9, 2013) (Farris, Noonan

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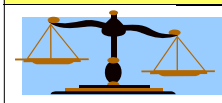

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(concurring), Bybee), the Ninth Circuit denied the alien's request for EAJA fees because the government's defense of the agency's adverse credibility finding was substantially justified. Judge Noonan concurred but explained that he regretted the result because it deprived the alien's attorney of remuneration for her services.

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■ **Ninth Circuit Defers to the BIA's Decision in *Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992)**

In ***Lawrence v. Holder***, __ F.3d __, 2013 WL 2159044 (9th Cir. May 21, 2013) (*Fernandez*, Rawlinson, Bybee), the Ninth Circuit held that the term "admissions" in former section 212(c) of the INA's effective date provision refers to the date the alien seeks a waiver under former section 212(c), not the date that the alien was admitted as a lawful permanent resident.

The petitioner, a citizen of Panama, was admitted in 1987 as a lawful permanent resident. On May 12, 1992, the State of California charged him with armed robbery and kidnapping. He pleaded guilty and was sentenced to nine years imprisonment. He served five years and seven months of his term and was released on December 16, 1997. A few weeks before his release, he was placed in removal proceedings on the basis that he had been convicted of an aggravated felony and a crime involving moral turpitude. On October 5, 1998, the IJ found petitioner ineligible for asylum and withholding of removal because he had been convicted of an aggravated felony particularly serious crime, and determined that he lacked jurisdiction over petitioner's CAT claim.

The BIA remanded the case to the IJ to consider the CAT issue. On remand, petitioner applied for a waiver under § 212(c) for the first time on March 2, 2004. On March 13, 2006, the IJ pretermitted petitioner's application for § 212(c) relief on the ground that he had been convicted of an aggravated felony for which he had served more than five years in prison and thus was barred from seeking a § 212(c) waiver. The BIA adopted and affirmed the IJ's decision on November 13, 2007, noting that the aggravated felony bar to a § 212(c) waiver applied to applications for a waiver filed after November 29, 1990, regardless of the alien's initial admission date to the United States.

The court rejected petitioner's contention that, because he had been admitted as an LPR on or about June 16, 1987, the felony bar did not apply to him. The court deferred to the Attorney General's regulations promulgated on October 3, 1991 (56 *Fed. Reg.* 50,033) and *Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992), where the Attorney General determined that "the statutory bar to section 212(c) relief shall apply only to those applications submitted after November 29, 1990."

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■ **Ninth Circuit Holds that Individual Born in the Philippines in 1931 Did Not Acquire Citizenship from His United States Citizen Father**

In ***Friend v. U.S. Att'y Gen.***, __ F.3d __, 2013 WL 1799993 (9th Cir. April 30, 2013) (*Watford*, Berzon, Carr (by designation)), the Ninth Circuit affirmed the district court's grant of summary judgment for the government on the plaintiff's citizenship claim.

The plaintiff claimed he was born out of wedlock to a United States citizen father in 1931 in the Philippines, which was then an outlying United States possession. Previously, the court rejected Plaintiff's 1990 attempt to obtain recognition of his citizenship status because plaintiff's father had never resided in the United States, as required by the statute in effect in 1931. Plaintiff filed a second application and argued that his claim was governed by a provision of the Nationality Act of 1940 that applied retroactively to children born out of wedlock. The district court granted the government's motion for summary judgment.

The Ninth Circuit held that plaintiff did not acquire citizenship under the Nationality Act of 1940, because that law did not retroactively apply to him.

The Ninth Circuit held that plaintiff did not acquire citizenship under the Nationality Act of 1940, because that law did not retroactively apply to him. The court further held that, even if the law were retroactive, the plaintiff did not meet the legitimation requirement for children born out of wedlock because he was not legitimated as a minor.

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TENTH CIRCUIT

■ **BIA Faulted for Ignoring Evidence Related to Petitioner's Political Opinion and Past Persecution**

In ***Karki v. Holder***, __ F.3d __, 2013 WL 1799994 (10th Cir. April 30, 2013) (Kelly, *McKay*, O'Brien), the Tenth Circuit reversed the Board's denial of a Nepalese petitioner's applications for relief and protection because the Board ignored testimony showing the alien was targeted on account of his political opinion.

In 2007, petitioner entered the United States and subsequently overstayed his visitor's visa. Peti-

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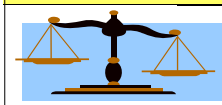

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tioner requested asylum and claimed that he had been persecuted by Maoists because they opposed both his financial development products and his support for the Nepali Congress Party. The IJ found (1) that petitioner failed to demonstrate the requisite nexus because he was only targeted for extortion and recruitment, and (2) that any harm petitioner suffered did not rise to the level of persecution. The BIA agreed.

The Tenth Circuit concluded that substantial evidence did not support the agency's nexus finding because the agency disregarded evidence that Maoists routinely harassed petitioner about his relief work and told him to stop talking about democracy. The court further held that the agency erred in discounting evidence of attacks against petitioner's colleagues and relying on a lack of permanent physical harm to find that petitioner was not persecuted. Finally, the court rejected the agency's denial of CAT protection, vacated the agency's decision, and remanded the case.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds That There Is No Duress Exception to the Material Support Bar

In ***Alturo v. U.S. Att'y Gen.,*** __ F.3d __, 2013 WL 2157749 (11th Cir. May 21, 2013) (Tjoflat, Carnes, Pryor) (*per curiam*), the Eleventh Circuit held that petitioner had provided material support to a terrorist organization designated by the Department of State, and therefore was ineligible for immigration reliefs under INA § 212(a)(3)(B)(iv)(VI) even if he had acted under duress.

The BIA had concluded that petitioner was statutorily ineligible for asylum, withholding of removal, and CAT relief because he had provided material support to a designated terrorist organization, the United Self–Defense Forces of Columbia (AUC), in the form of six annual payments of $300 in war taxes, totaling $1,800. The BIA alternatively found that petitioner's claims for relief failed on the merits because he did not establish past persecution or a well-founded fear of future persecution on account of a statutorily protected ground, or that he would be tortured by or with the acquiescence of Colombian authorities upon return to his native country.

"[W]e are constrained by the language Congress chose to use and the BIA's reasonable construction of that language. It is up to Congress, not the courts, to correct any perceived inequity."

The court held that the BIA had reasonably concluded that the statutory bar does not exempt material support provided to a terrorist organization under duress. "As the BIA aptly noted, the material support bar contains no express duress exception, which stands in marked contrast to a neighboring provision in the INA that includes an explicit involuntariness exception for aliens who have been affiliated with a totalitarian party," explained the court. The court also concluded that the fact the AUC was demobilized in 2006 did not render the material support bar inapplicable because at the time petitioner made the payments, the AUC was still active.

The court observed that "[w]hile the result might reasonably be viewed as harsh, we are constrained by the language Congress chose to use and the BIA's reasonable construction of that language. It is up to Congress, not the courts, to correct any perceived inequity."

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■ Eleventh Circuit Vacates Prior Decision on Own Motion and Remands Equitable Tolling Issue to the BIA

In ***Ruiz-Turcios v. U.S. Att'y Gen.,*** __ F.3d __, 2013 WL 2262470 (11th Cir. May 24, 2013) (*Barket*, Martin, Fay), the Eleventh Circuit vacated its prior decision issued on rehearing and entered a new decision. The panel had vacated its initial decision denying the alien's petition for review and issued a new decision granting the petition and remanding to the BIA for further proceedings.

The panel applied its recent *en banc* decision in *Avila-Santoyo v. U.S. Att'y Gen.*, __ F.3d __ , 2013 WL 1499419 (11th Cir. 2013) (*en banc*) (motion-to-reopen deadline is non-jurisdictional and subject to equitable tolling), and concluded that the motion to reopen filing deadline was not jurisdictional, and that both the filing deadline and numerical bar were subject to equitable tolling. In its May 24, 2013 decision, issued on its own motion, the panel held that whether or to what extent the numerical bar was subject to equitable tolling was a determination the BIA was entitled to make in the first instance. It ordered proceedings remanded so that the BIA could render the necessary interpretation of the motion-to-reopen provision.

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DISTRICT COURTS

■ **Southern District of Indiana Holds State Law Determines Whether Marriages and Divorces Are Valid for Immigration Purposes**

In ***Fall v. Napolitano***, Mo. 12-cv-1231 (S.D. Ind. May 9, 2013) (Magnus-Stinson, J.), the district court granted the government's motion for summary judgment, holding that the BIA correctly relied upon Indiana divorce laws to determine that the alien failed to enter into a legal marriage to a United States citizen because her foreign divorce was not valid. The court recognized that the divorce might have been valid for immigration purposes if it had taken place in a state with different laws.

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■ **Southern District of Florida Denaturalizes United States Citizen who Obtained his Naturalization by Concealing his Participation in a Conspiracy to Import 285 Kilograms of Cocaine**

In ***United States v. Gomez***, No 12-cv-20802 (S.D. Fla. May 15, 2013) (Cooke, J.), the district court for the Southern District of Florida granted the government's motion for summary judgment and revoked defendant Jose Gomez's certificate of naturalization. The court determined that Gomez, who conspired to import 285 kilograms of cocaine before naturalizing, illegally procured his citizenship because he lacked the good moral character necessary to naturalize.

The court rejected Gomez's defense under *Padilla v. Kentucky*, 559 U.S. 356 (2010), that the government could not rely on his conviction because he was never informed of the denaturalization consequences of his guilty plea. The court noted that *Padilla* is not retroactive, but even if it were, it would not apply because Gomez is unable to show that "but for" his counsel's alleged ineffective assistance he would not have pleaded guilty.

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■ **Northern District of Georgia Grants Summary Judgment in Favor of Government Because Alien Failed to Meet Minimum Educational Requirements for EB-2 Visa**

In ***Viraj, LLC v. Holder***, No. 08-72040 (N.D. Ga. May 9, 2013) (Story, J.), the district court for the Northern District of Georgia granted the Government's motion for summary judgment in a suit challenging the denial of an EB-2 visa. The court first dismissed the beneficiary as a party for lack of standing. The court then concluded that USCIS's administrative denial of the EB-2 visa was not arbitrary and capricious because the alien failed to demonstrate that a three-year Master's program in India was equivalent to a Master's program in the United States. Rather, the Indian degree was equivalent to a Bachelor's degree in the United States. Finally, the court dismissed the alien's due process claims because there was no evidence of discrimination.

The court concluded that USCIS's administrative denial of the EB-2 visa was not arbitrary and capricious because the alien failed to demonstrate that a three-year Master's program in India was equivalent to a Master's program in the United States.

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■ **Central District of California Grants Summary Judgment in Favor of Government in Adjustment of Status Case**

In ***Badillo v. Hazuda,*** No. 2:12-cv-03846 (C.D. Cal. May 29, 2013) (Lew, S.J.) the district court granted the government's motion for summary judgment in a case involving plaintiffs' eligibility for an adjustment of status under 8 U.S.C. § 1255(i). Plaintiff argued that his extraordinary worker visa application was "approvable when filed" in 1998 and therefore makes him eligible for section 1255 (i) adjustment as a "grandfathered" alien. The court held that the regulation defining "approvable when filed" was neither *ultra vires* nor retroactive. The court further held that United States Citizenship and Immigration Services reasonably concluded that plaintiff was not "extraordinary" in 1998 due to his lack of experience and other indicia of extraordinary skill.

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■ **Eastern District of Michigan Dismisses APA Claim to Review Adverse Information**

In ***Mullaj v. Napolitano***, No. 12-cv-14309 (E.D. Mich. May 31, 2013) (Cleland, J.), the district court dismissed plaintiffs' complaint asking the court to USCIS to produce the information it relied upon in issuing a notice of intent to deny a spousal petition. Finding USCIS's notice of intent to deny the spousal petition did not constitute a reviewable final agency action, the court dismissed plaintiffs' APA claims. Additionally, the court found that no regulation required USCIS to produce all of the underlying documents or entitled the plaintiffs to more than a summary of the adverse information considered by USCIS.

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We encourage contributions to the Immigration Litigation Bulletin

This Month's Topical Parentheticals

ASYLUM

■ ***Madrigal v. Holder,*** __ F. 3d __, 2013 WL 1983882 (9th Cir. May 15, 2013) (holding that: i) conjecture that threats and shooting attempt by unknown persons against former member of Mexican military were on account of revenge by drug cartel must presumed to be the motive, where this is plausible and alien has shown no other reason for the threats, and on remand DHS must refute by showing another plausible motive; ii) depending on the evidence of motive on remand, drug-cartel revenge against former member of military for arrests during his military service may constitute persecution on account of membership in a PSG of "former Mexican army soldiers who participated in anti-drug activity;" and iii) holding that agency erred in denying asylum on ground that Government of Mexico is willing to control drug cartel, because agency failed to decide if government is "able" to control the cartel)

■ ***Mendoza-Alvarez v. Holder,*** __ F.3d __, 2013 WL 1846616 (9th Cir. May 3, 2013) (asylum case holding that: i) Mexico's inadequate health care system which does not provide free medication for diabetes or mental illness is not harm inflicted because of membership in a PSG; ii) inconsistent alleged PSG's of "all disabled persons," "all insulin-dependent diabetics," or "all insulin-dependent diabetics who suffer from mental illnesses" in Mexico do not meet the "particularity requirement," because claimed groups are not "discrete," "include large numbers of people with different conditions and circumstances," and "sweep up a large and disparate population"; iii) "if someone suffers harm on grounds that are associated with group membership but also apply to many others, then the harm is not because of membership in a [PSG] and there is no basis to conclude that group members were intentionally targeted")

■ ***Karki v. Holder,*** __ F. 3d __, 2013 WL 1799994 (10th Cir. Apr. 30, 2013) (asylum case rejecting agency's ruling that threats and acts by Maoists in Nepal were on account of extortion and recruitment, rather than because of male applicant's political opinion, where IJ and BIA ignored direct statements by Maoists to applicant to stop advocating "democracy" while doing economic development work; reversing the conclusion that applicant did not establish past "persecution," where he experienced Maoist threats and harassment, a beating causing hospitalization; the bombing of jeep in which the applicant was supposed to be riding, and Maoist seizure of land. Also reversing conclusion of no well-founded fear or clear probability of future persecution, given the evidence above plus evidence that Maoists bombed an uncle's home killing the aunt, and there was a phone threat the next day to do the same to applicant and his family)

■ ***Matter of B-R-,*** 26 I.&N. Dec. 119 (BIA May 3, 2013) (holding that an alien who is a citizen or national of more than one country but has no fear of persecution in one of those countries does not qualify as a "refugee" under section 101(a)(42) of the INA, and is ineligible for asylum)

■ ***Sirbu v. Holder,*** __ F. 3d __, 2013 WL 2149904 (7th Cir. May 20, 2013) (remanding denial of asylum for error in applying an incorrect standard to determine if applicant established past "persecution"; the correct standard is whether the alien has actually shown past persecution, not whether the evidence compels a finding of past persecution, which is the standard applied by court on judicial review)

■ ***Chen v. Holder***, __ F.3d __, 2013 WL 1908017 (7th Cir. May 9, 2013) (reversing and remanding BIA's denial of asylum based on woman's claim of future forced sterilization in Fujian due to birth of two US children, holding that that BIA's decision fails to meet the agency's responsibility of reasoned administration of asylum law, because it relied heavily and selectively on parts of the 2007 DOS report negating forced sterilization in China that are called into question by court's independent research and reliance on selected excerpts from over 25 extra-record internet, journal, and newspaper articles, reports, references to Chinese regulations, and five extra-record DOS or CCEE (Congressional-Executive Commission) reports that were not presented to nor considered by the BIA)

■ ***Romeike v. Holder,*** __ F.3d __, 2013 WL __ (6th Cir. May 14, 2013) (holding that German law requiring, under penalty of prosecution, compulsory attendance at public schools, does not on its face single out any protected group, and that petitioners, who wanted to homeschool their children, failed to show that they were singled out for prosecution on account of a protected ground)

■ ***Alavez-Hernandez v Holder,*** __ F.3d __, 2013 WL 1891337 (8th Cir. May 8, 2013) (affirming denial of withholding of removal for Mexican applicants claiming past persecution in their home village in Mexico for being suspected by Catholic villagers of being Evangelicals, holding that past harassment and assaults by villagers did not constitute past persecution because there were no serious injuries; denial of services and access to water by villagers did not constitute past persecution because evidence showed this was not life-threatening; and applicants did not establish future persecution is more likely than not since were able to reasonable relocate to another city in Mexico and reasonably make a living there)

■ ***Javed v. Holder,*** __ F.3d __, 2013 WL 2278597 (1st Cir. May 24, 2013) (reversing denial of withholding for a man from Pakistan claiming past and future persecution by a lo-

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cal political party in his home village associated with a national party in Pakistan, where: i) applicant's testimony claiming that he experienced "threats of murder" and was "beat up. . .many times" compels a conclusion of past "persecution" entitling him to a presumption of future persecution; and ii) applicant's explicit testimony that as a result of his representation as attorney of a client, the local political group "thought that [the applicant] was affiliated with [an opposing political] group" and "thought of [him] as their enemy" compels the conclusion that the threats and beating were are "on account of" imputed political opinion, not simply because of applicant's involvement in litigation)

■ ***Bitsin v. Holder,*** __ F. 3d __, 2013 WL __ (7th Cir. May 31, 2013) (holding that under the REAL ID Act, court has no jurisdiction to review alien's claim that his facts established "extraordinary circumstances" excusing untimely filing of an asylum application, because like a "changed circumstances" claim, this is an application of a legal standard to a given set of facts, not a "constitutional claim or question of law;" further holding that the male withholding applicant from Bulgaria: i) failed to show a clear probability of persecution on account of being the son of a witness who testified against corrupt businessmen, where the applicant was never personally threatened or harmed; and ii) failed to show the government of Bulgaria is unable or unwilling to protect against the businessmen, where the applicant's father has been in a witness protection program for several years; declining to decide if "persons who testified against [the businessmen] and their family members" is a PSG, or whether the father's testimony against the businessmen constitutes a "political opinion" imputed to the applicant in light of petitioner's failure to show clear probability of future persecution and conduct that the government is unable or unwilling to control)

CANCELLATION

■ ***Rosario-Mijangos v. Holder,*** 2013 WL 2096588 (2d Cir. May 16, 2013) (holding that two "voluntary returns" of petitioner to Mexico were the result of a formal, documented process in which petitioner was found inadmissible and therefore severed his continuous physical presence and rendered him ineligible for cancellation of removal)

■ ***Matter of Montoya-Silva,*** 26 I&N Dec. 123 (BIA 2013) (holding that a parent's lawful permanent resident status and residence in the United States cannot be imputed to an unemancipated minor for purposes of establishing the child's eligibility for cancellation of removal under INA § 240A(a))

■ ***Reyes v. Holder,*** 2013 WL 1846493 (2d Cir. May 3, 2013) (concluding that an unadmitted alien who is not inadmissible under INA § 212(a)(2) is not barred from NACARA cancellation as "deportable" under INA § 237 even though his conviction falls within § 237)

■ ***Dhuka v. Holder,*** __ F. 3d __, 2013 WL 1859084 (5th Cir. May 3, 2013) (deferring to BIA's interpretation of 8 U.S.C. § 1255(c) and holding that petitioners were ineligible to adjust because they were out of "lawful status" for more than 180 days; reasoning that "lawful status" under Section 1255(c) is not synonymous with a "period of stay authorized by the Attorney General" under 8 U.S.C. § 1182 (a)(9), and does not include the period when an application for adjustment of status is pending)

CITIZENSHIP

Friend v. Holder, __ F. 3d __, 2013 WL 1799993 (9th Cir. Apr. 30, 2013) (holding that plaintiff, who was born out of wedlock to a U.S. citizen father in 1931 in the Philippines, which was then an outlying U.S. possession; did not acquire citizenship under the Nationality Act of 1940, first, because that law did not retroactively apply to him, and even if the law were retroactive, plaintiff did not meet the legitimation requirement for children born out of wedlock)

■ ***Edobor v. Onyango***, __ F. Supp.2d __, 2013 WL 1932806 (N.D. Georgia May 10, 2013) (holding that complaint under INA § 336(b) vests the court with exclusive jurisdiction over a plaintiff's naturalization application that cannot be rendered moot by a subsequent denial of the application by USCIS during the pendency of the litigation)

■ ***Munoz-Avila v. Holder,*** __ F.3d __, 2013 WL 1846527 (7th Cir. May 3, 2013) (holding that petitioner met his burden of demonstrating he was not inadmissible for falsely representing himself to be a U.S. citizen because the baptismal certificate was not sufficient to constitute a representation of U.S. citizenship, and the government forms included no evidence that any such representation was made or perceived)

CRIMES

■ ***Macias-Carreon v. Holder,*** __ F.3d __, 2013 WL 2350477 (9th Cir. May 30, 2013) (holding that a violation of Cal. Health & Safety Code § 11359 (possession of marijuana for purposes of sale) is categorically a crime "relating to a controlled substance" under the INA)

■ ***United States v. Diaz-Calderone,*** __ F. 3d __, 2013 WL 2247985 (11th Cir. May 23, 2013) (holding in a sentencing enhancement case that the district court correctly found the statute of conviction (battery upon a pregnant woman) divisible and properly considered a police arrest affidavit where the record of conviction contained a recording of the change-of-plea proceeding in which the defendant admitted guilt and

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Excerpts of Remarks by Attorney General Eric Holder at Naturalization Ceremony Held at the Department of Justice's Great Hall on May 28, 2013

This is an extraordinary occasion – and I'm so grateful for the chance to share it with you. Although the individual journeys that brought you to this moment began in 34 countries around the world – and although, in many cases, you've had to cross vast oceans and great cultural divides to be here – as of this morning, every one of you has earned the right to call this country your home. All of you have become indispensable parts of your communities and your new nation. No matter your profession, your background, or your reason for immigrating to the United States – each of you has come to embody the very best of what it means to be an American. And you're already living up to your newfound obligations as citizens by strengthening our country, displaying exemplary leadership, and making meaningful contributions.

Among the new citizens in this crowd today, we welcome a World Bank senior advisor, a community outreach professional, and a salesperson – all of whom are members of the same family from Pakistan. We welcome a doctor from Syria who has devoted his life to helping others, and a filmmaker from Kosovo who works hard to bring compelling stories to the big screen. We welcome a linguist from Afghanistan who risked his life in order to work with the U.S. military to improve – and rebuild – the country of his birth. And we welcome a nonprofit executive from Colombia who leads an organization that provides assistance to landmine victims and people with disabilities throughout Southeast Asia.

Like millions who came before you – and whose contributions have shaped and reshaped the country we live in today – these leaders, and every one of their peers in this crowd, have demonstrated remarkable faith in the principles of equality, opportunity, and justice that have always stood at the core of our identity as a nation. Many of you have faced great difficulties – and grave dangers – to reach this moment. But every one of you persevered. And your individual stories prove the enduring promise of the American dream.

* * *

More broadly, these same principles are also driving the Administration's efforts to reform America's broken immigration system in a way that is fair; that guarantees that all are playing by the same rules; and that requires responsibility from everyone – including those who are here in an undocumented status and employers who would hire or attempt to exploit them. As President Obama has made clear, the time for comprehensive, commonsense immigration reform is now. And the way we treat our friends and neighbors who are undocumented – and the steps we take to allow an estimated 11 million unauthorized immigrants to earn citizenship and move out of the shadows – transcends the issue of immigration status.

It's about who we are as a nation – and as a people. It's why my colleagues and I are firmly committed to working with Members of Congress to refine and advance proposals – like the bipartisan legislation recently approved by the Senate Judiciary Committee – which will help to make our nation stronger, more secure, and more prosperous. And it's why we're also seeking ways to modernize our legal immigration system – so citizens like you don't have to wait years for loved ones to be able to join you here in the United States.

Making these improvements – and ensuring that this country will always be able to welcome leaders, entrepreneurs, artists, innovators, and hard workers like all of you – is nothing less than a moral imperative. But it's also good policy. Especially in this time of economic uncertainty – as we move into an age of unprecedented global competition – the ideas, the optimism, and the energy of the talented men and women before me will be as critical as ever before in preserving the promise of the American dream; honoring the American story in its most basic form; and ensuring that our country stays true to its proud history as a nation made up of, and – let us never forget, a nation built by – immigrants.

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stated that the arrest affidavit established a factual basis for his plea)

JURISDICTION

■ ***Diallo v. Holder,*** __ F. 3d __, 2013 WL 2360099 (8th Cir. May 31, 2013) (finding no jurisdiction to review the denial of adjustment of status where one of the grounds of the denial was based on the IJ's exercise of discretion; further rejecting petitioner's claim that the IJ and BIA violated his right to due process by failing to administratively close his case)

WAIVERS

■ ***Lupera-Espinoza v. Att'y Gen. of United States,*** __ F.3d __, 2013 WL 2302330 (3d Cir. May 28, 2013) (holding that petitioner's service of more than five years in prison for an aggravated felony rendered him ineligible for § 212(c) relief, and rejecting the argument that equity demands he be relieved from the statutory bar because he had not served five years at the time he filed the 212(c) application)

Asylum Claim Denied for Home-Schooling

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lating the compulsory-attendance law, leading to still more fines. The prosecution and the mounting fines were the last straw, and the family in 2008 entered the United States under the Visa Waiver Program and decided to seek asylum.

An IJ approved the applications after finding that the Romeikes had a well-founded fear of persecution based on their membership in a "particular social group": homeschoolers. The BIA overturned the IJ's decision finding, inter alia that "[t]he record does not show that the compulsory school attendance law is selectively applied to homeschoolers like the applicants." It added that homeschoolers were not punished more severely than other parents whose children broke the law. It concluded by reasoning that, even if the German government had singled out people like the Romeikes, "homeschoolers" are not protected by the immigration laws because they "lack the social visibility" and "particularity required to be a cognizable social group."

The Sixth Circuit upheld the BIA's "permissible" finding that "the German authorities have not singled out the Romeikes in particular or homeschoolers in general for persecution." The court explained that, generally speaking, "[p]unishment for violation of a generally applicable criminal law is not persecution. Enforcement of a neutral law usually is incompatible with persecution." Here, petitioners failed to show that Germany's enforcement of its general school-attendance law amounts to persecution against them on a protected ground. The court also explained that "even assuming for the sake of argument that faith-based homeschoolers (or for that matter homeschoolers in general) are a cognizable social group," a matter that the court did not resolve, "[t]he record does not show that the compulsory school attendance law is selectively applied to homeschoolers like the applicants or that homeschoolers are more severely punished than others whose children do not comply with the compulsory school attendance law."

The court also rejected the Romeikes' argument that Germany's compulsory-attendance law violates their fundamental rights and various international standards, and thus constitutes persecution regardless of whether it is selectively enforced. "Each argument shares an Achilles' heel: Asylum provides refuge to individuals persecuted on account of a protected ground. The United States has not opened its doors to every victim of unfair treatment, even treatment that our laws do not allow," said the court. "The question is not whether Germany's policy violates the American Constitution, whether it violates the parameters of an international treaty or whether Germany's law is a good idea. It is whether the Romeikes have established the prerequisites of an asylum claim—a well-founded fear of persecution on account of a protected ground."

Accordingly, the court concluded that "German law does not on its face single out any protected group, and the Romeikes have not provided sufficient evidence to show that the law's application turns on prohibited classifications or animus based on any prohibited ground."

In a concurring opinion, Judge Rogers rejected the Romeikes' claim that the court should adjudicate whether Germany complied with international law related to its own citizens and instead noted that the court acted only to enforce asylum statutes.

By Francesco Isgro, OIL
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EOIR Launches Online Registration for Immigration Practitioners

EOIR has rollout an electronic registration for attorneys and fully accredited representatives who represent aliens in proceedings before EOIR's immigration courts and the BIA. After December 10, 2013, all attorneys and fully accredited representatives must have completed the registration process in order to appear as a representative before the immigration courts and the BIA.

Currently, immigration practitioners provide notice of their appearances before EOIR's adjudicators by submitting Form EOIR-27, "Notice of Entry of Appearance as Attorney or Representative Before the BIA" and Form EOIR-28, "Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court".

The eRegistry, part of a long-term plan to create an electronic case access and filing system for the immigration courts and the BIA, will provide the means for EOIR to begin receiving electronic versions of the Form EOIR-27 and Form EOIR-28. The registry and electronic filing of these forms will offer attorneys and fully accredited representatives an electronic option that will reduce paperwork and increase efficiencies through real-time information-sharing, which will also enhance EOIR's ability to schedule, track and update cases. Registered attorneys and fully accredited representatives will also be able to use the stored information to pre-populate and electronically file entry of appearance forms.

"EOIR's stakeholders have long sought the ability to file electronically with the agency," said EOIR Director Juan P. Osuna. "The new online registration process is the first step toward a more vigorous electronic case system, which is part of our ongoing efforts to improve the efficiency of our adjudications."

Georgetown Law Professors Contend That Affirmative Asylum Grant Rate Influenced by Non-Merits Factors

by Benjamin Mark Moss

The odds of receiving asylum could depend on the luck of the draw, a new study claims, because variances in asylum grant rates correlate to factors other than the merits of an asylum application.

In a May 23, 2013 presentation to the Office of Immigration Litigation, Andrew I. Schoenholtz and Philip G. Schrag, directors of Georgetown University's Center for Applied Legal Studies, shared insights into alleged disparities in affirmative asylum application grant rates.

Variables such as the regional asylum office and the length of service of the asylum officer can be significant, they said. At the Newark, New Jersey regional asylum office, for instance, some officers have an eighty-five-percent grant rate, but other officers grant only three percent of applications, said the authors of the forthcoming book *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security*.

Schoenholtz and Schrag summarized their research methods. Working with Temple University Professor Jaya Ramji-Nogales, Schoenhltz and Schrag examined the outcomes of about 320,000 merits asylum decisions made by asylum officers across the United States since 2009.

The researchers did not consider the roughly twenty percent of asylum applications filed defensively, Schoenholtz and Schrag said, explaining that it would be too difficult to draw meaningful conclusions because of differences among defensive asylum applicants.

Further, the researchers were unable to track how many aliens initially denied asylum later prevailed before an immigration judge or on appeal.

Andrew I. Schoenholtz Philip G. Schrag

Still, said Schoenholtz and Schrag, non-merits disparities in grant rates make it "very troubling that your chance at winning depends on who you got." "If you get a denial, what you might be looking at is a stingy asylum officer, immigration judge or Board member," Schoenholtz and Schrag added.

The upshot, the professors suggested to an audience of OIL attorneys and staff members, is to remember that asylum officers, ICE attorneys, immigration judges and Board members are very busy and may not have gotten it right.

The professors urged OIL attorneys to consider each case with an open mind: "You're the person who may be giving the case the most attention of anyone who's ever seen the case."

The author of this summary and the Department of Justice do not necessarily endorse any of the views or conclusions described herein.

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Inside EOIR: Five New Immigration Judges Sworn-In

EOIR announced early this month the investiture of five new immigration judges. Chief Immigration Judge Brian M. O'Leary presided over the investiture during a ceremony held at EOIR's headquarters on May 3, 2013.

After a thorough application process, Attorney General Eric Holder appointed Timothy R. Everett (Los Angeles), J. Traci Hong (Los Angeles), Amy T. Lee (Los Angeles), Elizabeth H. McGrail (Los Angeles) and John C. Odell (Tacoma) to their new positions.

Meet OIL's Summer Interns

Adilene Núñez graduated from Santa Clara University in with a Bachelor of Science degree in Political Science and Spanish Studies with an emphasis in Pre-Law. She is a rising 3L at The Catholic University of America, Columbus School of Law.

Daniel Kaplan graduated from the University of Virginia with a major in History and is currently a rising 3L at the University of Virginia School of Law. He spent the past summer at the D.C. U.S. Attorney's Office.

Elizabeth Bahati Mutisya graduated from Carnegie Mellon University Tepper School of Business with Honors in 2011. She is a rising 2L at Wake Forest University School of Law.

Erin Keeley graduated from Saint Joseph's University with a major in International Relations & Political Science. She is a rising 3L at Loyola University Chicago School of Law. She spent the past school year interning at USCIS and the Chicago Immigration Court.

Harris Hoffberg graduated from the University of Maryland's Robert H. Smith School of Business with a double degree in Marketing and Supply Chain Management. He is a rising 2L at Georgetown University Law Center.

Heba Tellawi graduated from the University of Virginia with a major in Global Development Studies and is a rising 3L at American University Washington College of Law. She is excited to be back at OIL after interning on Team Bernal last fall.

Julie Wolf graduated from Penn State University with majors in journalism and Spanish and is a rising 2L at American University Washington College of Law. She worked for a year as an Americorps VISTA member before beginning law school.

Kimberly Shi just completed her first year at The George Washington University this past semester. She wishes to go to law school in the future. She is excited to be an intern for OIL this summer.

Khiet Nguyen graduated from Dartmouth College in 2009 with an A.B. in Government and is a rising 2L at Boston College Law School. Khiet is thrilled to be part of OIL this summer.

Lara Wagner graduated from Rhodes College in 2011 with a major in International Studies and German. She is now a rising 3L at the University of Michigan Law School, where she is a member of the Jessup International Moot Court Team and the Michigan Journal of International Law.

Lauren Gold is a rising 3L at the University of Maryland School of Law, where she is also incoming president of the Immigration Law and Policy Association. Before entering law school, she worked as a reporter for the Palm Beach Post. She earned her bachelor's degree in human development from Cornell University.

Lynette Gaspar graduated from University of Maryland University College with a major in Environmental Management. She is a rising 3L at Wake Forest University. Last summer, she was an intern with the North Carolina Attorney General's Office.

Matt Evans graduated from the University of St. Thomas with a major in Psychology and is a rising 2L at the University of Michigan Law School.

Rima Kundnani graduated from Lewis & Clark College with a major in Economics and is a rising 3L at the University of Southern California. She spent her 2L year in the Immigration Clinic at University of Southern California.

Roberta Roberts graduated from the University of Florida with a major in Public Relations, a minor in Nonprofit Leadership, a concentration in Business Administration and a Certificate in Public Affairs. She is currently a rising 2L at The George Washington University Law School.

Sarah Kim graduated from Temple University with a major in Business and Accounting. She is a rising 3L at the University of Maryland Francis King Carey School of Law. This past spring as a judicial intern at the Maryland Court of Appeals.

Thomas Lodwick graduated from Northeastern University in 2007 with a major in Political Science and is a recent graduate of the George Washington University Law School. After he completes his internship with OIL Thomas will clerk for a federal district judge in North Carolina.

Zorba Leslie is a rising 2L at Howard University School of Law, where he is a member of the National Moot Court Team. Following his graduation from the University of Puget Sound, he received the Thomas J. Watson Fellowship to undertake a comparative study of transitional justice mechanisms in Chile, South Africa, Rwanda, and Cambodia.

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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-

Office of Immigration Litigation

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

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