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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Employment Authorization Does Not Provide An Alien With Lawful Status

It may seem counterintuitive at first, but the fact that DHS may authorize an alien to work, does not necessarily make "lawful" that alien's presence in the United States. This issue arose in ***Bokhari v. Holder***, __F.3d__, 2010 WL 3768016 (5th Cir. Sept. 29, 2010) (*Jolly*, DeMoss, Dennis), where the Fifth Circuit upheld the BIA's denial of Bokhari's application for adjustment of status because he had failed to maintain a lawful status for more than 180 days as required under INA §§ 245(c)(2), (k)(2)(a), 8 U.S.C. §§ 1255(c)(2), (k)(2)(a).

Bokhari had entered the United States on April 9, 2001, as a B-2 non-immigrant visitor for pleasure. His B-2 status was twice extended, rendering his presence lawful in the United States until October 9, 2002.

On June 11, 2002, Bokahri's status was changed to an L-1A non-immigrant intra-company transferee based on the approval of a petition filed by Syed T. Enterprises Inc. ("Syed"). Syed is a subsidiary of Mir Motors, the Pakistan-based company owned by Bokhari. Bokhari was Syed's sole shareholder, and sole employee.

On June 9, 2003, one day before Bokhari's approved L-1A status

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Update on Chinese Coercive Population Control Cases: Defining "Other Resistance"

In 2008, the Attorney General overruled prior Board precedent by holding that INA 101(a)(42), 8 U.S.C. § 1101(a)(42), does not permit per se asylum entitlement for spouses of people who have undergone forced abortion or involuntary sterilization. *See Matter of J-S-*, 24 I&N Dec. 520, 536 (AG 2008). *Accord Nai Yuan Jiang v. Holder*, — F.3d —, 2010 WL 2757377 (9th Cir. 2010) (finding that *Matter of J-S-* overruled *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) and *Matter of S-L-L-*, 4 I. & N. Dec. 1 (BIA 2006)); *Dong v. Holder*, 587 F.3d 8 (1st Cir. 2009) (same); *Chen v. Holder*, 348 F. App'x 622 (2d Cir. 2009) (same); *Wu v. Holder*, 343 F. App'x 309 (10th Cir. 2009) (same); *Jin v. Holder*, 572 F.3d 392 (7th Cir. 2009) (same); *Zhao v. Holder*, 569 F.3d 238 (6th Cir. 2009) (same); *Yu v. Att'y Gen.*, 568 F.3d 1328 (11th Cir. 2009) (same); *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147 (3d Cir. 2009) (same).

The Attorney General reiterated, however, that those spouses may still qualify for relief if they can show, inter alia, "other resistance" to China's coercive population control program. *Matter of J-S-*, 24 I&N Dec. at 537-38. Since that reinterpretation of the statute, the way courts define "other resistance" to China's family planning policy has become particularly impor-

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"Other resistance"

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tant.

An alien may qualify for asylum under the "other resistance" provision if he has been persecuted because of "other resistance to a coercive population control program" or if he has a "well founded fear that [he] will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). To establish a claim, an applicant must show that his acts rose to the level of overt opposition, and—as in any other asylum claim—that he endured harm rising to the level of persecution and that there is a nexus between the harm and the protected ground (here, the applicant's resistance). This article provides an overview of how the Board and courts interpret the requirement that an applicant's action qualify as "other resistance." It also notes which circuits have avoided analyzing whether an act itself constitutes"resistance" by denying petitions for review on other grounds, such as by finding a failure to show either persecution or the requisite nexus.

The Board's Definition of "Other Resistance"

In 2006, the BIA held that, "[i]n the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." *Matter of S-L-L-*, 24 I&N Dec. at 10 (overruled in part on other grounds by *Matter of J-S-*, 24 I&N Dec. at 530). In 2008, the Board added that "the reference to 'other resistance' must be assessed against the failures or refusals to comply with official demands to adhere to birth planning policies." *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 638 (BIA 2008). An act constituting "resistance" does not necessarily have to be active or forceful, but at the very least it must thwart family planning policy and does not include mere grudging compliance. *Id*. The Board also emphasized the importance of analyzing nexus in "other resistance" cases: the persecution must have been inflicted "for some resistance that the alien manifested, that is, to target certain individuals for punishment for, or because of, their opposition or resistance to China's family planning policy." *Id*. at 642.

"The reference to 'other resistance' must be assessed against the failures or refusals to comply with official demands to adhere to birth planning policies."

The Courts' Definitions of "Other Resistance"

The Ninth Circuit was the first circuit explicitly to define "other resistance." *See Li v. Ashcroft*, 356 F.3d 1153, 1160 (9th Cir. 2004). The court held that the petitioner "vocally resisted" China's population control policy of restricting the age of marriage when she told a village official that she "wanted freedom for being in love," "publicly announced her decision to marry even after a license was refused," and told the official she intended "to have many babies." *Id*. The court held that Li further vocally resisted when she said that she did "not believe in the policy" limiting family size and that she did not want the official to "interfere." *Id*. The court additionally found that she "physically resisted" the policy "by kicking and struggling when forced to undergo a gynecological examination." *Id*. The court later reiterated that an applicant establishes "resistance" by "physically or vocally resist[ing] birth control officials while the officials performed duties related to the birth control program." *Lin v. Gonzales*, 472 F.3d 1131, 1135 (9th Cir. 2007).

The Ninth Circuit recently elaborated their definition, holding that "[p]ursuant to *Matter of J-S-* and *Li*, it is clear that [the alien's wife's] forced abortion, in which Jiang was not a willing participant, and Jiang's continued attempts to cohabit and marry in contravention of China's population control policy, in the face of denial of an official marriage license, constitute 'other resistance.'" *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1095 (9th Cir. 2010). The court found these "acts in defiance of the coercive population control policy fit squarely within our precedent as to the meaning of 'other resistance.'" *Id*. Without specifically recognizing it as a possible issue, the court in *Jiang* appears to equate a mere violation of China's marriage age requirement with overt resistance sufficient to support to an asylum claim.

The Eleventh Circuit affirmed, but did not elaborate on, the Board's definition of "resistance" in *Matter of S-L-L*. *See Yu v. Att'y Gen.*, 568 F.3d 1328, 1334-35 (11th Cir. 2009). The Eleventh Circuit also has issued a number of unpublished decisions on resistance, although it occasionally conflates resistance with other elements of asylum. *See, e.g., Wen Guang Pan v. Att'y Gen.*, 2010 WL 2588370, *3-*4 (11th Cir. 2010) (unpublished) (finding no resistance where alien pointed to no evidence that he expressed his disagreement with China's family planning policy or attempted to interfere with the policy, paid the fine levied against him, and promised family planning officials that he and his wife would not have additional children); *Jian Qin Jiang v. Att'y Gen.*, 2010 WL 2381051, *3 (11th Cir. 2010) (unpublished) (finding no resistance where alien testified that he tried to stop the authorities from taking his wife, but did not claim that he was physically harmed, threatened, or

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Population control's "other resistance"

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punished for doing so). The Eleventh Circuit also appears to distinguish between resistance that is political in nature, which might thus support an asylum claim, and resistance for personal reasons, which would be insufficient under the INA. *See Feng Chai Yang v. Att'y Gen.*, 345 F. App'x 424 (11th Cir. 2009) (unpublished) (finding no resistance where alien resisted injections not because of the population control program, but because of her allergy to anesthesia; also finding that although officials twice forced her to have intrauterine devices implanted, she did not state that she resisted the procedures).

The Third Circuit recently addressed "other resistance" in a published case where the Board assumed the alien had resisted population control policy and denied asylum for other reasons. *Cheng v. Att'y Gen.*, — F.3d —, 2010 WL 3896198 (3d Cir. 2010). The court held that "there can be no doubt that Chen resisted China's population control policies" where she repeatedly refused to comply with increasingly strenuous demands that she abort her first pregnancy, fled the township to have her baby, defied orders to undergo sterilization, had to be dragged to a clinic for IUD insertion, and missed multiple gynecological appointments. *Id*. at *12. These actions were found to be "significantly more defiant" than the more limited actions held to constitute resistance in *Matter of M-F-W- & L-G-*. *Id*. Judge Roth issued a concurring opinion expressing a narrower view of "other resistance," which she recognizes is contrary to existing interpretations. *Id*. at *18-19 (Roth, J., concurring). Rather than encompassing *all* actions that thwart the goals of population control policy, she proposes that Congress intended "other resistance" to refer to "activities of individuals who are resisting or opposing China's population control policy." *Id*. This could include, for example, "a doctor's refusal to perform abortion or sterilization procedures, a conscientious objector's circulation of material supporting the ban of abortion and sterilization procedures, or an activist's organization of public demonstrations in opposition to forced abortion and sterilization." *Id*.

The Fourth and Fifth Circuits have not developed a thorough analysis of "other resistance," but each of those courts has published at least one case discussing whether a specific behavior constitutes "resistance." For instance, *see Ni v. Holder*, — F. 3d —, 2010 WL 2745786 (4th Cir. 2010). The Fifth Circuit held that merely impregnating one's girlfriend is not an act of "resistance." *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004).

The Seventh and Ninth Circuits have recognized that a parent's resistance to a coercive population control program potentially could be imputed to a child.

While the Second Circuit has not developed a full definition of "other resistance" in a published case, it has recognized the Board's decision in *Matter of S-L-L-* and cited favorably to Ninth and Eleventh Circuit precedent. *See Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 312-13 (2d Cir. 2007). The court emphasized that the mere fact that someone's spouse has been subjected to forced abortion or sterilization is not in itself "other resistance," but that there is still a possibility such an applicant could demonstrate that his partner's resistance has been or would be imputed to him. *Id*. at 313. Similarly, the Seventh and Ninth Circuits have recognized that a parent's resistance to a coercive population control program potentially could be imputed to a child. *See Chen v. Holder*, 604 F.3d 324 (7th Cir. 2010) (remanded for the agency to consider whether Chen's parents' resistance could be imputed to him); *Zhang v. Gonzales*, 408 F.3d 1239, 1246-47 (9th Cir. 2005) (finding that the hardships alien suffered were on account of her parents' resistance). Accordingly, while a spouse's (or presumably a parent's) persecution or resistance cannot provide per se asylum under *Matter of J-S-*, some courts may still consider it to be relevant to the analysis.

The Second Circuit has addressed "resistance" more frequently in unpublished cases and often cites to the Fifth Circuit's *Zhang* decision, which held that merely impregnating one's girlfriend is not an act of "resistance." *See, e.g., Shi-Qi Lin v. Holder*, 318 F. App'x 31, 33 (2d Cir. 2009) (unpublished) ("misleading authorities about his wife's whereabouts and going into hiding with his wife did not constitute 'overt forms of resistance,' but were instead efforts to avoid the policy's requirements by concealing an unauthorized pregnancy"); *Yue Ping Lin v. Holder*, 359 F. App'x 230, 231 (2d Cir. 2010) (unpublished) (having two children in violation of the family planning policy is not an act of resistance to the policy); *Zhu Hua Li v. Holder*, 340 F. App'x 731, 733 (2d Cir. 2009) (unpublished) (alien impregnating his wife a second time and then hiding her during her second pregnancy is not "other resistance"). In these cases, the Second Circuit appears to require that an alien resist family planning policy beyond simply hiding or failing to comply. *See Xui Rui Dong v. Mukasey*, 294 F. App'x 648, 649 (2d Cir. 2008) (unpublished) (impregnating girlfriend and making efforts to hide her are not resistance and alien never asserted that he expressed opposition to China's family planning policy or that he ever confronted officials to prevent

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them from taking his girlfriend for an abortion).

Courts' Avoiding "Other Resistance"

The Fourth Circuit has not yet addressed the definition of "other resistance," but one judge noted in a dissenting opinion that a case could be dismissed without conducting this analysis where there is a lack of nexus. *See Li Fang Lin v. Mukasey*, 517 F.3d 685, 699-700 (4th Cir. 2008) (Traxler, J., dissenting) (stating that remand is unnecessary to address a persecution issue where the petitioner failed to produce any evidence linking her IUD procedure to "other resistance"). Similarly, while the Second Circuit has some case law on point, as discussed above, it often dismisses these cases based on the alien's inability to prove that the persecution occurred "on account of" his actions, without reaching the issue of whether an alien's conduct qualifies as "resistance." *See, e.g., Guo Heng Huang v. Holder*, 346 F. App'x 633, 635 (2d Cir. 2009) (unpublished) ("Even assuming, *arguendo*, that Huang demonstrated 'other resistance'. . . he fails to establish that the Chinese government persecuted him, or seeks to persecute him, on account of such resistance."); *Yu Zhen Xie v. Holder*, 339 F. App'x. 9, 10 (2d Cir. 2009) (unpublished) (same).

Similarly, some circuits have avoided reaching the "resistance" issue by denying petitions for review for failure to establish that the alleged governmental actions against the alien rose to the level of persecution. Examples of this avoidance can be found in many circuits, but particularly in the Third, Seventh, and Tenth Circuits, which have not yet explicitly defined "resistance." *See, e.g., Chang Hao Lin-Lin v. Att'y Gen.*, 360 F. App'x 392, 394 (3d Cir. 2010) (unpublished) ("While Lin-Lin's complaints about his wife's abortions to family planning officials likely constitute "other resistance," the record does not compel a finding that his experiences based on that resistance rise to the level of persecution."); *Dao Shun Wu v. Holder*, 2010 WL 1896420 (10th Cir. 2010) (unpublished) (avoiding deciding whether fathering a child out of wedlock constituted resistance and finding no persecution); *Lin Guo Li v. Holder*, 2010 WL 2144291 (10th Cir. 2010) (unpublished) (avoiding deciding whether non-credible alien's claim of attack on family planning officer was resistance to a coercive population-control policy, where the petitioner failed to prove past persecution); *Lin v. Att'y Gen.*, 223 F. App'x 91, 94 (3d Cir. 2007) (unpublished) (declining to decide whether the court would adopt the Ninth Circuit's approach to defining "other resistance" in *Li v. Ashcroft,* because the harm Petitioner alleges is not persecution); *Xiong Chen v. Gonzales*, 245 F. App'x. 558, 560 (7th Cir. 2007) (unpublished) (declining to address alien's claim that he resisted population control policies by having a child without registering his marriage and then hiding from authorities, where the alleged retaliation does not constitute persecution).

Some circuits have avoided reaching the "resistance" issue by denying petitions for review for failure to establish that the alleged governmental actions against the alien rose to the level of persecution.

The Eleventh Circuit has frequently taken this approach as well, and at times conflates the separate issues of resistance, persecution, and nexus. *See, e.g., Huang v. Att'y Gen.*, 346 F. App'x 463, 466 (11th Cir. 2009) ("Even accepting as true Huang's claim that he argued with government officials about his wife's abortion, there is no evidence that he was persecuted for doing so."); *Feng Chai Yang v. Att'y Gen.*, 345 F. App'x 424 (11th Cir. 2009) (unpublished) (finding that "the procedures also did not constitute persecution because they were intended to implement the population control program and not to punish Yang for any resistance to that program. Even if we assume that Yang's removal of the first intrauterine device was an act of resistance, Yang was not persecuted for that act.") (internal citations omitted); *Liang Yin Shao v. Att'y Gen.*, 336 F. App'x 965, 969 (11th Cir. 2009) (Even assuming that hiding his wife's unauthorized pregnancy and trying to stop Chinese officials from taking his wife to be sterilized "could be construed as 'other resistance,' Shao did not claim or present any evidence indicating that he was persecuted in the six years he remained in China after committing these alleged acts of resistance, nor did he present evidence indicating that one who has resisted China's family planning policies has a well-founded fear of such persecution"); *Qin Liu v. Att'y Gen.*, 252 F. App'x 964 (11th Cir. 2007) (unpublished) (holding that alien had not suffered independent past persecution based on his resistance, because a brief altercation with family planning officials and going into hiding to avoid arrest are not sufficient to establish persecution).

In conclusion, a split is emerging among the circuits. The Ninth Circuit, as shown in *Jiang*, considers certain actions "resistance" that other circuits do not, specifically an alien's continued attempts to cohabit and marry despite being denied an official marriage license. The Second and Fifth Circuits, on the other hand, have held that mere acts of policy noncompliance, such as impregnating a girlfriend, mis-

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What is "lawful status?"

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expired, Syed, on behalf of Bokhari, filed form I-129, seeking an extension of Bokhari's L-1A status. The I-129 application was denied on March 19, 2004. On April 19, Syed appealed, but the appeal was denied on September 2, 2005.

While the denial of the extension of the L visa was pending on appeal, Syed on June 8, 2004, filed an I-140 form, seeking permanent residence for Bokhari under the multinational manager category, INA § 101(a)(15)(L). Simultaneously, Bokhari, acting individually, filed an I-485 application for adjustment to permanent resident status. The I-140 application for permanent resident status was approved more than a year later, on July 11, 2005. Bokhari's I-485 application, however, was later denied on September 20, because he had failed, for more than 180 days before filing the application, to maintain lawful immigration status.

The court found that the extension of his work authorization "did not provide him with lawful immigration status" as defined in 8 C.F.R. § 1245.1(d)(1)(ii).

On December 29, 2006, DHS commenced removal proceedings against Bokhari. At the hearing he conceded removablity but claimed that he was eligible for adjustment. On August 17, 2007, the IJ issued her decision, finding that Bokhari's lawful immigration status ended on June 10, 2003, when his one-year term of approved L-1A status ended. She also found that Bokhari had not filed his application for adjustment of status until June 8, 2004, nearly one year after his lawful immigration status expired. Accordingly, the IJ pretermitted addressing his application for adjustment for status. The IJ's decision was affirmed by BIA.

The Fifth Circuit, agreeing with the BIA, rejected Bohkari's contention that the employment authorization accompanying Syed's I-129 application had granted him lawful immigration status.

The court explained that although Bokhari met the three statutory eligibility requirements of INA § 245(a), he still had to comply with INA § 245 (c)(2) which provides that an alien is not entitled to the adjustment of his status if he was "in unlawful immigration status on the date of filing the application for adjustment of status or . . . failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." However, the § 245(c)(2)'s requirements are excused, if the alien, following his "lawful admission has not, for an aggregate period exceeding 180 days failed to maintain, continuously, a lawful status." INA § 245(k)(2)(a). The regulations provide that a nonimmigrant has "lawful immigration status where the "initial period of admission has not expired or whose nonimmigrant status has been extended . . . ." 8 C.F.R. § 1245.1(d)(1)(ii).

The court found that Bokhari had lawful immigration status through June 10, 2003, as an L-1A nonimmigrant. When the company that sponsored him applied for an extension, the regulations automatically authorized him to continue his employment with Syed for "a period not to exceed 240 days beginning on the date of the expiration of [his] authorized period of stay." See 8 C.F.R. § 274a.12(b)(20). The court found that the extension of his work authorization "did not provide him with lawful immigration status" as defined in 8 C.F.R. § 1245.1(d)(1)(ii). The court agreed with the government's contention that "employment authorization and lawful immigration status are two separate considerations, presenting issues independent of each other." The court further noted that it had recognized this distinction in the context of a direct criminal appeal in *United States v. Flores*, 404 F.3d 320, 327-28 (5th Cir. 2005), where it had held that "an alien may be temporarily granted a stay of removal and be permitted to work during that stay, but still be considered illegal."

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Final Rule Adjusts USCIS Fees

USCIS has published a final rule adjusting fees for immigration applications and petitions which become effective on November 23, 2010. 75 *Fed. Reg.* 58961 (September 24, 2010).

The final rule will increase overall fees by a weighted average of about 10 percent, but does not increase the fee for the naturalization application. The rule establishes three new fees, including a fee for regional center designations under the Immigrant Investor (EB-5) Pilot Program, a fee for individuals seeking civil surgeon designation, and a fee to recover USCIS costs to process immigrant visas granted by the Department of State. Additionally, the final rule reduces and eliminates several fees, including some for service members and certain veterans of the U.S. armed forces who are seeking citizenship-related benefits. The final rule also expands the availability of fee waivers to additional categories.

USCIS is a primarily fee-based organization, with about 90 percent of its budget coming from fees paid by applicants.

FURTHER REVIEW PENDING: Update on Cases & Issues

Particularly Serious Crimes

On June 2, 2010, the Ninth Circuit granted rehearing en banc in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the 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?

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Aggravated Felony — Missing Element

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

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Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court will hear argument in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court will consider the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 U.S.C. § 1326 The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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Due Process– Duty to Advise

In ***U.S. v. Lopez-Velasquez***, 568 F.3d 1139 (9th Cir. 2009), the court held that defendant's due process rights were violated when the IJ did not inform him that he was eligible for discretionary relief even though defendant was indeed not eligible under the law as it then existed. On March 8, 2010, the Ninth Circuit granted rehearing en banc and vacated the panel's opinion.

The question presented is: Whether an illegal reentry defendant had a due process right to be advised in his underlying deportation proceeding of his potential eligibility for discretionary relief under INA 212(c), where the defendant was not then eligible for that discretionary relief, but there was a plausible argument that the law would change in defendant's favor.

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Convictions - State Expungements

On September 24, 2010, the court granted the government's petition for en banc rehearing 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.

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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.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that Criminal Extortion Did Not Amount to Persecution on Account of a Protected Ground

In ***Vanchurina v. Holder,*** __ F.3d __, 2010 WL 3491173 (1st Cir. September 8, 2010) (*Lynch*, Boudin, Lipez), the First Circuit held that substantial evidence supported the BIA's finding that, while the asylum applicants, Julia Vanchurina and her husband may have been subjected to criminal extortion in Russia, such threats did not occur on account of a protected ground under the INA, and therefore they were statutorily ineligible for asylum.

Vanchurina, a citizen of Russia, and her husband, a native of Yugoslavia and citizen of Serbia, entered the United States as non-immigrant visitors. On October 30, 2006, prior to the expiration of their visas, Vanchurina filed an affirmative asylum application listing her husband as a derivative beneficiary. That application was not granted and both applicants were referred to an IJ for a removal hearing. At the hearing Vanchuria testified that in Russia she ran a successful internet business. However, her business then started to be the subject of government inspection, and she was told telephonically that she needed to pay a price to stop those inspections. Following threats, she sold her business and moved to the suburbs where she began construction on a house. Again, police started inspecting the house and Vanchurina was told that she needed to pay them $500 per month for protection from further inspections. To avoid the threats, Vanchrina and her husband left for the United States.

In its decision affirming the IJ's denial of asylum and withholding the BIA found that petitioners' claim entailed "criminal extortion and threats" and did "not implicate an enumerated protected ground."

The court agreed, and rejected Vanchurina contention that "small business owners" should be treated as a "social group" under the INA. The court explained that, "in evaluating claims for asylum on grounds of membership in a social group, the key is whether the claimed persecution is aimed at an individual because of his or her affiliation with a group of persons, all of whom share a common, immutable characteristic. The IJ and BIA were not compelled to conclude on these facts that the individual economic extortion of Vanchurina was on protected grounds."

"Inconsistencies between statements made during a credible fear interview and testimony during a hearing provide a legitimate basis for an adverse credibility determination."

Furthermore, the court determined that even if "small business owners" were a "social group" within the meaning of the INA, petitioners failed to establish that any harm they suffered was because they were in fact small business owners.

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First Circuit Holds that Substantial Evidence Supports Adverse Credibility Finding

In ***Huang v. Holder***, __ F.3d __, 2010 WL 3516864 (1st Cir. September 8, 2010) (*Lynch*, Selya, Howard), the First Circuit upheld the IJ's adverse credibility finding based on inconsistencies and a lack of detail in the Chinese asylum applicant's testimony, as well as the applicant's failure to present sufficient corroborating evidence. The court found that the IJ's credibility determination was plainly predicated on "reasoned consideration," explained cogently in the IJ's decision, and supported by the record. The petitioner could not recall significant details regarding his 2001 attempt to leave China, borrowing money to pay the snakehead in 2004, or his successful journey to the United States. The court also noted the numerous discrepancies between his July 11, 2007, testimony before the IJ and his October 3, 2005, statement to the asylum officer, including whether he knew the name on the passport he traveled under in 2004, and whether he entered the United States from Mexico aboard a taxi or in a truck. The court rejected petitioner's contention that the discrepancies between his statements before the IJ and the asylum officer should be discounted because of the "inherent unreliability" of asylum interviews. "Inconsistencies between statements made during a credible fear interview and testimony during a hearing provide a legitimate basis for an adverse credibility determination," said the court.

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First Circuit Holds that Phone Threats and Vandalism Did Not Constitute Persecution on Account of a Protected Ground

In ***Vilela v. Holder***, __ F.3d __, 2010 WL 3505088 (1st Cir. September 9, 2010) (*Lynch*, Lipez, Howard), the First Circuit held that an asylum applicant from Brazil failed to establish a nexus between the harm he allegedly suffered from communists and his political views.

The petitioner entered the United States on January 26, 1997, on a six-month non-immigrant visa and never departed. When placed in removal proceedings in September 2004, he applied for asylum, with-

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holding and CAT protection. He claimed that while doing social work in Brazil he was threatened by the communists. The IJ denied all relief and the BIA affirmed finding that Petitioner failed to establish a nexus between the harm he had suffered and any protected ground, and failed to establish that what he suffered rose to the level of persecution.

Before the First Circuit petitioner only challenged the denial of withholding and contended that the phone threats constituted persecution, particularly when combined with the vandalism and the incident in which he was nearly struck by a car. The court held that the BIA "was not compelled to find these events to be persecution. Unpleasantness, harassment, and even basic suffering do not rise to the level of persecution," it said. The court added that while "credible verbal death threats may fall within the meaning of 'persecution,' this is only when the threats are so menacing as to cause significant actual suffering or harm."

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SECOND CIRCUIT

■ New York Sexual Misconduct Conviction Is An Aggravated Felony

In ***Ganzhi v. Holder***, __ F.3d __, 2010 WL 3465604 (2d Cir. September 7, 2010) (Walker, Livingston, Lynch) (*per curiam*), the Second Circuit affirmed the BIA's holding that a conviction for sexual misconduct under NYPL § 130.20 constitutes sexual abuse of a minor and therefore qualifies as an aggravated felony. The court agreed that under the modified categorical approach the victim's age is implicitly an element of the offense because lack of consent is required, and by statute a minor is incapable of consenting.

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■ Second Circuit Holds that Alien Was Not Prejudiced by Former Attorneys' Alleged Ineffective Assistance

In ***Vartelas v. Holder***, __ F.3d __, 2010 WL 3515503 (*Kearse*, Cabranes, Livingston) (2d Cir. September 9, 2010), the Second Circuit upheld the BIA's denial of peititoner's motion to reopen alleging ineffective assistance of counsel.

The petitioner, a citizen of Greece and an LPR since 1989, pleaded guilty in 1994 of having conspired to make or possess a counterfeit security. That offense carried a maximum term of imprisonment of five years. The prison term imposed on petitioner was four months.

While "credible verbal death threats may fall within the meaning of 'persecution,' this is only when the threats are so menacing as to cause significant actual suffering or harm."

On January 29, 2003, petitioner returned to the United States from a trip to Greece and claimed the right to return as an LPR. He was questioned by an immigration officer about his 1994 conviction and, in March 2003 he was served with a notice to appear for removal proceedings on the ground that he was inadmissible as an alien who sought entry into the United States after being convicted of, or having admitted committing, a crime of moral turpitude.

At the removal hearing his former attorney informed the IJ that petitioner conceded that he was removable as charged, but requested relief from removal under former INA § 212 (c).

The IJ denied relief as a matter of discretion, finding that, *inter alia*, petitioner had made frequent trips to Greece and remained there for long periods of time; had not paid his United States income taxes; had not shown hardship to himself, his estranged wife, or his United States citizen children who resided in Chicago with their mother; and had not shown that he supported the children. The BIA affirmed.

Petitioner then filed a motion to reopen with the assistance of new counsel, alleging that the series of attorneys who represented him in the proceedings before the IJ had failed to provide him with effective assistance. Specifically, petitioner alleged that his prior attorneys failed to raise defenses to his removability. The BIA denied the motion finding no deficiency in the attorney's performance and alternatively no prejudice to his case.

The court affirmed the BIA's decision concluding that petitioner was not prejudiced by his prior counsel's failure to argue that he was not removable under the petty offense exception, where the crime for which he was convicted did not fit within the relevant statutory criteria. The court also concluded that petitioner was not prejudiced by his attorneys' failure to make a retroactivity argument. The court explained that the definition of "entry" under INA § 101(a)(13), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), could apply to lawful permanent residents who, after the effective date of IIRIRA, travel abroad and seek to reenter the United States.

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THIRD CIRCUIT

■ Third Circuit Holds that BIA Should Review *De Novo* Whether Alien's Fear of Persecution is Objectively Reasonable

In ***Huang v. Attorney Gen.,*** __ F.3d __, 2010 WL 3489543 (3d Cir.

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September 8, 2010) (Rendell, *Jordan*, Greenaway, Jr.), the Third Circuit, followed its ruling in *Kaplun,* held that the BIA should review *de novo* whether an alien's fear of persecution is objectively reasonable for purposes of asylum.

The court remarked that the "Government's briefing correctly observes that judging the objective reasonableness of the alien's fear involves a legal standard[] that must be applied to the Immigration Judge's factual findings, and [is] thus reviewed by the Board de novo." In addition, the court held that a judge's prediction of future events is a factual finding reviewed under the clearly erroneous standard. The court remanded for further consideration under *Kaplun* because it concluded that the BIA did not consider the record in its entirety in reaching its decision.

The court also held that a citizen child is statutorily barred from seeking judicial review of his parent's removal order in district court.

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■ **Third Circuit Holds That For Purposes Of The Continuous Residence Requirement For TPS, The Residence Of Aliens' Parents Could Not Be Imputed**

In ***De Leon-Ochoa v. Holder***, __F.3d__, 2010 WL 3817082 (3d Cir. October 1, 2010) (Fuentes, *Aldisert*, Roth), the Third Circuit held that, for purposes of the continuous residence requirement for temporary protected status, the residence of aliens' parents could not be imputed to aliens, and the statutory term "most recent designation" applied to the original designation of a country for temporary protected status and not to subsequent extensions.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that U.S. Citizen Child of Alien Cannot Seek Judicial Review of Parent's Removal Order in District Court**

In ***Hamdi ex rel. Hamdi v. Napolitano***, No. 09-3285 __F.3d __, 2010 WL 3463602 (6th Cir. September 7, 2010) (Merritt, *Moore*, Gibbons, JJ.), the court affirmed the district court's order granting the government's motion to dismiss. The court held that a U.S. citizen child is not jurisdictionally barred from bringing claims that raise constitutional rights distinct from his alien parents. However, the court also held that a citizen child is statutorily barred from seeking judicial review of his parent's removal order in district court, regardless of whether the removal order affects his constitutional rights.

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■ **Sixth Circuit Holds that It Lacks Jurisdiction to Compel Adjudication of Diversity Visa After End of Fiscal Year**

In ***Mwasaru v. Napolitano***, __ F.3d __, 2010 WL 3419458 (6th Cir. September 1, 2010) (*Gibbons*, Cook, Van Tatenhove, JJ.), the court held that it lacked jurisdiction to consider a mandamus action by an alien seeking a diversity visa because her eligibility had expired at the end of fiscal year 2007 and no visa was "immediately available," rendering the case moot.

USCIS had denied the alien's adjustment-of-status application because she was present in the United States without legal status. Four days before the fiscal year ended, the alien filed suit, challenging USCIS's denial and seeking an order compelling the State Department to reserve a visa while the application was under review. Because the district court did not rule on her petition before the fiscal year ended on September 30, 2007, and removal proceedings were commenced against her some weeks later, petitioner filed an amended petition seeking a court order compelling the IJ to review her application and compelling the State Department to reserve a 2007 diversity visa for her despite the expiration of the fiscal year. The district court dismissed the petition for lack of jurisdiction.

The Sixth Circuit also dismissed the case for lack of jurisdiction but on mootness grounds that that INA § 204 rendered petitioner ineligible for a DV-2007 visa as of midnight on September 30, 2007, and, therefore, she was ineligible for adjustment of status under § 245 because no visa was "immediately available."

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■ **Sixth Circuit Publishes Decision Holding that BIA Improperly Placed Burden on Alien to Prove Conviction Was Not Vacated for Rehabilitative or Immigration Purposes**

In ***Barakat v. Holder*** , __ F.3d__, 2010 WL 3543134 (6th Cir. September 9, 2010) (Boggs, Rogers, Cook), the Sixth Circuit designated its August 18, 2010, unpublished decision for full-text publication. In its opinion the court held that the BIA had improperly placed the burden on the alien to prove that a state court did not vacate his conviction for rehabilitative or immigration reasons. The court determined that the burden should have been placed on the government, which failed to prove that the alien's conviction was vacated for rehabilitative or immigration reasons. The court remanded the case to the BIA for further proceedings, including consideration of whether

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Padilla v. Kentucky, 130 S. Ct. 1473 (2010), has any effect on the outcome.

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SEVENTH CIRCUIT

■ **Seventh Circuit Remands for Determination Whether FGM of Aliens' Daughter Could Constitute Direct Psychological Persecution of Her Parents**

In ***Kone v. Holder***, __ F.3d __, 2010 WL 3398162 (7th Cir. August 31, 2010) (Manion, *Williams*, Darrah), the Seventh Circuit remanded for the BIA to address whether female genital mutilation of the aliens' United States citizen daughter could constitute direct psychological persecution of the parents under CAT.

The lead petitioner, a citizen of Mali, entered the United States in August 2001 as a visitor with her husband and daughter. None of them departed when their visas expired. In November 2004, petitioner had a second daughter, Mariam, born in the United States. On January 5, 2006, petitioner, filed an application for asylum, withholding, and CAT protection. She sought asylum based on her fear that if her family were made to return to Mali, Mariam would be forced to undergo FGM just as her sister and mother had. Petitioner acknowledged that her asylum application had been filed outside of the one-year deadline (at that point it had been over four years), but stated that she had only recently become aware of the fact that she could apply.

The IJ found petitioner's testimony to be credible and determined that it was more likely than not that Mariam would be forced to undergo FGM if she were to go to Mali. However, the IJ denied her claim for asylum as having untimely and denied withholding of removal ruling that petitioner could not obtain withholding for herself based on potential hardship to her daughter. The BIA concurred with the IJ's ruling but was silent, however, as to petitioner's argument that FGM of Mariam against her parents' will could constitute direct persecution of her parents.

In addition to remanding the case so that the BIA could consider whether FGM of Mariam would constitute direct persecution of her parents cognizable under CAT, the court further instructed the BIA, on remand, to consider whether there may be a claim for constructive deportation when both parents are in proceedings, as in this case. The court rejected the BIA's application of earlier circuit precedents noting that in those case only one parent was in removal proceedings, meaning there was at least the possibility that the other parent could take care of the child in the United States.

The BIA appropriately took administrative notice of the State Department Profile, because it took an individualized approach.

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■ **Seventh Circuit Reaffirms that Illegally Obtained I-551 Stamp Does Not Bestow Legal Status**

In ***Mozdzen v. Holder***, __ F.3d __, 2010 WL 3463705 (7th Cir. September 7, 2010) (Kanne, *Williams*, Hamilton), the Seventh Circuit rejected a claim to lawful permanent resident status based upon the I-551 stamp placed in the aliens' passports in conjunction with Operation Durango, an undercover investigation conducted by the former INS and the Federal Bureau of Investigation. The court also held reasonable the denial of a continuance, where the IJ had already granted several continuances and the "key facts" of removability, the aliens' nationality and citizenship, were uncontested.

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■ **Seventh Circuit Determines that Having Two Children in the United States Does Not Prove a Likelihood of Sterilization Absent Detailed Facts**

In ***Lin v. Holder***, __ F.3d __, 2010 WL 3419891 (7th Cir. September 1, 2010) (*Bauer*, Wood, Tinder), the Seventh Circuit affirmed the BIA's denial of petitioners' asylum and withholding of removal claims regarding their opposition to the Chinese population control policy. Although the agency concluded that the aliens were credible, "they presented no 'specific, detailed facts' . . . that they are likely to be sterilized" upon return to China due to having two children born in the United States. The court also held that the BIA appropriately took administrative notice of the State Department Profile, because it took an individualized approach and focused only on the parts of the report that were specific to the aliens' claims.

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NINTH CIRCUIT

■ **Ninth Circuit Holds that Assault With a Deadly Weapon Under Nevada Law Is Categorically a Crime of Violence**

In ***Camacho-Cruz v. Holder***, __ F.3d __, 2010 WL 3435379 ((9th Cir. September 2, 2010) (*Graber*, Callahan, Bea), the Ninth Circuit held that the alien's conviction for assault with a deadly weapon under Nevada Revised Statutes section 200.471 was categorically a crime of violence under 18 U.S.C. § 16. The court reasoned that because the statute requires the use of a deadly weapon to intentionally

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create in another person a reasonable fear of immediate bodily harm, the crime necessarily entails the threatened use of force against the person of another and also, by its nature, involves a substantial risk of force.

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■ **Ninth Circuit Holds that an Immigration Judge's Termination of Prior Proceedings Pending Reinstatement Is Not a Removal Order Subject to Judicial Review**

In *Galindo-Romero v. Holder*, __ F.3d __, 2010 WL 3435175 (9th Cir. September 2, 2010), (Clifton, *Bybee*, Korman), the Ninth Circuit held that an IJ's termination of prior proceedings pending reinstatement was not a removal order subject to judicial review in the court of appeals.

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■ **Ninth Circuit Holds that BIA Abused Its Discretion Where "Exceptional Circumstances" Excused Alien's Absence From Hearing**

In ***Vukmirovic v. Holder***, __ F.3d __, 2010 WL 3489924 (9th Cir. September 8, 2010) (*Schroeder*, Rawlinson, Moody), the Ninth Circuit held that the BIA abused its discretion in denying the alien's motion to reopen *in absentia* removal proceedings because the BIA failed to consider the "unique" qualities of the case. The court concluded the alien presented "exceptional circumstances," where the Immigration Court sent a hearing notice to the alien's former attorney and the alien's home address, but the former attorney did not notify the alien, and the alien was away from his home and unable to give his current attorney permission to enter an appearance before the agency. The court also held that the BIA incorrectly ruled that aliens seeking discretionary relief can never demonstrate "exceptional circumstances," where the alien had diligently pursued relief, had every incentive to attend his hearing, and had never been given a meaningful opportunity to present his asylum claim. Judge Rawlinson dissented, noting her "complete and total disagreement with the majority's conclusion," which she found inconsistent with circuit precedent.

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■ **Ninth Circuit Holds That Conviction Under Alaska "Coercion" Statute Is Not Categorically A Federal Crime Of Violence**

In ***Cortez-Guillen v. Holder,*** __F.3d.__, 2010 WL 3859629 (9th Cir. October 5, 2010) (Hawkins, McKeown, *Bea*), the Ninth Circuit held that an Alaska criminal law prohibiting "coercion" does not automatically equate with a federal "crime of violence," as the Board had determined. The court ruled the Alaska coercion statute provided the fear instilled in the victim could be physical injury or any other crime, and had not been interpreted more narrowly by Alaskan courts. As such, the court ruled the plain language of the Alaska coercion statute was broader than the generic federal definition, which requires use or threatened use of physical force against a person.

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■ **Ninth Circuit Holds That Wife Of A Deceased Asylum Applicant Could Not Assert A Derivative Claim For Withholding Of Removal Or Protection Under The Convention Against Torture**

In ***Saval v. Holder***, __F.3d __ 2010 WL 3704203 (9th Cir. September 23, 2010) (Hall, *Callahan;* Noonan, dissenting), the Ninth Circuit dismissed a deceased asylum applicant's petition for review as moot, but did not dismiss his wife's derivative claim in light of potential collateral consequences. The court also affirmed the denial of the wife's derivative asylum claim on the basis that substantial evidence supported the agency's adverse credibility finding. Furthermore, the court rejected the wife's derivative claims for withholding of removal and CAT protection on the basis that such claims could not be asserted derivatively.

The court rejected the wife's derivative claims for withholding of removal and CAT protection on the basis that such claims could not be asserted derivatively.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That Immigration Judge's Stereotyping Tainted Adverse Credibility Decision**

In ***Todorovic v. Holder***, __F.3d.__, 2010 WL 3733999 (Barkett, *Marcus*, Hood) (11th Cir. September 27, 2010), the Eleventh Circuit held that an Immigration Judge's demeanor finding that an alien did not appear "overtly gay" tainted the agency's adverse credibility decision. The BIA, which did not rely on the demeanor finding, failed to correct the Immigration Judge's comments. Thus, the court determined that it could not tell to what extent the Immigration Judge's stereotyping may have tainted the BIA's decision.

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This Month's Topical Parentheticals

ADJUSTMENT

■ ***Matter of Legaspi,*** 25 I.&N. Dec. 328 (BIA Sept. 1, 2010) (holding that an alien is not independently "grandfathered" for purposes of adjustment of status under section 245(i) of the INA simply by virtue of marriage to another alien who is "grandfathered" under section 245 (i) as the result of having been a derivative beneficiary of a visa petition)

■ ***Mozdzen v. Holder,*** __ F.3d __, 2010 WL 3463705 (7th Cir. Sept. 7, 2010) (rejecting petitioners' arguments that they held the status of lawful permanent residents based on an I-551 stamp that was fraudulently issued by a "broker" during a government sting operation; further affirming the denial of a continuance)

■ ***Bokhari v. Holder,*** __ F.3d __, 2010 WL 3768016 (5th Cir. Sept. 29, 2010) (holding that a grant of employment authorization did not confer lawful immigration status on petitioner, and he was therefore ineligible to adjust status because he accrued more than 180 days of unlawful presence)

ASYLUM

■ ***Matter of C-L-T-,*** 25 I.&N. Dec. 341 (BIA Sept. 14, 2010) (holding that the "one central reason" standard that applies to asylum applications also applies to withholding of removal applications in light of the intent and purpose of the REAL ID amendments regarding the burden of proof for persecution claims).

■ ***Kone v. Holder,*** __ F. 3d __, 2010 WL 3398162 (7th Cir. Aug. 31, 2010) (remanding for further consideration because the BIA failed to address petitioners' claim that FGM of their daughter would constitute *direct* psychological persecution of her parents)

■ ***Lin v. Holder,*** __ F.3d __, 2010 WL 3419891 (7th Cir. Sept. 1, 2010) (holding that because petitioners presented no specific, detailed facts that they are likely to be sterilized upon their return to China on account of having two children born in the United States, they have not met their burden of showing that their fear of future persecution is objectively reasonable)

■ ***Huang v. Att'y Gen. of United States,*** __ F.3d __, 2010 WL 3489543 (3d Cir. Sept. 8, 2010) (holding that the well-founded fear inquiry requires the exercise of legal judgment in applying a standard of objective reasonableness to the facts of an alien's particular case, and therefore is an issue over which the BIA has plenary review under 8 C.F.R. § 1003.1(d)(3)(ii); finding that the BIA failed to adequately address evidence which, if credited, would lend support to petitioner's asserted fear of sterilization based on two U.S. born children)

■ ***Saval v. Holder,*** __ F. 3d __, 2010 WL 3704203 (9th Cir. Sept 23, 2010) (dismissing deceased asylum applicant's claim as moot but not wife's derivative claim in light of possible collateral consequences)

■ ***Vukmirovic v. Holder,*** __ F.3d __, 2010 WL 3489924 (9th Cir. Sept. 8, 2010) (holding that petitioner's case presents "exceptional circumstances" warranting reopening of his *in absentia* order where petitioner prevailed before the Ninth Circuit on his claim that he was eligible for asylum, but on remand neither petitioner nor his attorney received notice of the asylum hearing "because of an ironic series of events")

■ ***Vilela v. Holder,*** __ F. 3d __, 2010 WL 3505088 (1st Cir. Sept 9, 2010) (holding that substantial evidence supported agency decisions that Brazilian citizen failed to establish a nexus between harm he allegedly suffered from communists and his political views, and failed to establish that threats, vandalism, and almost being hit by a car, rose to the level of persecution)

■ ***Malonga v. Holder,*** __ F.3d __, 2010 WL 3543538 (8th Cir. Sept. 14, 2010) (affirming BIA's finding that petitioner's beating and detention in the Congo did not rise to the level of past persecution, nor was it on account of a protected ground; remanding for consideration of whether petitioner faces a clear probability of persecution based on his political opinion because the BIA failed to adequately consider petitioner's claim on that issue) (Judge Colloton dissented)

■ ***Long v. Holder,*** __ F. 3d __, 2010 WL 3583532 (2d Cir. Sept 16, 2010) (remanding case as to petitioner Long for failure to consider "a number of relevant factors" and directing BIA to determine whether there is a Chinese law barring assistance to North Koreans, and (whether there is or is not) in what circumstances persecution of those who assist North Korean refugees would constitute persecution on account of a protected ground)

CREDIBILITY

■ ***Huang v. Holder,*** __ F.3d __, 2010 WL 3516864 (1st Cir. Sept. 10, 2010) (affirming IJ's adverse credibility finding based on a lack of detail and inconsistencies within petitioner's testimony, and lack of corroborating evidence)

CRIMES

■ ***Brooks v. Holder,*** __ F.3d __, 2010 WL 3606456 (2d Cir. Sept. 17, 2010) (holding that a New York State conviction for criminal possession of a weapon in violation of N.Y. Penal Law § 265.03(1)(b) categorically qualifies as a crime of violence because there is a substantial risk that physical force will be used)

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■ ***Camacho-Cruz v. Holder,*** __ F.3d __, 2010 WL 3435379 (9th Cir. Sept. 2, 2010) (holding that a conviction for assault with a deadly weapon under Nevada state law is categorically a crime of violence making petitioner ineligible for cancellation of removal)

■ ***Barakat v. Holder,*** __ F. 3d __, 2010 WL 3543134 (6th Cir. Aug. 18, 2010) (filed as a published decision on September 14) (granting petition where BIA improperly placed burden on petitioner to prove that the vacatur of his state conviction was not for rehabilitative or immigration purposes, and where the government failed to meet its burden of proving that the conviction was vacated for such reasons)

■ ***Cortez-Guillen v. Holder,*** __ F.3d __, 2010 WL ___ (9th Cir. Oct. 5, 2010) (holding that a conviction under the Alaska "coercion" statute is not categorically a "crime of violence" because it criminalizes conduct that is broader than the federal definition)

■ ***Ganzhi v. Holder,*** __ F.3d __, 2010 WL 3465604 (2d Cir. Sept. 7, 2010) (re-issued as a published decision) (holding that petitioner's conviction for sexual misconduct under NY state law was an aggravated felony where the criminal statute was divisible, and where, under the modified categorical approach, the BIA properly relied upon the criminal information to establish the victim's age)

■ ***Matter of Garcia,*** 25 I.&N. Dec. 332 (BIA Sept. 13, 2010) (holding that a conviction for a single crime involving moral turpitude that qualifies as a petty offense is not for an "offense referred to in section 212 (a)(2)" of the INA, for purposes of triggering the "stop-time" rule in section 240A(d)(1), even if it renders the alien removable under section 237(a)(2)(A)(i))

■ ***Muratoski v. Holder,*** __ F.3d __, 2010 WL 3619792 (7th Cir. Sept. 20, 2010) (noting that BIA correctly concluded that the IJ could find, but was not compelled to find, that petitioner lacked good moral character on the basis of his false claim of U.S. citizenship)

DUE PROCESS

■ ***United States v. Ramos,*** __ F.3d __, 2010 WL 3720208 (9th Cir. Sept. 24, 2010) (holding that petitioner's waiver of the right to appeal pursuant to the stipulated removal proceedings was not "considered and intelligent," and that his waiver of the right to counsel was not "knowing and voluntary," therefore violating due process)

■ ***United States v. Figueroa,*** __ F.3d __, 2010 WL 3528847 (7th Cir. Sept. 13, 2010) (finding that the district court judge violated due process during sentencing of Mexican alien by making "odd" comments about Mexico, which "were utterly out of bounds" and warranted resentencing) (Judge Evans concurred)

FAIR HEARING

■ ***Vartelas v. Holder,*** __ F. 3d __, 2010 WL 3515503 (2d Cir. Sept. 9, 2010) (rejecting ineffective assistance claim for lack of prejudice where petitioner was inadmissible for committing a CIMT, the BIA reasonably interpreted section 101(a)(13)(C)(v) of the INA as superseding the *Fleuti* doctrine, and application of that section to an LPR who, after the effective date of IIRIRA, made a trip abroad and sought to reenter the United States is not impermissibly retroactive)

■ ***Duhaney v. Att'y Gen. of United States,*** __ F.3d __, 2010 WL 3547434 (3d Cir. Sept. 14, 2010) (holding that res judicata does not bar the government from lodging new removal charges based on convictions that it had not previously raised where it could not charge petitioner with deportability based on those convictions until the law changed in 1996)

■ ***Matter of Anyelo,*** 25 I.&N. Dec. 337 (BIA Sept. 13, 2010) (concluding that the holding in *Matter of G-Y-R-*, 23 I.&N Dec. 181 (BIA 2001), as to the notice required to authorize the entry of an in absentia order, is applicable to cases arising in the Eleventh Circuit, and distinguishing *Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258 (11th Cir. 2002))

■ ***Todorovic v. United States Att'y Gen.,*** __ F. 3d __, 2010 WL 3733999 (11th Cir. Sept. 27, 2010) (remanding persecution claim to BIA upon concluding that the IJ's "demeanor finding" relied impermissibly on stereotypes about homosexuals which tainted the proceedings and prevented the court from conducting a meaningful review, especially where the BIA failed to correct the error)

JURISDICTION

■ ***Luna v. Holder,*** __ F.3d __, 2010 WL 3447886 (2d Cir. Sept. 3, 2010) (holding that habeas review remains available where the alien misses the 30-day petition-for-review deadline on account of ineffective assistance of counsel or "circumstances created by the government" because such claims regarding the timeliness of the petitions do not involve a challenge to an order of removal)

■ ***Arenas de Garcia v. Holder,*** __ F. 3d __, 2010 WL 3430234 (9th Cir. Sept 1, 2010) (finding jurisdiction to review the BIA's denial of reopening to the extent that it pertains to the petitioners' noncumulative evidence (evidence not previously submitted in original proceeding) but lacks jurisdiction insofar as it per-

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tains to petitioners' cumulative evidence, except to the extent that petitioners raise a question of law regarding the BIA's treatment of that evidence)

■ *Galindo-Romero v. Holder,* __ F.3d __, 2010 WL 3435175 (9th Cir. Sept. 2, 2010) (holding that the IJ's termination of removal proceedings against an alien who illegally reentered the country after being expeditiously removed is not a removal order subject to judicial review in the court of appeals)

■ *Hamdi ex rel. Hamdi v. Napolitano,* __ F.3d __, 2010 WL 3463602 (6th Cir. Sept. 7, 2010) (holding that neither section 242(g) nor (b)(9) applies to preclude review over "independent actions" brought by a citizen child asserting "distinct constitutional rights," even though the child sought to stay and vacate his mother's removal order; further holding that petitioner failed to state a claim upon which relief can be granted because 242(b)(9) precludes the court from granting the requested remedy)

VISAS

■ *Mwasaru v. Napolitano,* __ F.3d __, 2010 WL 3419458 (6th Cir. Sept. 1, 2010) (holding that because petitioner's eligibility for a diversity visa expired on September 30, 2007, and the defendants do not have authority to issue a 2007 diversity visa after that fiscal year ended, petitioner's claim is moot)

■ *United States v. Di Pietro,* __ F.3d __, 2010 WL 3365912 (11th Cir. Aug. 27, 2010) (rejecting defendant's argument that 8 U.S.C. § 1325(c) is invalid on the ground that it unconstitutionally preempts Florida's marriage laws, and reasoning that, to the extent any conflict exists between § 1325(c) and Florida's marriage laws, it could only serve to invalidate the latter in light of the Supremacy Clause)

WAIVERS

■ *Matter of Casillas-Topete,* 25 I.&N. Dec. 317 (BIA Aug. 24, 2010) (holding an alien is removable under section 237(a)(1)(A) of the INA as one who was inadmissible at the time of entry or adjustment of status pursuant to section 212(a)(2)(C) of the INA where an appropriate immigration official knows or has reason to believe that the alien is a trafficker in controlled substances at the time of admission to the United States)

TPS

■ *De Leon-Ochoa v. Att'y Gen. of United States,* __ F.3d __, 2010 WL 3817082 (3d Cir. Oct. 1, 2010) (holding that, for purposes of the continuous residence requirement for TPS, the residence of petitioners' parents could not be imputed to petitioners, and that the statutory term "most recent designation" applies to the original designation of a country for TPS and not to subsequent extensions)

MISCELLANEOUS

■ *Lozano v. City of Hazleton,* __ F.3d __, 2010 WL 3504538 (3d Cir. Sept. 9, 2010) (holding that a city ordinance assessing fines against landlords who rent to illegal immigrants, denying business permits to companies that give them jobs, and requiring all persons over the age of 18 who seek to live in rented property to obtain an occupancy permit (that can only be granted to those in lawful status) usurped the federal government's exclusive power to regulate immigration)

■ *Mohamed v. Jeppesen Dataplan, Inc.* __ F.3d __, 2010 WL 3489913 (9th Cir. Sept. 8, 2010) (en banc) (dismissing suit brought by foreign nationals against U.S. corporation who, according to plaintiffs, assisted US government in surreptitiously transferring them to other countries for detention and interrogation under the CIA's extraordinary rendition program; court held that dismissal is required based on the state secrets privilege because litigation of the merits would create an "unjustifiable risk of divulging state secrets")

■ *Martinez v. Schriro,* __ F.3d __, 2010 WL 3733560 (9th Cir. Sept. 27, 2010) (holding that there is no right to assistance of post-conviction counsel in connection with a state petition for collateral relief (and therefore no right to effective assistance of counsel in such a proceeding), even where collateral review represents the first opportunity for the criminal defendant to assert the ineffective assistance claim)

■ *Adusumelli v. Steiner,* __ F.3d __, 2010 WL 3786030 (S.D.N.Y Sept. 30, 2010) (holding that a New York State statute restricting eligibility for a pharmacist license to U.S. citizens and LPRs, and not to other lawful aliens, including those granted permission to work in the US, violates equal protection under any form of heightened scrutiny).

■ *United States v. Loaiza-Sanchez,* __ F.3d __, 2010 WL 3656004 (8th Cir. Sept. 22, 2010) (holding that because a person's legal status as a deportable alien is not synonymous with national origin, it was proper for the district court to impose an increased sentence based on defendants' illegal status)

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"Other resistance"

(Continued from page 4)

leading authorities about a spouse's wife's whereabouts or going into hiding with a spouse, or merely having two children in violation of the policy, do not qualify as resistance.

The Eleventh Circuit seems to agree that this kind of behavior is not "resistance," although the court frequently decides cases on another ground. The Third Circuit has only addressed "other resistance" in one case with a factual pattern that did not require it to address whether minor actions qualify as resistance, although Judge Roth issued a concurring opinion suggesting a narrower interpretation than any court has yet adopted. The First, Sixth, and Eighth Circuits have not yet addressed "other resistance" in any decision; nor has the United States Supreme Court. In the remaining decisions from the circuits that have considered this provision (namely the Fourth, Seventh, and Tenth Circuits), the courts generally avoid defining "resistance" and instead grant or deny the petition for review based on whether a nexus exists or whether the resulting behavior by the government rises to the level of persecution.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

The Ninth Circuit Paralegal Team wishes goodbye to Senior Litigation Counsel, Stacy Paddack.

INSIDE OIL

OIL welcomes the following three new attorneys.

Sabatino F. Leo comes to us from the Civil Rights Division-Voting Section where he worked as a trial attorney for the past two years. Prior to joining the Department, Sabatino served with the Law & Order Task Force, Al Rusafa, Iraq as a member of the Navy JAG Reserve. Sabatino brings ten years of litigation experience from his time in private practice at a Boston firm concentrating in construction litigation and Navy active duty in Florida and Italy. He is a graduate of the College of the Holy Cross and New England School of Law. Sabatino resides in Vienna with his wife Annalisa and daughter Alessia.

Sabatino Leo, Ashley Martin, Chris Buchanan

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Chris Buchanan obtained his B.A. in Natural Sciences from Johns Hopkins University in 1996, and his J.D. from Baylor School of Law in 1999. He served as a military judge advocate in the U.S. Army until 2006. He joined the ICE Enforcement Law Division in 2007. While at ICE he undertook a detail to DHS OGC, where he worked on various matters including litigation against Arizona's S.B. 1070.

Ashley Martin received her B.A. in Communication: Professional Writing from Centenary College of Louisiana in 2005, and her J.D. from Tulane University School of Law in 2008. She has joined OIL after working for two years at the U.S. Court of Appeals for the 11th Circuit. While at the 11th Circuit, Ashley worked for one year as a staff attorney, and spent her second year working as a law clerk to Senior Judge Peter Fay.

OIL bids farewell and congratulations to Senior Litigation Counsel ***Stacy Paddack*** who has accepted a position as an ALJ with the SSA in Tallahassee,

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

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

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

Office of Immigration Litigation

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