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SUPREME COURT SUMMARILY REVERSES NINTH CIRCUIT FOR VIOLATING REMAND RULE

For the second time in less than three years, the Supreme Court in an unanimous opinion in ***Gonzales v. Thomas***, __U.S.__, 126 S. Ct. 1613 (April 17, 2006), summarily reversed a Ninth Circuit decision, because that court exceeded its legal authority when it decided in the first instance an asylum issue that the BIA had not yet considered. The Court agreed with the Solicitor General's argument that the Ninth Circuit's failure to remand the case was legally erroneous and so obvious in light of *INS v. Orlando Ventura*, 537 U.S. 12 (2002), that summary reversal was appropriate. Quoting *Ventura*, the Court pointed out that "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision," and that "judicial judgment cannot be made to do service for an administrative judgment."

> **"A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."**

Additionally, the Court reaffirmed the principle that "[a] court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Accordingly, said the Court, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation" when a court overturns an agency's decision.

The *Thomas* case involves the asylum claim of Michelle Thomas and her immediate family. When they initially raised the claim, they indicated that they feared returning to South Africa because of persecution on account of political opinion and membership in a particular social group. However, at a hearing before an Immigration Judge, they emphasized their fear of persecution because of their race (they are white) and their kinship with Michelle's father-in-law, "Boss Ronnie," a white South African who allegedly held racist views and mistreated black workers at the company at which he was a foreman. The Immigration Judge, focusing

(Continued on page 2)

NINTH CIRCUIT ORDERS RELEASE OF ARRIVING ALIEN DETAINED FOR FIVE YEARS

In ***Nadarajah v. Ashcroft***, __ F.3d__, 2006 WL 686385 (9th Cir. March 17, 2006) (*Thomas*, Tallman, Dist. Ct. Judge Fitzgerald), the Ninth Circuit, in an unusually fact-bound case, ordered the release of an inadmissible alien who had been detained for nearly five years pending the completion of his removal hearing. The court found, relying on *Zadvydas* and *Clark*, that although the general detention statutes permit detention while removal remains reasonably foreseeable, the government cannot detain an alien indefinitely when there is no significant likelihood of his removal in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

(Continued on page 2)

10TH ANNUAL IMMIGRATION LITIGATION CONFERENCE DRAWS LITIGATORS TO THE NAC

About 140 attorneys from various components of the Department, including about 45 AUSAs, and attorneys from OIL and client agencies, participated at the Tenth Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation. The conference was held on April 18-21, 2006, at the National Advocacy Center, in Columbia, South Carolina. The theme for this year's conference is "Immigration Litigation in the National Interest: Old Issues, New Reforms" drew attention to the recurring old issues in immigration litigation and the new legislative reforms including the REAL ID Act of 2006. Among the keynote speakers were Jonathan Cohn, Deputy Assistant Attorney General for the Civil Division ,

(Continued on page 23)

Highlights Inside

SUPREME COURT VACATES ASYLUM DECISION

(Continued from page 1)
upon questions of race and political views, rejected their claim. And the BIA, responding to the Thomases' primarily race-related arguments, summarily affirmed that decision.

On review, a divided panel of the Ninth Circuit held that the Thomases had been subject to persecution and had a well founded fear of future persecution on account of "membership in a particular social group, as relatives of Boss Ronnie." *Thomas v. Ashcroft*, 359 F.3d 1169 (2004). The Ninth Circuit then heard the matter *en banc* and overruled what it considered aberrant contrary Circuit precedent and held, unanimously held that in principle "a family *may* constitute a social group for the purposes of the refugee statutes." 409 F.3d 1177, 1187 (2005) (*en banc*) (emphasis added) (overruling, *inter alia*, *Estrada-Posadas* v. INS, 924 F.2d 916 (C.A.9 1991)). In so doing, the court relied on earlier BIA opinions holding that certain "kinship ties" fall within the statutory term. The court then held, over the dissent of four judges, that the particular family at issue, namely "persons related to Boss Ronnie," fell within the scope of the statutory term "particular social group" and that the "Thomases were attacked and threatened because they belonged to the particular social group of persons related to Boss Ronnie." The dissenters argued that the question "whether the Thomases are a 'particular social group" should first be considered by the relevant administrative agency.

In vacating the judgment below, the Supreme Court found that, "the agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group.' The matter requires determining the facts and deciding whether the facts as found fall within a statutory term." Quoting again from *Ventura*, the Court said that "the agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."

by Francesco Isgro

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INADMISSIBLE ALIEN ORDERED RELEASED

The petitioner, a citizen of Sri Lanka and an ethnic Tamil was detained on October 2001, while seeking to enter the United States from Mexico. The INS initially granted parole on payment of $20,000 bond. Unable to pay it, petitioner remained in custody while his case was heard by an IJ. At the removal hearing petitioner conceded removability and applied for asylum and CAT protection, claiming past persecution and fear of future persecution on account of his ethnicity and imputed political opinion. Following several continuances, the hearing on the merits was held on April 21, 2003. DHS opposed petitioner's asylum application on the grounds that he was affiliated with the Liberation Tigers of Tamil Eelam (LTTE), a designated foreign terrorist organization. This allegation was supported by the affidavit of an ICE agent who had received information from a confidential informant. Despite the allegations, the IJ found petitioner credible and granted his request for asylum and CAT protection. DHS then filed a motion to reopen to present the testimony of a DHS agent. The IJ denied the motion but he was subsequently reversed by the BIA. At the reopened proceeding, held on June 8 and August 18, 2004, a DHS agent testified about his knowledge of LTTE and his investigation of the Tamil smuggling ring that brought petitioner to the United States. The agent's testimony was contradicted by petitioner's expert testimony. The IJ, finding "nothing of significance which would seriously alter" his original finding, reinstated the prior order. DHS again appealed the grant of asylum to the BIA, and petitioner appealed the IJ's use of hearsay evidence at the hearing.

In the interim, petitioner again request parole which ICE denied it because petitioner "no longer met the criteria for a bond." On September 24, 2004, petitioner filed a habeas petition. The district court denied the writ on October 27, 2005. On January 5, 2006, the BIA affirmed the IJ's second opinion granting asylum but remanded the case to the IJ for the completion of the DHS background checks as required by the regulations.

The Ninth Circuit distinguished its decision from that in *Demore v. Kim*, 538 U.S. 510 (2003), because there the alien had been detained pending a determination of removability, while the petitioner here had been granted asylum and CAT protection. Thus, reasoned the court, petitioner's detention "is more akin to the situation in *Zadvydas*, which was 'indefinite' and 'potentially permanent.'" The court read *Demore* as holding that a six-month period of detention was presumptively reasonable. Here, the court found "[b]y any analysis, a five-year period of confinement of an alien who has not been charged with any crime, and who has won relief at every administrative level, is unreasonable under the standards set forth by the Supreme Court." Additionally, the court found that there was no significant likelihood of removing petitioner because withholding of removal and withholding under CAT were mandatory. Therefore, petitioner could not be removed to Sri Lanka and the government had not identified any country to which he might be removed.

by Francesco Isgro

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FDIC ATTORNEY'S REFLECTIONS ON HER DETAIL TO OIL

To a casual observer, the Federal Deposit Insurance Corporation's ("FDIC") Legal Division does not appear to be a likely source of lawyers to defend immigration decisions in federal appellate courts. With a ballooning docket of immigration appeals, however, the Office of Immigration Litigation ("OIL") was open to creative solutions in responding to their litigation challenge. As a result, in June 2005, eight FDIC attorneys began a one-year detail with OIL.

The FDIC and the Justice Department have a long tradition of interagency cooperation. Currently, the Justice Department (Civil Division, Commercial Litigation Branch) is defending the government against parties seeking damages resulting from Congress' elimination of certain types of goodwill accounting on financial institution balance sheets. The FDIC is assisting the Justice Department in this defense. During a semi-annual meeting with FDIC Legal Division managers to discuss the progress of these "goodwill" cases, the Director of the Justice Department Office of Planning, Budget and Evaluation, Linda Liner, noted that some of the Justice Department "goodwill" attorneys might have to be diverted to work on immigration cases because the Justice Department had been inundated with immigration appeals.

FDIC Legal Division managers were sympathetic to this litigation challenge faced by the Justice Department because of their experience with the savings and loan and banking crises of the mid-1980's and 1990's. Between 1980 and 1994, approximately 2,900 financial institutions failed and were placed in receiverships. With these failures, the government assumed responsibility for handling the thousands of pending lawsuits by and against the failed financial institutions and for handling the numerous lawsuits that arose because of the failures themselves. Like the Justice Department, the FDIC had experienced a tsunami of litigation.

To free up the Justice Department attorneys to focus on the "goodwill" cases and to provide a training opportunity for FDIC attorneys, FDIC Deputy General Counsel Jack Smith proposed a detail of FDIC attorneys to the Justice Department to assist with the immigration appeals. The Justice Department and FDIC entered into a Memorandum of Understanding detailing eight FDIC attorneys to OIL, half providing full-time assistance and the other half providing part-time assistance. Several of these detailees were experienced appellate lawyers who could "hit the ground running" or at least at a fast walk. I volunteered as one of the part-time detailees. After 19 years as an attorney for banking agencies, I was ready for the challenge of learning a new area of the law. Immigration law is of particular interest to me because my adopted, 6-year old, twin daughters are immigrants from China.

I was ready for the challenge of learning a new area of the law. Immigration law is of particular interest to me because my adopted, 6-year old, twin daughters are immigrants from China.

As an attorney for the FDIC, I have dealt mostly with appeals of U.S. District Court decisions arising from the failure of financial institutions. Such litigation involves commercial/business claims, professional liability claims, receivership claims, asset purchaser claims and, on occasion, deposit insurance claims. Many times the cases had been resolved at the trial level through summary judgment.

The detail with OIL provided a dramatic professional change. All my cases involved aliens with final administrative decisions ordering their removal from the United States. They had sought relief from this removal by applying for asylum, withholding of removal, protection under the Convention Against Torture, and cancellation of removal. In hearings before immigration judges, many of these aliens testified of beatings and persecution in their native countries, and attempted to establish the harm was on account of their race, religion, nationality, political opinion or membership in a particular social group, and/or testified of their fear of being returned to these countries. Aliens with children born in the United States testified of the hardships these citizen children would suffer upon the removal of the parents. At the close of the hearing, the immigration judge would render an oral opinion and adverse decisions could be appealed to the Board of Immigration Appeals ("Board"). Aliens dissatisfied with the Board's ruling filed petitions seeking review in the U.S. Courts of Appeals based solely on the administrative record.

The OIL detail exposed me to the extensive system of laws and regulations governing immigration in the United States. Compared to my FDIC appellate work, my immigration briefs generally had fewer complex legal issues and required less original research because of the plethora of sample OIL briefs available as a reference. Not always, however. In my very first brief, I dealt with brand-new immigration legislation—i.e. the REAL ID Act of 2005, and was one of the first government attorneys to address what comprises a "question of law" for purposes of the court's limited review of petitions filed by aliens who had committed aggravated felonies. Moreover, because the immigration judges issued on-the-spot oral decisions and the Board often decided appeals without

(Continued on page 4)

FDIC DETAIL TO OIL

the benefit of briefing by the government, the immigration briefs often required me to craft original arguments. Finally, unlike my FDIC work, the immigration cases contained more extensive hearing records and raised more factual evidentiary issues, calling upon different analytical and drafting skills.

For me, the most interesting part of the detail was the international aspect of immigration work. I was surprised to learn that an alien could be "stateless." I likewise was unaware that various countries, unlike the United States, did not automatically confer citizenship to all persons born within their borders. This uncertainty of citizenship presents a difficult personal dilemma for the alien and a practical dilemma for the government at the time of removal.

In addition, in many of my cases, I encountered the U.S. Department of State Country Reports on Human Rights Practices, which described the political situation and human rights violations in a number of countries. I was surprised that these reports cited violations in countries where I would not suspect such problems existed based on national media reports. For example, in one of my cases, I reviewed a country report on a country that has been a longtime friend and ally of the United States, which indicated that in certain parts of the country the police had "solved" their criminal cases by obtaining confessions through torture, and the courts had admitted these confessions as evidence of guilt.

After nine months as one of the part-time detailees, I have gained a new perspective on the immigration problems that have been reported by the media. Without a doubt, the volume of immigration appeals is overwhelming. For fiscal year 2005 alone, the Administrative Office of the U.S. Courts reported the filing of 12,349 petitions to review decisions of the Board, with the Ninth Circuit receiving 53% of those petitions. I have been impressed by the blistering pace the full-time OIL staff maintains in drafting and filing immigration briefs. Unlike Lucy and Ethel in the classic I Love Lucy skit set in a candy factory with an accelerating assembly line belt, the OIL staff has been able to keep up, even when the workload significantly increased in February with 308 briefs received by OIL in 10 business days. OIL has similarly high expectations of productivity for its detailees and has established a system to effectively integrate detailees into the process of producing quality briefs.

The training and ongoing assistance by OIL staff is impressive. The mini-training at the outset of the FDIC's detail and the more comprehensive training in the Fall provided a good background for analyzing the issues presented by the petitions for review. In addition, OIL assigned each detailee to a team with a mentor to provide substantive guidance on brief preparation. The staff promptly responded to "ISO" emails for sample briefs and the team leader provided biweekly email updates of newly decided cases. In addition, OIL graciously extended invitations to the detailees to their social functions. In sum, I am grateful for the detail because I have had an opportunity to gain an overview of immigration law, to learn about world conditions, and to work with a terrific group of OIL lawyers, certainly some of the best in a town overflowing with good lawyers.

By Kathy Gunning

Ed. Note: Kathy Gunning is a Counsel in the FDIC Legal Division's Appellate Litigation Unit and is a detailee on OIL Assistant Director Linda Wernery's team.

DHS UNVEILS COMPREHENSIVE ENFORCEMENT STRATEGY

On April 20, 2006, Homeland Security Secretary Michael Chertoff unveiled a comprehensive immigration enforcement strategy for the nation's interior.

The new interior enforcement strategy represents the second phase of the Secure Border Initiative (SBI), which is the Department of Homeland Security's multi-year plan to secure America's borders and reduce illegal migration. The first phase of the SBI remains focused on gaining operational control of the nation's borders through additional personnel and technology, while also re-engineering the detention and removal system to ensure that illegal aliens are removed from this country quickly and efficiently.

The interior enforcement strategy will complement the Department's border security efforts by expanding existing efforts to target employers of illegal aliens and immigration violators inside this country, as well as the many criminal networks that support these activities. The primary objectives are to reverse the tolerance of illegal employment and illegal immigration in the United States. To meet these objectives, the strategy sets out three primary goals or courses of action that will be carried out simultaneously:

■The first is to identify and remove criminal aliens, immigration fugitives and other immigration violators from this country.

■The second is to build strong worksite enforcement and compliance programs to deter illegal employment in this country.

■The third is to uproot the criminal infrastructures at home and abroad that support illegal immigration, including human smuggling/trafficking organizations and document/benefit fraud organizations.

SUMMARIES OF RECENT BIA DECISIONS

The Need To Demonstrate Statutory Eligibility For Cancellation Of Removal Pursuant To 8 C.F.R. § 1003.23(b)(3) Only Applies To The Continuous Physical Presence Requirement

In ***Matter of Bautista Gomez***, 23 I&N Dec. 893 (BIA 2006), the Board ruled that the provision in 8 C.F.R. § 1003.23(b)(3), that an applicant for cancellation of removal under 8 U.S.C. § 1229b(b) must demonstrate statutory eligibility for that relief prior to the service of a notice to appear, applies only to the continuous physical presence requirement and has no bearing on the issues of qualifying relatives, hardship, or good moral character. In so concluding, the Board observed that by its terms, the regulatory provision at 8 C.F.R. § 1003.23 (b)(3) only applies to the issue of an applicant's continuous physical presence in the United States, and had no bearing on the other requirements of cancellation of removal.

An Application For Adjustment Of Status Cannot Be Based On A Previously Used Visa Petition

In ***Matter of Villarreal-Zuniga***, 23 I&N Dec. 886 (BIA 2006), the Board held that an application for an adjustment of status cannot be based on an approved visa petition that has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant. In 1990, the alien adjusted his status to that of a permanent lawful resident on the basis of a visa petition filed on his behalf by his mother. In 2000, he was granted cancellation of removal, after being placed in removal proceedings for aiding and abetting the smuggling of aliens into the United States. In 2005, the alien was again placed in proceedings following his October 2004 conviction for unlawfully carrying a handgun. In rejecting the alien's claim that he was eligible for adjustment of status based on the same visa petition he used in 1990 to become a lawful permanent resident, the Board relied on 8 C.F.R. § 204.2 (h)(2), which "clearly implies" that a new visa petition is the only means of reaffirming or reinstating a previously approved visa petition.

The Board also rejected the alien's assertion that his due process rights had been violated by the immigration judge's denial of his request for a continuance, finding that the alien did not suffer any prejudice and that the denial did not materially affect the ultimate outcome of his case in light of the Board's determination that he is ineligible for adjustment of status.

> The Board found that 8 C.F.R. § 204.2(h)(2), "clearly implies" that a new visa petition is the only means of reaffirming or reinstating a previously approved visa petition.

The Offense Of Possession Of Child Pornography In Violation Of Section 827.071(5) Of The Florida Statutes Is A Crime Involving Moral Turpitude

In ***Matter of Olquin***, 23 I&N Dec. 896 (BIA 2006), the Board affirmed the Immigration Judge's decision finding the alien removable and ineligible for relief on the basis of his conviction. The Board cited the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), in which that Court observed that sexual abuse of a child is a most serious crime and "an act repugnant to the moral instincts of a decent people."

The Board noted that the case did not directly address the issue of moral turpitude, but it did recognize the serious offense to the ethics and accepted moral standards posed by child pornography; that the Court employed similar language to that used by the Board when making a determination regarding moral turpitude; and that the Court has also acknowledged child pornography to be intrinsically related to sexual abuse of children because – as a permanent record of a child's abuse – its circulation continues to harm the child's reputation and emotional well-being. Accordingly, the Board found that the offense of possession of child pornography is morally reprehensible and intrinsically wrong, and concluded that the Immigration Judge properly found the alien to have been convicted of a crime involving moral turpitude.

Prima Facie Eligibility For Relief Based On Alleged Violation Of China's Coercive Population Control Policy Cannot Be Established Where The Evidence Fails To Demonstrate Chinese Nationals Returning To That Country With Foreign-Born Children Have Been Subjected To Harm

In ***Matter of C-C-***, 23 I&N Dec. 899 (BIA 2006), the Board determined that an alien seeking to reopen removal proceedings based on a claim that the birth of a second child in the United States will result in the alien's forced sterilization in China cannot establish prima facie eligibility for relief where the evidence submitted with the motion and the relevant country conditions reports do not indicate that Chinese nationals returning to that country with foreign-born children have been subject to forced sterilization in the alien's home province.

The Board distinguished the Third Circuit's decision in *Guo v. Ashcroft*, 386 F.3d 556 (3rd Cir. 2004), but also pointed out that the latest documents on country conditions issued by the Department of State conflict with the views of the affidavit prepared by Dr. John Aird, a retired demographer, on which the *Guo* court relied in reaching that decision.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **Asylum Applicant Adverse Credibility Determination Upheld Based Upon Inconsistent Statements At Port Of Entry**

In ***Simo v. Gonzales***, __F.3d__, 2006 WL 924008 (1st Cir. April 11, 2006) (Torruella, *Stahl*, Howard), the court upheld the adverse credibility findings and affirmed the denial of asylum and withholding of removal to an applicant from Albania. The IJ had found that the applicant's testimony at the asylum hearing was inconsistent with the statements that he had previously provided to immigration officials at the border. The BIA affirmed and adopted noting that the inconsistencies constituted a cogent basis for the adverse credibility determination. The court affirmed, finding that the applicant's account of how he procured his passport and "his failure to mention persecution at the airport were sufficient to raise significant doubt about [his] credibility."

Asylum applicant's account of how he procured his passport and "his failure to mention persecution at the airport were sufficient to raise significant doubt about [his] credibility."

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■ **First Circuit Holds That It Lacked Jurisdiction To Review Determination That Asylum Application Was Untimely**

In **Hayek v. Gonzales**, __F.3d__, 2006 WL 964742 (1st Cir. April 14, 2006) (Lynch, Stahl, Lipez) (*per curiam*), the First Circuit held that it lacked jurisdiction to review a finding that petitioner's asylum application was not timely filed. "Findings as to timeliness and changed circumstances are usually factual determination," and consequently not reviewable under the REAL ID Act, said the court.

The petitioner, a citizen of Lebanon, entered the United States as a visitor in 1992 and shortly thereafter married a Lebanese citizen who had overstayed his visa. They later had two children, but the husband was subsequently deported to Lebanon in 2000. Petitioner, who is a Maronite Christian, claimed that she had been involved with the Lebanese Forces, a Christian military and political group opposed to the Syrian presence in Lebanon.

The BIA affirmed the IJ's decision denying withholding and CAT, finding that petitioner had failed to establish past persecution where she failed to provide readily available corroborating evidence, and she had failed to establish a well-founded fear of persecution where the events she testified to took place more than eleven years prior to her application, current country conditions did not support her claims, and her parents and siblings continued to live in the country unharmed.

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■ **First Circuit Upholds Finding Of Marriage Fraud**

In ***Del Carmen v. Gonzales***, 441 F.3d 41 (1st Cir. 2006) (Lynch, Campbell, *Cyr*), the First Circuit upheld the BIA's determination that petitioner, a citizen from the Dominican Republic, procured his permanent resident status by entering into a fraudulent marriage with a U.S. citizen. The court affirmed the IJ's finding that petitioner's ex-spouse's in-court recantation of her previous statement to DHS that her marriage was fraudulent was not credible. DHS had made no promises or threats in order to obtain her statement. The ex-wife had stated under oath, on audiotape, that petitioner had paid her $1500 to marry him and that they neither lived together nor had marital relations. At the hearing, the ex-wife could not recall important details of her marriage. Additionally, the documentary evidence of the marriage, such as love letters and insurance policy, appeared to be deliberately contrived to conceal the fraudulent nature of the marriage.

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■ **The Criminal Offense Prong Of The "Stop-Time Rule" Applies To End Accumulation Of Continuous Presence For Cancellation Of Removal**

In ***Peralta v. Gonzales***, 441 F.3d 23 (1st Cir. 2006) (*Lynch*, Torruella, Lasker (by designation)), the First Circuit held, as a matter of first impression, that the "stop-time rule" retroactively ended the accumulation of continuous physical presence or continuous residence required for cancellation of removal at the time the alien committed a crime involving moral turpitude. The court also held that the stop-time provision clearly applies retroactively.

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■ **Ethnic Chinese Christian Woman From Indonesia Not Entitled To Asylum Because of Changed Conditions**

In ***Susanto v. Gonzalez***, 439 F.3d 57 (1st Cir. 2006) (Boudin, *Cyr*, Lynch), the First Circuit affirmed the agency decision denying asylum. The court found substantial evidence supported the denial of asylum, because State Department Reports assert that the worst of the 1998 anti-Chinese violence occurred in a region of the country where the alien did not reside and that Indonesia had taken serious remedial measures to reduce the level of violence, and the alien could reasonably relocate to a safer part of

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)
Indonesia were she threatened with harm.

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SECOND CIRCUIT

■ Second Circuit Finds That INA § 242(a)(2)(B)(ii) Is Not A Bar To Review Denial Of Continuance

In ***Sanusi v. Gonzales***, __F.3d__, 2006 WL 998223 (2d Cir. April 18, 2006) (Cabranes, Sotomayor, Raggi) (*per curiam*), the Second Circuit held that it had jurisdiction to review the denial of a continuance, agreeing with those Circuits that have held that such decision "is not a decision specified under [INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii)] to be in the discretion of the Attorney General." *See Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004); *Zafar v. Att'y Gen.*, 426 F.3d 1330 (11th Cir. 2005). *But see Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004). The court held that it would review a denial of a motion for a continuance for abuse of discretion, and noted that IJs have "broad discretion with respect to calendaring matters," similar to the "largely unfettered discretion of a district court judge to deny or grant a continuance."

IJs have "broad discretion with respect to calendaring matters," similar to the "largely unfettered discretion of a district court judge to deny or grant a continuance."

The petitioner, a citizen of Nigeria, had been denied a request for asylum in 1998 based on an adverse credibility determination. He did not seek review of that decision. However, petitioner's case was subsequently reopened so that he could pursue a CAT claim. The IJ again found him not credible based on inconsistent testimony and on his demeanor at the hearing. The IJ also denied a third request for continuance. The BIA affirmed and also declined to remand the case to the IJ to evaluate newly available evidence.

The court found nothing to suggest that the denial of petitioner's third request for a continuance was an abuse of discretion. The court also affirmed the denial of CAT protection finding that substantial evidence supported the IJ's adverse credibility finding. Finally, the court found that he BIA did not abuse its discretion in refusing to remand the proceedings, observing that "the Executive Branch officials charged with promulgating immigration regulations and enforcing the immigration laws of the United States have demonstrated their general antipathy to motions to reopen."

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■ Second Circuit Reverses Adverse Credibility Determinations Principally Based On The Use Of Fraudulent Documents To Leave Country

In ***Rui Ying Lin v. Gonzales***, __F.3d__, 2006 WL 945446) (2d Cir. April 12, 2006) (Walker, Cardamone, *Sotomayor*), the Second Circuit reversed the IJ's adverse credibility determination made against an applicant from the Fujan Province, China. The adverse credibility determination was based on internal inconsistencies in petitioner's testimony and her submission of false documentation to flee China.

The court held that a falsified document that goes to the heart of an applicant's claim for asylum may call into question the authenticity of other documents submitted in support of that application, but the use of a fraudulent document to escape immediate danger or imminent persecution, standing alone, is an insufficient basis for an adverse credibility determination. "The circumstances surrounding the creation and use of some false documents, and those documents' relationship to an asylum proceeding, do very little to undermine the authenticity of other documents," said the court "A person who obtains false documents to escape persecution does not, as a result, face a higher burden of persuading an IJ of his or her credibility. People attempting to escape persecution reasonably use all means at their disposal to do so. They may lie to *their government*," observed the court (emphasis added).

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■ Second Circuit Concludes That Excludable Alien Remains Ineligible For Suspension Of Deportation

In ***Tanov v. INS***, __F.3d__, 2006 WL 860694 (2d Cir. April 4, 2006) (Meskill, Pooler, *Hall*), the Second Circuit determined that the Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA") did not change the eligibility requirements for suspension of deportation, and that excludable aliens remain ineligible for suspension of deportation. The petitioner, a Bulgarian citizen, sought to enter the U.S. in 1990. When denied admission he applied for asylum. His application was ultimately denied by the BIA and petitioner was ordered excluded in 1991. Three years later in 1994, petitioner sought reconsideration of that decision, but was again ordered excluded. However, subsequent to the enactment of NACARA in 1997, petitioner successfully moved to reopen his exclusion case but was denied suspension relief based on statutory ineligibility.

The court also held that NACARA, which distinguishes between excludable and deportable aliens, does not violate the Equal Protection Clause because it is not difficult to conceive of a legitimate and bona fide reason why

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
Congress made the distinction.

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■ **Second Circuit Affirms Denial Of Asylum To Chinese National Based On Past And Future Persecution**

In ***Lin v. Atty Gen***, 441 F.3d 193 (2d Cir. 2006) (Winter, Cabranes, Pooler) (*per curiam*), the Second Circuit, affirmed the IJ's denial of asylum to an applicant from the PRC who feared persecution because when he was 16 years old he had posted pro-democracy flyers in public spaces. Although the IJ determined that petitioner subjectively believed he would be persecuted if he returned to PRC, there was insufficient documentary evidence to demonstrate an objective likelihood that petitioner suffered past persecution or would suffer future persecution if returned to his native country.

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■ **Second Circuit That The Substantial Evidence Test Is More Demanding When The Government Seeks To Prove Deportability By Clear And Convincing Evidence**

In ***Francis v. Gonzales***, 442 F.3d 131 (2d Cir. 2006) (Mclaughlin, *Sack*, Koetl (SNDY)), the court reversed the BIA's holding that a permanent resident alien was deportable based upon two alleged convictions in Jamaica prior to his application for admission. The petitioner became an LPR by applying for SAW status in 1988. Ten years or so later, when petitioner applied for citizenship, the INS initiated deportation proceedings claiming that he had been convicted twice in Jamaica in 1980 and 1981 for possession of marijuana. Consequently, the INS argued that when petitioner obtained SAW status he was he was inadmissible under INA § 212(a)(2)(A)(A)(i)(II), and was now deportable under INA § 237. The BIA found that petitioner's admission to the IJ that he had been convicted in Jamaica and a faxed photocopy of petitioner's "rap sheet" from a Jamaican police department was clear and convincing evidence to sustain the charge of removablity.

The court held that "the substantial evidence test becomes more demanding as the government's underlying burden of proof increases."

Preliminarily the court held that "the substantial evidence test becomes more demanding as the government's underlying burden of proof increases." The court specifically disagreed with the Eleventh Circuit's view that the fact that INS was required to prove deportability by clear and convincing evidence did not make judicial review of the BIA's decision more stringent. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (*en banc*). That court reasoned that "findings of fact made by administrative agencies, such as the BIA, may be reversed by this court only when the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings." Instead, the Second Circuit adopted the Sixth and Ninth Circuit's conclusion that evidence may need be more "substantial" to meet the clear and convincing evidence standard. *See Hana v. Gonzales*, 400 F.3d 472, 475-76 (6th Cir. 2005); *Nakamoto v. Ashcroft*, 363 F.3d 874, 882 (9th Cir. 2004), Accordingly, said the court, "under the substantial evidence test, in order to grant a petition for review of an order of the BIA, we are not required to find that any rational trier of fact would be compelled to conclude that [petitioner] was in fact not convicted of two drug offenses. Rather, we must find that any rational trier of fact would be compelled to conclude that the proof did not rise to the level of clear and convincing evidence."

On the merits, the court found that the governing law in the case was the applicable statute that existed in 1988 through 1990. Thus, the court applied the definition of "conviction" under *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). *Ozkok* required an individualized analysis of the particular ameliorative procedures of different states to determine whether a person had been "convicted." Here, the court found that although the Jamaican police report was admissible under 8 C.F.R. §1003.41(d), its use as evidence of "conviction" was not reliable and did not constitute clear and convincing evidence. The court noted that the BIA had failed to consider whether, even accepting as true the facts in the police report, petitioner had been convicted under the *Ozkok* rule. The court also held that petitioner's testimony was insufficient to establish a conviction under *Ozkok*, because there was no proof that a formal judgment of guilt was entered by the Jamaican court. Accordingly, the court concluded that no "rational factfinder" could conclude that this evidence, standing alone, constitutes clear, convincing, and unequivocal evidence that petitioner had two "convictions," and remanded for further factfinding.

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■ **Lack Of Doctrinal Knowledge Of Religion Does Not Automatically Render Claim Of Persecution On Account Of Religion Incredible**

In ***Rizal v. Gonzales***, 442 F.3d 84 (2d Cir. 2006) (Walker, Newman, *Katzmann*), the court reversed and remanded the IJ's adverse credibility finding made against an asylum applicant from Indonesia. The applicant claimed that since he had converted to

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

Christianity he had been subject to harassment and discrimination. The IJ denied the application principally based on his finding that petitioner's lack of detailed doctrinal knowledge about Christianity automatically rendered incredible his claim of religious persecution. "We expressly reject this approach," said the court. "Both history and common sense make amply clear that people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion's doctrinal tenets, and that those same people can be persecuted for their religious affiliation. Such individuals are just as eligible for asylum on religious persecution grounds as are those with more detailed doctrinal knowledge." The court noted, however, that questions about religious doctrine may be relevant in certain circumstances.

> "Both history and common sense make amply clear that people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion's doctrinal tenets, and that those same people can be persecuted for their religious affiliation."

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■ **Second Circuit Reverses Adverse Credibility Determination And Suggests Reassignment To A Different Immigration Judge**

In ***Pavlova v. INS*** , 441 F.3d 82 (2d Cir. 2006) (Calabresi, Straub, *Wesley*), the Second Circuit vacated a denial of asylum where the IJ had determined that petitioner's account of religiously-motivated persecution was not credible. Petitioner claimed that as a member of the Baptist faith had been subject to violence and threats by a Russian nationalistic group. The IJ also denied asylum in the alternative, finding that petitioner's mistreatment lacked the government involvement necessary to constitute persecution.

The Second Circuit found that "six of the seven bases that the IJ gave for his adverse credibility determination [were] erroneous." It also held that the petitioner's failure to submit corroborating evidence was insufficient to support an adverse determination because it was not clear whether the same decision would have been reached without the noted errors.

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■ **Contact With Intimate Parts Of A Child Is An Aggravated Felony Under Connecticut Law**

In ***Dos Santos v. Gonzales***, 440 F.3d 81 (2d Cir. 2006) (Oakes, *Pooler*, Sotomayor), the court held that a Connecticut conviction for contact with the "intimate parts" of a child under the age of sixteen or for subjecting such a child to contact with the defendant's "intimate parts" is a crime of violence and thus an "aggravated felony." The court determined that it is the non-consent of the victim (under Connecticut law, children under the age of sixteen cannot consent to sexual contact) that is the touchstone for determining whether a sex-based crime is a crime of violence.

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■ **Immigration Judge Cannot Disbelieve Asylum Applicant's Claim To Be A Christian Without Questioning Him On This Subject**

In ***Yang, You Hao v. Gonzales***, 440 F.3d 72 (2d Cir. 2006) (Calabresi, Straud, Wesley) (*per curiam*), the court concluded that the IJ's adverse credibility finding was not supported by substantial evidence. The court determined that petitioner's testimony and submitted documents were consistent, and criticized the IJ for not fully developing the record. In particular, the court held that the petitioner's claim that he was a Christian could not be disbelieved based solely on his failure to provide specific examples of his knowledge of Christian doctrine, and that to disbelieve petition on this ground, the IJ must ask specific questions directed to petitioner's knowledge.

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■ **Second Circuit Determines That REAL ID's "Questions Of Law" Refers To Narrow Category Of Issues Of Statutory Construction**

In ***Bugayong v. INS***, 442 F.3d 67 (2d Cir. 2006) (Kearse, Cardamone, Cabranes)(*per curiam*), the Second Circuit held that the denial of petitioner's request for a section 212(h) waiver of inadmissibility and adjustment of status was a discretionary judgment committed by law to the BIA and not subject to judicial review. The court discussed the interplay of the former INA jurisdiction provisions and the REAL ID Act jurisdiction provision, which restores judicial review for "constitutional claims or questions of law." The court held that the phrase "questions of law" does not extend to the alien's claims of legal error, but instead refers to a narrow category of issues regarding statutory construction. The court also noted that the statute plainly places the decision to grant 212(h) relief in the discretion of the Attorney General, even if the statutory prerequisites are met.

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FOURTH CIRCUIT

■ **A Motion To Reopen For Ineffective Assistance Of Counsel Must Comply With *Lozada* Even Where Movant Is Prima Facie Eligible For Asylum**

In ***Barry v. Gonzales***, __F.3d__,

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

2006 WL 1009215) (4th Cir. April 19, 2006)(Michael, King, *Gregory*), the Fourth Circuit held that the BIA did not abuse its discretion by denying petitioner's motion to reopen premised on a claim of ineffective assistance of counsel. The petitioner, a citizen of the Republic of Guinea had unsuccessfully sought asylum on the basis of past persecution on account of political opinion. Petitioner then sought to reopen her case claiming that the ineffective assistance of her prior counsel prevented her from presenting evidence that she had undergone FGM and that he daughter would also likely be forced to undergo FGM if returned to Guinea. The BIA denied the motion because the FGM evidence had been available at the initial asylum hearing and that she had not satisfied the three-prong test set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

The court held that it would only reach the merits of a claim of ineffective assistance of counsel where an alien "substantially complies with *Lozada* requirements."

The court preliminarily noted that but for the alleged ineffectiveness of counsel, petitioner had presented a prima facie case of persecution that would have entitled her to asylum had this evidence been presented at the initial hearing. However, the court held that it would only reach the merits of a claim of ineffective assistance of counsel where an alien "substantially complies with *Lozada* requirements, such that the BIA could have ascertained that the claim was not frivolous and otherwise asserted to delay deportation." "Aliens who fail to satisfy any of the three *Lozada* requirements will rarely, if ever, be in substantial compliance," said the court. Here, the court found that petitioner had failed to satisfy any of the requirements and consequently it concluded that the BIA did not abuse its discretion in denying the motion. The court also found that the BIA acted within its discretion in denying the motion under 8 C.F.R. § 1003.2 (c), because petitioner relied on evidence that was available during her initial removal proceeding.

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■ **Fourth Circuit Rejects Claim That Immigration Judge Erroneously Disregarded Corroborating Evidence**

In ***Gandziami-Mickhou v. Gonzales***, __F.3d__, 2006 WL 3771681 (Wilkinson, King, *Shedd*) (4th Cir. April 17, 2006), the court upheld the denial of asylum to a citizen of the Republic of Congo. The applicant claimed that she had been persecuted on account of her involvement with the Congolese Movement for Democracy and Integral Development (MCDDI), an opposition political party. She also argued the IJ had violated circuit precedent by ignoring corroborating evidence she submitted in support of that claim. The court held that the allegedly disregarded evidence (affidavits from family and friends) did not constitute independent evidence that the alien suffered persecution on account of a protected ground. The court found that the IJ's determination was "not manifestly contrary to law and [was] supported by substantial evidence."

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■ **Fourth Circuit Concludes That Immigration Judge Erred As a Matter of Law Because He Did Not Apply the Mixed-Motive Standard To Petitioner's Claim Of Persecution**

In ***Menghesha v. Gonzales***, 440 F.3d 201 (4th Cir. 2006) (Williams, King, *Gregory*), the Fourth Circuit held that the IJ misapplied the law in ruling that the government of Ethiopia intended to prosecute petitioner for obstruction of justice, and improperly held the alien to an "overly stringent legal standard" of proving that political persecution was the government's "sole motive." "An asylum applicant need only show that the alleged persecutor is motivated in part to persecute him on account of a protected trait. Recognizing that persecutors often have multiple motives for punishing an asylum applicant, the INA requires only that an applicant prove that one of those motives is prohibited under the INA," said the court.

In a dissenting opinion, Judge Willimas, while agreeing that the INA contains a "mixed motive" standard, would have found that under *Elias-Zacarias*, the IJ's decision was supported by substantial evidence.

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FIFTH CIRCUIT

■ **Fifth Circuit Determines That Connection With Police Does Not Constitute Nexus To Statutory Ground For Asylum**

In ***Tamara-Gomez v. Gonzales***, __F.3d__, 2006 WL 1000571 (5th Cir. April 18, 2006) (Reavley, *Jolly*, DeMoss), the Fifth Circuit affirmed the denial of asylum, withholding of removal, and CAT protection to a native of Colombia. The petitioner, after serving in the Colombian Air Force, was employed as a helicopter mechanic by a company that provided support to the Columbian National Police (CNP). Petitioner accompanied the CNP on helicopter missions and wore the CNP uniform. In one of their missions against the narco-terrorist group FARC, petitioner and the helicopter crew were filmed by a FARC member and threatened with retaliation. Subsequently, petitioner re-

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

ceived threatening phone calls, followed by a bombing of his neighborhood. Fearing for his family and unable to get CNP protection, petitioner moved his family to the United States. Petitioner remained in Colombia but moved to a military base for protection. Later, fearing for his own life, he entered the United States as a visitor and less than a year later applied for asylum, withholding, and CAT protection. An IJ denied these applications and the BIA affirmed without opinion.

The court found, contrary to the IJ's finding, that petitioner had been subject to past persecution by the FARC. However, the court found that the petitioner's association with the police did not constitute a nexus to political or imputed political grounds. "It is clearly established that '[d]angers faced by policemen as a result of that status alone are not ones faced on account of race, religion, nationality, membership in a particular social group or political opinion,'" said the court citing *Matter of Fuentes*, I&N Dec. 658, 661 (BIA 1988). Similarly, because of the lack of nexus between the persecution and one of the five grounds, the court found substantial evidence to support the denial of asylum based on future persecution and the denial of withholding of removal.

The court also held that the Columbian government's failure to apprehend or eradicate the threat or risk of harm did not constitute sufficient state action for purposes of the CAT. "The Government of Colombia has not in any way, inflicted, acquiesced, or even turned a blind eye to the conduct of the FARC," said the court. "We agree with other circuits that neither the failure to apprehend the persons threatening the alien, nor the lack of financial resources to eradicate the threat or risk of torture constitute sufficient state action for purposes of the Convention Against Torture," concluded the court.

The court held that the Columbian government's failure to apprehend or eradicate the threat or risk of harm did not constitute sufficient state action for purposes of the CAT.

Finally, the court noted that petitioner's "case evokes feelings of sympathy for those fighting the drug lords and insurrectionists in Colombia. We have been made aware of the dangers that many face in the drug wars and related violence occurring in Colombia."

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■ **Fifth Circuit Concludes That It Lacks Jurisdiction To Review A Discretionary Denial Of Adjustment Of Status**

In ***Hadwani v. Gonzales***, __F.3d__, 2006 WL 905622 (5th Cir. April 4, 2006) (Jones, Wiener, DeMoss) (*per curiam*), the Fifth Circuit held that it lacked jurisdiction over petitions for review concerning the discretionary denial of adjustment of status. The petitioner, a citizen of India entered the United States in 1995 and did not depart when his authorized stay expired. Petitioner was placed in proceedings in 2000, where he sought adjustment of status. The IJ denied adjustment in the exercise his discretion, because petitioner had "deliberately, negligently, and willfully" failed to disclose the fact that he had previously been arrested for selling alcohol to a minor, and had illegally worked in the United States." The BIA summarily affirmed

The court also noted that while it retained jurisdiction over constitutional claims and questions of law, no such claims were raised and the alien's constitutional claim was "an abuse of discretion argument [cloaked] in constitutional garb." "The Fifth Amendment affords an alien the right to "(1) notice of the charges against him, (2) a hearing before an executive or administrative tribunal, and (3) a fair opportunity to be heard," and petitioner did not dispute that these requirements were met in his case, said the court.

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■ **Fifth Circuit Holds That Sentence Enhancements Count For Purposes Of Counting The Term Of Imprisonment For Aggravated Felonies.**

In ***Mutascu v. Gonzales***, __F.3d__, 2006 WL 853306) (5th Cir. April 3, 2006) (Reavely, Jolly, DeMoss) (*per curiam)*, the Fifth Circuit upheld the denial of the petitioner's application for cancellation of removal based on his conviction for an aggravated felony. The court reiterated its disagreement with the Ninth Circuit's decision in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (*en banc*). The court explained that under the statute, the "term of imprisonment" is defined according to the sentence imposed by a "court of law," not the sentence prescribed by the underlying statute. Further, the court noted that the alien's offense required a prior conviction as an element of the crime. Thus, the petitioner's sentence could not be "atomized" into constituent parts, and, as the term imposed was 365 days, it satisfied the statutory aggravated felony definition.

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■ **Fifth Circuit Holds That A Pending Administrative Motion To Reopen Does Not Automatically Toll A Voluntary Departure Period**

In ***Banda-Ortiz v. Gonzales,*** __F.3d__, 2006 WL 774923 (5th Cir. March 28, 2006) (Jolly, *Garza*; Smith dissenting), the Fifth Circuit upheld the BIA's de-

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

nial of cancellation of removal based on the failure to depart the United States under an agreed-upon voluntary departure order. The court rejected the argument that a timely-filed motion to reopen automatically tolled the time for voluntary departure. The court noted that VD is the result of an agreed-upon exchange of benefits between an alien and the Government. It is not granted "unless the alien requests such voluntary departure and agrees to its terms and conditions." VD confers benefits and exacts costs including a speedy departure. Any automatic tolling or judicial extension of the voluntary departure period would be contrary to the intent of the statute and regulations reasoned the court. The court concluded that the BIA reasonably interpreted the statute's motion to reopen and voluntary departure provisions in a manner that permits an alien who accepts voluntary departure to pursue a motion to reopen within the bounds and restrictions prescribed by Congress.

VD is the result of an agreed-upon exchange of benefits between an alien and the Government. It is not granted "unless the alien requests such voluntary departure and agrees to its terms and conditions."

Judge Smith filed a dissenting opinion noting that the majority "unnecessarily creates a circuit split on an important issue of immigration law."

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■ An Individualized Fear Of Persecution Can Be Negated By Evidence Directly Related To That Fear

In ***Shehu v. Gonzales*** , 443 F.3d 435 (5th Cir. 2006) (*Smith*, Garza, Prado), the Fifth Circuit affirmed the denial of asylum and of humanitarian asylum to an applicant from Kosovo. The court determined that even if the government were required to negate the assertion of individualized persecution by requiring the submission of more than generalized evidence of changed country conditions, the government had done so in the current case. The court also found that evidence that Kosovar Muslim experienced at hands of what, at time, was Kosovo's Serbian-dominated police force of persecution was no more severe than that experienced by the vast percentage of others seeking asylum and was insufficient to establish the criteria of severe persecution required to entitle one to "humanitarian" asylum.

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SIXTH CIRCUIT

■ Sixth Circuit Holds That Reliance On State Department Investigation Reports Violated Due Process Because They Were Hearsay

In ***Alexandrov v. Gonzales***, 442 F.3d 395 (*Martin*, Nelson, Cole) (6th Cir. 2006), the Sixth Circuit held that the IJ violated petitioner's due process rights when he rejected his asylum application as frivolous based on two reports prepared by the Department of State. The petitioner, a Bulgarian citizen, entered the United States as a student. However, he never attended school. Instead, less than a year after his admission, he filed an asylum application which was granted in 1997. Six months after the grant of asylum, the former INS sought to terminate petitioner's asylum status based on its conclusion that petitioner had submitted fraudulent documents in support of his asylum application. At the asylum hearing, the INS submitted two memoranda prepared by the U.S. Embassy in Sofia and the testimony of a consular official who testified telephonically. Based on the documents and the testimony, the IJ concluded that petitioner had submitted fraudulent documents, that he was not credible, and that he had filed a frivolous asylum application under 8 C.F.R. 1208.20, thereby rendering him ineligible for all forms of relief. The BIA affirmed.

The court apparently held that the official documents presented by the INS were so highly unreliable that they violated petitioner's due process. In particular, the court criticized the Embassy's memoranda because they lacked a degree of detail, particularly because they did not identify what type of investigation was conducted and who the investigator was. "There is not much that we know aside from the apparent conclusions of the mysterious investigation," said the court. The court also reversed the IJ's adverse credibility finding, stating that "his conclusion to be a questionable one based on what appears in the transcript." Accordingly, the court vacated and remanded the case to the BIA.

Judge Nelson wrote a dissenting opinion. He would have concluded that the IJ's reliance on the embassy memoranda was not fundamentally unfair, and would have affirmed the denial of asylum.

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■ Sixth Circuit In A Split Opinion Remands For New Asylum Determination Where Adverse Credibility Findings, Coupled With Apparent Ineffective Assistance, Were Questioned

In ***N'Diom v. Gonzales***, 442F.3d 494 (6th Cir. 2006) (*Merritt*, Martin; Gilman, dissenting), the court vacated the BIA's decision and remanded for a "retrial" of the question of petitioner's eligibility for asylum. The IJ found at

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

least six discrepancies between the testimony and the asylum application that led him to find petitioner not credible. The court determined that these discrepancies were "simply omission to state a particular detail," and were not opposite or inconsistent with prior statements. The court also found that the BIA had failed to consider the dire human rights situation in Mauritania. Additionally the court found that petitioner's counsel was incompetent and lacked diligence because he had not timely introduced evidence at the asylum hearing. Finally, the court found that the rejection of petitioner's testimony was questionable when it was consistent with known facts in Mauritania.

"The immigration bar would be well served by strongly considering whether to promulgate certain standards of conduct - - i.e. ABA-like Guidelines for the Performance of Counsel in Immigration Proceedings."

In a concurring opinion, Judge Martin joined the chorus of federal judges who have criticized the increasing number of decisions reaching the federal courts that are "lacking in reason logic, and effort." However, he also noted that "the problem lies not only with the administrative courts, but also with petitioners' own counsel," noting that "reviewing court have been, in my opinion, unduly tolerant of ineffective counsel." Judge Martin suggested that "the immigration bar would be well served by strongly considering whether to promulgate certain standards of conduct – i.e. ABA-like Guidelines for the Performance of Counsel in Immigration Proceedings – that could assist counsel in representing immigration clients and also help the courts in evaluating counsel's performance."

Judge Gilman filed a dissenting opinion. He would have found that substantial evidence supported the IJ's adverse credibility finding. He would also have found that the ineffective assistance of counsel claim did not entitle petitioner to a remand because he had not presented it to the BIA in the first instance.

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SEVENTH CIRCUIT

■ Habeas Petitioners Must Sue Their Immediate Custodian In The District Of Confinement And Not The Secretary of DHS Or The Attorney General

In an issue of first impression, the Seventh circuit held in ***Kholyavskiy v. Achim***, __F.3d__, 2006 WL 988043 (7th Cir. April 17, 2006) (Cudahy, *Ripple*, Kanne), that the Attorney General was not proper respondent to alien's petition, and that the warden of state jail where alien was detained, rather than director of field office of the United States Immigration and Customs Enforcement (ICE), was alien's immediate custodian, and thus was proper respondent.

The petitioner, who had entered the United States as a Russian refugee in 1992, had been ordered removed for committing two or more crimes involving moral turpitude and was being held at the Kenosha County Detention Center in Kenosha, Wisconsin. While in detention he brought an habeas action challenging his detention on constitutional grounds and naming as respondents the director of the ICE Chicago field office, DHS, and the Attorney General. The district court dismissed the habeas based on the government's contention that respondents did not have "custody" over petitioner within the meaning of the habeas statute.

On appeal petitioner contended that the traditional immediate custodian rule applicable to a habeas petitioner serving a criminal sentence should not be applied to an alien undergoing removal proceedings. The court noted that the circuits are divided on this question. *Compare*, *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003), and *Henderson v. INS*, 157 F.3d 106, 126 (2d Cir.1998), allowing an alien to name INS district director, with *Yang You Yi v. Maugans* 24 F.3d 500, 507 (3d Cir. 1994), and *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000), applying the immediate custodian rule. In light of the Supreme Court's decision in *Rumsefeld v. Padilla*, 542 U.S. 426 (2004), the court first determined that petitioner's challenge in this case fell within the "core" category of habeas challenges. In particular, petitioner was not challenging the removal order but rather the constitutional validity of his confinement. Consequently, under *Padilla*, the proper respondent was person who had the immediate custody over petitioner's detention. The court rejected petitioner's contention that the ICE director was the functional equivalent of the warden because he could order his release. Accepting this argument, said the court, would mean that anyone in the chain of command, including the President, could be the immediate custodian.

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■ Seventh Circuit Finds That Asylum Applicant Did Not Suffer Persecution On Account Of A Protected Ground

In ***Margos v. Gonzales***, __F.3d__, 2006 WL 861137 ((7th Cir. April 5, 2006) (Flaum, Easterbrook, *Manion*), the Seventh Circuit affirmed the BIA's determination that petitioner did not suffer past persecution and did not have a well-founded fear of future persecution in Iraq. The court held that petitioner's injuries, suffered at the hands of Iraqi police, followed his

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)
assault on another Iraqi and her uncooperative behavior, and thus were not on account of her political opinion. The court further determined that the recent changes in Iraq foreclosed petitioner's well-founded fear of future persecution.

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■ **Seventh Circuit Determines That Brigadier General's Dismissal From Military Was Not Grounds For Asylum**

In ***Musabelliu v. Gonzales***, 442 F.3d 991 (Cudahy, Posner, *Easterbrook*) (7th Cir. 2006), the Seventh Circuit affirmed the denial of asylum and withholding of removal to an asylum applicant from Albania. The court held that the applicant, a Brigadier General, who was dismissed from the military, failed to establish "causation" between his complaint to his superior in the military and the government about the diversion of relief supplies in Albania, and his subsequent dismissal from the military and an attack on a military convoy in which he was riding. The court found that *post hoc ergo propter hoc* is not a good way to prove causation and, even assuming causation, petitioner's complaints to his superiors in the government about corruption in the military was not a "public political stand" amounting to a form of political opinion.

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■ **Theft Offenses, Including Downloading Music Over The Internet, Are Crimes Involving Moral Turpitude**

In ***Hashish v. Gonzales***, 442 F.3d 572 (7th Cir. 2006) (*Ripple*, Kanne, Rovner), the Seventh Circuit affirmed the BIA's determination that petitioner's theft offenses were crimes involving moral turpitude. Petitioner contended that his first conviction - for theft of a recordable sound - to downloading music over the internet, "does not arouse indignation in the general populace and, therefore, should not be considered a crime of moral turpitude." The court rejected the alien's invitation to look beyond the crimes charged to his underlying conduct, and instead employed the categorical approach by examining only the elements of the statute under which the alien was convicted. The court ruled that petitioner's convictions for theft of recordable sound and misdemeanor theft both required the knowing exertion of authority or control over the property of another, and were therefore crimes of moral turpitude per se.

> "It would be necessary (and appropriate) to consider constitutional claims only if Congress had provided for kangaroo tribunals (in general) or adopted some specific rule that is open to constitutional doubt."

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■ **Active Questioning Of Alien And Three Hour Time Limit On Hearing Did Not Implicate The Due Process Clause**

In ***Rehman v. Gonzales***, 441 F.3d 506 (7th Cir. 2006) (*Easterbrook*, Ripple, Wood) the Seventh Circuit affirmed the denial of asylum to an applicant from Pakistan. The court ruled that the IJ's intervention with the petitioner's counsel questioning was designed to keep the hearing focused on material issues. The court also found that there was no evidence that the three hour time limit imposed by the IJ precluded petitioner from presenting material evidence. The court criticized petitioner's constitutional challenge to the IJ's time limit. "It would be necessary (and appropriate) to consider constitutional claims only if Congress had provided for kangaroo tribunals (in general) or adopted some specific rule that is open to constitutional doubt," said the court. "Yet [petitioner] does not challenge the validity of any of the many statutes and rules of procedure that govern removal hearings. We have remarked before on the tendency of flabby constitutional arguments to displace more focused contentions."

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■ **Seventh Circuit Rejects Claim Of Invalid Service Based On Judicial Admission**

In ***Quereshi v. Gonzales***, 442 F.3d 985 (7th Cir. 2006) (Flaum, *Bauer*, Evans), the Seventh Circuit dismissed as moot petitioner's claim that the IJ abused his discretion in denying a request for a continuance pending adjudication of his visa petition, where the government presented evidence at oral argument showing that the petition had been adjudicated and denied. The court also determined that, although the Notice to Appeal's certificate of service failed to comply with the regulations because it contained no date of service, petitioner's pleading to the charges constituted a judicial admission and a waiver of the alien's challenge to the removal proceedings.

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■ **Seventh Circuit Holds That It Lacks Jurisdiction To Review Discretionary Denial Of Adjustment Of Status**

In ***Sokolov v. Gonzales***, 442 F.3d 566 (7th Cir. 2006) (Bauer, Posner, *Wood*), the Seventh Circuit held that it lacked jurisdiction to review the IJ's denial of petitioner's application for adjustment of status in the exercise of discretion. The petitioner initially filed

(Continued on page 15)

Summaries Of Recent Federal Court Decisions

an asylum application claiming that he was persecuted in Russia because he is a practicing Baptist. The IJ denied the application, finding that petitioner had failed to meet his burden of showing past persecution and had filed his claim too late. While his appeal to the BIA was pending, petitioner married a U.S. citizen. The BIA thus remanded the case to the IJ to consider whether petitioner could adjust his status based on the marriage. The IJ thought not, exercising his discretion to deny petition's application primarily because of his implausible explanation of a recent conviction for financial identity theft. The BIA affirmed the denial of both claims.

The court determined that the denial of the adjustment application on the ground that the petitioner had been convicted of financial identity theft was within the IJ's discretion and not subject to judicial review. However, it noted that "the door-closing statute remains "inapplicable to orders that violate the Constitution.'"

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■ **No Equitable Tolling To File MTR Where Petitioner Failed To Demonstrate Due Diligence**

In ***Patel v. Ashcroft***, 442 F.3d 1011 (7th Cir. 2006) (Manion, Rovner, *Wood*), the court held that the BIA did not abuse its discretion in denying petitioner's motion to reopen based on ineffective assistance of counsel where she failed to demonstrate due diligence so as to be entitled to equitable tolling of the motion to reopen time limits. The court found that the BIA reasonably imputed to petitioner the knowledge her family previously received regarding the existence of a deportation order, which should have prompted her to timely follow-up on her own case.

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■ **Seventh Circuit Rejects Petitioner's Challenge To Denial Of Continuance**

In ***Pede v. Gonzales***, 442 F.3d 570 (7th Cir. 2006) (Posner, *Evans*, Williams), the court affirmed the IJ's order of removal against the petitioner who had been convicted of visa fraud. An IJ had granted several continuances to allow the INS/DHS to adjudicate his application for adjustment of status. After five years without a decision, the IJ refused further delays and ordered petitioner removed. The Seventh Circuit held that the IJ properly exercised his discretion in denying further continuances, because petitioner adjustment application had little chance of success due to her convictions for visa fraud.

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■ **Seventh Circuit Applies The "Hypothetical Federal Felony Rule"**

In ***Gonzales-Gomez v. Achim***, 441F.3d 532 (7th Cir. 2006) (*Posner*, Evans, Williams), the court reversed the BIA's order of removal holding that the alien's Illinois felony conviction for possession of cocaine was not an aggravated felony drug trafficking offense, because it would be punishable as only a misdemeanor under federal law.

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Ed. Note: The circuits have split on this "hypothetical federal felony" rule. On April 3, 2006, the Supreme court granted *certiorari* in *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005), *petition for certiorari granted,* 74 U.S.L.W. 3289 (U.S. April 3, 2006) (No. 05-547)). The Eighth Circuit held below that an alien's felony drug possession offense under state law was a "drug trafficking offense," and hence an aggravated felony, even though the crime would be not punishable as a felony under the federal Controlled Substances Act. The government acquiesced in the alien's petition for *certiorari* in order to resolve the circuit conflict on this issue.

■ **Seventh Circuit Criticizes Last-Minute Motion For Expert Telephonic Testimony**

In ***Djedovic v. Gonzales***, 441 F.3d 547 (7th Cir. 2006) (*Easterbrook*, Williams, Sykes), the Seventh Circuit upheld the denial of a motion to permit an expert to testify by telephone, and the subsequent denial of asylum and withholding of removal. The petitioners, husband and wife citizens of Serbia and Montenegro, respectively sought asylum on two bases. First, the husband claimed that his conscription into the Serbian armed forces and his possible imprisonment for desertion amounted to persecution. Second, they claimed because they were a Muslim and a Christian, they were subjected to persecution due to having married across religious lines. At the hearing, petitioners sought to present the telephonic testimony from an expert in Balkan history. However, because the IJ had not been given advance notice, the IJ invited counsel to submit a written report from the expert and declined to continue the hearing. Counsel did not accept the invitation. The IJ denied asylum and the BIA summarily affirmed.

On appeal, petitioner's challenged on constitutional grounds the IJ's refusal to permit live testimony from the expert. "Reliance on the due process clause is not only unnecessary but also inappropriate," said the court. "Statutory arguments take precedence over constitutional ones, and because every alien must have "a reasonable opportunity – to present evidence on the alien's own behalf," 8 U.S.C. § 1229a(b)(4)(B), the only question we need consider is whether that "reasonable opportunity" was afforded. Here, the court found that petitioner was given a opportunity to present his case. The court rejected

(Continued on page 16)

Summaries Of Recent Federal Court Decisions

(Continued from page 15)

the argument that limiting an alien to written expert testimony violates the Constitution, pointing to the decision in *Richardson v. Perales*, 402 U.S. 389 (1971), where the Court held that the both the Constitution and the APA permit agencies to receive expert evidence in written form, without producing the expert for oral testimony. The court disagreed with a contrary ruling in *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005), noting that it was "hard to accept a decision that fails to engage controlling authority form the Supreme Court."

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■ **Seventh Circuit Holds It Has Jurisdiction To Review Decision On Timeliness Of Asylum Claim Due To Mischaracterization**

In ***Mabasa v. Gonzales*** , 440 F.3d 902 (7th Cir. 2006) (*Bauer*, Manion; Williams, dissenting), the court affirmed the BIA's denial of asylum and withholding of removal to an applicant and his family from Zimbabwe. The IJ determined that petitioner's asylum claim was untimely, and that he had not established "changed circumstances" to excuse that late filing. The BIA affirmed, but erroneously referred to the petitioner's claim as based on "extraordinary circumstances." The court held that it had jurisdiction under the REAL ID Act to review the BIA's refusal to excuse the late filing by reason its mischaracterization, but ruled the error harmless since the asylum claim should not have been permitted under either ground. The court also affirmed the denial of withholding and CAT protection finding the lack of a clear provability that petitioner would be subject to persecution by the government on account of his political opinion.

In a dissenting opinion, Judge Williams would have found that petitioner was entitled to withholding because he had presented compelling evidence that he would face persecution and torture if returned to Zimbabwe.

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■ **Seventh Circuit Affirms Denial of Withholding Of Removal To Applicant From Uganda**

In ***Kobugabe v. Gonzales***, 440 F.3d 900 (7th Cir. 2006) (*Easterbrook*, Williams, Sykes), the Seventh Circuit held that the BIA did not abuse its discretion or commit error in its denial of withholding of removal. The petitioner, a citizen of Uganda, claimed tribal and political persecution because the government allegedly killed family members who participated in previous regimes. She also claimed that she had been raped by members of the Ugandan army. The court noted the untimeliness of petitioner's asylum application, did not address the BIA's finding of adverse credibility, but determined that even if the alien was credible, neither the record evidence nor current country conditions suggest any persecution either of petitioner's tribe or of relatives of former regime members. "The United States does not insure aliens against unrest or civil war in their homelands," said the court.

> "The United States does not insure aliens against unrest or civil war in their homelands."

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■ **Seventh Circuit Holds That Petitioner Waived Review Of The BIA's Denial Of His Motion To Reconsider.**

In ***Asere v. Ashcroft***, 439 F.3d 378 (7th Cir. 2006) (*Cudahy*, Ripple, Kanne), the Seventh dismissed a petition for review of the BIA's denial of asylum. The petitioner applied for asylum because he claimed that his family in Ghana would kill him because he rejected the family's traditional religion in favor of Christianity. The IJ granted asylum, and the BIA affirmed without opinion. On the government's motion to reconsider, however, the BIA reversed itself and denied asylum by simply saying that petitioner could relocate within Ghana. Petitioner then filed a motion to reconsider which was denied. The petition for review filed by petitioner only challenged the BIA's denial of asylum and ignored the BIA's denial of the motion to reconsider. The court concluded that petitioner had waived any argument concerning the denial of the motion to reconsider and that any other arguments were untimely. The court suggested, however, that it would be appropriate for petitioner to file a motion to reopen based on ineffective assistance of counsel.

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■ **Seventh Circuit Commends Government's Request To Remand**

In ***Ren v. Gonzales***, 440 F.3d 446 (7th Cir. 2006) (*Posner*, Easterbrook, Evans), the Seventh Circuit granted the government's motion to remand the case for further consideration of the petitioner's asylum applications in light of current country conditions in China. The court initially ordered supplemental memoranda on whether the government's remand motion was a confession of error and whether the court had to exercise independent judgment on the remand request. The court then held that agency remands are entitled to greater deference than confessions of error in district courts, and noted that the Supreme Court has commended

(Continued on page 17)

Summaries Of Recent Federal Court Decisions

(Continued from page 16)

the remanding of agency proceedings in lieu of determination on the merits.

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EIGHTH CIRCUIT

■ Eighth Circuit Concludes That Alleged Incidents Did Not Rise To The Level Of Persecution

In ***Suprun v. Gonzales***, 442 F.3d 1078 (8th Cir. 2006) (Murphy, Bowman, *Benton*), the Eighth Circuit affirmed the denial of asylum, withholding of removal and CAT protection to a Russian citizen. Petitioner testified that when he was a young boy in the Soviet Union he had been called anti-Semitic names and had been assaulted because he was Jewish.

The court ruled that the incidents testified to by the petitioner did not rise to a severity constituting "persecution", and that he had failed to establish any nexus between the incidents and the government. The court also found that the evidence would not compel a reasonable fact finder to conclude that the government was unwilling or unable to control the persons bothering him.

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■ Asylum Case Remanded For Failure To Make A Determination Of Past Persecution

In ***Bushira v. Gonzales***, 442 F.3d 626 (8th Cir. April 4, 2006) (Bye, Beam, *Gruender*), the Eighth Circuit vacated the denial of asylum holding that the IJ erred in failing to make a finding on whether the alien suffered past persecution due to a protected ground.

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■ Applicant Failed To Establish A Clear Probability Of Persecution If Returned To Albania After Long Absence

In *Ruzi v. Gonzales*, 441F.3d 611 (8th Cir. 2006) (Melloy, Colloton, *Benton*), the court affirmed the denial of asylum and withholding of removal to a citizen of Albania. The court held that given the speculative evidence supporting the applicant's claims of persecution and the changed country conditions in Albania during the 11 years he had been absent from the country, he has not sufficiently established a "clear probability" of persecution.

> The court found that it lacked jurisdiction under the REAL ID Act to review the Attorney General's discretionary denial of petitioner's request for a waiver of the requirement under INA § 216(c)(4)(B).

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■ Eighth Circuit Determines That The Board Has Authority To Issue A Final Removal Order In The First Instance

In ***Solano-Chicas v. Gonzales*** , 440 F.3d 1050 (8th Cir. 2006) (Smith, *Heaney*, Benton), the court affirmed the BIA's entry of an order of removal in the first instance. The BIA had reversed the IJ's grant of cancellation and ordered the alien removed. The court held that the BIA has the authority to issue a removal order in the first instance, and specifically disagreed with the Ninth Circuit's decision in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004).

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■ Eighth Circuit Concludes That It Lacks Jurisdiction To Review A Discretionary Denial Of Good Faith Marriage Waiver.

In ***Suvorov v. Gonzales***, 441 F.3d 618 (8th Cir. 2006) (Arnold, *Beam*, Riley), the court dismissed the petition for review, finding that it lacked jurisdiction under the REAL ID Act to review the Attorney General's discretionary denial of petitioner's request for a waiver of the requirement under INA § 216(c)(4)(B), that he and his former spouse file a joint petition to remove the conditional basis of petitioner's permanent residence status. The petitioner, a Russian citizen, had married a U.S. citizen, and had received a conditional permanent residence status. However, a year after the marriage the two separated and later divorced. Petitioner then sought to qualify for a waiver to file a joint petition on the basis that there had been a "good faith" marriage. The IJ, in a fifty-eight page opinion, found otherwise and denied the waiver.

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■ Eighth Circuit Determines That Omission That Goes To The Heart Of Asylum Claim Raises Credibility Issue

In ***Cao v. Gonzales*** , 442 F.3d 657 (8th Cir. 2006) (*Melloy*, Colloton, Benton), the court upheld the denial of a derivative asylum claim by a Chinese national, who claimed his wife was forced to undergo forced sterilization. The court examined separately the IJ's five reasons for finding the petitioner not credible. While noting that several of the IJ's reasons alone would be insufficient, petitioner's omission in his affidavit of his wife's forced abortion and sterilization, taken together with his statements about China's family planning policy that were at odds with the State Department's Asylum Profile, were mate-

(Continued on page 18)

Summaries Of Recent Federal Court Decisions

(Continued from page 17)
rial and sufficient to uphold an adverse credibility determination.

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■ **Eighth Circuit Rejects "Pattern Or Practice" Of Persecution Of Ethnic Chinese Indonesians.**

In ***Wijono v. Gonzales***, 439 F.3d 868 (8th Cir. 2006) (Bye, *Bowman*, Gruender), the court rejected the assertion that ethnic Chinese Indonesians suffer from a "pattern or practice" of persecution and affirmed the denial of asylum. The court noted that the State Department reported a sharp decline in violence against Chinese Christians, the Indonesian government officially promoted ethnic and religious tolerance, and that attacks by Muslim extremists were geographically isolated.

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■ **Eighth Circuit Denies Claim Of Past Persecution Arising Out Of Petetitioner's Failure To Join Military**

In ***Rodriguez v. Gonzales***, 441 F.3d 593 (8th Cir. 2006) (*Murphy*, Bowman, Benton), the court affirmed the denial of asylum, withholding of removal and CAT protection to an applicant from Guatemala. The court held that the applicant, who claimed persecution due to his refusal to join the military, had failed to demonstrate that he experienced past persecution on the basis of a statutorily protected ground, or that he reasonably feared future persecution.

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■ **Eighth Circuit Holds That Alien Granted Advance Parole Is Ineligible For Suspension Of Deportation**

In ***Geach v. Chertoff***, __ F.3d__, 2006 WL 508101 (8th Cir. March 3, 2006) (Murphy, Bright, *Gruender*), the court affirmed the decision of the district court holding that the BIA did not violate due process or equal protection guarantees by placing petitioner in exclusion instead of deportation proceedings because he was returning to the United States on advance parole. The alien could have applied for suspension of deportation relief in deportation but not in exclusion proceedings. The petitioner, entered the U.S. as a visitor an later married a U.S. citizen. While his application for adjustment was pending he was granted advance parole to travel to England to visit his sick parents. Subsequently, his application for adjustment was denied because of two convictions for possession of marijuana and he was placed in exclusion proceedings.

The court held that petitioner's placement in exclusion proceedings satisfied due process, noting the plenary power of Congress in this area. The court found petitioner's right to equal protection was not violated because he was not similarly situated to aliens who did not apply for admission in that such aliens are subject to criminal charges and other adverse consequences, and that any different treatment was justified by the government's rational basis of the "efficient administration of the immigration laws at the border."

In a dissenting opinion, Judge Bright would have found the advance parole regulation invalid as inconsistent with the former suspension of deportation statute.

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NINTH CIRCUIT

■ **Ninth Circuit Determines That 15-Year-Old Threats Can Form The Basis Of A Well-Founded Fear Of Future Persecution**

In ***Canales-Vargas v. Gonzales***, 441 F.3d 739 (9th Cir. 2006) (*Pregerson*, Hawkins; Kozinski, dissenting), the Ninth Circuit, vacated the denial of asylum and remanded for further proceedings. The petitioner contended that after giving a speech denouncing the Shining Path at a political rally in Peru in 1990, she received anonymous threatening notes, including a note that threatening to bomb her house and kill her family, if she did not leave Peru. The IJ denied asylum based on failure to establish past persecution and well-founded fear of future persecution. The BIA affirmed without opinion. The panel majority agreed with the IJ's finding that the notes and calls received by the petitioner did not constitute persecution. However, the court held that the petitioner had a well-founded fear of future persecution on account of political opinion based on escalating threats by the Shining Path, despite petitioner's stay in Peru for seven months without harm after the last of the threats. Such evidence, said the court, would "compel a reasonable fact finder" to conclude that the requisite fear of persecution was shown by the petitioner.

In a dissenting opinion, Judge Kozinsky stated that the Ninth Circuit has "never before held that anonymous death threats, without a scintilla of corroborating harassment, compel a finding that an asylum seeker's fear of persecution is well founded.

In a dissenting opinion, Judge Kozinsky stated that the Ninth Circuit has "never before held that anonymous death threats, without a scintilla of corroborating harassment, compel a finding that an asylum seeker's fear

(Continued on page 19)

Summaries Of Recent Federal Court Decisions

(Continued from page 18)

of persecution is well founded, and I cannot join the majority in interfering, yet again, with the ability of Immigration Judges to do their jobs. Petitioner doesn't allege she endured any harassment other than anonymous threats-not beatings, not detention, not face-to-face confrontation-to support her claim that she will be persecuted if she returns to Peru." He criticized the majority for "substituting its own judgment for the IJ's, and announc[ing] that ancient death threats compel a finding that a petitioner's fear of persecution is well founded today."

The court found that whether an offense is a "particularly serious crime" is a question of law subject to review under the REAL ID Act.

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■ **Ninth Circuit Deems Conviction Of Unlawful Sexual Intercourse With A Minor To Be An Aggravated Felony**

In ***Afridi v. Gonzales***, 442 F.3d 1212 (9th Cir. 2006) (Hug, *Alarcon*, McKeown), the court held that the BIA did not apply proper legal standard in denying withholding of removal to petitioner who had been convicted of an aggravated felony finding that whether an offense is a "particularly serious crime" is a question of law subject to review under the REAL ID Act. However, he court upheld the removability finding that petitioner's conviction of unlawful sexual intercourse with a minor was an aggravated felony under the sexual abuse of a minor provision.

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■ **Denial of MTR Is Unreviewable When The BIA Relies On A Discretionary "Merits" Determination On Which The Alien Had Already Received An Adjudication Below**

In ***Fernandez v. Gonzales***, 439 F.3d 592 (9th Cir. 2006) (B. Fletcher, *Berzon*, Gibson), the Ninth Circuit held that if the BIA determines that a motion to reopen proceedings in which there has already been an unreviewable discretionary denial of relief does not make out a prima facie case of statutory eligibility for that relief, the INA precludes the court's review of statutory eligibility just as it would if the BIA had affirmed the immigration judge on direct appeal. The court found that otherwise, petitioners could make an end-run around the bar to review of their direct appeals simply by filing a motion to reopen.

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■ **Application of *Matter Of Jean* Waiver Standard Requires First A Finding That Underlying Crime Was Violent**

In ***Rivas-Gomez v. Gonzales***, 441 F.3d 1072 (9th Cir. 2006) (Leavy, *Trott*; Pollack, dissenting), the court held that petitioner's conviction for third degree rape constituted an aggravated felony, because the terms of the state criminal statute fit within the ordinary meaning of the word "rape." However, the court remanded the case because the IJ had not properly applied *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

The petitioner, a citizen of Guatemala, sought a waiver of inadmissibility under 8 U.S.C. § 1159(c). This waiver is available "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." The IJ denied the waiver by applying the heightened "extreme hardship" set by the Attorney General in *Matter of Jean*. In *Jean* the AG determined that "evaluations of requests for waivers of inadmissibility . . . cannot. . . focus solely on family hardships, but must consider the nature of the criminal offense that rendered an alien inadmissible in the first place." The AG stated that "violent or dangerous individuals" would not be granted a waiver "except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship." The court rejected petitioner's challenge that the AG had exceeded his authority by adopting the heightened standard. However, the court agreed with petitioner that the IJ had erred when he applied the *Jean* standard without first making a determination that petitioner's crime was violent or dangerous.

In a dissenting opinion, Judge Pollak would have found that petitioner had not been convicted of an aggravated felony

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■ **Ninth Circuit Reverses Holding Of Statutory Ineligibility For Cancellation Of Removal**

In ***Ibarra-Flores v. Gonzales***, 439 F.3d 614 (9th Cir. 2006) (Goodwin, Clifton, and *Rhoades*, District Judge), the Ninth Circuit reversed and remanded an IJ's decision finding petitioner statutorily ineligible for cancellation of removal because his continuous physical presence was broken when he was granted administrative voluntary departure. The court reasoned that no voluntary departure form was introduced into evidence by DHS, petitioner gave confusing testimony regarding the events surrounding his apprehension at the border, and even if a voluntary departure form had been submitted, there was no

(Continued on page 20)

Summaries Of Recent Federal Court Decisions

(Continued from page 19)

evidence that petitioner knowingly and voluntarily accepted administrative voluntary departure. The court also concluded it was reasonable for petitioner to seek evidence in DHS's possession regarding the voluntary departure form, and on remand instructed the IJ to order the production of all forms referencing the petitioner's departure from the United States.

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■ **Ninth Circuit Reverses Credibility Determination But Upholds Denial Of Torture Convention Claim**

Singh v. Gonzales, 439 F.3d 1100 (9th Cir. 2006) (McKeown, *Alarcon*, Holland (D. Alaska)), the Ninth Circuit held that substantial evidence did not support the IJ's adverse credibility determination. The court further determined that while a State Department report may be used to discredit a generalized statement about a country, it may not be used to discredit specific testimony regarding a particular experience. Lastly, the court upheld the denial of CAT protection because petitioner did not provide evidence that internal relocation was not possible. The court remanded the case to determine whether petitioner's arrest was for a legitimate purpose or because of imputed political opinion.

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■ **Unlawful Sexual Intercourse With A Minor Is Not Categorically A Crime Of Violence**

In *Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (O'Scannlain, Cowen, *Bea*), the Ninth Circuit withdrew a prior decision and reversed the BIA's order of removal. The court held that the California offense of unlawful sexual intercourse with a minor under age 18 and a defendant at least age 21 is not necessarily a "crime of violence" involving the risk of use of force against the victim. The court reasoned that 1) the victim's inability to legally consent to sexual activity does not presuppose the absence of factual consent, and 2) the physical maturity of a 17-year old victim generally removes the possibility of coercion arising from differences in physical strength between the victim and the perpetrator.

Under California law, the offense of unlawful sexual intercourse with a minor under age 18 and a defendant at least age 21 is not necessarily a "crime of violence" involving the risk of use of force against the victim.

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TENTH CIRCUIT

■ **Tenth Circuit Reverses Adverse Credibility Determination For Asylum Applicant Who Claimed A Fear Of Female Genital Mutilation**

In *Uanreroro v. Gonzales*, __F.3d__, 2006 WL 895240 (Henry, McKay, *Tymkovich*) (10th Cir. April 6, 2006), the Tenth Circuit reversed an IJ's adverse credibility determination made against an asylum applicant from Nigeria who claimed that she would be forced to undergo female genital mutilation prior to her marriage. Petitioner testified that she came from a tribe that inhabited a village called Uzebba, located in Edo State in southwest Nigeria. She described the practice of "female circumcision" as a ritual performed to "initiate young women into adulthood" prior to marriage. The ceremony required an oath of virginity. If a woman about to be circumcised was discovered or believed to be unchaste, she would be publicly humiliated and tormented. She would be marched naked throughout the town, while the inhabitants would gather and chant songs of infidelity. The woman would then be stoned and cane-whipped. Finally, she would be ostracized and sent into what the tribe called an "evil forest" for twenty-one days of "spiritual cleansing." In many cases, the woman would never return alive. Petitioner attempted to escape before the arranged ceremony but was returned to her village, where she was beaten, locked in a dark room and subsequently taken by the chief priest to the "evil forest." Subsequently, the chief priest tied her to a tree, cut her body and inserted a black powder in the wounds. He also forced her to drink blood. She was then left in the forest for three days without food or water. When the chief priest arrived at the end of the three-day period, he told the petitioner that she must wait until the full moon for the final (and most dangerous) stage of the ritualistic cleansing. This stage would begin with a ceremony that required killing a seven-day-old baby and bathing petitioner with the baby's blood. Then petitioner would be left in the "evil forest" for the traditional twenty-one-day cleansing period. Before the full moon arrived, petitioner learned that her father, who was a tribal chief, had arranged for her to marry the chief priest so that, if she survived the cleansing period, she was to be circumcised in preparation for that marriage. In response, petitioner's mother crafted a second plan of escape-this time borrowing money so she could pay to obtain a visa for petitioner and have her taken to Europe.

Petitioner traveled to France where she stayed for a couple of weeks and then moved to Holland where she lived for eight months. When confronted by a group of Nigerians who threatened to return her to Nigeria because she had evaded female circumcision, petitioner obtained a British passport belonging to an-

(Continued on page 21)

Summaries Of Recent Federal Court Decisions

(Continued from page 20)

other woman and traveled to the United States where she applied for asylum after having been denied admission.

An IJ found petitioner's claim not credible due to, *inter alia*, inconsistent statements, and false statements given to the immigration inspector upon arrival. The BIA affirmed the denial issuing a single BIA Member brief order under 8 C.F.R. § 1003.1(e)(5), where it affirmed the adverse credibility denial based on two reasons: inconsistency concerning marital status, and conflict with the Department of State papers regarding FGM practices in Nigeria.

> The court found that petitioner's statements at the border were only one factor to consider and that alone were insufficient to find petitioner incredible.

Preliminarily, the court noted that for purposes of reviewing decisions issued under 8 C.F.R. § 1003.1 (e)(5), it would not affirm on grounds raised in the IJ decision unless they were relied upon by the BIA in its affirmance. However, when seeking to understand the grounds provided by the BIA it would consult the IJ opinion to get a more complete explanation. Here, the court found that the explanation provided the IJ regarding the inconsistency in the marital status was not substantially reasonable. The court also faulted the IJ and BIA for relying on stale data from the Department of State noting that a more recent paper on FGM was available before petitioner's hearing. Additionally, the court found that the Department's of State report on Nigeria supported petitioner's testimony that among certain ethnic groups, and possibly in the Edo State, almost all females are subject to FGM.

Finally, the court disagreed with the IJ's conclusion that petitioner's false statements to the immigration inspector were sufficient to demonstrate a lack of credibility. Although the court declined to adopt the Ninth Circuit rule that lies told in order to get admission to the United States cannot serve as a basis for an adverse credibility finding (*see Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)), those facts, said the court are appropriate to consider as part of the "totality of the circumstances." Accordingly, the court found that petitioner's statements at the border were only one factor to consider and that alone were insufficient to find petitioner incredible. Accordingly, the court found that the reasons provided by the BIA to deny asylum did not individually or collectively constitute substantial evidence to deny asylum.

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ELEVENTH CIRCUIT

■ Non-Compliance With Filing Deadline Governing Appeal To BIA Is Not A Jurisdictional Defect

In ***Huerta v. Gonzales,*** __F.3d__, 2006 WL 925634 (10th Cir. April 11, 2006) (Henry, *McKay*, Tymkovich), the Tenth Circuit affirmed the denial of a motion to reopen filed by a Mexican citizen who claimed to be a United States citizen. The court held that although petitioner's initial administrative appeal was filed one day out-of-time, the BIA and the court had jurisdiction because the time for appealing to the BIA is "mandatory but not jurisdictional." "Because the government [DHS] responded on the merits to Petitioner's late-filed appeal in this case, it has forfeited it timeliness objection and we have jurisdiction to address Petitioner's appeal," said the court. The court then found no abuse of discretion in denying the motion because the only evidence petitioner submitted in support of the motion was a United States passport that had subsequently been revoked.

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■ Informants Working Against Narcotics Traffickers Do Not Constitute A Particular Social Group Under The Refugee Definition

In ***Castillo-Arias v. Gonzales***, __F.3d__, 2006 WL 1027726 (11th Cir. April 20, 2006) (Birch, Marcus, Nangle (E.D. Mo., by designation)), the Eleventh Circuit affirmed the denial of asylum and withholding to petitioner and his family who feared persecution by the Cali drug cartel in Colombia. The court had previously determined in an unpublished opinion, that the petitioner had not established persecution on account of political opinion. However, the court had remanded the case to the BIA with the specific instruction to determine whether non-criminal informants working against the Cali drug cartel constitute a "particular social group" within the meaning of that phrase in INA § 101(a)(42)(A). On remand, the BIA applied *Matter of Acosta* and concluded that non-criminal informants did not constitute a "particular social group." In particular, the BIA found that while petitioner's past experience as an informant was immutable, the purported social group did not have "social visibility," because it did not involve characteristics which were highly visible and recognizable by others in the country in question. The BIA noted that social group definition was not meant to be a catch-all, and quoted UNHCR guidelines for the proposition that a social group "cannot be defined exclusively by the fact that it is targeted for persecution."

The court preliminarily deferred under *Chevron*, to the BIA's determination that a "particular social group,"

(Continued on page 22)

Summaries Of Recent Federal Court Decisions

(Continued from page 21)

as initially defined in *Matter of Acosta*, refers to persons who "share a common immutable characteristic." "The expertise necessary to craft this definition is well within the BIA's bailiwick and is neither arbitrary, capricious, nor clearly contrary to law," said the court. The court also applied *Chevron* deference to the BIA's further articulation of the *Acosta* formulation with regard to the eligibility of non-criminal informants who work against the Cali cartel, and found reasonable its determination that non-criminal informants do not fall within the *Acosta* formulation.

"The definition of 'particular social group,' should not be a "catch all" for all persons alleging persecution who do not fit elsewhere."

The court noted that while the alien's activity as an informant is "an historic fact which is immutable," it is "not necessarily an experience shared by others that is sufficient to define a social group for asylum purposes," because narcotics traffickers threaten everyone perceived to have interfered with, or who might pose a threat to, their criminal enterprises; informants remain anonymous and not visible enough to be considered a "particular social group." The "social visibility of informants is different in kind from the particular social groups that have been afforded protection under the INA," observed the court. "Their defining attribute is their persecution by the cartel," and the definition of 'particular social group,' should not be a 'catch all' for all persons alleging persecution who do not fit elsewhere . . . Congress could not have intended that all individuals seeking this relief would qualify in some form by defining the own 'particular social group,'" concluded the court.

After finding petitioners ineligible for asylum, the court expressed its dismay that "these petitioners, who risked their lives and the safety of their families to assist our nation's allies in the 'war on drugs,' have been ignored by our nation."

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■ **Eleventh Circuit Invalidates Regulation Barring Arriving Aliens In Removal Proceedings From Seeking Adjustment Of Status**

In *Scheerer v. U.S. Attorney General*, __F.3d__, 2006 WL 947680 (11th Cir. April 13, 2006) (*Black*, Hull, Farris), the Eleventh Circuit joined the First, Third, and Ninth Circuits in finding that 8 C.F.R. § 1245.1(c)(8), barring adjustment of status for arriving aliens in removal proceedings is invalid.

The case involves a German citizen who fled his homeland in 1995 after he was convicted and sentenced to 14 months' imprisonment for inciting racial hatred in violation of the German Penal Code. To avoid prosecution in Germany, petitioner fled to Spain, then to England, and in August 2000, he was paroled into the United States. Petitioner's application for asylum was not granted by an Asylum Office and was later denied by an IJ. He subsequently married a U.S. citizen and sought to reopen the proceedings so that he could apply for adjustment of status. The BIA applied the regulatory bar at 8 C.F.R. § 1245.1(c)(8), and denied the motion to reopen. Following the denial of an emergency motion to stay removal, petitioner was removed to Germany.

The Eleventh Circuit preliminarily determined that substantial evidence supported the denial of asylum because petitioner had failed to produce compelling evidence of persecution or fear of future persecution on account of imputed political opinion. However, the court overturned the IJ's finding that petitioner had filed a frivolous asylum application. Under 8 U.S.C. § 1158(d)(4)(A), (d)(6), if an alien knowingly files a frivolous application for asylum having received notice of the consequences of filing such a frivolous application, the alien is permanently ineligible to receive immigration benefits. "Because the consequences are so severe", said the court, an IJ must follow 8 C.F.R. § 208.20 before making such a finding, and the "alien must then be given ample opportunity during his hearing to address and account for any deliberate, material fabrications upon which the IJ may base a finding of frivolousness."

The court held that "because 8 C.F.R. § 208.20 mandates the IJ specifically find material elements of an asylum application were deliberately fabricated, an adverse credibility determination alone cannot support a finding of frivolousness." Here, the IJ did not examine which specific, material aspects of petitioner's claim were knowingly false. Accordingly, the court overturned the finding of frivolousness.

Finally, the court determined that 8 U.S.C. § 1255(a) (2005) is, at best, ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status. Relying on the entire statutory scheme, the court determined that "Congress intended to allow most paroled aliens to apply for an adjustment of status", and that the Attorney General exceeded his authority by promulgating the regulation, which bars almost all paroled aliens in removal proceedings from seeking such relief. "Thus the regulation is not based on a permissible construction of the governing statute," concluded the court.

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■ **Court Lacks Jurisdiction To Review Statutory Eligibility For NACARA.**

In *Centeno v. U.S. Atty. Gen.*,

(Continued on page 23)

SUMMARIES RECENT DECISIONS

(Continued from page 22)

441 F.3d 904 (11th Cir. 2006) (Marcus, Wilson, Hill) *(per curiam)*, the court reaffirmed its earlier holding that "[a] decision by the Attorney General regarding whether an alien established that his status should be adjusted under NACARA is not reviewable by any court."

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■ **Court Rejects Argument That Alien No Longer Has A Criminal Conviction Based On Grant Of Motion For New Trial**

In ***Ali v. Gonzales***, 443 F.3d 804 (11th Cir. 2006) (Carnes, Wilson, Pryor) (*per curiam*), the Eleventh Circuit held that the alien's Georgia child molestation conviction was not vacated on the basis of procedural or substantive defect in the underlying proceedings. The court determined that it was pure speculation for the alien to claim that the reason the court granted the new trial and *nolle prosse* motions was that alien was not adequately advised, prior to the guilty plea, as to the effect the plea would have on his immigration status.

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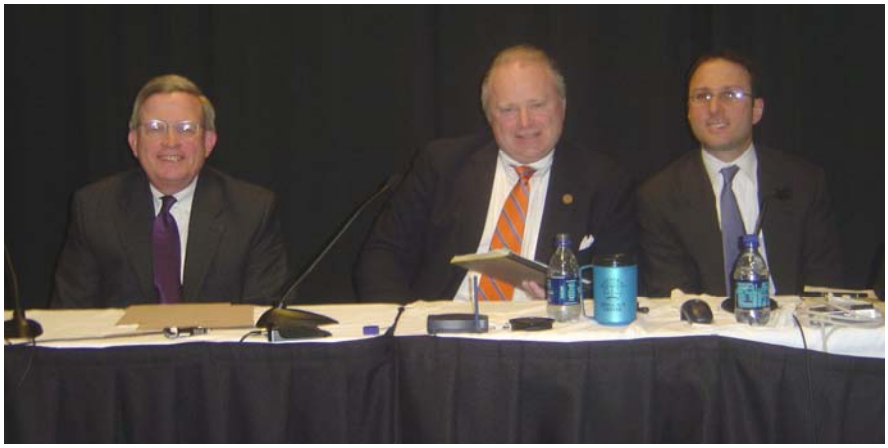
INDEX TO CASES SUMMARIZED IN THIS ISSUE

IMMIGRATION LITIGATION CONFERENCE

(Continued from page 1)

Robert Divine, Acting Deputy Director of the United States Citizenship and Immigration Services, William Howard, Principal Legal Advisor of the Immigration and Customs Enforcement, and Lori Scialabba, Chairman of the Board of Immigration Appeals. Immigration Judges, Jennie Giambastiani form Chicago and Henry Dugin of Newark, spoke about the every day challenges of being an Immigration Judge. Also participating at the Conference were representatives from the Department of Justice of Canada.



"Prosecutorial Discretion Panel" - Thomas Hussey, William Howard, Jonathan Cohn

INDEX TO FEDERAL COURTS*

*See p. 23 for the Cases Index

BREAKING NEWS

District Court Vacates Injunction On Removal To Somalia in Ali Ali, v. Ashcroft, No. C02-2304P (W.D. Wash. April 27, 2006)

On remand from the Ninth Circuit, in light of *Jama v. ICE*, 543 U.S. 335 (2005), the district court vacated the injunction and de-certified a nationwide class of aliens whose removal to Somalia was barred under the injunction. In *Jama* the Supreme Court affirmed the Eighth Circuit's decision that ICE could remove an alien to his country of birth under 8 U.S.C. § 1231(b)(2), without prior acceptance of his repatriation from a government in his country of removal.

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INSIDE OIL

A warm welcome to the following three new OIL Attorneys:

Mr. **R. Alex Goring** is a graduate of the Central Missouri State University and the Creighton University School of Law. Prior to joining OIL Mr. Goring was an Assistant Chief Counsel in the ICE Miami Office.

Ms. Lindsay L. Chichester is a graduate of Miami University and of the Tulane Law School. Before joining OIL, she was an Attorney Advisor to the Office of the Chief Immigration Judge, EOIR.

Daniel G. Lonergan graduated from George Washington University and the College of William and Mary's Marshall-Wythe School of Law. Mr. Lonergan was an appellate counsel to the Federal Deposit Insurance Corporation and most recently was Counsel to the Federal Reserve Board.

OIL also welcomes new paralegal **Michael Green**.

Baseball Season To Begin June 1 - OIL's softball team, the OIL SLICKS, is getting into the swing of things. Continuing in an annual tradition, OIL will be fielding a team to challenge teams from other DOJ components. Our games, which will be played on the Mall, begin June 1. The team includes OIL attorneys, interns, and support staff.

Baseball Schedule

6/1 Constitutional Torts
6/8 Federal Programs
6/15 ENRD
6/22 Bureau Econ. Analysis (DOL)
6/28 Civil Frauds
7/20 Constitutional Torts
7/27 Environmental Torts
8/3 Appellate
8/10 Commercial Litigation

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INSIDE EOIR

David L. Neal, was appointed Acting Chief Immigration Judge in April 2006. Judge Neal previously served as an Assistant Chief Immigration Judge from April 2005 to April 2006. He graduated in 1984 from the Harvard Divinity School, and obtained his Juris Doctorate in 1989 from Columbia Law School.

The goal of this monthly publication is 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. This publication is also available online at https://oil.aspensys.com. 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. 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.

Office of Immigration Litigation

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

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