U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 14, No. 11 *November 2010*

LITIGATION HIGHLIGHTS

■ **ADJUSTMENT**

►Alien ineligible for adjustment where he made false claim to U.S. citizenship (9th Cir.) **8**

■ **CANCELLATION**

►Cancellation claim of mother with two children remanded to consider impact of father's removal (7th Cir.) **7**

►Case remanded to BIA to clarify statutory ground for denial of cancellation (9th Cir.) **9**

■ **CRIMES**

►Shooting at an inhabited dwelling or vehicle is not categorically a crime of violence (1st Cir.) **7**

►Documents failed to establish aggravated felony under modified categorical approach (3d Cir.) **6**

►Robbery is categorically a CIMT (9th Cir.) **8**

■ **JURISDICTION**

►Reissuance of BIA decision triggers new 30-day judicial review period (2d Cir.) **6**

►No jurisdiction where alien failed to exhaust claim that prior conviction was not a CIMT (10th Cir.) **10**

►Court lacks jurisdiction to review discretionary § 212(k) waiver (2d Cir. Cir.) **6**

►Court finds jurisdiction to review order vacated by BIA where the order was later partially reaffirmed (9th Cir.) **9**

Inside

5. Further review pending
6. Summaries of court decisions
11. November Parentheticals
12. New Immigration Judges
16. Inside OIL

Ninth Circuit Finds That Aliens In Removal Proceedings Have a Statutory Right To Access their A-File And That Upon Request DHS Must Furnish Those Documents

In ***Dent v. Holder*** , __ F.3d __, 2010 WL 4455877 (9th Cir. November 9, 2010) (Thomas, Tashima, *Kleinfeld*), the Ninth Circuit held that aliens in removal proceedings have a statutory right to access their A-files and that here, where petitioner requested the records, his right to a fair hearing was violated because those documents would have supported his claim that he was a U.S. citizen.

The case involves a native of Honduras who came to the attention of DHS following his 2003 conviction in Arizona for a controlled substance violation and escape in the third degree. DHS claimed that petitioner, who had lived in the U.S. since 1981, was an LPR who was subject to removal because he had been convicted of an aggravated felony.

At the initial removal hearing, the petitioner, who appeared pro se, conceded that he was not a citizen of the United States. Subsequently, however, he told the IJ that he had been adopted by an American citizen and that the government possessed that information. The IJ continued the hearing to permit petitioner to produce the adoption papers. At the reconvened hearing, petitioner produced the adoption decree. How-

(Continued on page 2)

The Exhaustion of Administrative Remedies Under The INA - - Tread Carefully

A person challenging agency action (or sometimes inaction) generally must exhaust her administrative remedies prior to taking the agency to court. Congress has seen fit to mandate this doctrine in immigration practice by codifying it directly in the Immigration and Nationality Act. *See* 8 U.S.C. § 1252(d)(1). Yet, as with immigration law generally, practitioners should take no comfort in the apparent simplicity of the statutory language: after all, that "[a] court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right" may seem straightforward. *Id.* But "in the never-never land of the Immigration and Nationality Act . . . plain words do not always mean what they say," *Yuen Sang Low v. Att'y Gen.*, 479 F.2d 820, 821 (9th Cir. 1973), and "the meaning of the statutory language [can be] a moving target." *N-A-M v. Holder*, 587 F.3d 1052, 1058 (10th Cir. 2009) (Henry, J., concurring). The exhaustion requirement is no exception.

Take for instance the command that "[a] court may review a final order of removal only if" the alien first exhausts her administrative remedies: Does the provision "merely" make exhaustion mandatory, thus possibly

(Continued on page 3)

Aliens have a statutory right to access their A-File

(Continued from page 1)
ever, the DHS attorney argued that petitioner had not proved that the adoptive mother, Roma Dent, now deceased, was an American citizen. The IJ gave petitioner several weeks to produce his adopted parent's birth certificate.

At the reconvened hearing, petitioner submitted a letter from the lawyer who handled his adoption. That lawyer stated that that he would be unable to get a birth certificate because Ms. Dent had died in Honduras and that the Kansas county courthouse where the birth record would have been located had lost due to a fire, all birth certificates before 1911. The lawyer instead provided Ms. Dent's application for a social security number reflecting that she was born in the United States. The lawyer also wrote a statement to the IJ indicating the circumstances of how petitioner came to be adopted by Ms. Dent in 1981.

Nonetheless, because of lack of proof of Ms. Dent's citizenship, the IJ ordered petitioner removed to Honduras. Following an appeal and then a remand by the BIA on a nonsubstantive matter, petitioner was again ordered removed for having been convicted of an aggravated felony. The BIA issued a final order of removal on August 18, 2005, but apparently failed to send the notice to petitioner's current address.

In 2008, petitioner was arrested for illegally reentering the United States. In 2009, however, the government dismissed the indictment after conceding that petitioner had received inadequate notice of the BIA's 2005 order of removal. It was in the context of this attempted prosecution that petitioner obtained from DHS a copy his application for naturalization and his adopted mother's petition. Counsel then successfully petitioned the BIA to reissue its decision so that petitioner could pursue judicial review. The newly uncovered relevant documents were not submitted to the BIA.

In his petition for review, petitioner raised for the first time the issue that DHS should have furnished him with the naturalization petitions in his A-file. He also moved the court to take notice of the petitions for naturalization, copies of which he attached to his motion. Initially, the court held that in this case it could take notice of out-of-record evidence, namely the petitions for naturalization, because unlike prior cases of the Ninth Circuit where it was limited to reviewing only the administrative record, the documents here were official records from petitioner' A-file. It declined however, to take notice of the facts proved by the documents because the facts could not be eeadily be ascertained.

"It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it."

The court then considered whether the failure to provide petitioner with the documents in his A-file denied him an opportunity to fully and fairly litigate his removal and his defensive citizenship claim. The court determined that under INA § 240(c)(2)(B), petitioner was entitled to have access to his A-file.

The court rejected the government's view that under the 8 C.F.R. § 103.21 petitioner would have to file a FOIA request to get the contents of his A-file. First, said the court, the regulations do not address removal hearings and if it were applied to removal hearings a "serious due process" problem would arise, because FOIA requests often take a very long time," continuances are discretionary, and thus aliens may not get a response before they are removed. "It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it. That would unreasonably impute to Congress and the agency a Kafkaesque sense of humor about aliens' rights," said the court.

The court also held that prejudice had been shown in petitioner's case because the A-file when fully examined may show that petitioner is a citizen of the United States.

The court concluded that when petitioner asked for help in getting access to his A-file, he should have been furnished a copy. "We do not imply that [petitioner's] request for help in getting the records was a necessary precondition to the government's obligation if [petitioner] had not asked, because those cases are not before us. We are unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when the facts call for it."

Finally, the court decided not to remand the case to the BIA but instead to transfer it to the district court because petitioner had presented, under INA § 242(b)(5), 8 U.S.C § 1252(b)(5), a genuine issue of material fact regarding his claim to U.S. citizenship.

By Francesco Isgro, OIL

Contact: Paul Fiorino, OIL
☎ 202-352-9986

Contributions to the Immigration Litigation Bulletin Are Welcomed

Exhaustion under the INA

(Continued from page 1)
excusing its application if not asserted by the agency, or does it go a step further and make subject-matter jurisdiction contingent on it? 8 U.S.C. § 1252(d)(1). And what does it mean for a remedy to be "available" to the alien "as of right" or, for that matter, what is an "administrative remedy" in the first place? The Second Circuit, for example, reads the term "remedy" in § 1252(d)(1) to exclude exhaustion of issues – as opposed to forms of relief from removal, such as asylum or cancellation of removal – while providing for issue exhaustion through a judicial construction. *See Lin Zhong v. U.S. DOJ*, 480 F.3d 104, 117-25 (2d Cir. 2007). The Tenth Circuit, on the other hand, recently reaffirmed that issue exhaustion stems from the statutory language itself. *See Garcia-Carbajal v. Holder*, No. 09-9558, 2010 WL 4367060, *3 (10th Cir. Nov. 5, 2010); *cf. Booth v. Churner*, 532 U.S. 731, 738-39 (2001) (interpreting a similar exhaustion statute using the term "remedy" and observing that persons "exhaust processes, not forms of relief").

As these questions and the above example illustrate, the doctrine's scope yields few, if any, bright-line answers. Nor could this article supply them. A discussion of that magnitude would go beyond the space provided, the author's proficiency, and most readers' patience. Instead, the article will point to some of the more difficult nuances involving the doctrine today to assist practitioners in spotting issues as they arise.

Turning to the rationale first, exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds as recognized by Booth*, 532 U.S. 731. Courts often acknowledge that agency adjudicators have expertise in hearing their particular type of case and are normally in the best position to develop a factual record and flesh out the issues. *See, e.g.*, *Castaneda-Suarez v. INS*, 993 F.2d 142, 144-45 (7th Cir. 1993). In turn, by enforcing exhaustion, the judiciary is more likely to receive a completed record, thus lessening the chance of a court having to revisit the case in the future (and possibly saving the court the expense of judicial review entirely by allowing the agency to correct any errors made). *See, e.g.*, *id.*

The rationale first, exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency."

This reasoning is not just pedantic. By way of example, not enforcing exhaustion would permit a party to bypass the administrative regime and have a court interpret ambiguous provisions of the statute the agency is charged with administering (and the agency's own implementing regulations) in the first instance. *See, e.g.*, *id.* Because the agency receives deference on both counts, a subsequent agency interpretation, at least with an ambiguous statutory provision, could mean that the court's take may not become authoritative. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Auer v. Robins*, 519 U.S. 452 (1997); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, even without a statutory prescription, courts have long enforced exhaustion for practical reasons in the exercise of judicial restraint. *See McCarthy*, 503 U.S. at 145-46.

Although § 1252(d)(1) has generally supplanted the judicial version in immigration practice, awareness of judicially imposed "prudential exhaustion" remains useful for at least two reasons. First, "prudential exhaustion" may be raised as an alternative to statutory exhaustion, either to buttress the § 1252(d)(1) argument generally, *see, e.g.*, *Castaneda-Suarez*, 993 F.2d at 144-45, or to assert exhaustion where circumstances warrant and where circuit precedent is unclear as to whether the statutory version applies. An example of this ambiguity lies with the filing of a motion to reopen or reconsider. Prior to the 1996 amendments to the Act, the right to file either motion stemmed entirely from agency regulations. *See* 8 C.F.R. §§ 3.2, 3.23 (1996) (recodified at § § 1003.2, 1003.23). Case law in several circuits interpreting the similarly-worded predecessor to § 1252(d)(1) therefore excused the filing of such motions from statutory exhaustion because they were not considered "administrative remedies available to [the alien] 'as of right.'" *Lin Zhong*, 480 F.3d at 118 n.16 (citing to pre-1996 cases for support); *Puga v. Chertoff*, 488 F.3d 812, 814-15 (9th Cir. 2007) (same); *see also Grullon v. Mukasey*, 509 F.3d 107, 113-14 (2d Cir. 2007) (reading the phrase "as of right" in § 1252(d)(1) to exclude "wholly discretionary" remedies).

In 1996, however, Congress codified the ability for aliens to file both types of motions, *see* 8 U.S.C. §§ 1229a(c)(6)-(7), a fact that has not gone unnoticed by some courts. *See Dada v. Mukasey*, 128 S. Ct. 2307, 2312 (2008) (balancing the alien's "statutory right to file a motion to reopen" against the "rules governing voluntary departure"); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (requiring the alien to bring a procedural challenge to the agency's alleged improper violation of a regulation in issuing its final opinion to the agency first by way of a motion to

(Continued on page 4)

Exhaustion under the INA

(Continued from page 3)
reconsider before raising it to the judiciary); *Padilla v. Gonzales*, 470 F.3d 1209, 1214 (7th Cir. 2006) (suggesting that the filing of a motion to reopen may be statutorily mandated in certain instances). Thus, the argument that statutory exhaustion applies to the filing of a motion to reopen or reconsider, under appropriate circumstances, appears viable in some venues. With that said, the practitioner could still assert "prudential exhaustion" as an alternative.

The second reason has already been noted. Some circuits, such as the Second, finely parse the exhaustion doctrine, making some issues raised on judicial appeal subject to § 1252(d)(1), others subject to the judicial construction, and some not subject to exhaustion at all. *See Lin Zhong*, 480 F.3d at 115 & n.14, 117-19 & nn.15, 18 (subjecting exhaustion of the bases of relief to § 1252(d)(1); exhaustion of issues "generally" to the judicial construct; and stating that "specific, subsidiary legal arguments, or arguments by extension [of a main argument], that were not made below" may be exempt from exhaustion entirely). Because the origin of the exhaustion doctrine being applied ultimately determines the extent of the court's ability to except the doctrine, knowledge of what type of exhaustion is being asserted may be dispositive.

Of the two types, "prudential exhaustion" is subject to the most exceptions. They include assertions of undue prejudice that may result from delays in awaiting an agency adjudication of an issue, contentions that the agency cannot provide the relief requested, and arguments intimating bias, impartiality, or prejudgment on the part of the agency with the matter at issue. *McCarthy*, 503 U.S. at 146-49. Statutory exhaustion, in contrast, chiefly permits of only two possible exceptions. First, if the alien raises a substantive constitutional challenge (*i.e.*, an attack on the legality of an agency regulation or the Act) – as opposed to a procedural one (*e.g.*, an argument that the agency violated due process by not providing a "full and fair hearing") – § 1252(d)(1) does not apply because no "available" "administrative remedy" exists to provide meaningful relief to an alien on such a challenge. *See Booth*, 532 U.S. at 736 & n.4; *see also Padilla*, 470 F.3d at 1213 (equating the "as of right" language in § 1252(d)(1) with the agency having "the authority and the ability to grant meaningful relief"); *Matter of Cortez*, 16 I&N Dec. 289, 291 n.2 (BIA 1977).

If the agency does not raise statutory exhaustion as a "defense" on judicial appeal, some circuits may deem the issue waived and assume jurisdiction.

Second, if the agency does not raise statutory exhaustion as a "defense" on judicial appeal, some circuits may deem the issue waived and assume jurisdiction. *See, e.g.*, *Lin Zhong*, 480 F.3d 115 & n.14; *Korsunskiy v. Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006). Whether this option is viable, however, is dependent upon the court's view of § 1252(d)(1). In a string of cases including *Eberhart v. United States*, the Supreme Court emphasized that certain commands are "nonjurisdictional claim-processing rules" (*i.e.*, going toward whether the tribunal can entertain the claim procedurally) whereas others "deprive courts of subject-matter jurisdiction" (*i.e.*, questioning the tribunal's adjudicatory competence to consider the issue). 546 U.S. 12, 16 (2005) (unanimous *per curiam* opinion). The Seventh Circuit, whose decision the *Eberhart* Court reversed with obvious reluctance, *see id.* at 19-20, clarified its position even before the publication of *Eberhart* by holding § 1252(d)(1) mandatory but not jurisdictional. *See Abdelqadar v. Gonzales*, 413 F.3d 668, 670-71 (7th Cir. 2005).

Even though *Eberhart* and its progeny dealt with rules of procedure not grounded in any statute, courts may react differently to § 1252(d)(1) in their wake. The Second Circuit, for example, responded by maintaining § 1252(d)(1)'s jurisdictional status but carving out issue exhaustion from its domain, making that mandatory only. *See Lin Zhong*, 480 F.3d at 107. Other courts have adhered to *stare decisis* and maintained § 1252(d)(1) as jurisdictional and mandatory, leaving the provision's scope intact. *See, e.g.*, *Camaj v. Holder*, --- F.3d ----, No. 09-3926, 2010 WL 4398519, at *4 (6th Cir. Nov. 8, 2010); *Segura v. Holder,* 605 F.3d 1063 (9th Cir. 2010); *Bin Lin v. Att'y Gen.*, 543 F.3d 114, 119-22 & n.6 (3d Cir. 2008).

In any event, the distinction is in almost all cases academic. *See Lin Zhong*, 480 F.3d at 107 n.1. That is to say, apart from the obvious ability for the agency to waive the matter, the tribunal would still be precluded from reaching the merits of the unexhausted matter as a claim-processing rule so long as the agency raises the "defense" on judicial appeal. *See id*. Moreover, in many cases exhaustion would also have to be considered alongside jurisdiction, particularly in instances where the court may lack jurisdiction over the petition for review unless a constitutional claim or question of law is raised. *See* 8 U.S.C. §§ 1252(a)(2)(D) (providing for jurisdiction over constitutional or "pure" legal questions even over an otherwise unreviewable agency decision *except* to the extent certain

(Continued on page 13)

FURTHER REVIEW PENDING: Update on Cases & Issues

Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit en banc heard oral arguments 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 BIA 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?

Contact: Erica Miles, OIL
☎ 202-353-4433

Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009). The court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction.

The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

Contact: Holly M. Smith, OIL
☎ 202-305-1241

Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court heard arguments in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court is considering 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 U.S.C. § 1326. The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

Contact: Carol Federighi, OIL
☎ 202-514-1903

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.

Contact: Mary Jane Candaux, OIL
☎ 202-616-9303

Convictions - State Expungements

On December 16, 2010, the Ninth Circuit en banc heard arguments in ***Nunez-Reyes v. Holder***, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel had applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of congressionally-created immigration law.

Contact: Holly M. Smith, OIL
☎ 202-305-1241

Aggravated Felony — Pre-1988

On June 14, 2010, the government filed a petition for rehearing en banc in ***Ledezma-Garcia v. Holder***, (9th Cir. 2010), where the Ninth Circuit had held that the Anti-Drug Abuse Act of 1988, that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988. The petitioner had been order removed from the U.S. based on his commission of an aggravated felony of sexually molesting a minor. The question presented to the court is whether the Anti-Drug Abuse Act that made aliens deportable for aggravated felony convictions applies to convictions entered prior to its enactment on November 18, 1988.

Contact: Robert Markle, OIL
☎ 202-616-9328

Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

■ **Second Circuit Finds No Jurisdiction To Review Discretionary Waiver Denial and Rejects Equitable Estoppel Claim**

In ***Ahmed v. Holder***, 624 F.3d 150 (Jacobs, Feinberg, Cabranes) (*per curiam*) (2d Cir. 2010), the Second Circuit held that it lacked jurisdiction to review the BIA's discretionary denial of a waiver of inadmissibility under § 237(a)(1)(H).

The petitioner, a citizen of Yemen, obtained on January 8, 1991 an immigrant visa as the unmarried son of a United States citizen. On January 15, 1991, while still in Yemen, he entered into a marriage. On February 22, 1991, he appeared at the New York port of entry and was admitted under the visa granted to him as an unmarried son of a U.S. citizen. Five years later, on October 10, 1996, Ahmed filed an application for naturalization. During the resulting investigation, the government learned of his Yemeni marriage. On November 25, 1997, the INS served Ahmed with a Notice to Appear alleging that he had procured his visa by fraud and was therefore inadmissible under INA § 212(a)(6)(C)(i) and that he was not in not in possessionof a valid unexpired immigrant visa and was therefore inadmissible under INA § 212(a)(7)(A)(i).

Ultimately, following remands from the BIA and the Second Circuit, the IJ found petitioner ineligible for a § 212(k) waiver, but even if he were, he would deny the waiver as a mater of discretion because his business was engaged in (1) "multiple types of criminal behavior" and because (2) he was "serious[ly] derelict[ ]" in providing support for his children. The IJ held that petitioner was statutorily eligible for a § 237(a)(1)(H) waiver, but that he did not merit a favorable exercise of discretion for those same reasons. On September 29, 2009, the BIA affirmed the IJ's decision and dismissed petitioner's application for a waiver of inadmissibility

Petitioner then filed a petition for review and challenged only the denial of his § 237(a)(1)(H) waiver. The Second Circuit held, that since petitioner had not raised a "colorable constitutional claims or questions of law" it lacked jurisdiction under § 1252(a)(2)(B)(ii) to reviews the discretionary denial of the waiver.

Petitioner also claimed that it would be a manifest injustice for the government to enforce the terms of his visa and remove him from the United States, because (1) the consular officer who issued the visa did not warn him, as required by State Department regulations, that he would have to remain unmarried until he entered the United States, and (2) the consular officer did not require him to sign a Statement of Marriageable Age. The court, assuming that it had jurisdiction over the question, distinguished the facts in petitioner's case from those in Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976), and held that the BIA had acted reasonably in concluding that petitioner had failed to demonstrate that removal would be manifestly unjust.

.

Contact: Jeff Menkin, OIL
☎ 202-353-3920

■ **Second Circuit Holds That The Reissuance Of A BIA Decision, Triggers A New Thirty-Day Period For Judicial Review**

In ***Lewis v. Holder***, __ F.3d __, 2010 WL 4398764 (2d Cir. November 8, 2010) (McLaughlin, Katzmann, Hall) (*per curiam*), the court held that the BIA's "reissuance" of a prior decision triggers a new thirty-day period to obtain judicial review. The petitioner had filed a motion to reopen a 2003 BIA denial of her appeal based on her failure to file a brief, alleging ineffective assistance of counsel. The BIA denied her motion to reopen, but reissued the 2003 decision in an "abundance of caution" due to uncertainty as to her past mailing address.

> The court held that the BIA has authority to reissue decisions and that such decisions are subject to a "fresh petition for review."

The court joined the 7th Circuit which held in *Firmansjah v. Ashcroft*, 347 F.3d 625, 627 (7th Cir. 2003), that the BIA has authority to reissue decisions and that such decisions are subject to a "fresh petition for review." The court, however, required the parties to submit supplemental briefs addressing whether petitioner was denied the right to counsel when the BIA dismissed her appeal of the denial of her application for cancellation of removal by order dated July 9, 2003.

Contact: Nicole Murley, OIL
☎ 202-605-7227

THIRD CIRCUIT

■ **Third Circuit Holds Documents Failed To Establish Alien's Drug Convictions Constituted Aggravated Felonies Under Modified Categorical Approach**

In ***Thomas v. Attorney General***, __ F.3d __, 2010 WL 4188242 (3d Cir. October 26, 2010) (Sloviter, Barry, *Smith*), the Third Circuit held that it had jurisdiction to review the alien's petition for review notwithstanding the BIA subsequent grant of a motion to reconsider. On review of the merits of the petition, the court held that the documents in the record pertaining to the alien's crimi-

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

nal drug convictions, specifically, police reports alleging the criminal sale of marijuana, were insufficient to establish that the convictions constituted aggravated felonies under the modified categorical approach.

Contact: Patrick Glen, OIL
☎ 202-305-7232

■ **Release On "Conditional Parole" Is Not Equivalent To "Parole Into the United States" And Does Not Support Eligibility For Adjustment**

In ***Delgado-Sobalvarro v. Holder***, __F.3d__, 2010 WL 4292020 (3d Cir. Nov. 2, 2010) (Rendell, Fuentes, *Roth*), the Third Circuit, held that the petitioner and her daughters' release from detention on "conditional parole" under INA § 236, after their illegal entry into the United States, was not equivalent to "parole into the United States" under INA § 212.

The petitioners entered the the United States on November 19, 2001, near Hidalgo, Texas. At that time, they were detained by immigration authorities and issued Notices to Appear, which charged them with removability pursuant to INA § 212(a)(6)(A)(i) for being present in the United States without having been admitted or paroled. Pending a decision on their removability, the petitioners were released on conditional parole on their own recognizance in accordance with INA § 236. In 2002 DHS instituted removal proceedings. On June 6, 2003, the principal petitioner married a United States citizen who then filed I-130 immediate relative petitions for petitioner and her daughter. Petitioner and her husband subsequently had two children together. Petitioner then applied for adjustment of status claiming that because they were released from detention on "conditional parole" under INA § 236, they had been "paroled into the United States" so that they were statutorily eligible to adjust their status under INA § 245. The IJ and later the BIA concluded that the petitioners were ineligible to adjust status because release on conditional parole "is not the type of 'parole' that would impact the [petitioners'] adjustment eligibility."

The Third Circuit, addressing an issue of first impression, deferred to the BIA's interpretation that parole under § 236 does not constitute parole into the United States for the purposes of adjustment of status under § 245.

The court deferred to the BIA's interpretation that parole under § 236 does not constitute parole into the United States for the purposes of adjustment of status.

The court applied the two-step analysis in *Chevron*, finding first that the statute was ambiguous, and then that the BIA's interpretation was reasonable and was amply--supported by the legislative history.

Contact: Jeffrey L. Menkin, OIL
☎ 202-353-3920

FOURTH CIRCUIT

■ **Fourth Circuit Upholds BIA's Interpretation Of 8 C.F.R. § 1239.2(f)**

In ***Barnes v. Holder***, __F.3d__, 2010 WL 4486599 (4th Cir. November 10, 2010) (*Duncan*, Wilkinson, Shedd), the Fourth Circuit, in a published decision, upheld the BIA of interpretation of 8 C.F.R. § 1239.2(f) adopted in *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007). The court agreed that an Immigration Judge may only terminate proceedings based on the pendency of a naturalization application if an alien presents an affirmative communication from the government confirming that he is prima facie eligible for naturalization. The court determined that the BIA interpretation furthered the regulation's purpose and was consistent with the statute's "priority provision" under 8 U.S.C. § 1429.

Contact: Janette Allen, OIL
☎ 202-532-4095

SIXTH CIRCUIT

■ **Sixth Circuit Finds That Service Of Hearing Notice Upon Alien's Counsel By Certified Mail Fulfilled Statutory Notice Requirement**

In ***Camaj v. Holder***, __ F.3d __, 2010 WL 4398519 (6th Cir. November 8, 2010) (Guy, Griffin, *Barzilay*), the Sixth Circuit, held that the statute requires that the government serve a notice of hearing only on counsel for the alien, and therefore the removal order was valid even though the notice was not served on the alien and the alien failed to show up. The court also held it lacked jurisdiction to consider the alien's argument that he did not fail to appear but was merely late for the hearing.

Contact: Anthony Nicastro, OIL
☎ 202-6169358

SEVENTH CIRCUIT

■ **Seventh Circuit Remands Cancellation Claim Of Mother Of Two Children For BIA To Consider Impact Of Father's Possible Removal**

In ***Champion v. Holder***, __ F.3d __, 2010 WL 4702452 (7th Cir. November 22, 2010) (O'Connor (Ret. Asso. Justice), Williams, Sykes), the Seventh Circuit, held that in considering whether an alien was eligible for cancellation of removal based on extremely unusual hardship to her two United States citizen children, the BIA must consider the impact of potential removal of the children's father. The court denied the alien's claim that due process was violated for not allowing closing argument, but con-

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
cluded the BIA's failure to consider evidence was a question of law over which it had jurisdiction. The court found that the Immigration Judge and BIA had both "virtually ignored" evidence that the alien's children's father could also be removed.

Contact: Kathryn DeAngelis, OIL
☎ 202-305-2822

SEVENTH CIRCUIT

■ **Seventh Circuit Holds That The Decision To Deny Administrative Closure Is Within the Court's Cognizance And That An Immigration Judge Had No Duty To Advise On Speculative Eligibility For Relief**

In ***Vahora v. Holder***, __ F.3d __, 2010 WL 4595396 (7th Cir. November 15, 2010) (Cudahy, *Ripple*, Hamilton), the Seventh Circuit, in a published decision, held that although the decision to deny administrative closure is within the court's cognizance, the agency's decision was not an abuse of discretion. The court rejected the reasoning of the Ninth Circuit that it lacked jurisdiction over this issue because of the lack of sufficiently meaningful standards for evaluating the agency decision. The court also held that the Immigration Judge had no duty under 8 C.F.R. § 240.11(a)(2) to advise on speculative eligibility for relief.

Contact: John Holt, OIL
☎ 202-616-8971

NINTH CIRCUIT

■ **Ninth Circuit Holds That Shooting At An Inhabited Dwelling Or Vehicle Is Not Categorically A Crime Of Violence**

In ***Covarrubias Teposte v. Holder***, 623 F.3d 1094 (9th Cir. October 26, 2010) (O'Scannlain, *Gould*, Ikuta) the Ninth Circuit held that the offense of shooting at an inhabited dwelling or vehicle under California Penal Code (CPC) § 246 is not categorically a crime of violence, because it is a general intent crime which can be violated by reckless conduct

The petitioner is a citizen of Mexico, who was admitted to the United States as a lawful permanent resident on February 15, 2002. On April 23, 2003, he was convicted under CPC § 246 and sentenced to a term of imprisonment of seven years. DHS then charged petitioner as removable pursuant to INA § 237(a)(2)(A)(iii) alleging that his conviction under CPC § 246 was an aggravated felony in the form of a crime of violence for which the term of imprisonment was at least one year. The IJ determined that § 246 was categorically a crime of violence under both 18 U.S.C. §§ 16(a) and (b), and ordered petitioner removed. On appeal, the BIA agreed with the IJ that CPC § 246 qualified as a "crime of violence" and therefore as an aggravated felony, but the BIA relied on 18 U.S.C. § 16(b) only and did not address § 16(a).

The court held that robbery, and the lesser and necessarily included offense of theft, involve moral turpitude.

The court concluded that its holding was compelled by *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*), a precedent which precludes "a doctrinal development that would acknowledge the common sense view that shooting at an inhabited structure, whether intentionally or recklessly, is a crime of violence warranting removal."

Contact: Manuel A. Palau, OIL
☎ 202-616-9027

■ **Ninth Circuit Holds That Robbery Under Cal. Penal Code § 211 Is Categorically A Crime Involving Moral Turpitude**

n ***Mendoza v. Holder***, __ F.3d __, 2010 WL 4227879 (9th Cir. October 27, 2010 (Rymer, *N.R. Smith*, Leighton), the Ninth Circuit, held that a robbery conviction under Cal. Penal Code § 211 is categorically a crime involving moral turpitude under the INA. The court observed that the BIA and every circuit to reach the issue has long held that robbery, and the lesser and necessarily included offense of theft, involve moral turpitude. The court also summarily dismissed the alien's challenge to the agency's denial on discretionary grounds of his application for a waiver of inadmissibility under INA § 212(h), which would have permitted him to adjust his status.

Contact: Joseph D. Hardy, OIL
☎ 202-305-7972

■ **Ninth Circuit Holds Alien Ineligible For Adjustment Of Status Where He Made A False Claim Of United States Citizenship That Was Not Timely Recanted**

In ***Valadez-Munoz v. Holder***, 623 F.3d 1304 (9th Cir. 2010) (*Fernandez*, Silverman, Duffy (by designation)), the Ninth Circuit held that the alien was inadmissible for having made a false claim of United States citizenship and was not entitled to cancellation of removal due to a break in his continuous physical presence in the United States.

The petitioner, a citizen of Mexico, entered without inspection in December of 1987 at the age of sixteen, and resided in the United States thereafter, except for some brief absences. In 1994, his brother gave him a State of Texas birth certificate for Robert Louis Moreno. Petitioner used that birth certificate to obtain a California driver license in the name of Robert Moreno so that he could more easily obtain and maintain employment. In January of

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

199, petitioner again left the country for Mexico; he traveled by airplane to Mexico so that his then fiancée could meet his family. Following his return flight to the Houston, Texas airport on February 15, 1997, he attempted to use the false Texas birth certificate and the driver license to reenter the United States under the name of Robert Moreno. Following an intensified inspection, petitioner confessed his true identity. The officer found that he was an excludable alien and gave him the option of either seeing an IJ or withdrawing his application for admission and voluntarily returning to Mexico. Petitioner chose the latter and signed a document indicting that he understood his choice. Petitioner returned to Mexico that same day, but a few days later he reentered the United States without inspection.

"When a person supposedly recants only when confronted with evidence of his prevarication, the amelioration is not available."

On July 27, 1998, petitioner married his current wife, a United States citizen. The couple have two United States citizen children. On December of 2001, petitioner applied for adjustment of status but his application was denied on November 19, 2002, on the basis that he was ineligible due to his false claim of United States citizenship. He was then placed in removal proceedings. Petitioner then also applied for cancellation of removal based upon hardship to his wife and children. The IJ and later the BIA held that petitioner's withdrawal of his application for admission and return to Mexico broke his physical presence in the United States, and thus he was statutorily ineligible for cancellation, and that the presentation of a Texas birth certificate to immigration officers constituted a false claim of United States citizenship, making him ineligible for adjustment.

In his petition for review, petitioner questioned the sufficiency of the evidence regarding his claim to U.S. citizenship. "It cannot be said that the BIA's determination that [petitioner] intended to and did make a false claim of United States citizenship at that time was so unfounded that no "reasonable factfinder" could so determine," said the court. "Indeed, in this civil proceeding we are almost asked to take a flight of fancy when we are asked to believe that [petitioner] was not asserting citizenship at that time."

Petitioner also contended that although he had made a false claim, he had retracted it and, therefore under the doctrine of timely recantation he should not have been found inadmissible. The court rejected the plea, noting that petitioner's "attempt to wrap himself in that cloak of goodness fails because he overlooks the important limitation on the principle. As we have pointed out, when a person supposedly recants only when confronted with evidence of his prevarication, the amelioration is not available."

Petitioner also challenged the finding that his withdrawal of the application for admission had broken his continuous physical presence. The court deferred to the BIA's interpretation in *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005) (*en banc*), where the BIA had held that a "refusal to admit an alien at a land border port of entry will not constitute a break in the alien's continuous physical presence, unless there is evidence that the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw his or her application for admission, or was subjected to any other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States." Here the court found that although "the procedure may not have been as formal as an actual completed proceeding that results in an exclusion order or in an expedited removal order, but it was formal nonetheless. There can be no doubt that [petitioner] could have been placed in removal proceedings, as he was told, and that he avoided that by requesting the withdrawal of his application for admission, a request which did not have to be granted."

Contact: Liza S. Murcia, OIL
☎ 202-616-4879

■ **Ninth Circuit Remands For BIA To Clarify The Statutory Grounds For Denying Cancellation Of Removal**

In ***Lozano- Arredondo v. Holder***, __ F.3d __, 2010 WL 4291391), (9th Cir. November 2, 2010) (*Goodwin*, Hawkins, N.R. Smith), the Ninth Circuit remanded the BIA decision that the Mexican alien was statutorily ineligible for cancellation of removal because of his 1997 conviction for petty theft under Idaho Code Ann. § 18-2408(3). The court held that the BIA did not address the applicability, if any, of the petty offense exception and time period limitations outlined in 8 U.S.C. § 1227(a)(2)(A)(i) or 8 U.S.C. § 1182(a)(2)(A)(ii), regarding crimes involving moral turpitude, to the alien's offense. The court remanded the case to the BIA to clarify the statutory grounds upon which it relied in denying further review.

Contact: Jem Sponzo, OIL
☎ 202-305-0186

■ **Ninth Circuit Holds That It Has Jurisdiction To Review Order That BIA Vacated When The Order Is Partially Reaffirmed Later**

In ***Saavedra-Figueroa v. Holder***, __F.3d __, 2010 WL 4367047, (9th Cir. November 5, 2010) (Kozinksi, Archer, *Callahan*), the Ninth Circuit, held that it has jurisdiction to review a removal order vacated by the BIA where the BIA later reaffirmed (in part) its initial decision, even though no new petition for review was filed. The court determined that a misdemeanor conviction for false imprisonment under

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

Cal. Penal Code § 236 is not categorically a crime involving moral turpitude because an intent to harm the victim is not a requirement for conviction. The court vacated the BIA's final order of removal.

Contact: Bryan Beier, OIL
☎ 202-514-4115

■ **Ninth Circuit Denies The Government's Petition For En Banc Rehearing, Challenging The Court's Pre-REAL ID Act Adverse Credibility Rules**

In ***Sukhwinder Singh v. Holder, Jr.***, No. 09-71716 (9th Cir. November 8, 2010), the Ninth Circuit denied the government's petition for en banc rehearing of the August 11, 2010 unpublished decision in which the court granted the alien's petition for review, concluding that the agency's adverse credibility determination was not supported by substantial evidence. In support of that decision, the panel concluded that the agency denied the alien the opportunity to explain almost all of the identified inconsistencies, and thus excluded those inconsistencies from consideration. The panel isolated and rejected any remaining elements of the agency's decision.

Contact: Brienna Strippoli, OIL
☎ 202-305-7029

TENTH CIRCUIT

■ **Tenth Circuit Finds No Jurisdiction For Failure To Exhaust Claim That Alien's Prior Conviction Was Not A Crime Involving Moral Turpitude**

In ***Garcia-Carbajal v. Holder***, __ F.3d __, 2010 WL 4367060 (10th Cir. November 5, 2010) (Lucero, *Gorsuch*, Arguello), the Tenth Circuit held that it lacked jurisdiction to consider an alien's claim that his prior conviction for assault did not constitute a crime involving moral turpitude rendering him ineligible for cancellation of removal, where the alien failed to assert that substantive claim before the BIA, and only presented the claim before the BIA that the immigration judge failed to use proper analysis to determine if the prior conviction was a crime involving moral turpitude.

Contact: Ann Welhaf, OIL
☎ 202-532-4090

DISTRICT COURTS

■ **Western District Of Washington Grants Preliminary Injunction Requiring DHS To Allow Plaintiffs To Return To United States For Removal Proceedings**

In ***Rahman v. United States***, No. 09-cv-1269 (W.D. Wash. November 10, 2010) (Martinez, J.), the district court entered an order against the DHS and the Department of State, requiring DHS to allow plaintiffs to return to the United States for removal proceedings. The aliens left the United States pursuant to advance parole authorizations. While the aliens were outside the United States, USCIS denied their adjustment of status applications (based upon its decision to revoke the underlying visa petition). When the aliens returned to the United States without lawful status, Customs and Border Protection offered them two options: expedited removal or voluntary withdrawal of their applications for admission. The aliens withdrew their applications for admission and filed a motion for a preliminary injunction. The district court determined that it had jurisdiction to order DHS to return the aliens to the United States because advance parole is either revoked automatically (and thus not revoked pursuant to the agency's discretion) or because DHS's decision not to parole them into the United States was a constitutional violation.

Contact: Melissa Leibman, OIL DCS
☎ 202-305-7016

■ **District Of Columbia District Court Upholds The Legality Of The Prevailing Wage Regime In Department Of Labor Regulations**

In ***United Farm Workers v. Solis,*** No. 09-cv-62 (D.D.C. November 18, 2010) (Urbina, J.), the District Court granted the government's motion for summary judgment, holding that Department of Labor did not violate the APA when promulgating the new prevailing wage regime. Plaintiffs had filed suit challenging the DOL's final rule implementing changes to the temporary agricultural guest worker program. Plaintiffs contended that DOL's prevailing wage regime was irrational and not adequately explained, contrary to the procedural requirements of the APA. The court had previously denied plaintiffs' motion for summary judgment in *UFW v. Solis*, 697 F.Supp. 2d 5 (D.D.C. 2010).

Contact: Geoffrey Forney, OIL DCS
☎ 202-532-4329

■ **Western District Of Texas Asserts Exclusive Jurisdiction To Review Alien's Naturalization Application**

In ***Ipina v. Napolitano***, No.10-cv-00056 ((W.D. Tex. Nov. 8, 2010) (Sparks, J.), the district court granted the government's alternative motion to remand and denied the alien's request that the court declare him eligible for naturalization or hold a hearing on his naturalization application. The district court held that it had exclusive jurisdiction to determine the alien's eligibility because USCIS did not adjudicate his naturalization application within 120 days. The court asserted exclusive jurisdiction over the alien's application for naturalization under the Immigration and Nationality Act. The court concluded that USCIS lacked jurisdiction to deny the alien's application, and remanded the application to USCIS for adjudication without undue delay.

Sherease Pratt, OIL DCS
☎ 202-616-0063

This Month's Topical Parentheticals

ADJUSTMENT

■ **Valadez-Munoz v. Holder**, __ F.3d __, 2010 WL 4241586 (9th Cir. Oct. 28, 2010) (upholding BIA's determination that petitioner falsely represented himself to be a citizen of the United States and is thus ineligible for adjustment; finding that substantial evidence supported BIA's determination that petitioner accepted the opportunity to withdraw his application for admission and depart voluntarily in lieu of being placed in removal proceedings, and accordingly, his continuous physical presence was interrupted for purposes of cancellation of removal eligibility)

■ **Delgado-Sobalvarro v. Att'y Gen. of United States**, __ F.3d __, 2010 WL ___ (3d Cir. Nov. 2, 2010) (deferring to BIA's determination that an alien released on "conditional parole" under INA § 236 has not been "paroled into the United States" for purposes of INA § 245, and is therefore ineligible to adjust her status)

ARREST SEARCH, SEIZURE

■ **Porro v. Barnes**, __ F.3d __, 2010 WL 4456990 (10th Cir. Nov. 09, 2010) (in an immigration detainee's excessive force claim, neither county's policy for the use of stun guns, nor the jail's failure to enforce federal policy that completely banned the use of stun guns, demonstrated deliberate indifference)

■ **United Stated v. Villa-Gonzalez**, __F.3d__, 2010 WL 4273259 (8th Cir. November 01, 2010)(granting motion to suppress because the alien was "seized" at the time that he was handed cell phone by police to talk to ICE agent, and a reasonable person would not have felt free to terminate the police encounter)

■ **United States of America v. Quintana**, __ F.3d __, 2010 WL 4237854 (8th Cir. Oct. 28, 2010) (holding that an immigration officer properly placed petitioner under administrative arrest, without a warrant, when brief questioning (following a traffic stop) provided reason to be believe that he was a deportable alien and might abscond before a warrant could be obtained)

■ **United States v. Diaz-Lopez,** __ F.3d __, 2010 WL 4455880 (9th Cir. Nov. 09, 2010) (the district court did not err in admitting testimony about the results of an ICE database search introduced to show that Diaz had no permission to return to the U.S.)

■ **Oduche-Nwakaihe v. Duran,** __F.Supp.2d__, 2010 WL 4668975 (D.Del. Nov. 16, 2010) (immigration detention is not "in custody" such that a federal court may hear a challenge to a state criminal conviction under 28 U.S.C. § 2254)

CANCELLATION

■ **Arredondo v. Holder**, __F.3d__, 2010 WL 4291391 (9th Cir. November 2, 2010)(case remanded where BIA failed to articulate the statutory ground for denying cancellation)

CITIZENSHIP

■ **Fox v. Clinton**, __ F.Supp.2d __, 2010 WL 4630239 (D.D.C. Nov. 17, 2010) (U.S. citizen chose to acquire citizenship in Israel through a means that did not require a "formal" oath, therefore he cannot establish an expatriating act by taking a personal oath, without state involvement)

CRIMES

■ **Covarrubias v. Holder**, __ F. 3d __, 2010 WL 4189306 (9th Cir. Oct. 26, 2010) (holding that the offense of shooting at an inhabited dwelling or vehicle in violation of Cal. Pen. Code § 246 is not categorically a crime of violence because it requires a mens rea of recklessness, and therefore does not, by its nature, involve a substantial risk of physical force against the person or property of another)

■ **Matter of Soram,** 25 I&N Dec. 378 (BIA 2010) (holding that the crime of unreasonably placing a child in a situation that poses a threat of injury to the child's life or health in violation of section 18-6-401(1)(a) of the Colorado Revised Statutes is categorically a crime of child abuse under INA § 237(a)(2)(E)(i))

■ **Saavedra-Figueroa v. Holder**, __ F.3d __, 2010 WL 4367047 (9th Cir. November 5, 2010)(holding that a misdemeanor false imprisonment conviction under California law is not categorically a CIMT)

■ **Thomas v. Att'y Gen. of the United States**, __ F.3d __, 2010 WL 4188242 (3d Cir. Oct. 26, 2010) (holding that the BIA's grant of a motion to reconsider did not moot a pending PFR where the new BIA decision did not vacate or materially alter the original decision; further holding that petitioner's misdemeanor convictions for violating New York Penal Law § 221.40 are not drug trafficking crimes because the records of conviction do not establish that petitioner admitted or assented to engaging in a remunerative sale of marijuana)

■ **Mendoza v. Holder**, __ F.3d __, 2010 WL 4227879 (9th Cir. Oct. 27, 2010) (holding that the BIA's determination that robbery under Cal. Pen. Code § 211 is a crime involving moral turpitude is entitled to deference as it is consistent with its own precedent and that of the Ninth Circuit holding that theft crimes are CIMTs)

■ **United States v. Anderson**, __ F.3d __, 2010 WL 4608796 (9th Cir. Nov. 16, 2010) (conviction based on nolo plea is a felony conviction)

DUE PROCESS – FAIR HEARING

■ **Villegas de la Paz v. Holder**, __ F.3d __, 2010 WL __ (6th Cir. Nov. 08, 2010), amending 614 F.3d 605 (6th Cir. Jul 30, 2010) (no prejudice when the IJ failed to tell alien that she

(Continued on page 12)

The Executive Office for Immigration Review Swears in 23 New Immigration Judges

Acting Deputy Attorney General Gary Grindler invested 23 new immigration judges during a ceremony held at the Executive Office for Immigration Review's (EOIR) headquarters on Nov. 5, 2010.

Attorney General Eric Holder appointed Silvia R. Arellano, Jerry A. Beatmann Sr., Jesse B. Christensen, Steven J. Connelly, Philip J. Costa, V. Stuart Couch, Thomas G. Crossan Jr., Leo A. Finston, Saul Greenstein, Amy C. Hoogasian, Stuart F. Karden, F. James Loprest Jr., Lisa Luis, Joren Lyons, H. Kevin Mart, Sheila McNulty, Maureen S. O'Sullivan, Daniel J. Santander, Alice Segal, Andrea H. Sloan, Dan Trimble, Eileen R. Trujillo, Clarence M. Wagner Jr., and Virna A. Wright to these important public service positions. Andrea H. Sloan entered on duty on Oct. 24, 2010, but was unable to attend Friday's ceremony.

"We have made great progress since we began our robust immigration judge hiring initiative earlier this year," said Chief Immigration Judge Brian M. O'Leary. "These new immigration judges bring the judge corps of our 59 immigration courts to 262, and we expect to further enhance the corps by additional immigration judges before the end of the calendar year."

The hiring process for most of these new immigration judges began in December 2009. After initial screening, EOIR's human resources section referred 1,782 applications to the Office of the Chief Immigration Judge. Four panels of assistant chief immigration judges screened the applications for the following criteria: ability to demonstrate the appropriate temperament to serve as a judge; knowledge of immigration laws and procedures; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; and knowledge of judicial practices and procedures.

The most highly recommended candidates were selected for interviews. Top candidates were then referred for a second review and interview by a panel of senior Department of Justice officials. The Attorney General made the final selections.

This Month's Topical Parentheticals

(Continued from page 11)

could seek to withdraw her application for admission to the United States because under the BIA's precedent at the time, the IJ almost certainly would have denied the request because Villegas entered the country with fake documents)

JURISDICTION

■ **Ahmed v. Holder**, __ F.3d __, 2010 WL 4227449 (2d Cir. Oct. 27, 2010) (holding that court lacks jurisdiction under section 242(a)(2)(B)(ii) to review the BIA's discretionary denial of a waiver of inadmissibility under INA § 237(a)(1)(H), and that the BIA did not abuse its discretion in denying petitioner's equitable estoppel claim where petitioner's testimony on this issue was inconsistent)

■ **Lewis v. Holder**, __ F.3d __, 2010 WL 4398764 (2d Cir. Nov. 08, 2010) (BIA's "reissuance" of a decision triggers a new thirty-day period to obtain judicial review)

■ **Barnes v. Holder**, __ F.3d __, 2010 WL 4486599 (4th Cir. Nov. 10, 2010) (upholding BIA's interpretation that an IJ can only terminate removal proceedings based on the pendency of a naturalization application if the alien presents an affirmative communication from the DHS confirming that he is prima facie eligible for naturalization, because Congress clearly intended to give removal proceedings priority over naturalization.)

■ **Camaj v. Holder,** __ F.3d __, 2010 WL 4398519 (6th Cir. Nov. 08, 2010) (holding that court lacked jurisdiction under to review claim that "slight tardiness" should not permit an in absentia order)

■ **Dent v. Holder**, __ F.3d __, 2010 WL 4455877 (9th Cir. Nov. 09, 2010) (because DHS had information relevant to a claim to U.S. citizenship, the alien should have been permitted access to his A-file)

■ **Garcia-Carbajal v. Holder**, __F.3d__, 2010 WL 4367060 (10th Cir. November 5, 2010)(holding that petitioner failed to exhaust administrative remedies where BIA sua sponte considered arguments that he had not advanced on appeal)

MISCELLANEOUS

■ **Lubrano v. United States**, __ F.Supp.2d __, 2010 WL 4643097 (E.D.N.Y. Nov. 17, 2010) (money damages unavailable under the Federal Tort Claims Act or 42 U.S.C. § 1983 for delays in approval of immigrant visa)

■ **Gonzalez v. Arizona**, __ F.3d __, 2010 WL 4192623 (9th Cir. Oct. 26, 2010) (holding that Arizona proposition 200, requiring prospective voters in Arizona to present documentary proof of citizenship in order to register to vote, is invalid under the Constitution's Election Clause because it is inconsistent with Congress' enactment of the National Voter Registration Act, which seeks to increase federal voter registration by streamlining the voting registration process)

Exhaustion under the INA

(Continued from page 4)

provisions in § 1252(a) preclude review), 1252(d)(1) (trumping the application of § 1252(a)(2)(D)).

Finally, whether anything beyond the above-two mentioned exceptions applies to statutory exhaustion is unclear. The Supreme Court suggested "no" in *Booth*, *see* 532 U.S. at 741 & n.6, but some courts have recognized an exception post-*Booth* (including when interpreting exhaustion as jurisdictional and mandatory) where exhaustion would impose a "manifest injustice." *See Li Zhong*, 480 F.3d at 107 n.1. Whether such an exception would survive in light of *Bowles v. Russell* is uncertain at best. See 551 U.S. 205, 214 (2007) ("Because this Court has no authority to create equitable exceptions to *jurisdictional* requirements, use of the 'unique circumstances' doctrine is illegitimate.") (emphasis added).

In any event, exhaustion is a complex doctrine, particularly as it applies in immigration practice. Indeed, several ancillary issues remain that have not been discussed, including whether: the alien must raise a matter before *both* the Board of Immigration Appeals and the immigration judge to exhaust her claim, *compare Bonhometre v. Gonzales*, 414 F.3d 442, 447 (3d Cir. 2005) (pointing out how it and the Ninth Circuit say "no"), *with Korsunskiy*, 461 F.3d at 849 (saying "yes"); to the manner by which the alien must raise her claim to the Board for it to be deemed exhausted, *compare Hoxha v. Holder*, 559 F.3d 157, 159-60 (3d Cir. 2009) (deeming sufficient listing the matter on the "Notice of Appeal" to the Board from an immigration judge's decision), *with Abebe v. Mukasey*, 554 F.3d 1203, 1207-08 (9th Cir. 2009), *full en banc reh'g denied*, 577 F.3d 1113 (finding exhaustion satisfied only if raised in the brief to the Board, if the alien indicated one would be filed on the "Notice of Appeal"); to the extent the agency itself can waive the failure to exhaust administratively by raising the matter *sua sponte* in an administrative decision, *see Bin Lin*, 543 F.3d at 123-26 (noting the split between the Eleventh and other circuits).

Put simply, the exhaustion doctrine constantly evolves, and the takeaway should be a simple one for practitioners: tread carefully.

By Timothy Hayes, OIL
☎ 202-532-4335

Director Thom Hussey , Deputy Director Donald Keener, Assistant Director William Peachey proudly displaying the length of service USDOJ pins.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Ahmed v. Holder..... **06**
Barnes v. Holder..... **07**
Camaj v. Holder..... **07**
Champion v. Holder..... **07**
Covarrubias Teposte v. Holder..... **08**
Delgado-Sobalvarro v. Holder..... **07**
Dent v. Holder..... **01**
Garcia-Carbajal v. Holder..... **10**
Ipina v. Napolitano..... **10**
Lewis v. Holder..... **06**
Lozano- Arredondo v. Holder..... **09**
Mendoza v. Holder..... **08**
Rahman v. United States..... **10**
Saavedra-Figueroa v. Holder..... **09**
Sukhwinder Singh v. Holder..... **10**
Thomas v. Attorney General..... **06**
United Farm Workers v. Solis..... **10**
Vahora v. Holder..... **08**
Valadez-Munoz v. Holder..... **08**

Length of Service USDOJ Pins

David McConnell, OIL's Deputy Director for Operations, recently awarded length of service USDOJ pins to OIL Director **Thom Hussey** (35 years), Deputy Director **Donald Keener** (30 years), Assistant Director **William Peachey** (25 years), Assistant Director **Michael Lindemann** (35 years), Senior Litigation Counsel Alison Drucker (30 years), Paralegal Supervisor **Valerie Dickson** (30 years), Trial Attorney **Surell Brady** (25 years), Paralegal Specialist **Jackquelyn Foster** (25 years).

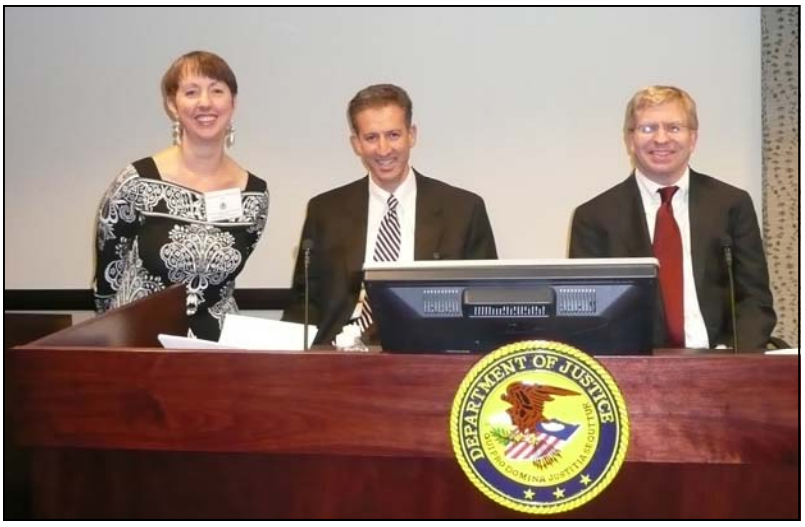
Contributions to the Immigration Litigation Bulletin Are Welcomed

INSIDE OIL

About 100 attorneys attended the 16th Annual Immigration Law Seminar held on November 15-19, 2010, in Washington, D.C. This is a basic immigration law course and is intended for new government attorneys involved in immigration law or policy. In addition to new OIL attorneys, attorneys from ICE, USCIS, DHS, EOIR, and Department of State also attended the seminar.

This year's seminar was co-chaired by ***Francesco Isgro*** and ***Thankful Vanderstar***.

Francesco Isgro, with Immigration Judges John Gossart and Paul W. Schmidt.



Thankful Vanderstar with BIA Members Hugh Mullane and Gary Malphrus

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

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

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

Office of Immigration Litigation

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

If you would like to receive the *Immigration Litigation Bulletin* electronically send your email address to: karen.drummond@usdoj.gov

Tony West
Assistant Attorney General

William H. Orrick, III
Deputy Assistant Attorney General
Civil Division

Thomas W. Hussey, Director
David M. McConnell, Deputy Director
Donald E. Keener, Deputy Director
Office of Immigration Litigation

Francesco Isgrò, Senior Litigation Counsel
Editor

Tim Ramnitz, Attorney
Assistant Editor

Linda Purvin
Circulation