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Immigration Litigation Bulletin

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ATTORNEY GENERAL OUTLINES REFORMS FOR IMMIGRATION COURTS AND BOARD

Attorney General Alberto R. Gonzales announced on August 9, in remarks at the Immigration Judges' Training Conference, that the Department of Justice will implement new measures to enhance the performance of the Immigration Courts and the Board of Immigration Appeals.

The announcement comes after the completion of a comprehensive review of the Immigration Courts and the Board that was initiated by the Attorney General in January 2006, following reports of judges failing to display temperament and produce work that meets the Department's standards. Based on the results of the review, the Attorney General directed the implementation of 22 new measures.

"The review has left me reassured of the talent and professionalism that exists in the Immigration Courts and at the Board of Immigration Appeals," said the Attorney General. "I am secure in the knowledge that our immigration judges and Board members stand ready to serve their country in discharging their demanding responsibilities to apply the rule of law and protect the Constitution. But there is room for improvement, and I believe these new measures will assist them greatly in their important work."

The new measures include the following key reforms needed to improve the performance and quality of work of the nation's immigration court system, based on the findings of the review.

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Performance Evaluations

The first of the reforms is the establishment of performance evaluations to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals. Just as performance appraisal records are used elsewhere in the

(Continued on page 2)

EXHAUSTION OF ISSUES NOT REQUIRED BY INA

In ***Zhong v. U.S. Department of Justice***, __F.3d__, 2006 WL 2260480 (2d Cir. Aug. 8, 2006) (*Calabresi*, Pooler; Kearse, dissenting), the Second Circuit, in a split opinion, held that "the failure to exhaust individual issues before the BIA does not deprive [the] court of *subject matter jurisdiction* to consider those issues." The court, while noting that it normally "applies an issue exhaustion doctrine to petition for review from the BIA," found that exhaustion of issues would not be required in those cases where the BIA's decision was a summary affirmance under 8 C.F.R. §1003.1(e)(4), the streamlining procedures.

Section 242(d)(1) of the INA provides in pertinent part that a court may review a final order of removal

(Continued on page 3)

THIRD CIRCUIT HOLDS THAT OFFENSES MUST BE AN AGGRAVATED FELONY TO BE A "PARTICULARLY SERIOUS CRIME"

In ***Alaka v. Gonzales,*** 456 F.3d 88 (*Ambro,* Becker, Stagg) (3d Cir. 2006), the Third Circuit held that petitioner was not statutorily barred from obtaining withholding of removal because her conviction of bank fraud was not an aggravated felony, and that under INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii), an offense must be an aggravated felony to be considered a "particularly serious crime."

The case involved a Nigerian citizen who illegally entered the United Sates in 1984 and obtained her LPR status in 1990. Following her return to the United States from one of her frequent trips abroad, she was denied admission because in 1992 she had been convicted of a crime

(Continued on page 22)

Highlights Inside

EOIR REFORMS

(Continued from page 1)

Justice Department to assess the work of personnel at all levels, EOIR performance evaluations will allow for identification of areas where an immigration judge or Board member may need improvement while fully respecting his or her role as an adjudicator.

The evaluations will also include an assessment by EOIR's Director during an immigration judge's initial two-year trial period as to whether a new appointee possesses the appropriate judicial temperament and skills for the job and whether steps are needed to improve that performance.

EOIR, working with the Office of Professional Responsibility and the Office of the Inspector General, will also conduct a review of its current complaint-handling procedures and develop a plan to standardize these procedures, clearly define the roles of the different offices charged with administering them, and ensure a timely and proportionate response to complaints.

Immigration Law Exam

To ensure that all immigration judges are proficient in the key principles of immigration law, the Attorney General has instructed EOIR to develop an examination testing for familiarity with these principles. Each newly appointed immigration judge and Board member appointed after December 31, 2006, will be required to pass the exam before he or she begins to adjudicate matters.

Additional measures directed to improve judges' performance include improved training for immigration judges, Board members, and EOIR staff.

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Sanctions Power

To ensure that immigration judges have the tools they need to control their courtrooms and to protect the adjudicatory system from fraud and abuse, EOIR will consider and, where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other gross misconduct. EOIR will also draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority.

To make sure that statutory limits on this power are respected, the proposal will provide for substantial oversight, such as approval by the EOIR Director or another overseeing body, and the Department would anticipate that it would be used sparingly. By better enabling judges to address frivolous submissions and to maintain an appropriate atmosphere in their courtrooms, we will reduce the pressures that may have contributed to intemperate conduct in the past.

Likewise the Board of Immigration Appeals should have the ability to sanction effectively litigants and counsel for strictly defined categories of gross misconduct. EOIR therefore will consider and, where appropriate, draft proposed revisions to the existing rules that provide sanction authority to the Board of Immigration Appeals.

Increased Resources

To give the immigration courts the resources needed to execute their duties appropriately, the Department will seek budget increases, starting in FY 2008, which will be aimed at hiring more immigration judges and judicial law clerks, focusing on those Immigration Courts where the need is greatest and hiring more staff attorneys to support the Board. In addition, the Board will be increased by the addition of four permanent members, and the continued use of temporary Board members to fulfill the Board's needs is encouraged.

Technological and Support Improvements

Several improvements will also be made to the Immigration Courts' ability to record, transcribe, and interpret court proceedings. The improvements include:

-Replacing the Immigration Courts' current tape recording system with a digital recording system, and ensuring that the Immigration Courts' other information management systems are efficient and innovative.

-A plan to be developed by EOIR to strengthen the transcription of oral decisions.

-A plan to be developed by EOIR to strengthen interpreter selection. The plan will address, among other things, ways to improve the screening, hiring, certification and evaluation of staff interpreters, and ways to ensure that contract interpreters meet similar standards of quality.

Improvements to the Streamlining Reforms

Furthermore, the new reforms will make adjustments to the Board's "streamlining" practices to, among other things, encourage the increased use of one-member written opinions to address poor or in-

(Continued on page 3)

EOIR REFORMS

(Continued from page 2)

temperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification, and to allow the limited use of three-member written opinions (as opposed to one-member written opinions) to provide greater analysis in a small class of particularly complex cases.

Streamlining, which the Department originally instituted in 1999 and expanded in 2002, brought much-needed efficiency to the Board's administrative review process, enabling the Board to eliminate a large backlog and to provide respondents with a final, reviewable administrative action in a reasonable amount of time. The adjustments to streamlining included in the new reforms balance the Board's need to explain its reasoning more fully in certain types of cases, with its existing and predicted caseload, its existing resources and the need to provide respondents with a final decision in a timely fashion.

Also included in the new reforms are measures for drafting a new code of conduct specifically applicable to immigration judges and Board members; improved mechanisms to detect poor conduct and quality by immigration judges and Board members; a pilot program to assign one or more Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts they oversee; improved complaint procedures for inappropriate conduct by adjudicators; and new procedures by which immigration judges and Board members may refer cases of immigration fraud and abuse for investigation.

EXHAUSTION OF ISSUES

"only if the alien has exhausted all administrative remedies available to the alien as of right." The Second Circuit noted that it had jurisdiction to review petitioner's case because "a decision had been rendered by an IJ and appealed to the BIA - - the two administrative remedies available to him as of right." The petitioner, however, in his petition for review raised issues that he had not raised previously in his administrative appeal to the BIA. The court was thus confronted with the question of whether the exhaustion of "'administrative remedies available to the alien as of right' further requires, as a matter of statutory jurisdiction, that an immigration petitioner raise before the BIA all issues contained within his or her petition for review to this court, or whether, instead, the requirement of issue exhaustion is a court-imposed one that is subject to waiver."

> "We are persuaded," said the court that § 242(d)(1) "does not require – as a *statutory* matter" that a petitioner raise to the BIA each issue presented in his or her petition for review.

The court first determined that while it had consistently applied an issue exhaustion requirement to petitions for review from the BIA, it had not "evaluated the origin of this requirement, and thus its susceptibility to waiver by the government." The court noted that in some recent cases it "had spoken in a manner that seemed to conflated § 242(d)(1) statutory jurisdictional requirements of exhaustion of remedies with the separate requirement of exhaustion of issues." In deciding the issue of exhaustion, the court said that it was mindful of the recent "Supreme Court's admonition that inferior courts must use great caution in distinguishing mandatory from jurisdictional rules." *See Eberhart v. United States*, 126 S. Ct. 403 (2005).

The court then held that § 242(d)(1) does not make issue exhaustion a statutory jurisdictional requirement, and that as a result, a failure to exhaust specific issues may be waived by the Attorney General. The court's conclusion rested primarily on the language of § 242(d)(1) which "does not expressly proscribe judicial review of issues not raised in the course of exhausting all administrative remedies." "We are persuaded," said the court, that § 242(d)(1) "does not require – as a *statutory* matter" that a petitioner raise to the BIA each issue presented in his or her petition for review. Therefore, the court held that failure to exhaust individual issues before the BIA does not deprive the court of subject matter jurisdiction to consider those issues.

In this case, involving an asylum applicant from China, the court held that it could consider issues not raised to the BIA, because the government had not raised the exhaustion argument and thereby had waived it. On the merits, the court held that the IJ's credibility findings were not supported "by sufficient evidence to rule out" petitioner's claim of fear of sterilization based on past threats of such sterilization." In particular, the court found that the petitioner's challenges to the IJ's decision when added to the errors he articulated in his appeal to the BIA "mean that we cannot be confident that 'the agency would reach the same result upon a reconsideration cleansed of errors.'" Accordingly, the court vacated the IJ's decision and remanded the case to the BIA for further proceedings.

Judge Kearse dissented from the majority's opinion. He ques-

(Continued on page 6)

SUMMARIES OF RECENT BIA DECISIONS

■ **Under The Laws Of Guyana, The Sole Means Of Legitimation Of A Child Born Out Of Wedlock Is The Marriage Of The Child's Natural Parents.**

In *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006), the Board overruled its holding in *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994), and determined that legitimation of a child born out of wedlock occurs under Guyanese law only when the natural parents marry. The alien was born out of wedlock in Guyana. Although the name of his mother and father appeared on his birth certificate, his parents never married. In 1986, the alien was admitted to the United States as a lawful permanent resident, and was convicted of the offense of attempted criminal sale of a controlled substance in 1998. During removal proceedings, he alleged that he was not subject to removal on the ground that he derived citizenship from his naturalized mother.

Relying on the district court's analysis of Guyana's pertinent statutes in *Gorsira v. Loy,* 357 F. Supp. 2d 453, 458-64 (D. Conn. 2005), the Board held that for purposes of derivative citizenship under former section 321(a)(3) of the Immigration and Nationality Act, a child born out of wedlock in Guyana may only be legitimated through the subsequent marriage of his parents.

■ **An Alien's Conviction For Domestic Battery Does Not Qualify Categorically As A Conviction For A "Crime Involving Moral Turpitude" Or A "Crime Of Domestic Violence"**

In *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), the Board concluded that the alien's conviction for domestic battery in violation of sections 242 and 243(e)(1) of the California Penal code did not qualify categorically as a conviction for a "crime involving moral turpitude" within the meaning of section 237(a)(2)(A)(ii) of the Immigration and Nationality Act. The Board noted that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involve aggravating factors that significantly increase their culpability. Because the minimal conduct necessary to be convicted of a "battery" under section 242 of the California Penal Code was simply an intentional "touching" of another without consent, the Board found that such an offense was in the nature of a simple battery, as traditionally defined, and on its face did not implicate any aggravating dimension to conclude that the offense was a crime involving moral turpitude.

> The Board concluded that the alien's conviction for domestic battery in violation of the California Penal Code did not qualify categorically as a conviction for a "crime involving moral turpitude."

Further, the Board held that in removal proceedings arising within the jurisdiction of the Court of Appeals for the Ninth Circuit, the alien's convictions did not qualify categorically as a "crime of violence" under 8 U.S.C. § 16, such that it may be considered a "crime of domestic violence" under section 237(a)(2)(E)(i) in light of the Court's holding in *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (holding the same).

The Board also determined that, even applying the modified categorical approach, the alien's convictions did not support the charge of removability under 237(a)(2)(E)(i). Although the modified categorical approach allowed the Board to consult "a limited class of judicially-noticeable documents constituting the 'record of conviction' in order to determine whether the alien pled guilty to conduct comprehended within the scope of the 'crime of violence' definition," in this case, there were no such documents available in the record. In declining to consider the police report, the Board found that there was no evidence indicating that the report had been incorporated into the charging instrument under the convicting state's rules of criminal procedure, as required by Ninth Circuit precedent to be considered in determining whether the alien was subject to removal.

Accordingly, because the admissible portions of the alien's conviction record did not reflect that he pled guilty to conduct encompassed within the "crime of violence" definition, the Board determined that the government had not met its burden of proving by clear and convincing evidence that the alien had been convicted of a crime of violence under 18 U.S.C. § 16 or, by extension, a crime of domestic violence under section 237(a)(2)(E)(i) of the Immigration and Nationality Act.

Editor's Note: On August 8, 2006, an emergency motion for withdrawal and rehearing en banc by the Board was filed in this case by the Department of Homeland Security. Moreover, on August 29, 2006, an en banc rehearing petition in *Ortega-Mendez* was filed by the government with the Ninth Circuit.

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ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any ideas for improving this publication, please contact Francesco Isgro at:

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CONSULAR NONREVIEWABILITY

The Immigration and Nationality Act ("INA") provides that aliens who meet certain requirements may be issued visas for admission to the United States. *See* INA §§ 101 *et seq.*, 8 U.S.C. §§ 1101 et seq.; *see also* 8 C.F.R. Parts 1 *et seq.*; 22 C.F.R. Parts 40-43. With limited exceptions (*see e.g.*, INA § 217, 8 U.S.C. § 1187 (visa waiver program)), aliens living abroad may not be admitted to the United States without first obtaining a visa from a United States consular officer. *See* INA § 221(a), 8 U.S.C. § 1201(a). A "consular officer" includes "any consular, diplomatic, or other officer of the United States designated . . . for the purpose of issuing immigrant or nonimmigrant visas." INA § 101(a)(9), 8 U.S.C. § 1101(a)(9). Courts have held that decisions made by consular officers to issue or reject a visa are not subject to judicial review. The preclusion of judicial review over a consular officer's decision is known as the doctrine of consular nonreviewability.

Consular nonreviewability is a product of Congress' plenary power over immigration. The Supreme Court has long recognized that the power to admit an alien is exercised exclusively by the political branches of the government because such authority involves national security and international relations. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *The Chinese Exclusion* Case, 130 U.S. 581, 609 (1889). Congress has the authority to prescribe the conditions for the admission of aliens and to have its declared policy in that regard enforced exclusively through the executive branch. *See Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Knauff v. Shaugnessy*, 338 U.S. 537, 542 (1950) ("an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government . . . only upon such terms as [it] shall prescribe."). In light of Congress' plenary power, the scope of judicial review over the admission of aliens is necessarily limited to when review has been authorized by treaty or by statute, or is required by the Constitution. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976); Fong *Yue Ting v. United States*, 149 U.S. 698, 713 (1893). It follows, therefore, that judicial review over the authority delegated to a consular officer to grant or deny a visa is likewise restricted where Congress has not explicitly authorized judicial review. The courts first recognized the nonreviewability of consular determinations in the 1920s, *see United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929); *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), and have since routinely rejected complaints seeking review of visa denials.

> Consular nonreviewability is a product of Congress' plenary power over immigration.

The INA contains no provision for the judicial review of a consular officer's visa determination. *See* INA § 242, 8 U.S.C. § 1252; *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173 (1993) (presumption against the statute's extra-territoriality). While the INA provides for review of judgments regarding whether an alien should be "removed" based on a finding of deportability or inadmissibility, *see* 8 U.S.C. § 1252, it makes no such provision for review of the denial of a visa by a consular officer. See INA § 201, 8 U.S.C. § 1201. As such, Congress clearly did not intend for the courts to review off-shore admissibility determinations made by consular officers:

> [T]o allow an appeal from a consul's denial of a visa would be to make a judicial determination of a right when, in fact, a right does not exist. Permitting review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws . . . [T]he question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer.

S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950).

Furthermore, although Congress has indicated that the Secretary of State is generally charged with the administrative and enforcement of consular officers, it has explicitly provided that the Secretary's authority does not extend to "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." INA § 104(a), 8 U.S.C. § 1104(a).

The D.C. Circuit has found that the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 306(a)(2) 110 Stat. 3009 (1996), reinforces the view "that the immigration laws preclude judicial review of consular visa decisions and that the doctrine of nonreviewability remains intact." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162-63 (D.C. Cir. 1999). Because IIRIRA restricted judicial review for "those detained by immigration officials at United States ports of entry," the court concluded, it was not "plausible" that Congress intended to allow for more expansive review for aliens residing abroad by providing for judicial review of decisions made by consular officers. Id. at 1161-62. In so doing, the court found that it should "infer that the immigration laws preclude judicial review of consular visa decisions. *Id.; see also Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1505-07 (11th Cir.) (1992) (finding that the INA makes no provision for judicial review of aliens' claims that the non-refoulement provi-

(Continued on page 6)

CONSULAR NONREVIEWABILITY

(Continued from page 5)

sions of the 1967 United Nations Protocol Relating to the Status of Refugees apply to aliens found outside of the United States, demonstrating Congress's intent not to extend judicial review to aliens abroad; there is no judicial review under Administrative Procedure Act).

The courts of appeals have repeatedly confirmed that a consular officer's visa determinations are not subject to judicial review. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d at 1160; *Chi Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998); *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990); *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (per curiam); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986); *Rivera de Gomez v. Kissinger*, 534 F.2d 518, 519 (2d Cir. 1976).

A few courts have found limited jurisdiction to consider challenges collateral to a consular officer's visa determination, such as the failure to adjudicate a visa application.

Notwithstanding the doctrine, a few courts have found limited jurisdiction to consider challenges collateral to a consular officer's visa determination, such as the failure to adjudicate a visa application. In *Patel v. Reno,* 134 F.3d 929, 932 (9th Cir.1997), the United States Consulate in Bombay, India had failed to resolve certain pending immigrant visa applications for eight years, and indeed, affirmatively "refused to act" on the pending applications. The Ninth Circuit held that where a suit challenges the authority of a consular officer to take or fail to take a nondiscretionary action granting or denying a visa, the court can grant mandamus relief and force the consulate to issue a decision (though importantly, in issuing the writ, the court may not direct the agency how to act). *Patel*, 134 F.3d 931-32. Similarly, the Fifth Circuit found that doctrine of consular nonreviewability did not apply to deprive jurisdiction over a suit by aliens challenging decisions of United States consular officers not to accept their applications for immigration visas. *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988); *but see Loza-Bedova v. INS*, 410 F.2d 343 (9th Cir. 1969) (holding that there is no review of challenge that consular acted upon erroneous information); *Kummer v. Shultz*, 578 F. Supp. 341 (N.D. TX 1984) (holding that district court did not have jurisdiction to compel Secretary of State to diligently and expeditiously process visa application).

As such, a majority of courts have rejected efforts to circumvent the consular nonreviewability doctrine. *See Nwansi v. Rice*, __F. Supp.__, 2006 WL 2032578 (N.D. Cal. July 18, 2006) (noting that the doctrine of consular nonreviewability affords almost absolute power to consular officers over a visa issuance); *Garcia v. Baker*, 765 F. Supp. 426, 428 (N.D. Ill. 1990) ("courts have consistently rejected attacks on consular decisions, whatever form they take."). In sum, a consular official's decision to grant or deny a visa remains judicially unreviewable.

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EXHAUSTION

(Continued from page 3)

tioned the majority's view that the law of the circuit on exhaustion of issues had been eroded by recent decisions.

Moreover, Judge Kearse disagreed with the proposition that "exhaustion of administrative remedies means simply that we have jurisdiction to consider any issue argued in the alien's petition to this Court for review, regardless of whether it was presented to the BIA, 'so long as a decision has been rendered by an IJ and appealed to the BIA - the two administrative remedies available as of right.'" In his view, the word "exhausted" has a procedural component that requires an alien to pursue all of the procedures available to him in "the BIA proceeding in connection with his request for relief, i.e., presented to the BIA all of the issues he wishes to press in his petition for review."

Judge Kearse also pointed out that the "prevailing interpretation by the federal courts has been that § 242(d)(1) restricts the jurisdiction of the courts of appeals to issues that the alien has presented to the BIA."

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TPS EXTENDED FOR NATIONALS OF SOMALIA

The USCIS recently announced an 18-month extension of Temporary Protected Status for nationals of Somalia until March 17, 2008. Countries (or parts thereof) which are currently designated under the TPS program are listed below:

Burundi: EAD extension sticker valid through February 28, 2006.
El Salvador: EADs auto-extended to March 9, 2007.
Honduras: EADs auto-extended to January 5, 2007.
Liberia: TPS expires October 1, 2006.
Nicaragua: EADs auto-extended to January 5, 2007.
Somalia: Re-registration ends September 25, 2006. EADs auto-extended to March 17, 2007.
Sudan: EAD extension sticker valid through May 2, 2007.

REAL ID ACT — Frequently Asked Questions

Question: Is the application of law to the record in a case a "question of law" for purposes of 8 U.S.C. § 1252 (a)(2)(D)?

Background: In order to avoid the criminal alien review bar and other jurisdictional bars, aliens are increasingly attempting to define their claims as "questions of law" merely because the claims involve the application of a legal standard to the record. *See, e.g., Toussaint v. Attorney General of the United States*, 455 F.3d 409 (3d Cir. 2006). How should we respond to such arguments in our briefs?

Answer: Application of a law to the record *may* raise a question of law under § 1252(a)(2)(D) but *generally does not* do so.

Courts have held that the application of law to undisputed "facts" is a question of law. But that just begs the question of what is a "fact."

Significantly, for purposes of the REAL ID Act, "facts" include more than historical facts, such as what happened to the alien. The legislative history of the REAL ID Act makes clear that if a claim is reviewed for substantial evidence, it should be treated as a *factual issue* rather than a question of law. For example, whether an alien has offered sufficient evidence to satisfy the legal standard of torture – where the undisputed historical facts are that he was beaten three times, detained once, his car was destroyed, etc. – is a question that is traditionally reviewed for substantial evidence. Thus, questions regarding the weighing and balancing of the evidence are generally considered factual questions, even though the historical facts are undisputed.

However, where the agency's weighing, judgment, and evaluation of the evidence are constrained because the application involves a purer construction of a legal standard or is animated by a legal principle, the claim more closely approximates a "question of law." For example: Is indefinite detention torture? Do criminal aliens constitute a social group?

Given the intent of the REAL ID Act to limit judicial review, we should presume that an application of a legal standard to the record raises an unreviewable factual issue unless the inquiry is predominantly centered on the construction of a statutory term. If you are at all unsure, please bring this specific issue to the attention of Dave Kline, Papu Sandhu, or your other OIL contact.

Question: How should we respond to an alien's request that a court of appeals remand a petition for review to the district court for further fact-finding pursuant to 28 U.S.C. § 2347(b)(3)?

Background: The jurisdiction of the courts of appeals to review removal orders is grounded in the Hobbs Act, 28 U.S.C. § 2342, et seq. *See* 8 U.S.C. § 1252(a). The Hobbs Act authorizes a reviewing court of appeals to "transfer the proceedings to a district court for the resolution of material facts when 'the agency has not held a hearing before taking the action of which review is sought,' 28 U.S.C. § 2347(b), and 'a hearing is not required by law,' § 2347 (b)(3)." *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*, 525 U.S. 471, 496 (1999) (Ginsburg, J., concurring) (quoting § 2347(b)(3)); *see Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129 (9th Cir. 2001) (applying 28 U.S.C. § 2347(b) to transfer a case to district court for limited fact-finding purposes).

Section 2347(b)(1) further allows for a remand to the *agency* "to hold a hearing, when a hearing is required by law," and where no such hearing was previously held.

Because the REAL ID Act eliminates any jurisdiction in district court for review of removal orders, many aliens have requested that the courts of appeals send review petitions to the district courts for further fact-finding under 28 U.S.C. § 2347(b)(3) where the appellate record is allegedly incomplete. These aliens have argued that unless some opportunity for fact-finding is available, the REAL ID Act's elimination of habeas review violates the Suspension Clause.

Answer: As a general matter, we should not challenge the possible availability of 28 U.S.C. §§ 2347(b)(3) and (b)(1). Indeed, in our appellate briefs we have argued that courts of appeals may invoke § 2347(b)(3) in certain narrow circumstances, and have further used this argument to defend the constitutionality of the REAL ID Act.

We should, however, generally oppose a request for transfer under §§ 2347(b)(3) and (b)(1). The primary reason for this is that aliens already have an opportunity to build the administrative record through immigration proceedings before an immigration judge. Furthermore, even after proceedings have closed, aliens can still enter evidence into the record through a motion to reopen.

Thus, when this issue is raised in a brief, we should ask: (1) what is the factual issue that the alien argues needs to be developed further, and (2) could that issue have been raised in the administrative proceedings below. If the alien has failed to specifically identify a factual issue, or has failed to show that the issue could not have been raised in administrative proceedings prior to judicial review, we should oppose the request on those grounds.

If you think that the alien has a legitimate argument for remand under §§ 2347(b)(3) or (b)(1), please bring this specific issue to the attention of d Dave Kline, Papu Sandhu, or your other OIL contact.

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ASYLUM LITIGATION UPDATE: PERSECUTION BY "THE GOVERNMENT OR PERSONS THE GOVERNMENT IS UNABLE OR UNWILLING TO CONTROL"

"Persecution" Requires Conduct By The Government Or By Private Parties The Government Is "Unable Or Unwilling To Control"

To qualify for asylum or withholding of removal an alien must prove, among other things, either past persecution or a well-founded fear, or clear probability, of future persecution. *See* 8 U.S.C. 1101(a)(42) (definition of refugee); 8 U.S.C. 1158 (asylum statute); 8 U.S.C. 1231(b)(3)(withholding statute); 8 C.F.R. 1208.13(b) and 8 C.F.R. 1208.16(b) (asylum and withholding regulations).

The Immigration and Nationality Act does not define "persecution." In a construction entitled to *Chevron* deference, the BIA has construed "persecution" to mean conduct by "the government or persons the government is unable or unwilling to control." *See Matter of H-*, 21 I&N Dec. 337 (BIA 1996); *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). This is consistent with Congress' intent, which two years before the definition of "refugee" and asylum provisions were enacted described "persecution" as, among other things, "the infliction of suffering or harm, under *government sanction*." H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4700, 4702, 4704 (emphasis added).

This is also consistent with the guidelines established by the United Nations High Commissioner on Refugees in the *Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook"), which provides that, "[p]ersecution is normally related to action by the authorities of a country," but it may also refer to actions by "sections of the population that do not respect the standards established by the law of the country. . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." UNHCR Handbook, para. 65.

This reflects the concept that asylum and withholding of deportation or removal are not for acts of violence between private citizens or one group of citizens against another, but are international protection that is afforded when "the bonds of trust, loyalty, protection and assistance existing between a citizen and his country have been broken and have been replaced by the relationship of an oppressor to a victim." *Matter of Acosta*, 19 I&N Dec. at 235.

The requirement that an alien must show conduct "by the government or persons the government is unable or unwilling to control" has been adopted by the courts. *See, e.g, Miranda v. U.S. INS* , 139 F.3d 624, 626 (8th Cir. 1988) ("[a] required component[] of 'persecution' [is]. . . the harm or suffering ha[s] to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control"); *Bartesaghi-Lay v. INS*, 9 F.3d 819, 921 (10th Cir. 1993) (same); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) ("'Persecution' may be inflicted by either the government or by persons or organizations which the government is unable or unwilling to control"), *quoting McMullen v. INS*, 645 F.2d 1312, 1315 (9th Cir. 1981); *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996) ("[p]ersecution meted out by groups that the government is unable or unwilling to control constitutes persecution under the Act"); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) ("The feared persecution must come from either the government or a group the government is unable to control").

No government is able to guarantee the safety of each of its citizens at all times: evidence that the government is taking reasonable steps or opposes the conduct can defeat a claim that the government is unable or unwilling to control persecution by private parties.

Persecution requires conduct "condoned by the state." *Ghaly v. INS*, 58 F.3d at 145, 1431 (9th Cir. 1995). Conduct that "the government does not sponsor and in which it is not complicit" does not qualify. *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001). "[V]iolence completely untethered to a governmental system does not afford a basis for asylum." *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir.2000). Evidence that the police were ineffective does not suffice. *See Singh v. INS*, 134 F.3d 962, 968 (9th Cir. 1997). An applicant must show that the government "condone[s] [the conduct] or at least demonstrate[s] a complete helplessness to protect the victims." *Roman v. INS*, 233 F.3d 1027 (7th Cir. 2000). *See also Valioukevitch v. INS*, 251 F.3d 747, 748 (8th Cir. 2001) (no eligibility for asylum where conduct did not occur "with the imprimatur" of the government).

No government is able to guarantee the safety of each of its citizens at all times: evidence that the government is taking reasonable steps or opposes the conduct can defeat a claim that the government is unable or unwilling to control persecution by private parties. *See, e.g, Castro-Perez v. Gonzales,* 409 F.3d 1069 (9th Cir. 2005) (evidence does not compel a finding that of conduct the government is unable or unwilling to control, where alleged persecution consisted of 2 rapes by a man the applicant dated, and country condition evidence showed rape was a crime punished by the government); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) (no persecution by the government or persons the government is unable or unwilling to control, where Egyptian

(Continued on page 9)

PERSECUTION BY GOVERNMENT OR BY OTHERS

(Continued from page 8)

Government took active steps to control anti-Christian violence); *Valiioukevitch*, 251 F.3d at 748 (no persecution by government or groups government unable or unwilling to control, where country condition evidence showed religious persecution was punished and government respected religious freedoms).

The alien has the burden of proof as to asylum and withholding of removal, 8 C.F.R. §§ 1208.13(b); 1208.16(b). Therefore in a case of private, or non-government persecution, the alien must prove that the government is unable or unwilling to control the persecution. On review, the alien must go one step further. He must prove that the evidence "compels" a finding that the government is unable or unwilling to control the persecution. See 8 U.S.C. 1252(b)(4)(B); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 and n.1 (1994).

In a case of private, or non-government persecution, the alien must prove that the government is unable or unwilling to control the persecution.

Distinction Between Private Persecution The Government Is "Unable" To Control Versus "Unwilling" To Control

There is a distinction between a government being "unable" to control persecution by private parties and being "unwilling" to do so.

Claims that the government is "unable" to control persecution are relatively rare. They fall into two general categories: (1) a claim of persecution by terrorist or para-military groups the government cannot control, *McMullen*, 658 F.2d 1314 (British government "unable to control" provisional wing of Irish Republican Army); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990) (Salvadoran Government "unable to control the paramilitary 'Death Squads'"); and (2) a claim of persecution by groups of citizens and social chaos so extreme that the government is unable to enforce its laws or control individual acts of persecution. *See Matter of H-, supra* (social chaos and clan violence so severe that despite presence of UN peacekeepers government "unable to cope with the unprecedented conditions" and control clan persecution).

The more common claim is persecution by private persons or groups of persons the government is "unwilling" to control. An applicant may prove that the government is "unwilling" to control private persecution in one of two ways: (1) showing the government is unwilling to control the persecution in the applicant's particular case, or (2) showing the government was or is unwilling to control the persecution generally. *See, e.g., Castro-Perez*, 409 F.3d at 1069 (9th Cir. 2005); *RJ Singh v. INS*, 94 F.3d 1353, 1357 (9th Cir. 1996) (Fiji government unwilling to control ethnic persecution where police repeatedly failed to respond to applicant's requests for protection, and "government has encouraged and condoned" persecution and enacted a constitution "institutionalizing" discrimination); *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996) (Fiji government unwilling to control persecution where police refused to respond to private acts of violence or provide reasonable explanation for failing to do so); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (Azerbaijan government unwilling to control persecution of Armenians where police refused request for protection and country reports document "widespread nature of persecution of ethnic Armenians"); *Matter of O-Z- & I-Z-*, Int. Dec. 33346 (BIA 1998), 1998 WL 177674 (BIA) (Ukrainian government unwilling to control anti-Semitic persecution where local police refused three times to investigate and country evidence credibly showed "local authorities have not taken action against those who foment ethnic hatred").

To Prove The Government Is Unwilling To Control Private Persecution In A Particular Case, The Applicant Must Ordinarily Report It To Authorities, Unless It Would Be Futile Or Dangerous To Report

To prove the government was (or is) unwilling to control private persecution, the applicant ordinarily must show that the government is aware of the persecution, by reporting the matter to the appropriate authorities, unless it would be futile or dangerous to report. *Compare Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) ("where non-governmental actors are responsible for persecution . . . we consider whether an applicant reported the incidents to police."). An applicant need not report private acts of persecution to the authorities if the applicant can prove it would be futile or dangerous to report; *Ornelas-Chavez v. Gonzales*, __F.3d__, 2006 WL 2390302 (9th Cir. 2006) (applicant was not required to report private acts of persecution to government authorities, if he could establish that reporting would have been futile or have subjected him to further abuse); *Matter of S-A-,* 22 I&N Dec. 1328, 1335 (BIA 2000) (applicant was not required to report father's private abuse to authorities where evidence convincingly showed that government could not be relied upon to protect her and reporting may have made her circumstances worse) *with Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005) (applicant failed to show government unable or unwilling to control private rapes by person a woman was dating because she never reported the rapes to the police and failed to show that reporting would be futile).

An applicant's subjective belief or assumption that it would be futile or dangerous to report is not sufficient. There must be objective evidence that

(Continued on page 10)

PERSECUTION BY GOVERNMENT OR BY OTHERS

(Continued from page 9)

compels this conclusion. See id. (alien's testimony that she did not report rapes to police because she "thought they were not willing to do anything because they would say that we were boyfriend and girlfriend and that they would not say or think that that was [not] normal" and was afraid of how her father, who had beaten her in the past, would react does not compel a finding the Honduran government is unwilling to control the rapes).

Evidence that police took steps to respond to a report shows the government is willing to control the alleged persecution. *See Singh v. INS*, 134 F.3d 962, 968 (9th Cir. 1998) (applicant failed to establish persecution, in part because the police responded to her call even though police took no further action); *Matter of V-T-S-, supra* (record did not support claim that the government was unable or unwilling to control persecution where evidence indicated that the government mounted massive rescue efforts to find kidnapped family members).

Evidence that the police were ineffective does not prove the government is unwilling to control the persecution. *See Singh*, 134 F.3d at 968. But evidence that the police repeatedly refused to respond to reports can suffice. *See R.J. Singh v. INS*, 94 Ff.3d 1353, 1357 (9th Cir. 1996) (Fiji government unwilling to control ethnic persecution where police repeatedly failed to respond to applicant's requests for protection and "government has encouraged and condoned" persecution and enacted a constitution "institutionalizing" discrimination); *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996) (Fiji government unwilling to control persecution where police refused to respond to private acts of violence or provide reasonable explanation for failing to do so); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (Azerbaijan government unwilling to control persecution of Armenians where police refused request for protection and country reports document "widespread nature of persecution of ethnic Armenians"); *Matter of O-Z- & I-Z-*, Int. Dec. 33346 (BIA 1998), 1998 WL 177674 (BIA) (Ukrainian government unwilling to control anti-Semitic persecution where local police refused three times to investigate and country evidence credibly showed "local authorities have not taken action against those who foment ethnic hatred").

> Country condition evidence showing that the government condones, tolerates, or is complicit in private persecution may also prove the government is unwilling to control it.

To Prove The Government Is Unwilling To Control Private Persecution Generally, Documentary Evidence Showing The Persecution Is Condoned Or Tolerated By The Government May Suffice

Country condition evidence showing that the government condones, tolerates, or is complicit in private persecution may also prove the government is unwilling to control it. *See Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198, 1199 (9th Cir. 2000) (Russian government unwilling to control private persecution of Armenians because of "tacit government sponsorship" and toleration of persecution); *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1998) (Armenian government unwilling to control persecution of Moslem Kurdish family because failed to investigate family murder, shut down family business, and documentary evidence showed government does not respond to persecution of religious minorities); *Matter of S-A-, supra* (Moroccan government unwilling to control private acts of father's fundamentalist Moslem persecution, where objective evidence showed Moslem government tolerates strict enforcement of Moslem religious codes, has judicial procedures that are "skewed" against women, and country reports and testimony showed it would be futile and dangerous to seek government protection); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (Togolese police and government were unwilling to control persecution (female genital mutilation or "FGM"), where they would take no steps to stop it, had poor human rights record, and were assisting in persecution by searching for applicant).

But evidence that the government is taking reasonable steps within the limits of its resources to control the persecution is sufficient to show that the government is willing to control it. *Cf. Elnager*, 930 F.2d at 788 (no showing government of Egypt unable or unwilling to control religious violence against Coptic Christians where it has made reasonable efforts to intervene and control). Refugee status and asylum law do not require foreign countries to provide absolute protection against private acts of violence or persecution.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That IJ's Denial Of A Continuance For Filing An Asylum Application Does Not Violate Due Process

In ***Alsamhouri v. Gonzales***, __F.3d__, 2006 WL 2337001 (1st Cir. August 14, 2006) (Boudin, *Lynch,* Lipez), the First Circuit held that the IJ did not violate petitioner's due process rights by declining to grant a continuance to permit him to file an application for asylum since the denial of the motion for continuance did not render the proceedings fundamentally unfair.

The petitioner, a Jordanian citizen, appeared before the IJ on July 2, 2003, and was given a continuance. On April 19, 2004, petitioner appeared with counsel and was given until July 7, 2004, to file applications for asylum and withholding of removal. On May 28, 2004, petitioner's counsel filed a motion to withdraw, attaching a copy of a letter he had given to petitioner advising of the July 7, 2004, filing date and of the consequences of a failure to file the applications on time. At the July 7, 2004, hearing, petitioner did not file his applications but asked for a continuance. The IJ denied the continuance finding that petitioner was not credible as to the issue of the letter he received from his counsel. While he testified he never understood there was a deadline for filing his applications and that he never received the letter from his counsel advising him of the deadline and the consequences of not meeting it, he then switched his testimony to admit he received the letter, but added he did not understand it.

On appeal, petitioner challenged the IJ's denial of a further continuance as a violation of due process and an abuse of discretion. The court held that, based upon the INA's jurisdictional provisions, it had no jurisdiction over the question of whether the IJ's failure to grant a continuance was an abuse of discretion. The court also found that the "due process claim is not even colorable," because the record supported the IJ's determination that petitioner was well aware of the significance both of the application and of the filing date of July 7, 2004. The court noted that petitioner had had nearly 39 months to file an application from the time he entered the U.S. and that the record reflects "actions by [petitioner] to delay his immigration proceedings and thus string out the time he could remain in this country." On these facts, the court concluded "there is no possible claim that the denial of a continuance rendered the proceeding "fundamentally unfair."

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■ First Circuit Affirms Denial Of Asylum, Withholding Of Removal, And CAT To Colombian National

In ***Toloza-Jimenez v. Gonzales,*** __F.3d__, 2006 WL 2328622 (1st Cir. August 11, 2006) (*Torruela,* Lynch, Lipez), the First Circuit concluded that the BIA correctly decided petitioner was not entitled to asylum or withholding of removal based upon the IJ's adverse credibility determination and the lack of evidence of past persecution or a nexus to a protected category.

The petitioner, a citizen of Colombia, claimed that she and her husband had been threatened and persecuted by the Revolutionary Armed Forces of Colombia (FARC). The IJ did not find petitioner credible and denied her application for asylum. The IJ also determined that the alleged harm was caused by "pervasive criminality" in Colombia and not on account of a protected ground.

The court first determined that because petitioner had not challenged the IJ's adverse credibility determination she had, therefore, waived any argument on that issue. The court, nonetheless found that even assuming petitioner was credible, she had failed to establish past persecution since none of the incidents described in her testimony rose to the level of persecution. She also failed to establish that any of her political activities as a member of the Colombian Liberal Party were connected to that alleged persecution. The court further noted her return on two occasions to Colombia, undermining her claim of fear of future persecution.

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■ First Circuit Finds No Jurisdiction To Review Finding That Asylum Was Not Timely Filed Where Applicant From Albania Was Not Found Credible

In ***Stroni v. Gonzales,*** 454 F.3d 82 (1st Cir. 2006) (Torruella, Lipez, *Stafford*), the First Circuit affirmed the BIA's denial of asylum, withholding of removal and CAT claims, to an applicant from Albania. The applicant claimed that he had entered the United States in March 2001, by using a fake Italian passport under someone else's name. He initially applied for asylum directly with an asylum officer. When that application was not granted he was referred for a removal hearing. Petitioner claimed that on several occasion he had been persecuted by the Socialist government of Albania, on account of his father's support of the Democratic Party (DP). He testified that he feared he would be killed, tortured, or arrested if returned to Albania. Ultimately, an IJ determined that petitioner could not show that he filed his asylum application within one year of his arrival to the U.S. and denied that relief on the basis of statutory ineligibility. The IJ also denied the applications for withholding and CAT protection finding that petitioner's claim of future persecution on the basis of his activities on behalf of the DP were undermined by the changed country conditions in Albania, and by the fact that his parents who openly supported the DP, continued to live undisturbed

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

in Albania. The IJ also determined that petitioner's story about past and future persecution was not credible. The BIA affirmed and adopted the IJ's decision finding additionally that petitioner had failed to show eligibility for CAT protection given that he had suffered no torture in the past and that he had not shown that he could not relocate to another area in Albania to avoid torture in the future.

On appeal, the court preliminarily held that it lacked jurisdiction to review the IJ's finding that petitioner had not timely filed his asylum application. The court noted that those finding were "based largely on [petitioner's] lack of credibility" and consequently were not subject to review.

The court then found that the record as a whole supported the IJ's adverse credibility finding because there were many inconsistencies and implausibilities in the testimony that went to the heart of the withholding claim. The record also showed that petitioner had improbable memory lapses, changed his testimony when the IJ became incredulous, and blamed any discrepancies in his testimony on mistakes of other persons. The court also held that petitioner did not establish it was more likely than not he would be persecuted upon his return to Albania due to association with a particular political party. In fact, his father and other family members had continued to live for several years in Albania without major incident despite their affiliation with that political party, petitioner had never been a member of that party, he had been living in Albania without incident for four months prior to leaving, and country reports revealed that all political parties had been active in most of the country without a pattern of mistreatment. The court concluded that the record demonstrated that the findings of the BIA were amply "supported by reasonable, substantial, and probative evidence on the record considered as a whole."

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■ First Circuit Holds Alien Failed To Exhaust Administrative Remedies By Not Challenging Before BIA The IJ's Finding That He Had Been Convicted of "Rape" And By Waiving The Argument On Appeal

In ***Silva v. Gonzales,*** *455* F.3d 26 (1st Cir. 2006) (*Selya*, Lynch, Lipez), the First Circuit held that petitioner had waived any challenge to the IJ's determination that his Massachusetts conviction for statutory rape constituted a "rape" conviction, and thus an aggravated felony because he did not challenge that determination in his opening brief. The court also held that petitioner had failed to exhaust his administrative remedies when he failed to challenge on appeal to the BIA the determination by the IJ that his state crime was classified as a "rape" and thus an aggravated felony.

"We have held, with a regularity bordering on the monotonous, that litigants 'have an obligation to spell out their argument squarely and distinctly, or else forever hold their peace.'"

The petitioner, a Portuguese national was admitted into the United States as an LPR in 1985 when he was seven years old. On February 25, 2000, he plead guilty to a charge of statutory rape under Massachusetts law. The offense involved a fourteen-year-old girl. On the basis of that conviction, the former INS initiated removal proceedings on the charge of having been convicted of an aggravated felony. Petitioner did not dispute the fact of the underlying conviction but denied that he was removable as an aggravated felon. The IJ found that petitioner's state-court conviction was "first of all, for the crime of rape" therefore, constituted a conviction for an aggravated felony. The IJ also found that the conviction was also one for the "crime of abuse of a child" and qualified as an aggravated felony on that basis as well. On appeal to the BIA, petitioner did not challenge the classification of his state crime as a rape. The BIA summarily affirmed.

The First Circuit first determined that under the REAL ID Act it could consider petitioner's "abstract legal question" that the IJ had erred in characterizing his state-court conviction as one for an aggravated felony. On the merits, petitioner argued that statutory rape did not constitute sexual abuse of a minor and therefore the crime was not an aggravated felony, overlooking that the IJ's decision rested on an independent ground: a determination that the he had been convicted of "rape," a specifically enumerated offense under under INA § 101(a)(43)(A), 8 U.S.C. § 1101 (a)(43)(A). Petitioner did not raise "in any way, shape, or form" that determination, said the court, and therefore he had waived any challenge to that finding. "We have held, with a regularity bordering on the monotonous, that litigants 'have an obligation to spell out their argument squarely and distinctly, or else forever hold their peace,'" said the court. Additionally, the court found that petitioner never challenged the classification of his state crime as a rape before the BIA. "That omission constitutes a breach of the INA's exhaustion requirement," under § 242(d)(1), and therefore non-exhaustion principle barred further review, held the court. The court explained that "when an argument cold have been, but was not, advanced before the BIA, we consistently have rejected belated efforts to resurrect the foregone argument on judicial review, deeming such efforts barred by non-exhaustion principles."

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

Finally, even if petitioner had preserved his argument, the court said that it would have found that petitioner's conviction for rape was an aggravated felony conviction because the statutory language was "unambiguous" and that the "proper province of the court is to enforce the statute according to its tenor."

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SECOND CIRCUIT

■ Second Circuit Upholds Immigration Judge's Denial Of Petitioner's Request For Protection Under The Convention Against Torture

In ***Jo v. Gonzales***, 458 F.3d 104 (2d Cir. 2006) (Walker, *Kearse*, Winter), the Second Circuit affirmed the IJ's denial of petitioner's CAT application. Petitioner alleged that he or his family would be subject to torture if returned to China because of a large debt that he owed to smugglers also known as Snakeheads. Petitioner originally had applied for asylum and withholding but subsequently conceded that his claim of difficulties with China's family planning officials had been fabricated. Petitioner testified that if returned to China the Snakeheads would destroy his house as they had done to his neighbor when he failed to pay a debt. The IJ denied CAT protection for two reasons. First, the IJ determined that petitioner had failed to show that the Snakeheads were part of the Chinese government. Second, even assuming that they were, the IJ held that the type of retribution described by petitioner, namely deprivation of his home, did not constitute torture. The BIA adopted and affirmed the IJ decision in a *per curiam* opinion.

The court held that the type of deprivation that petitioner showed did not constitute torture. The court found that under the "understandings" of the Senate when it ratified CAT and the implementing regulations "the concept of torture has its focus on injury to persons, rather than on damage to property." The court noted that although the definition of torture includes the infliction of pain that is mental rather than physical, and the loss of property can cause mental anguish, "the regulations make it clear that in order to come within the definition of torture, the mental anguish must have its origin in the treatment, actual or threatened, of a person." The regulations leave no room for the proposition that the "CAT concept of torture encompasses simple deprivation of property," said the court.

> "The concept of torture has its focus on injury to persons, rather than on damage to property."

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■ Second Circuit Remands Asylum Case Directing BIA to Explain Standard It Applies in Evaluating Claims of Economic Persecution

In ***Mirzoyan v. Gonzales***, 457 F.3d 217 (2d Cir. 2006) (Straub, Sotomayor, Katzmann) (per curiam), the Second Circuit did not uphold the agency's denial of asylum and withholding of removal. Instead, the Court required the BIA to clearly identify the statutory construction of the word "persecution" when assessing the ethnic Armenian's claim of economic persecution.

The petitioner, an ethnic Armenian and a citizen of the republic of Georgia, claimed that she had been denied the opportunity to earn a livelihood because of her ethnicity and that when she applied for jobs in her profession, she was repeatedly turned down because of her ethnicity. Unable to find work in her profession, petitioner was forced to take a job as a courier at a furniture plant, but anti-Armenian sentiment rose in Georgia, and eventually she was fired even from this job because of discrimination against ethnic Armenians. Petitioner then worked from home, making clothes and selling them to wholesalers. The IJ denied petitioner's applications for asylum and withholding because she concluded that the economic mistreatment petitioner claimed to have suffered in her native country did not constitute "persecution." The IJ explained that the harm petitioner suffered did not constitute persecution, because "discrimination such as mistreatment by school authorities, having trouble finding or maintaining employment, or being harassed does not rise to the level of persecution." The BIA summarily affirmed finding that petitioner had not shown persecution on a account of a protected ground.

On appeal, the court held that neither the IJ nor the BIA had clearly identified the standard it applied when assessing claims of economic persecution. The court noted that the BIA has referred to various standards governing economic persecution over the years, and that given the credible testimony of petitioner that she had experienced discrimination that interfered with her ability to earn a livelihood, her mistreatment might constitute a "substantial economic disadvantage" under one of the BIA's formulations. Consequently, the court concluded that because it could not discern what construction of the term the BIA had adopted, it remanded the case for clarification of this important question.

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■ Second Circuit Determines That It Has The Authority To Stay Voluntary Departure Order And Holds That It Has Jurisdiction To Review An Order Granting Voluntary Departure

In ***Thapa v. Gonzales***,__F.3d__, 2006 WL 2361248 (2d Cir. August 16, 2006) (Sack, *Katzmann*, Murtha), the Second Circuit held that it had the authority under 28 U.S.C. § 2349(b), as

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

incorporated by reference in the immigration statute's jurisdictional provision, to grant stays of voluntary departure orders, and that the appropriate standard for granting such stays was the same standard for granting stays of removal orders.

The petitioner, a citizen of Nepal, was placed in removal because he had overstayed his nonimmigrant visa. At his immigration hearing, he admitted to the overstay charge, but challenged the validity of the Notice to Appear arguing that it was improperly issued. He also moved for a continuance so that the Connecticut Department of Labor would have time to adjudicate his request for labor certification. He also sought for voluntary departure. The IJ rejected the argument that the NTA was improperly issued and declined to continue the hearing pending the determination of petitioner's labor certification, because, the IJ explained, it would be speculative to assume that the certification would be granted. The IJ, however, granted a 60-day period of voluntary departure.

The BIA affirmed the IJ's decision, finding *inter alia* that petitioner's basis for a continuance was speculative because of no certainty that the petition would be approved. Petitioner then filed a petition for review. However, before the court took any action, the BIA reopened the case *sua sponte*, after it realized that it had neglected to reinstate the 60-day voluntary departure order and reissued a new order on April 10, 2006. On April 19, 2006, petitioner moved to dismiss the petition and simultaneously filed another petition to review the second BIA order and also sought a stay of the voluntary departure order. The court granted the motion to dismiss. On May 18, 2006, petitioner submitted a motion for a stay of removal and the court subsequently heard oral argument on that issue. The merits of the case are still pending.

On the merits of the motion for a stay, the court stated it presented "an issue of first impression in this Circuit: whether, notwithstanding the 60-day statutory time frame for voluntary departure, we have the authority to stay the order of voluntary departure pending consideration of a petition for review on the merits." The court noted that the majority of the courts that have addressed the question, with the exception of the Fourth Circuit, have concluded that the courts have such authority. The court then found that the majority position was a better one and adopted it. The court found "nothing in any statutory or regulatory provision relating to voluntary departure that rebuts the presumption that courts may stay an agency order pending review of a petition on the merits."

The court held that it had jurisdiction to review a order of voluntary departure that included an alternate order of removal because a final order is subject to review under INA § 242, 8 U.S.C. § 1252, once the BIA has affirmed it.

The court also held, after noting that neither party had raised it, that it had jurisdiction to review a order of voluntary departure that included an alternate order of removal because a final order is subject to review under INA § 242, 8 U.S.C. § 1252, once the BIA has affirmed it. The court explained that the courts have long held that the grant of voluntary departure does not result in the alien's not having an outstanding final order of deportation. The court found that the regulations at 8 C.F.R. § 1241.1(f) (2005), indicating that unless and until an alien overstays the period of voluntary departure there is no final order from which to appeal are "inconsistent with the statutory definition of a final order of removal if applied to determine finality for purposes of judicial review." The court also noted that the regulations seem to conflict with Congress' intent in IIRIRA to allow aliens to pursue petitions for review from abroad. If the alien complied with the VD order and left the country, there would be no final order under the regulation and thus the alien would be prohibited from appealing. Accordingly, the court concluded that because VD orders are final orders of removal for purpose of judicial review, and "because the provisions in the INA governing voluntary departure do not strip us of our traditional authority to stay agency orders pending consideration of petitions for review on the merits," stays of removal are available to those aliens who can meet the standard of a stay.

The court then found, as the parties agreed, that the usual criteria for obtaining injunctive relief apply when an alien seeks a stay of voluntary departure. Here, the court found that petitioner had demonstrated some possibility of success and that the balance of hardships tipped in his favor. In particular, the court noted that petitioner had a strong case of success on the argument that the IJ had abused his discretion in denying a continuance pending the adjudication of the labor certification application.

Finally, the court determined that it was premature to address the standard for the granting of a motion for a stay of removal because the issue had not been fully briefed. However, it concluded that the granting of a stay of voluntary departure would not necessarily lead to a granting of a stay of removal as some courts, such as the Ninth Circuit, had found.

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(Continued on page 15)

Summaries Of Recent Federal Court Decisions

(Continued from page 14)

THIRD CIRCUIT

■ Third Circuit Holds That Failure To Inform Alien Of Right To Seek Appeal Of Reinstatement Order, If Prejudicial, Is Fundamentally Unfair

In ***United States v. Charleswell,*** 456 F.3d 347 (Scirica, McKee, *Nygaard)* (3d Cir. 2006), the Third Circuit held that the government's failure to inform the alien of his statutorily prescribed right to seek an appeal of his reinstatement order, combined with the misleading language contained in the reinstatement "Notice of Intent" form, was a fundamental defect of a nature that, if prejudicial, rendered the proceeding fundamentally unfair. The court explained that under Supreme Court precedent, a procedural defect is fundamentally unfair when it deprives the alien of judicial review, including a statutory right to appeal.

The court held that the government was entitled to charge the alien as removable for having been convicted of an aggravated felony under two different statutory subsections.

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■ Third Circuit Rules That Forgery Conviction Involving Fraud And A Sentence Of Less Than One Year Is An Aggravated Felony

In ***Bobb v. Gonzales***, 458 F.3d 213 (*Fisher*, Lourie; Aldisert, dissenting) (3d Cir. 2006), the Third Circuit held that the alien's forgery conviction involving fraud and a sentence of less than one year was an aggravated felony. The alien was convicted for forgery in an amount over $10,000 under 18 U.S.C. § 501(a)(2), and sentenced to four months imprisonment. The court held that the government was entitled to charge the alien as removable for having been convicted of an aggravated felony under two different statutory subsections, INA § 101(a)(43)(M)(i) and (R). The court also held that the government was not required to meet the requirements of both subsections to remove the alien from the United States as an aggravated felon because the underlying conviction was not a "hybrid offense."

Judge Aldisert dissented. He would have held that Congress intended to apply § 101(a)(43)(R) to forgery convictions because it is the only classification that specifically mentions the crime of forgery.

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■ Third Circuit Holds That A Former Refugee Convicted Of A Removable Offense May Be Placed In Removal Proceedings

In ***Romanishyn v. Gonzales,*** 455 F.3d 175 (McKee, *Garth,* Lifland) (3d Cir. 2006), the Third Circuit upheld the BIA's determination that a lawful permanent resident, who initially entered the United States as a refugee, and subsequently was convicted of a removable offense, may be placed in removal proceedings, even though his refugee status was never terminated under INA § 207(c)(4).

The petitioner, a native of Ukraine, entered the United States as a refugee and later adjusted his status to that of a lawful permanent resident or LPR. In 2003, he was convicted twice for burglary. As a result of his convictions, the former INS initiated removal proceedings charging him with removability as an alien who had been convicted of an aggravated felony. Petitioner argued that although he had acquired LPR status, he maintained his refugee status as well, and thus was not removable. The BIA rejected this argument.

Petitioner initially filed his action in the district court but his case was transfered to the court of appeals under the REAL ID Act and converted to a petition for review. Preliminarily, the court indicated that petitioner's contention that this refugee status had to be terminated prior to being placed in removal proceedings was an issue of first impression. However, in 2004 the court had directed the BIA to answer this precise question and the BIA did so in *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005). In *Smirko*, the BIA held that a refugee does not have complete protection from removal *before* he adjusts to LPR status, so it does not follow, under the INA, that he should have such protection or immunity *after* he becomes an LPR. The court found that the BIA's interpretation was "correct and reasonable" and applying *Chevron* principles deferred to that interpretation.

The court also rejected petitioner's contention that his due process rights were violated because the IJ had restricted the number of witnesses who could testify at his hearing. The court held that petitioner was "afforded a reasonable opportunity to present evidence" and that the judge's ruling did not amount to a denial of fundamental fairness and it did not substantially prejudice petitioner.

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FOURTH CIRCUIT

■ Fourth Circuit Holds That Filing An Administrative Motion To Reopen Does Not Automatically Toll A Voluntary Departure Period

In ***Dekoladenu v. Gonzales***, __F.3d__, 2006 WL 2382523 (4th Cir. August 18, 2006) (*Motz*, King, Gregory), the Fourth Circuit upheld the BIA's denial of petitioner's motion to reopen to apply for adjustment of status because he had failed to depart the United States under an agreed-upon voluntary departure order. The

(Continued on page 16)

Summaries Of Recent Federal Court Decisions

(Continued from page 15)

court joined the Fifth Circuit (and disagreed with the Third, Eighth, Ninth, and Eleventh Circuits) in rejecting the argument that a timely-filed motion to reopen automatically tolled the time for voluntary departure, and relied upon the plain language of the relevant statutes and "clear congressional intent." The court noted that allowing tolling when an alien files a motion to reopen "would have the effect of rendering the time limits for voluntary departure meaningless."

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■ Fourth Circuit Affirms Asylum Denial On Humanitarian Grounds But Remands For Further Consideration Whether Changed Circumstances Rebutted The Well-Founded Fear Presumption

In ***Naizgi v. Gonzales,*** 455 F.3d 484 (Williams, *Gregory*, Floyd) (4th Cir. 2006), the court upheld a denial of humanitarian asylum, finding that its precedential decisions "have been true to [a] narrow construction" of the governing regulation at 8 C.F.R. §1208.13(b)(1)(iii)(providing that an alien is eligible for asylum if he has "demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution").

In this case, the IJ had granted humanitarian asylum to a citizen from Eritrea, on the premise that it was warranted by the severe persecution he and his family had endured when the government's actions resulted in the entire family's expatriation and loss of their livelihoods and property. The BIA disagreed with this finding, reasoning that although the past persecution petitioner and his family had suffered was "deplorable," it did not reach the level of severity for which the humanitarian asylum regulation was designed.

The court affirmed the BIA's decision that petitioner was ineligible for humanitarian asylum finding that although the Ethiopian government's treatment of petitioner and his family was both troubling and deplorable, it was not "the most atrocious abuse." However, the court also concluded that the IJ's analysis of the well-founded fear of persecution was incomplete, and reversed and remanded for further consideration on whether changed circumstances rebutted the presumption of future persecution.

> Allowing tolling when an alien files a motion to reopen "would have the effect of rendering the time limits for voluntary departure meaningless."

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FIFTH CIRCUIT

■ Fifth Circuit Denies Panel And En Banc Rehearing And Upholds Its Prior Ruling That A Motion To Reopen Does Not Toll A Voluntary Departure Period

In ***Banda-Ortiz v. Gonzales,*** 458 F.3d 367 (5th Cir. 2006) (Jolly, Smith, Garza, Jones, Benavides, Stewart, Dennis) (*per curiam*), the Fifth Circuit denied the petitioner's request for a panel and *en banc* rehearing of a prior published opinion (445 F.3d 387). In that decision, the majority rejected the petitioner's argument that a timely-filed motion to reopen automatically tolled his voluntary departure period and preserved his eligibility for discretionary relief. Five members of the court dissented from the denial of rehearing (Smith, Jones, Benavides, Stewart, Dennis). Writing for the dissenters, Judge Smith noted that at the time when the majority and dissenting opinions were filed, the only circuits to have considered the issue had ruled for the alien, and that while this case was pending on petition for rehearing en banc, another circuit had joined that list. *See Ugokwe v. United States Attorney Gen.*, 453 F.3d 1325 (11th Cir. 2006).

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SIXTH CIRCUIT

■ Sixth Circuit Affirms BIA's Denial Of Withholding Of Removal And CAT Protection

In ***Almuhtaseb v. Gonzales***, 453 F.3d 743 (6th Cir. 2006) (Boggs, *Moore*, Cook), the Sixth Circuit affirmed the BIA's denial of a Jordanian national's withholding of removal and CAT claims. The BIA found that petitioner had failed to demonstrate sufficient likelihood of future persecution if she were to return to West Bank territory to qualify for withholding of removal since her fears of shootings, shellings, bombings, Israeli settlers' attacks, lack of infrastructure, and lack of access to medical care were based on existence of generalized or random possibility of persecution in her native country.

Preliminarily, the court determined that it lacked jurisdiction to review an asylum timeliness determination unless it presented, as provided under the REAL ID Act, a constitutional claim or a question of law. Agreeing with the Second Circuit reasoning in *Chen v. U.S. Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006), the court held that a "question of law" does not include discretionary or factual questions but rather is a question regarding the construction of a statute. In this appeal, petitioner asserted only that the IJ had incorrectly applied the "changed circumstances" provisions. The court determined that the existence of "changed circumstances" is a predominantly factual determination and consequently not a question of law

(Continued on page 17)

Summaries Of Recent Federal Court Decisions

(Continued from page 16)
subject to judicial review. On the merits, the court ruled that the evidence in the record did not compel the conclusion that the petitioner warranted withholding or CAT protection.

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■ Sixth Circuit Holds That It Lacks Jurisdiction To Review The Denial Of Special Rule Suspension Of Deportation Under NACARA

In *Ruiz v. Gonzales*, 455 F.3d 661 (6th Cir. August 3, 2006) (Boggs, Cole, Rosen) (*per curiam*), the Sixth Circuit dismissed the petitioner's challenge to the BIA's determination that he was ineligible for special rule suspension of deportation under the Nicaraguan Adjustment and Central American Relief Act (NACARA), because he failed to timely register for benefits. The court held that section 309(c)(5)(C)(ii) of the Illegal Immigration Reform and Immigrant Responsibility Act deprives the courts of jurisdiction to review the agency's determinations as to whether a petitioner satisfies certain statutory requirements for NACARA relief.

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SEVENTH CIRCUIT

■ Seventh Circuit Rejects Chinese Petitioner's Challenge To Denial Of His Application For Asylum

In ***Chen v. Gonzales***, __F.3d__, 2006 WL 2256981 (7th Cir. August 8, 2006) (*Kanne,* Bauer, Williams), the Seventh Circuit held that the petitioner failed to establish past persecution based upon his claim that he was expelled from school and that his past girlfriend was subjected to a forced abortion for opposing family planning. Likewise, the court held that the petitioner failed to establish a well-founded fear of future persecution based upon on his parents' forced sterilization many years ago and the fact that the he had two children in the United States, more than the family-planning policy allowed.

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■ Seventh Circuit Denies Government's Motion To Dismiss Under The Fugitive Disentitlement Doctrine

In ***Gutierrez-Alamazan v. Gonzales***, __F.3d__, 2006 WL 1975401 (7th Cir. July 17, 2006) (Kanne, Rovner, Wood) (*per curiam*), the Seventh Circuit denied the government's motion to dismiss the alien's petition for review under the fugitive disentitlement doctrine, even though the alien initially failed to report for removal in response to a "bag and baggage" letter. The court reasoned that the alien was not a "fugitive" because he did not try to escape, but instead, turned himself in as soon as he became aware that he was being pursued by the DHS. The court noted that the alien was currently in DHS custody, and therefore, would be available for removal if his petition for review failed. "Pragmatic considerations should guide courts' application of the doctrine," said the court relying on *Degen v. United States*, 517 U.S. 820 (1996).

> The court said that pragmatic considerations should guide the courts' application of the fugitive disentitlement doctrine.

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■ BIA's Refusal To Recognize An Exception To The One-Year Bar For Filing An Asylum Application Did Not Violate Due Process

In *Mabasa v. Gonzales,* 455 F.3d 740 (7th Cir. 2006) (*Bauer*, Manion; Williams,), the Seventh Circuit, in an amended opinion, ruled that it had jurisdiction under the REAL ID Act to address the petitioner's claim of a due process violation arising from the BIA's rejection of the petitioner's untimely filed asylum application. The court then held that the BIA's careless wording, mistakenly characterizing his claim as one of "extraordinary circumstances" instead of one of "changed circumstances," was harmless and did not violate due process.

On the merits, the court held that petitioner had failed to show a clear probability of persecution in Zimbabwe under either the requirements for showing individual or group persecution. In particular the court noted that the government stamped his passport when he left that country instead of detaining him and that his political party, the MDC, was an enormous political organization holding one-third of the seats in Zimbawe's parliament, and that one-third of the population belonged to that party, too.

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■ Seventh Circuit Refuses To Apply Estoppel Against Immigration Authorities

In ***Gutierrez v. Gonzales***, __F.3d__, 2006 WL 2358206 (7th Cir. August 16, 2006) (Ripple, *Kanne*, Rovner), the Seventh Circuit rejected the petitioner's argument that the government should be estopped from seeking his removal because his illegal presence only came to its attention through his attorney's immigration fraud. The court held that "[t]he government's conduct of acting on information provided voluntarily to it indicating a violation of the immigration laws cannot constitute the type of

(Continued on page 18)

Summaries Of Recent Federal Court Decisions

(Continued from page 17)
egregious affirmative misconduct necessary to justify the extraordinary remedy of estoppel."

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EIGHTH CIRCUIT

■ Firing Into An Occupied Building Is A Crime Involving Moral Turpitude

In ***Recio-Prado v. Gonzales***, 456 F.3d 819 (8th Cir. 2006) (*Heaney*, Smith, Gruenderi), the court held that firing into an occupied building was a crime of moral turpitude. The court explained that an accessory to a shooting that involved the malicious and intentional firing of a weapon into an occupied dwelling "strikes us as undoubtedly *malum in se*; even without the statute's prohibition on such conduct, it is wrong."

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■ Asylum Applicants Who Had Been Granted Refugee Status in Australia Had Been "Firmly Resettled"

In ***Sultani v. Gonzales***, 455 F.3d 878 (8th Cir. 2006) (*Bowman,* Murphy, Benton), the Eighth Circuit affirmed the BIA's denial of asylum. The court held that substantial evidence established that asylum applicants, who were natives of Afghanistan, had firmly resettled in Australia prior to entering the United States. The petitioners, while residing in Pakistan were granted refugee status in Australia where they subsequently moved in 1988. Under the grant of refugee status they were permitted indefinite renewal of that status, they enjoyed unrestricted employment, and permission to travel abroad. Indeed the father had previously testified that his family was in fact resettled in Australia, and that while in Australia, the family rented an apartment, the children attended public schools, and they all received free medical care and monetary assistance from the Australian government. In 1989 the petitioners came to the United States for a temporary period to obtain medical treatment for one of the children but never departed. The court also found that petitioners did not qualify for either exception to the firm-resettlement bar to asylum, since the fact that one child received better medical treatment in United States than in Australia did not indicate that he was denied resettlement, and petitioners stayed in Australia longer than was necessary to secure passage to United States.

An accessory to a shooting that involved the malicious and intentional firing of a weapon into an occupied dwelling "strikes us as undoubtedly *malum in se*; even without the statute's prohibition on such conduct, it is wrong."

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■ Eighth Circuit Vacates Order Terminating Asylum Because DHS Did Not Prove That Petitioner Committed Fraud

In ***Hailemichael v. Gonzales***, __F.3d__, 2006 WL 2034421 (8th Cir. July 21, 2006) (Murphy, Melloy, *Gruender*), the Eighth Circuit vacated the BIA's order terminating the asylum status to an applicant from Ethiopia. The court held that in order to terminate asylum, the government had to show not only that petitioner's husband had not been imprisoned as she initially claimed, but that petitioner actually knew at the time that she testified that this assertion was false.

In this case, after the IJ had granted petitioner asylum, DHS moved to reopen the removal proceedings and terminate the grant of asylum. DHS claimed that it had discovered that, contrary to what petitioner had stated in her asylum application and testimony, that her husband had not been imprisoned in Ethiopia. The IJ granted the motion to reopen and terminated petitioner's asylum status.

On appeal, the court held that the IJ abused her discretion when she reopened petitioner's removal proceedings without requiring DHS to show that the evidence it offered in support of its motion to reopen "was not available and could not have been discovered or presented at the former hearing." The court also held that the IJ improperly terminated petitioner's asylum application without a showing that she actually committed fraud and directed the BIA to determine whether the documents DHS presented in support of its motion to reopen tend to prove that petitioner had committed fraud in her earlier application.

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■ Eighth Circuit Upholds BIA's Denial Of Asylum Because Petitioner Presented No Evidence Of A Pattern Of Persecution

In ***Vonhm v. Gonzales,*** __ F.3d__, 2006 WL 2011031 (8th Cir. July 20, 2006) (*Loken*, Bowman, Bye), the Eighth Circuit affirmed the BIA's denial of asylum, withholding of removal, and CAT protection. The court held that acts of violence committed by rebels against the Liberian petitioner's family members did not show a pattern of persecution tied to him, and that even if petitioner's fear of persecution was subjectively reasonable based upon tribal conflict and random violence, it was not an objectively well-founded fear of persecution on a protected basis.

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(Continued on page 19)

Summaries Of Recent Federal Court Decisions

(Continued from page 18)

■ **Eighth Circuit Upholds Adverse Credibility Determination Where Petitioner Failed To Explain Inconsistencies**

In *Onzongo v. Gonzales*, __ F.3d__, 2006 WL 2290503 (8th Cir. August 10, 2006) (Smith, Heaney, *Gruender*), the Eighth Circuit accepted the IJ's adverse credibility determination as controlling where the corroborating evidence bore the hallmarks of fraud and the petitioner did not request corroboration from available sources. The court also rejected a requirement that the petitioner's testimony must be "clearly false." Judge Heaney dissented, stating that the majority was "nitpicking" and the asylum hearing lacked the level of decorum expected in a federal government hearing.

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NINTH CIRCUIT

■ **California Conviction For Accessory After The Fact Is A Crime Of Moral Turpitude**

In *Navarro-Lopez v. Gonzales*, 455 F.3d 1055 (9th Cir. 2006) (Pregerson, *Leavy*, Beistline), the Ninth Circuit held that the petitioner's conviction under California state law for accessory after the fact was a conviction involving a crime of moral turpitude. The court utilized the categorical approach, noting that the elements of the offense included a knowing and active interference with the enforcement of the law and specific intent to help someone avoid prosecution. The court relied upon a California state court holding that this crime "necessarily involves moral turpitude since it requires that a party has a specific intent to impede justice with knowledge that his actions permit a fugitive of the law to remain at large."

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■ **Hawaii's Prostitution Offense Is Not A Crime Of Prostitution For Immigration Purposes**

In *Kepilino v. Gonzales*, __F.3d__, 2006 WL 2052309 *(Pregerson,* Fletcher, Hall) (9th Cir. July 25, 2006), the Ninth Circuit reversed an IJ's finding that the alien's Hawaii prostitution conviction rendered her inadmissible under 8 C.F.R. § 1182(a)(2)(D)(i). The court held that Hawaii's statute was not a crime of prostitution for immigration purposes under the categorical or modified categorical approach. The court also found reasonable the Department of State's definition of "prostitution" at 22 C.F.R. § 40.24(a) (defining prostitution as "engaging in promiscuous sexual intercourse for hire").

Because a BIA's unpublished decision is not binding on third parties and does not carry the force of law, it is not entitled to *Chevron* deference.

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■ **Ninth Circuit Holds That Unpublished Board Decision Does Not Merit Full *Chevron* Deference And Rejects Board's Interpretation Of Cancellation Of Removal Statute.**

In *Garcia-Quintero v. Gonzales*, __ F.3d__, 2006 WL 2042896 (9th Cir. July 24, 2006) (Hawkins, *Paez*, Graber, concurring and dissenting), the Ninth Circuit determined that the BIA's interpretation that the petitioner's beneficiary status under the Family Unity Program (FUP) did not render him "admitted in any status" for purposes of cancellation of removal was not entitled to *Chevron* deference.

Cancellation of removal under INA § 240A(a)(2), is available to alien who can establish, *inter alia*, seven years of continuous residence in the United States "after having been admitted in any status." Petitioner illegally entered the U.S. in 1986. In 1993 he was accepted into the FUP, which permits alien spouses and children of legalized aliens who entered the U.S. before 1988 and resided here since that time to apply for the program. In 1998, petitioner was granted LPR status. However, in 2001 he was placed in removal proceedings because he had attempted to smuggle an alien into the United States, thus ending his residency. The BIA rejected petitioner's contention that he was first "admitted" in 1993 when he was accepted into the FUP program and therefore had accumulated the seven years of continuous residence. Accordingly, the BIA denied the request for cancellation.

The Ninth Circuit preliminarily held that the BIA's unpublished decision was not due *Chevron* deference. The court explained that *Chevron* deference applies only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in the exercise of such authority. Because a BIA's unpublished decision is not binding on third parties and does not carry the force of law, it is not entitled to *Chevron* deference. The court rejected the government contention that the Supreme Court in *Aguirre-Aguirre* had applied *Chevron* deference to an unpublished BIA decision, noting that that case had been decided before the Supreme Court decision in *Mead* decision and more importantly, the BIA had relied on a statutory interpretation adopted in a previous published decision. The court then applied the lower standard of deference articulated in *Skidmore* and determined that the BIA's inter-

(Continued on page 20)

Summaries Of Recent Federal Court Decisions

(Continued from page 19)

pretation was not acceptable. The court then held that the plain meaning of "admitted in any status", the legislative history of the cancellation statute, and the precedential decision of the court and of the BIA, led to the conclusion that acceptance into the FUP constituted "admission" in "any status."

In a concurring and dissenting opinion, Judge Graber agreed with the majority's opinion regarding the deference due to unpublished BIA decision, but disagreed with the majority's finding that an alien admitted into the FUP was "admitted" under the INA for purpose of cancellation of removal.

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■ Due Process Does Not Require Notice To Petitioner That A Conviction May Bar Relief

In *Salviejo-Fernandez v. Gonzales,* 455 F.3d 1063 (9th Cir. 2006) (Pergerson, *Leavy*, Beistline), the Ninth Circuit joined the Second and Fifth Circuits and held that due process does not require that the Notice to Appear include charges that are not grounds for removal, but are grounds for denial of relief from removal. The court affirmed the denial of the petitioner's application for cancellation of removal based on his conviction for maintaining a place for selling or using controlled substances in violation of California law, despite there being no mention of that charge in the petitioner's Notice to Appear.

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Due process does not require that the Notice to Appear include charges that are not grounds for removal, but are grounds for denial of relief from removal.

■ Ninth Circuit Holds That U.S. Border Patrol Agents Did Not Have Reasonable Suspicion To Stop Illegal Aliens

In ***United States v. Manzo-Jurado,*** 457 F.3d 928 (9th Cir. 2006) (*Bea,* Gould, Canby), the Ninth Circuit, in an amended published decision, denied the government's petition for rehearing. The court also amended its previous opinion (452 F.3d 1028), deleting what the original decision described as a concession by the government at oral argument that the alien was seized within the meaning of *Terry*, and substituting a paragraph stating that because the Border Patrol officer's order to the truck occupants to show their hands was a "'meaningful interference' with [the alien's] freedom," the alien, who had not yet admitted he was in the country illegally, was seized within the meaning of *Terry*.

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■ Ninth Circuit Vacates Earlier Opinion And Denies Claim Of Asylum Based on Religious Persecution in China

In ***Gu v. Gonzales***, 454 F.3d 1014 (9th Cir. 2006) (Beezer, Tallman, *Pregerson*), the Ninth Circuit denied rehearing *en banc,* withdrew its earlier opinion, and issued a modified decision affirming the BIA's holding that petitioner, an asylum applicant from China, had not been subject to past persecution. The petitioner claimed that he had been detained, interrogated, and mistreated by authorities on one occasion because he had distributed Christian religious materials and had attended an "unofficial house church." However, petitioner had not suffered adverse job consequences, and had not been objectively unable to attend his household church. The court further held that an IJ may give hearsay statements of a friend less weight and probative value than non-hearsay evidence.

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■ Ninth Circuit Held That The BIA Applied Impermissibly Strict Standards To Petitioner's Withholding Of Removal And CAT Claims When It Imposed A Strict "Reporting Requirement" To Establish Government Persecution

In *Ornelas-Chavez v. Gonzales*, __F.3d__, 2006 WL 2390302 (9th Cir. Aug. 21, 2006) (*Browning,* Nelson; O'Scallion dissenting), the Ninth Circuit reversed the BIA's decision denying petitioner's request for withholding of removal and CAT protection. The court held that petitioner did not have to show that he had reported incidents in which he was harmed to government officials in order to establish past persecution and he did not have to show that the government sanctioned his torture in order to qualify for CAT protection.

The petitioner, a Mexican national came to the United States illegally to escape abuse suffered on account of his homosexuality and female sexual identity. At his removal hearing, he reported suffering one incident of harm at the hands of government agents: a detention of several hours. The IJ, later affirmed by the Board, concluded that this single incident did not rise to the level of persecution. All of the other harm suffered occurred at the hands of private citizens and was never reported to government authorities. Considering the evidence in the context of the general country conditions in Mexico, the BIA noted that "while perhaps revealing societal disfavor of homosexuals, [the evidence] does not demonstrate that the authorities would have been inattentive to the primary incidents of persecution al-

(Continued on page 21)

Summaries Of Recent Federal Court Decisions

(Continued from page 20)

leged here: the rape and physical abuse of a young child." Because petitioner never reported his incidents of harm to government authorities, the BIA found that he did not prove that the Mexican government was unwilling or unable to control those who harmed or may harm him and denied him withholding of removal.

The court reversed the BIA's decision stating that "we must therefore conclude that the only credible testimonial evidence the BIA considered in determining that the Mexican government was unwilling or unable to control [petitioner's] alleged persecutors was the fact that [he] did not report the incidents of abuse he suffered to the police. Such treatment of the evidence was tantamount to making the reporting of private persecution a sine qua non for the success of [petitioner's] withholding of removal claim."

The court found that "neither IIRIRA nor the regulations implementing it require that an alien seeking withholding of removal based on third-party persecution must have reported that persecution to the authorities." The court further noted "we now make explicit what was implicit in our earlier cases: an applicant who seeks to establish eligibility for withholding of removal on the basis of past persecution at the hands of private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse." The court concluded that the BIA applied the wrong legal standard in denying the request for CAT protection because the evidence did not establish that the government "sanctioned" his torture. The court stated "because 'sanction' connotes greater volition and approbation than 'acquiescence,' 'awareness,' 'willful blindness,' and even 'willful acceptance' the IJ applied a higher legal standard to assess [petitioner's] CAT claim than is permitted under the law."

The court found that "neither IIRIRA nor the regulations implementing it require that an alien seeking withholding of removal based on third-party persecution must have reported that persecution to the authorities."

In a dissenting opinion Judge O'Scallion would have found that the BIA had properly considered that petitioner had failed to report the alleged abuse to government authorities and would have affirmed the denial of CAT protection.

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TENTH CIRCUIT

■ Tenth Circuit Denies Claim Of VWP Alien That He Had A Right To An Adjudication Of His Adjustment Of Status Application

In *Ferry v. Gonzales,* __F.3d__, 2006 WL 2258805 (10th Cir. August 8, 2006) (Tasha, Seymour, *Briscoe),* the Tenth Circuit denied the petitioner's claim that he had a right to an adjudication of his adjustment of status application by an IJ.

The court held that the petitioner, a native of Northern Island, who had been admitted in December 2000 under the Visa Waiver Program had no right to apply for any form of relief other than asylum after he had overstayed his authorized time in this country. The court ruled that there was no exception for claims involving adjustment of status.

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■ Tenth Circuit Rejects Agency's Adverse Credibility Determination And Denial Of Petitioner's Application For Asylum

In ***Solomon v. Gonzales,*** __F.3d__, 2006 WL 2037403 (10th Cir. July 21, 2006) *(McConnell*, Anderson, Tymkovich), the Tenth Circuit reversed and remanded the BIA's denial of petitioner's asylum and withholding of removal claims. Petitioner, who was an Eritrean of mixed Eritrean/Ethiopian descent, claimed that she was forcibly repatriated from Ethiopia to Eritrea, and forcibly drafted and persecuted while serving in the Eritrean army because of her Ethiopian background. The court held that the IJ's reliance on the submission of a mutilated passport, her failure to present testimony of her sisters who resided in the United States, and her lack of corroborating documentary evidence did not sufficiently support the agency's adverse credibility determination.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds That Evidence Concerning Family Court Proceedings was New And Material Evidence For Purpose of Reopening

In ***Verano-Velasco v. U.S. Attorney General,*** 456 F.3d 1372 (11th Cir. 2006) (Anderson, Fay, Siler) (*per curiam*), the Eleventh Circuit reversed the BIA's denial of petitioner's motion to reopen and remanded the matter for a new hearing before the IJ. The court found that the BIA erred in denying petitioner's motion to reopen based on newly discovered evidence regarding the government's witness. The court explained that the evidence offered in the motion to reopen was unavailable at the time of the initial hearing, and that evidence substantially called into question the credibility of a witness who was material to

(Continued on page 22)

Federal Court Decisions

(Continued from page 21)

the IJ's assessment of petitioner's application. The court also found that the new evidence called into question the credibility of a witness upon whose testimony the IJ relied substantially in determining that petitioner's application was frivolous and that it was questionable whether a determination of frivolity could be reached in the absence of the witness's testimony. The court stated that "we can think of nothing more crucial to an evaluation of the credibility of [petitioner] than a full consideration of the character and credibility of [the government witness.] The new evidence is therefore material to the very crux of the application for asylum."

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■Following Rehearing, The Eleventh Circuit Holds That The Immigration Judge Did Not Abuse His Discretion In Denying A Continuance Request To Await The Adjudication Of A Labor Certification

In ***Zafar v. U.S. Att'y Gen***, __F.3d__, 2006 WL 2440044 (11th Cir. August 24, 2006) (Anderson, Hull, *Roney*), the Eleventh Circuit granted panel rehearing and vacated its prior published decision. The court reached the same result but addressed some claims more fully. The court first held that jurisdiction to review the denial of a continuance is not barred by 8 U.S.C. § 1252(a)(2)(B)(ii). The court then held that the Immigration Judge in each case did not abuse his discretion in denying the aliens' requests for a continuance to await the adjudication of pending labor certifications because the aliens were not "eligible to receive an immigrant visa" at the time of their hearings, as required by 8 U.S.C. § 1255(i)(2)(A). The court also ruled that no due process or equal protection violations existed.

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"PARTICULARLY SERIOUS CRIME"

(Continued from page 1)

involving moral turpitude, namely bank fraud. At her removal hearing she admitted the charge of inadmissibility but requested cancellation of removal, § 212(c) waiver, withholding of removal, and withholding under CAT. The IJ denied the request for cancellation and 212(c) finding that petitioner had abandoned her permanent resident status because of the length of time she had spent abroad. The IJ denied the request for withholding finding that the bank crime was a "particularly serous crime" therefore rendering petitioner ineligible for withholding of removal. The IJ also denied withholding under CAT finding no evidence to suggest likelihood of government torture. The BIA affirmed and adopted these findings.

> The court held that given the plain language of the statute and structure of § 241(b)(3)(B), an offense must be an aggravated felony to be considered a "particularly serious crime."

The court first determined that it had jurisdiction to review the denial of withholding. It disagreed with the government's contention that the IJ's finding of a "particularly serious crime" was a discretionary decision not subject to judicial review under INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(2)ii). The court explained that the key to § 242(a)(2)(B)(ii) lies in the requirement that the discretion giving rise to the jurisdictional bar must be specified in the statute. Although there are two terms in § 241(b)(3)(B) that might suggest discretion, namely "decide" or "determine," the court said that standing alone these were insufficient to specify "discretion" noting that Congress did so in thirty-two additional provisions in the subchapter referenced by § 242(a)(2)(B).

Second, the court then determined that, because petitioner had been convicted of a criminal offense, it lacked jurisdiction under § 242(a)(2)(C) to review the IJ's finding that petitioner had abandoned her lawful permanent residence. That finding was based on the factual determination that petitioner lacked the intent to return to the United States and consequently fell outside the jurisdictional savings provisions of the REAL ID Act. However, the court also determined that it had jurisdiction under the REAL ID Act to review petitioner's contention that an offense must be an aggravated felony to qualify as a "particular serious crime," because that was a question of law.

On the merits, the court held, deciding an issue of first impression, that given the plain language of the statute and structure of § 241(b)(3)(B), an offense must be an aggravated felony to be considered a "particularly serious crime." The court then found that petitioner's conviction for bank fraud was not an aggravated felony under INA § 101(a)(43)(M)(i), because the amount of the fraud did not exceed $10,000. The court determined that the IJ had erred when he considered the amount of intended loss for all of the charges ($47,969) rather than the single count ($4,716) for which petitioner was convicted. The court also found that the IJ had also erred as matter of law when he considered the dismissed charges to find that petitioner's offense was "particularly serious." Accordingly, the court remanded the case for consideration of petitioner's withholding or removal claim. Petitioner did not pursue on appeal her CAT claim.

By Francesco Isgro, OIL

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IMMIGRATION AND CUSTOMS ENFORCEMENT INCREASES NUMBER OF FUGITIVE OPERATIONS TEAMS

Julie L. Myers, Assistant Secretary for U.S. Immigration and Customs Enforcement (ICE), recently announced that seven new Fugitive Operations teams are now operating, bringing the total number of teams nationwide to 45.

ICE Fugitive Operations teams have federal authorities and nationwide jurisdiction. Though based in specific regional offices, the teams can be deployed to conduct operations anywhere fugitive alien populations are located in the United States. These teams use intelligence-based information and leads to find, arrest, and place into removal proceedings aliens who have been ordered to leave the country by an immigration judge, but have failed to comply -- thus making them fugitive aliens.

"The United States is a land of opportunity, but it is also a nation of laws," said Assistant Secretary Myers. "As such, an immigration judge's order of removal is not optional and must be followed. The addition of these new fugitive teams increases ICE's ability to aggressively pursue immigration violators as part of our nationwide interior enforcement strategy."

The teams prioritize their efforts to arrest fugitive and other illegal aliens according to public safety criteria and other factors. Of the more than 52,000 illegal aliens apprehended by ICE Fugitive Operations teams since the first teams were created in 2003, roughly 22,669 had convictions for crimes that include homicide, sexual assault against children, robbery, violent assault, narcotics trafficking, and other aggravated felonies and crimes of moral turpitude. The 45 Fugitive Operations teams currently in existence are collectively apprehending more than 1,000 illegal aliens per week.

ICE Fugitive Operations teams are assigned to regional offices of ICE Detention and Removal Operations, which often have responsibility for more than one state. Many regional offices have more than one Fugitive Operations team assigned to them, particularly those offices with significant fugitive alien populations. These Fugitive Operations teams are a crucial part of ICE's interior immigration enforcement. A critical element of this interior enforcement strategy is to identify and remove criminal aliens, fugitives, and other immigration violators from the United States.

The increased apprehension of alien fugitives, is likely to lead to more court challenges both at the administrative and the federal level.

INDEX TO CASES

INSIDE OIL

(Continued from page 24)

the U.S. Attorney's Office, Western District of Pennsylvania.

Jesse Bless is a graduate of Boston College and Wake Forest School of Law. In the last two years, Jesse worked for the Executive Office for Immigration Review as an Honors Law Clerk for Judge Ellen K. Thomas, and as a Special Assistant United States Attorney in the District of Columbia

Kelly Walls is a graduate from Willamette University and the University of the Pacific, McGeorge School of Law. After law school, she joined the Executive Office for Immigration Review through the Honors Program in 2004, and prior to joining OIL served as attorney advisor at the San Diego Immigration Court.

Manning Evans is a graduate of the University of Chicago and the University of San Francisco law school. He was an Assistant Chief Counsel with ICE in San Francisco for the last three years, and before that he worked at the Ninth Circuit as a motions attorney and law clerk.

Kathryn Moore is a graduate of Bryn Mawr College and the University of Cincinnati College of Law. Kathryn joined EOIR through the Honors Program in 2004, where she worked at the Office of General Counsel for two years.

INDEX TO FEDERAL COURTS*

12TH ANNUAL IMMIGRATION LAW SEMINAR

The Office of Immigration Litigation will present its 12th Annual Immigration Law Seminar on October 23-27, 2006, in Washington, D.C. This is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law.

For additional information contact Francesco Isgro at:

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INSIDE OIL

OIL welcomes the following new attorneys:

Karen Stewart is a graduate of Virginia Union University and Howard University School of Law. Prior to joining OIL, she held the position of Senior Trial Counsel in the Civil Division, Federal Programs Branch.

Holly Smith is a graduate of West Liberty State College and DePaul University College of Law and is a member of the Order of the Coif. After graduation from law school, she served 2 years as a law clerk and then 2 years as the senior law clerk to the Honorable Kenneth B. Kramer, Chief Judge (retired), of the U.S. Court of Appeals for Veterans Claims. Prior to joining OIL, she worked for 1 year at

(Continued on page 23)

Pictured from L to R: Jesse Bless, Kathryn Moore, Holly Smith, Kelly Walls, Karen Stewart, and Manning Evans.

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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