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

# Immigration Litigation Bulletin

*Vol. 8, Nos. 11-12* **VISIT US AT: https://oil.aspensys.com** *December 31, 2004*

## DOJ-WIDE IMMIGRATION BRIEFING PROJECT

On November 4, 2003, Deputy Attorney General James Comey issued a memorandum to the Assistant Attorneys General, the Litigating Divisions, and all United States Attorneys to seek assistance with briefing immigration cases nationwide. The memo represents the Department's interim response to the surge of immigration cases in the courts, the pace of which has exceeded the abilities of both the Office of Immigration Litigation, which briefs cases in all circuits but the Second Circuit, and the Southern District of New York which briefs Second Circuit cases. Mr. Comey stated that: "[w]e expect the Department will have to file more than 3,400 immigration briefs over the next 4 months, roughly 2,200 more than OIL and the SDNY can absorb." On behalf of the OIL staff, Director Thom Hussey observed that: "Immigration litigation is a rewarding and challenging practice, vitally important to our immigrant heritage and our national security. I am deeply grateful for the assistance of our Department and USAO colleagues, and trust that they will find OIL an able and supportive partner in handling these cases."

**Immigration litigation is a rewarding and challenging practice.**

In response to the Comey memo, OIL Deputy Director David M. McConnell led a panel of attorneys in a Justice Television Network (JTN) program which was aired live on November 16, 2004, and will be repeated on JTN throughout the project. The program, entitled "The Nuts and Bolts of Immigration Brief Writing," was specially designed for this project and is intended to be a streamlined version of OIL's other training programs. The panel included Special Counsel for Asylum Margaret Perry, Senior Litigation Counsel Linda Wernery, and Senior Litigation Counsel and Acting Director of Training Julia Doig Wilcox. As always, OIL is available to offer specialized training to DOJ attorneys, on request to the Director of Training.

OIL has also established a special website for brief writers, entitled "The Basics" and found at http://10.173.2.12/civil/MiniOLIV/home.html. This site can be accessed only from DOJ computers. It includes a brief and motions bank organized by topic and by circuit, training materials, and a list of OIL contacts. OIL also maintains a comprehensive secure website with an extensive collection of other materials. Those interested in obtaining a user ID and password for the secure website can do so through a link on the Basics site.

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## IRTPA Enacted

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub.L.No. 108-458, 118 Stat. 3638, was signed into law on December 17, 2004. Although most of the immigration-related provisions were removed, several important changes survived. New charges of inadmissibility and deportability were added to sections 212(a) and 237(a) to cover aliens who "committed, ordered, incited, assisted, or otherwise participated in" genocide, torture, or extrajudicial killing, foreign government officials who in that capacity were "responsible for or directly carried out" particularly severe violations of religious freedom, or persons who received military-type training from a terrorist organization. In addition, section 101(f) was expanded to preclude those involved in genocide, torture, extrajudicial killing, or severe violations of religious freedom from proving good moral character.

IRTPA also amended section 205 to provide that the Secretary of Homeland Security may "at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition approved by him under section 204." Such revocations are effective as of the date of approval, with no requirement that the petitioner or beneficiary be notified. In addition, section 221(i)

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## *Highlights Inside*

## Opposing Stays of Removal in District Court
## An AUSA's Perspective

As an Assistant United States Attorney (AUSA), I have faced the following scenario more than once: it's 9:00 p.m. on a Friday night; I'm at home with the family; the phone rings; it is a district court judge's clerk; an application for a temporary restraining order (TRO) seeking a stay of removal has been filed on behalf of an alien; does the government oppose the application? If so, how soon can the government file its opposition? What to do?

In districts across the country, AUSAs routinely face the same challenge. Responding to a stay of removal requires quick analysis and decision-making. It also requires the wherewithall to contact the appropriate agency officials, many times after-hours, to ascertain the information necessary to respond to the court's inquiries, and to ensure that any order is properly communicated to the agency. This article is intended to provide federal district court litigators, particularly AUSAs, with a basic understanding of law and procedure to defend the government's ability to execute a removal order.

### The Initial Review

In order to oppose a stay application, it is essential to know certain information: the alien's name and alien registration or "A" number (starts with "A" and is followed by eight numbers). Generally, this information can be ascertained from the application itself or the accompanying habeas petition. If the application has not made it into your hands, call the court clerk, identify yourself and the purpose of your telephone call, and ask that the clerk provide you with the information. Alternatively, if the alien is represented by counsel, contact him or her directly.

### Contact The Agency

Once advised that a stay application is being filed and with the essential information, immediately contact the Chief Counsel's office (agency counsel) for Immigration and Customs Enforcement (ICE). It is imperative that AUSAs have good communication and a good working relationship with the Chief Counsel's office. (For a complete address list of ICE Chief Counsel offices, go to http://www.ice.gov/graphics/about/district_offices.htm).

The Chief Counsel's office should determine the status of the alien's removal, and communicate the fact that a stay application has been filed to the Detention and Removal Office (DRO) (the unit responsible for arranging travel and executing the removal order). You should also determine from the Chief Counsel whether ICE opposes the stay.

**AUSAs must have good communication and a good working relationship with the Chief Counsel's office.**

However, in the event the application arrives after-hours, it is essential to have direct telephone numbers to DRO. Most districts should have a telephone in DRO that is monitored on a 24-hour basis. Contact this number and ask to speak to the DRO officer in charge.

Once the line of communication to ICE has been established, provide the petitioner's name and alien registration number. Ideally, the ICE official will be able to quickly provide you with information as to the petitioner's location and the immediacy of removal. If the petitioner is on a bus or van headed to the airport, ask for the cellular telephone number of the DRO officer escorting the alien in case the court enters a stay and the removal must be halted.

### The Legal Standard For A Stay Of Removal

So you know that an alien has filed an emergency application for a stay of removal, and you have the essential information. Now what? Before you can successfully oppose a motion for stay of removal, a basic understanding of the legal standard an alien must meet for granting such relief is necessary.

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), a stay of deportation was automatic upon the service of a petition for review. See 8 U.S.C. § 1105a(a)(3) (1994). In cases where a stay of deportation was not automatic, the district courts would treat an alien's motion for a stay as a discretionary motion for injunctive relief. See Fed. R. Civ. P. 65(b); *see also Jenkins v. INS*, 32 F.3d 11, 14-15 (2d Cir. 1994); *Arthurs v. INS*, 959 F.2d 142, 143-44 (9th Cir. 1992). (Note: This article focuses on challenges to removal orders in the district courts, in habeas corpus proceedings, and not by way of petitions for review in the Courts of Appeals.)

However, in 1996, Congress eliminated the automatic stay provision and enacted INA section 242(f)(2) [8 U.S.C. § 1252(f)(1)], which provides that, "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." This stringent showing was a "deliberate effort to reform the immigration law in order to relieve the courts from the need to consider meritless petitions, and so devote their scarce judicial resources to meritorious claims for relief." *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003).

The "exacting standard" of section 242(f)(2) has created a split in the Courts of Appeals that has yet to be settled by the Supreme Court. *See*

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*Kenyeres*, 538 U.S. at 1388. In *Weng v. U.S. Attorney General*, 287 F.3d 1335 (11th Cir. 2002), the Eleventh Circuit examined section 242(f)(2), and determined that Congress' reference to the power to "enjoin" encompasses stays of removal. *Id.* at 1339. Thus, in the Eleventh Circuit, an alien must show, by clear and convincing evidence, that his or her removal is prohibited as a matter of law.

The majority of the Courts of Appeal, however, have reached a contrary result. These courts have concluded that the heightened standard of section 242(f)(2) applies only to injunctions against an alien's removal and not to temporary stays sought for the duration of an alien's challenge. Thus, the First, Second, Third, and Sixth Circuits apply the standard for granting a preliminary injunction to stays of removal. *See Arevalo v. Ashcroft*, 344 F.3d 1, 7-8 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3rd Cir. 2004); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001). In an unpublished case, the Seventh Circuit reached the same conclusion. *Lal v. Reno*, 221 F.3d 1338 (7th Cir. 2000). Under this standard, the alien requesting a stay of removal must establish: (1) a likelihood of success on the merits of the underlying petition; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the moving party outweighs the harm to the opposing party if a stay is not granted; and, (4) that the granting of the stay would serve the public interest. *Douglas*, 374 F.3d at 233.

The Ninth Circuit applies a similar preliminary injunction standard to stays of removal. *See Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001). Under the Ninth Circuit's standard, an alien seeking a stay must show either: "(1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips favorably in the [alien's] favor." *Id.* at 483.

Armed with the knowledge that an alien must make a formidable showing, you are ready to face the facts of the case. Where do you go first?

### Crafting An Opposition

**When presented with a stay of removal, begin by asking several key questions.**

With the necessary information in hand, it is now time to analyze the claims asserted in the stay application and the accompanying habeas corpus petition. A sound strategy to respond to the pleadings can then be developed.

As set out above, regardless of the circuit in which you practice, the principal argument raised in opposition to a stay will focus on the likelihood of success on the merits, or lack thereof, of the underlying petition. Although each case presents its own set of facts and circumstances, certain key issues should be analyzed before delving into the merits of the petition. In particular, look for the following issues of justiciability or jurisdiction:

(1) Is removal imminent?
Although this sounds elementary, it is not necessarily the case in all stay applications that removal is imminent. If ICE does not plan on removing the alien in the immediate future (i.e., within the next week), suggest to the court clerk that briefing be scheduled accordingly. As one court has found, an emergency *ex parte* application is "the forensic equivalent of standing in a crowded theater and shouting 'Fire!' There had better be a fire." *Mission Electric v. Continental*, 883 F.Supp. 488 (C.D.Cal. 1995).

(2) Is the alien "in custody?"
For purposes of habeas corpus proceedings, an alien need not be in the actual, physical custody of ICE in order to seek relief. A majority of circuits recognize that the existence of a final administrative order of removal is sufficient to constitute "custody" for habeas purposes. *See Simmonds v. INS*, 326 F.3d 351, 354 (2d Cir. 2003); *Mustata v. U.S. Dept. of Justice*, 179 F.3d 1017, 1021 (6th Cir. 1999); *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001). Note: this is not the position taken by the Fifth Circuit. *See Marcello v. District Director of INS*, 634 F.2d 964, 968 (5th Cir. 1981) (a final deportation order, without actual custody, is insufficient to provide petitioners with the standing to seek a writ of habeas corpus).

(3) Is the petition ripe for review?
An order of removal that is not final does not, by itself, constitute "custody" for habeas purposes. Review the habeas petition. Does the alien challenge the fact that he or she will be ordered removed? Though it sounds far-fetched, I have encountered unripe petitions.

(4) Did the alien exhaust available administrative remedies?
Is the issue raised by the petitioner one that must be exhausted at the administrative or judicial level before resorting to habeas review? *See Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988), *cert. denied* 491 U.S. 904 (1989); *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); *Kurfees v. INS*, 275 F.3d 332 (4th Cir. 2001); *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004); *Soberanes v. Comfort*, 388 F.3d 1305 (10th Cir. 2004).

(4) Is the alien in the right court?
Notwithstanding the jurisdiction-stripping provisions of IIRIRA, is the issue presented in the petition one

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subject to review in habeas proceedings or one that must be decided by way of petition for review in the Courts of Appeal? In other words, does the petition challenge the fact that the alien is removable? *See*, *e.g.*, *Bosede v. Ashcroft*, 309 F.3d 441, 445 (7th Cir. 2002); *Moussa v. INS*, 302 F.3d 823, 825 (8th Cir. 2002); *Laing v. Ashcroft*, 370 F.3d 994, 997-98 (9th Cir. 2004); *Latu v. Ashcroft*, 375 F.3d 1012, 1017 (10th Cir. 2004).

(5) Does the petition assert a constitutional violation or statutory error? Habeas corpus review is not available to challenge the exercise of discretion. Rather, habeas is available to review questions of "pure law." *See INS v. St. Cyr*, 533 U.S. 289, 314, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); *Carranza v. INS*, 277 F.3d 65, 73 (1st Cir. 2002); *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001); *Bakhtriger v. Elwood*, 360 F.3d 414, 420 (3d Cir. 2004); *Bowrin v. INS*, 194 F.3d 483, 490 (4th Cir. 1999); *Bravo v. Ashcroft*, 341 F.3d 590, 592 (5th Cir. 2003); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 827 (9th Cir. 2002).

(6) Does the alien already have a stay? Although this seems rather elementary, the existence of a stay in another court, particularly a court of appeal, is not always communicated to the district court in the moving papers. Thus, a quick review of PACER may resolve the application.

Time is extremely limited when opposing a stay request. Nevertheless, providing the court with a complete and accurate picture of the facts is imperative. Often, the factual scenario presented in the alien's moving papers stresses the positive factors in the case, while completely omitting essential information such as convictions, prior deportations, etc. Additionally, when possible, provide the court with supporting evidence, either in the form of documents or declarations. The declaration of an ICE officer attesting to the fact that removal is not, as the alien asserts, imminent, may suffice to convince the court to deny the application.

### What Next?

Although an interlocutory order, the denial of a stay application may be immediately reviewed in the Courts of Appeal. *See* 28 U.S.C. § 1292(a)(1). Thus, the district court's order may not bring finality to the challenge, as an alien may seek further review and, of course, a stay of removal in the appellate court.

**The denial of a stay application may be immediately reviewed in the Courts of Appeal.**

As previously mentioned, IIRIRA eliminated automatic stays of removal. As a result, the Courts of Appeal were inundated with stay requests. To eliminate the risk that aliens would be deported before their stay requests were decided, some Courts of Appeal adopted a procedure whereby an alien is granted an automatic, temporary stay of removal upon the filing of a motion for a stay that will remain in effect until the court reviews the motion. *See DeLeon v. INS*, 115 F.3d 643 (9th Cir. 1997). However, such automatic stays are limited to applications filed in conjunction with a petition for review, and not the appeal of the denial of a stay application or a habeas petition by the district court. Therefore, unless ordered otherwise, you may instruct your contact at ICE to proceed with the alien's removal.

### A Final Word

When Congress enacted IIRIRA, it was well-aware of the difficulty encountered by the INS in its effort to remove aliens. "Removal of aliens . . . who are ordered deported after a full due process hearing, is an all-too-rare event." H.R. Report No. 104-469. Clearly, defending ICE's ability to remove aliens from the United States is paramount. The district courts have increasingly become the final hurdle in the effort, and one used by aliens on a regular basis. It is of utmost importance, therefore, for those litigators in the field to have a sound foundation from which to raise the barrier to further delays in the removal process.

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# IRTPA Enacted

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was amended to provide that a consular officer or the Secretary of State may revoke a visa at any time and as a matter of discretion and shall notify the Attorney General. This section precludes judicial review of such revocations "except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B)."

Finally, IRTPA changed Section 212(d)(3) to remove a global reference to Section 212(a)(3)(E) and replace it with a specific reference to clauses (i) and (ii) of section 212(a)(3)(E). Thus, it appears that aliens involved in extra-judicial killing may be granted a waiver and be admitted to the United States on the recommendation of the Secretary of State or the discretion of the Attorney General.

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# The Evidentiary Status of State Department Reports in Asylum Cases

In *Gramatikov v. INS*, 128 F.3d 618, 620 (7th Cir. 1997), Chief Judge Posner, writing for the court, noted that reports by the State Department on political and human rights conditions in foreign countries are not binding on either the government in an asylum proceeding or on the courts. The opinion then added, "there is perennial concern that the [State] Department softpedals human rights violations by countries that the United States wants to have good relations with." During the ensuing seven years, that statement has been cited with approval in published opinions in a number of other circuits. *Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (stating that an immigration court "cannot assume that a report produced by the State Department – an agency of the Executive Branch of Government that is naturally bound to be concerned to avoid abrading relations with other countries, especially other major world powers – presents the most accurate picture of human rights in the country in issue"); *Shah v. INS*, 220 F.3d 1062, 1069-70 (9th Cir. 2000); *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998).

In *Niam v. Ashcroft*, 354 F.3d 652, 658-59 (7th Cir. 2004), Judge Posner expanded upon *Gramatikov* by criticizing the government's "chronic overreliance" on State Department reports in asylum proceedings, pointing out the perceived "evidentiary infirmities" of such reports, and reiterating that "[t]he State Department naturally is reluctant to level harsh criticisms against regimes with which the United States has friendly relations." There are a number of concerns that attorneys engaged in asylum-related litigation should bear in mind with regard to State Department reports and the *Gramatikov* line of cases.

1. The quoted statement in *Gramatikov* was *dicta* in its purest sense, and was unsupported by citation to any kind of authority. The same is true of *Niam*, which contrasted State Department reports on Sudan and Bulgaria as follows:

> The United States is not at all friendly to Sudan, which we bombed in 1998 and continue to designate as one of seven nations that sponsor terrorism, and the country report . . . pulls no punches in describing the atrocities committed by the Sudanese regime. (For all we know, it *exaggerates* those atrocities – but this is not contended). But we are very friendly with the former communist states of central and eastern Europe, and so the country report on Bulgaria can be expected to emphasize the bright side of Bulgarian politics.

354 F.3d at 658.

2. There are a significant number of post-*Gramatikov* circuit court decisions that affirm the reliability and credit-worthiness of State Department reports. *Yuk v. Ashcroft*, 355 F.3d 1222, 1236 (10th Cir. 2004); *Dia v. Ashcroft*, 353 F.3d 228, 245-46 (3d Cir. 2003) (*en banc*) (endorsing the value of a State Department report as a measure of the petitioner's credibility); *Koliada v. INS*, 259 F.3d 482, 487 (6th Cir. 2001); *Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999) ("A State Department report on country conditions is highly probative evidence in a well-founded fear case."); *Marcu v. INS*, 147 F.3d 1078, 1081 (9th Cir. 1998). In addition, there are at least two Seventh Circuit cases, *Mitev v. INS*, 67 F.3d 1325 (7th Cir. 1995), and *Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir. 1991), which predate *Gramatikov* but which articulate a fundamental principle – that the court gives great weight to State Department reports because they concern matters within that agency's area of expertise, *Mitev*, 67 F.3d at 1332; *Kaczmarczyk*, 933 F.2d at 594 – that has not been overruled or even overtly criticized in subsequent Seventh Circuit opinions. It is also noteworthy that *Mitev* concerned conditions in Bulgaria, one of the countries in issue in *Niam*.

3. Some of the opinions critical of State Department reports point to information on country conditions gathered by the court itself from the Internet or other media. *See Chen*, 359 F.3d at 131 n.6 & 7, 132 n.8; *Niam*, 354 F.3d at 656. However, the BIA and immigration judges must decide cases on the evidence presented by the asylum applicant and DHS, consistent with the applicable burdens of proof, and, by statute, a reviewing court may decide a petition for review "only on the administrative record on which the order of removal is based . . . ." 8 U.S.C. § 1252(b)(4)(A) (Supp. IV 2004). *See also Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (*en banc*) (acknowledging the statutory limit on judicial review and overruling prior decisions that were based on extra-record reports on country conditions).

4. In many cases, the evidence put forward by the asylum applicant consists of hearsay testimony about warnings he has received from relatives or friends in his home country, or, less often, letters to the same effect. However, *Gramatikov* itself holds that such evidence is insufficient to outweigh a report by the State Department. 128 F.3d at 620. In so holding, *Gramatikov* cited *Mitev* and *Kaczmarczyk* in stating that "courts inevitably give considerable weight" to State Department reports. Id.

5. *Gramatikov* also stated that an asylum applicant "had better be able to point to a highly credible independent source of expert knowledge if he wants to contradict the State Department's evaluation of the likelihood of his being persecuted if he is forced to return home . . . ." 128 F.3d at 620. In *Navas v. INS*, 217 F.3d 646, 653-54

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# State Department Reports in Asylum Cases

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& n.5 and 7 (9th Cir. 2000), the Ninth Circuit referred to Americas Watch as a "reputable" human rights organization and discussed at length Americas Watch reports on conditions in El Salvador that the petitioner had introduced. However, in *M.A. v. INS*, 899 F.2d 304 (4th Cir. 1990) (*en banc*), which involved reports on conditions in El Salvador from Amnesty International as well as Americas Watch, the Fourth Circuit stated that a standard of asylum eligibility "based solely on pronouncements of private organizations or the news media is problematic almost to the point of being non-justiciable." *Id.* at 313. The court stated that it was unable to perceive the standards "by which the courts would analyze the reports of private groups[,]" *id.*, and added that while it did not "wish to disparage the work of private investigative bodies in exposing inhumane practices, these organizations may have their own agendas and concerns, and their condemnations are virtually omnipresent." *Id.* The court continued, in language that can be read as a counterpoint to *Gramatikov*:

> It is, of course, the role of private organizations and news reports to energize the political branches. But that is quite a different thing from requiring the courts in each instance to evaluate independently the accusations of private organizations to determine whether they set forth conditions adequate to overturn the Board's discretionary judgment. This responsibility would require us to make immigration decisions based on our own implicit approval or disapproval of U.S. foreign policy and the acts of other nations.

*Id.*

**No court has held that State Department reports do not constitute substantial evidence.**

6. Finally, no court has held that State Department reports do not constitute substantial evidence. The Seventh Circuit recently upheld an asylum denial where the immigration judge had relied on a State Department report to find that the petitioner lacked a well-founded fear of persecution in Albania. *Hasanaj v. Ashcroft*, 385 F.3d 780, 782-83 (7th Cir. 2004). In overturning a finding of no well-founded fear, the Ninth Circuit turned to a State Department report for "guidance" on conditions in Iran. *Jahed v. INS*, 356 F.3d 991, 1000-01 (9th Cir. 2004). And in *Yuk*, the Tenth Circuit noted that even where there is evidence that contradicts or detracts from a State Department report, it is not the role of a reviewing court "to reweigh the evidence, but only to decide whether substantial evidence supports the [immigration judge's] decision." 355 F.3d at 1236. The petitioners in *Yuk* had relied on criticisms from various sources of an election in Cambodia, *see id.* at 1235, but the court stated that "we have no reason to believe that these pieces of evidence are more accurate than the State Department Report." *Id.* at 1236.

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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 Julia Doig Wilcox at:**

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# Reinstatement Ruling

In *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. Nov. 18, 2004) (Nelson, Reinhard, *Thomas*), the Ninth Circuit granted Morales's petition for review of a reinstatement order and remanded to DHS for further proceedings. Morales, a native an citizen of Mexico, illegally entered the United States in 1990. Four years later, he was apprehended by INS and released after being served with an Order to Show Cause. When he failed to attend his immigration court hearing, Morales was ordered deported *in absentia*. Morales was subsequently apprehended by INS and removed to Mexico in 1998.

Morales subsequently attempted to reenter using a false border crossing card and was expeditiously removed for misrepresenting a material fact. He illegally reentered the next day. In 2001, Morales married a U.S. citizen and sought to have his status adjusted. Adjustment was denied and a reinstatement order was issued. Morales petitioned for review of the reinstatement order.

The court granted the petition for review and concluded that the reinstatement procedures of the implementing regulation, 8 C.F.R. § 241.8, violate the INA because they do not provide for a hearing before an IJ. The court held that "[t]he plain statutory language, supported by the structure of the legislation, provides that an immigration judge must conduct all proceedings for deciding the inadmissibility or deportability of an alien. The Attorney General's promulgation of the reinstatement regulation established at 8 C.F.R. 241.8, a regulation that vests an immigration officer with the authority to determine the admissibility or deportability of an alien, is in conflict with § 240(a) of the Immigration and Nationality Act." 388 F.3d at 1305.

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# Summaries Of Recent Federal Court Decisions

## ADJUSTMENT OF STATUS

In *Mahabir v. Ashcroft*, 387 F.3d 32 (1st Cir. Oct. 22, 2004) (Seyla, *Lynch*, Lipez), the First Circuit affirmed the Board's order finding petitioner removable. Petitioner, a native of Trinidad and Tobago, entered the United States in 1989 on a visitor's visa and later converted to an employment visa. In 1995, petitioner applied for adjustment of status to legal permanent resident. Because of a mixup with the paperwork, the INS did not act on her application, and in the meantime, Petitioner's sponsor died. Upon learning of the death, INS denied petitioner's application for adjustment of status, and an IJ found petitioner removable, reasoning that the death of her employer invalidated her employment visa. The IJ found that, while the delay in the adjudication of petitioner's application was the fault of the INS, the death of her sponsor automatically revoked petitioner's employment visa. Petitioner appealed to the BIA, which affirmed.

The court held that the Board did not abuse its discretion in finding petitioner ineligible for adjustment of status because the requirement of a living sponsor cannot be waived. Furthermore, the court found that even if the INS had received the information prior to the death of petitioner's sponsor, there was no guarantee that it would have been processed in time, or that it would have been approved.

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## ASYLUM

In *Ambartsoumian v. Ashcroft*, 388 F.3d 85 (3rd Cir. Nov. 5, 2004) (Sloviter, *Becker*, Stapleton), the Third Circuit affirmed the Board's decision denying asylum, withholding of removal, and CAT protection. Garegin, a Georgian of Armenian and Ossetian ancestry, and Nadia, a Ukrainian Baptist, sought asylum, alleging they had been persecuted and feared future persecution if returned to either Georgia or Ukraine. The IJ denied asylum, withholding and CAT, but granted voluntary departure, and the Board affirmed.

**The IJ's reliance on a 1999 Country Report was harmless error, even though the report was not in the record.**

On appeal, the court held that the petitioners failed to establish a well-founded fear of persecution in either Georgia or Ukraine. The court held that while Nadia's family had been persecuted during the Soviet era, Nadia herself did not suffer the same degree of persecution as her father, the post-Communist Ukraine was much more hospitable to Baptists, and Nadia's family continued to practice their beliefs in Ukraine without incident. Moreover, the court held that Garegin's troubles in Ukraine stemmed not from his ethnicity, but from his lack of official permission to live and work in that country. The court similarly found that even if petitioners encountered difficult conditions in Georgia on account of Garegin's ethnicity, that fact did not necessarily support a finding of past persecution, and accordingly denied their petition for review.

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The Ninth Circuit, in *Circu v. Ashcroft*, 389 F.3d 938 (9th Cir. Nov. 22, 2004) (O'Scannlain, *Siler*, Hawkins), denied a petition for review of the Board's decision denying asylum. Circu, a native and citizen of Romania, entered the United States on November 2, 1994, as a nonimmigrant visitor and was authorized to remain until November 1, 1995. She overstayed her visa and applied for asylum based on religious persecution. Romania is predominantly Romanian Orthodox, whereas Circu and her family are Pentecostal. Circu testified that, when she was young, her father was imprisoned and her brother was taken from the family. She alleged that in 1987 she was interrogated by the police for 36 hours, sexually harassed, and slapped. In 1990, she claimed she was again interrogated and harassed by the police. She testified that she was denied admission to public universities because her parents were not communists, and was expelled from a private university after trying to print articles detailing atrocities committed by the Romanian government. After her expulsion from school, she fled to the United States.

The IJ held that although Circu had proven past persecution, she failed to prove a well-founded fear of future persecution due to changed country conditions. The IJ determined that the 1999 Country Reports, which stated citizens can more freely practice minority religions in post-communist Romania, rebutted Circu's presumption of future persecution. Circu appealed, claiming the IJ violated her due process rights by relying on the Country Reports, which were never introduced into evidence. The Board affirmed without opinion.

On appeal, the court held that although the IJ should have referenced the 1997 Report, her reliance on the 1999 report was only a harmless error that did not amount to abuse of discretion. The court found no significant differences between the two reports, and moreover, as Circu raised the issue on appeal, she had the opportunity to challenge the report's contents. The court held that the IJ did not err in concluding that Circu did not have a well-founded fear of future persecution.

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In *El Sheikh v. Ashcroft*, 388 F.3d 643 (8th Cir. Nov. 12, 2004) (*Loken*, Bye, Melloy), the Eighth Circuit vacated the Board's decision denying asylum, withholding of removal and CAT protection. At his removal hearing, petitioner, a native of Sudan, conceded removability and sought asylum. He alleged that, while in college, he spoke at several informal student meetings and discussed the civil war between the Islamic government and the tribal insurgents. He also claimed that in April 1999 the police arrested him as a leader of a demonstration, and he was imprisoned, beaten, and held without charges for seven days. Petitioner alleged that he was arrested again in December 1999 for distributing anti-government flyers outside the university. He was detained for 35 days and released after signing a statement promising not to distribute flyers or speak at the discussion group. Petitioner alleged that government security officers harassed him to the point that he quit school and decided to leave the country. Petitioner fled to South Korea where he stayed for three months prior to coming to the United States.

The IJ denied petitioner's claims, finding "palpable" discrepancies between his testimony and his earlier interview with an asylum officer in which he claimed that he did not participate in the demonstration in April 1999, and was only "talking with friends" prior to his arrest in December. Furthermore, the IJ questioned whether petitioner was actually fleeing Sudan when he went to South Korea, and noted that he provided no corroboration that he was harmed by the government, and therefore failed to meet his burden of proof. The Board affirmed, citing insufficient corroboration.

**Petitioner's evidence which identified him as an anti-government activist was sufficient corroboration for his credible testimony.**

On appeal, the Eight Circuit vacated the Board's decision and remanded for further proceedings. The court noted that arrests without charges would not likely be documented, and that while petitioner submitted no evidence of medical treatment, severe injuries may not require medical treatment when the victim is released several days later. The court held that petitioner's evidence which identified him as an anti-government activist was sufficient corroboration for his credible testimony.

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In *Gemchu v. Ashcroft*, 387 F.3d 944 (8th Cir. Nov. 5, 2004) (Murphy, Bright, *Melloy*), the Eighth Circuit denied review of the Board's final order of removal. Petitioner overstayed his student visa and applied for asylum and CAT protection due to his involvement in the Oromo Liberation Front in Ethiopia. He testified that he taught Oromo history at a school and was arrested and detained for over one month because of his teachings. Petitioner, who graduated first in his class and worked as a clerk at the Ministry of Justice and the Ethiopian Civil Service College, was offered a scholarship to the Civil Service college by the Ethiopian government. He accepted a scholarship to the University of Michigan Law School instead, and was fired from College. Petitioner testified that he received a letter from his brother saying that he had been beaten and detained by the government and was in hiding in Ethiopia. Petitioner testified that, after receiving this letter, he became fearful that he would be persecuted if he returned. The IJ found Petitioner's testimony concerning his fear of persecution incredible and denied relief. The Board affirmed.

On appeal, the Eighth Circuit affirmed. The court found substantial evidence supporting the IJ's determination that petitioner failed to establish that he was a member of the Oromo Liberation Front and that his family had been persecuted, and found that petitioner had not been persecuted in Ethiopia. To the contrary, the court found that he held several positions of prestige and his achievements undermined his claim that the government sought to persecute him.

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In a *per curiam* decision in *Ghebremedhin v. Ashcroft*, — F.3d —, 2004 WL 2757932 (7th Cir. Dec. 3, 2004) (Posner, *Ripple*, Rovner), the Seventh Circuit agreed to modify its October 13, 2004 opinion in light of the Supreme Court's decision in *INS v. Ventura*, 537 U.S. 12 (2002). In *Ventura*, the Court held that the Ninth Circuit exceeded its authority in resolving an issue of fact the Board has not considered, rather than remanding for further proceedings. The government argued that the circuit Court's October decision contravened *Ventura,* in that once an agency error is identified, a court of appeals should remand for additional investigation, and appellate courts should not decide issues when an agency has not considered them.

The court disagreed that *Ventura* stands for the broad proposition that a court must remand for additional investigation once an error is identified, holding that in this case, the undisputed record evidence compelled a finding of persecution, and the court was within its authority to reverse the IJ's determination if manifestly contrary to law. However, the court agreed that the power to grant asylum is vested solely in the hands of the Attorney General, and modified its opinion, remanding the case for further proceedings.

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In *Guo v. Ashcroft*, 386 F.3d 556 (3rd Cir. Oct. 25, 2004) (*Ambro*, Aldisert, Stapleton), the Third Circuit granted petitioner's motion to reopen and remanded for further proceedings. Petitioner, a native of China, entered the United States without valid entry documentation on January 3, 2000. At her removal hearing, petitioner conceded removability and applied for asylum on the grounds of religious persecution. The IJ found petitioner's testimony that she was a member of an underground church and had been targeted by the government for arrest, and that she did not know the whereabouts of her husband, was incredible, and even if true did not merit asylum. The Board affirmed, and petitioner filed a motion to reopen on January 21, 2003.

Petitioner married in March 2001 and gave birth to a child in January 2002. At the time petitioner filed her motion to reopen, she was pregnant and claimed she was entitled to asylum because she would be sterilized under China's one-child policy. The Board denied the motion, finding that petitioner failed to address the IJ's adverse credibility finding or to prove a well-established fear of persecution on account of a protected ground.

The Third Circuit held that the Board's cursory rejection of petitioner's motion was improper, as the IJ's adverse credibility finding had no relation to petitioner's claim. The court also found that petitioner, in light of prior Board decisions granting relief under similar circumstances, had established a *prima facie* case, thus remanded for further proceedings.

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In *Hassan v. Ashcroft*, 388 F.3d 661 (8th Cir. Nov. 16, 2004) (Loken, Bright, *Dorr*), the Eighth Circuit affirmed the Board's denial of asylum, withholding, and protection under the CAT. Hassan was born in Somalia, and fled to Ethiopia and Djibouti before entering the United States illegally in August 1998. Petitioner sought asylum, claiming persecution on account of his membership in the Midgan clan. He alleged that during the Somali civil war, three men in military uniforms and members of the Hawiye ruling clan took him into custody, believing him to be a Midgan. Petitioner alleged he was held captive for three months, was denied food, water, and shelter, and was threatened and assaulted. He claimed that he escaped and fled to Ethiopia where he learned that his wife and brother had been killed, allegedly by the Hawiye. Mohammed Goran also testified that he knew petitioner from a refugee camp in Ethiopia, and that petitioner was a Midgan.

**The Court held that the Board's cursory rejection of Petitioner's motion to reopen was improper, as the IJ's adverse credibility finding had no relation to Petitioner's new claim.**

The IJ denied petitioner's claims for relief, finding little evidence supporting his claim that he was a Midgan. The IJ discounted Goran's testimony regarding petitioner's clan membership, and held that, even if petitioner was a Midgan, he did not prove that he suffered past persecution. The IJ classified the violence against petitioner as incidental to a civil war, rather than directed at him due to his clan membership. Furthermore, the IJ believed petitioner could relocate to another area of Somalia to be safe from future persecution. The Board affirmed without opinion.

The Eighth Circuit affirmed, finding substantial evidence supporting the denial of relief. The court found that there was no conclusive evidence that the violence against petitioner was on account of his membership in the Midgan clan, and that he had failed to prove that he had been or would be persecuted if returned to Somalia.

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In *Huang v. Ashcroft*, — F.3d —, 2004 WL 2793148 (9th Cir. Dec. 7, 2004) (Canby, *Rymer,* Hawkins), the Ninth Circuit affirmed the District Court's denial of habeas. Petitioner, a native of China, entered the United States on July 24, 1993, and applied for asylum. His application was denied, and on December 13, 1995, an IJ found petitioner excludable and ordered deportation. Finding no past persecution or well-founded fear of future persecution, the Board dismissed petitioner's appeal and the First Circuit denied his petition for review.

On February 28, 2003, Petitioner pled guilty in District Court to one count of laundering monetary instruments and was sentenced to thirty-three months imprisonment. Upon completion of his sentence, petitioner sought habeas relief on the ground that execution of the order of deportation violated Article 3 of the CAT. The district court denied the petition, reasoning that CAT claims must be brought before the Board in a motion to reopen, and that regulations implementing CAT provided aliens in Petitioner's position with an opportunity to seek protection under CAT so long as the motion was filed on or before June 21, 1999. On appeal, petitioner argued that he could seek only deferral of removal because his conviction rendered him ineligible for withholding, and that the deadline for filing motions to reopen under 8 C.F.R. § 208.18(b)(2) applies only to applicants who seek withholding of removal under § 208.16(c). Petitioner's argument turned on the language in § 208.18(b)(2) that an alien whose removal order became final before March 22, 1999 may move to reopen "for the sole purpose of seeking protection *under § 208.16(c).*" 8 C.F.R. § 208.18(b)(2). He reasoned that § 208.16 (c) describes eligibility for *withholding of removal* under CAT, whereas *deferral of removal* is treated in § 208.17(a). From this language, he inferred that the time limit in § 208.18(b)(2) applied to appli-

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cants for *withholding* but not for *deferral.*

The court disagreed, finding that an alien must first establish that he is entitled to protection before the form of protection becomes relevant. As petitioner should have exhausted his claim for CAT protection, habeas was not the only appropriate means of relief available, and the court therefore declined to consider whether he had made out a *prima facie* case for CAT protection.

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The Ninth Circuit, in *Kaiser v. Ashcroft*, 390 F.3d 653 (Dec. 3, 2004) (Reinhardt, *Wardlaw*, Paez), affirmed the Board's decision denying petitioner's application for withholding of removal and held that the Board erred in denying asylum. Petitioner and his family, natives and citizens of Pakistan, sought asylum because their lives were threatened by the Muttahida Quami Movement (MQM). Petitioner testified that in 1985, while in the Pakistani army, MQM members shot at him and and placed him on the MQM's "hit list." He alleged that in 1997, MQM began to threaten him again, calling his home and threatening his life because of his participation in the arrests of MQM leaders. Petitioner testified that in August of 1998, he was followed by MGM assassins in an attempted kidnaping. Petitioner moved his family to Islamabad, where the threatening phone calls continued. Petitioner and his family then fled to the United States.

**An alien must first establish that he is entitled to protection before the form of protection becomes relevant.**

The IJ, while finding Petitioner credible, ruled that he had not met his burden of proof to warrant asylum or withholding of removal. The IJ reasoned that none of the threats had been carried out, and that petitioner could safely relocate within Pakistan. The Board affirmed, finding petitioner failed to establish past persecution and failed to establish why it would be unreasonable for him to relocate.

The court disagreed with regard to the asylum claim, holding there was credible, direct, and specific evidence that petitioner was placed on MQM's death list, that his family was repeatedly threatened, and that petitioner and his son were followed at least once by MQM assassins. The court noted that MQM remained an active organization that resorted to violence to achieve its goals, therefore petitioner's fears of future persecution were reasonable. Furthermore, the court found that there was insufficient evidence to support the Board 's finding that petitioner could safely relocate within Pakistan, citing the threatening phone calls received in two cities on opposite sides of Pakistan. Lastly, the court affirmed the Board's decision denying petitioner's application for withholding, finding insufficient evidence that it was more likely than not that his family would be persecuted.

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In *Kaur v. Ashcroft*, 388 F.3d 734 (9th Cir. Nov. 12, 2004) (*Graber*, Hall, Brunetti), the Ninth Circuit granted Kaur's petition for review of the denial of her applications for asylum and withholding. Kaur, a native and citizen of India, entered the U.S. on April 6, 1994, and applied for asylum several months later. In a 1998 interview with an INS officer, Kaur alleged that she had been beaten and gang-raped in front of her children because she is a Sikh. In 2000, before her immigration hearing, Kaur's son entered the United States and was granted asylum. In 2001, Kaur disavowed her previous application and alleged persecution on account of her husband's political affiliation. At her hearing, her son was not allowed to testify, though he was presented as a corroborating witness. The IJ found Kaur's testimony to be incredible, in light of her recanted earlier application, and denied her application for asylum. The Board dismissed Kaur's appeal. The court reversed, holding that, by not allowing Kaur's son to testify, her due process rights were abridged and the outcome of the hearing potentially affected.

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In *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. Nov. 22, 2004) (Gould, Paez, *Silver*), the court affirmed the Board's denial of petitioner's withholding of removal and CAT claims, and vacated the Board's denial of petitioner's asylum claim. Petitioner, a native of Argentina, entered the United States on March 20, 1990 by crossing the border from Mexico, eventually moving to Seattle. On October 8, 1999, INS charged petitioner with removability for illegal entry. Petitioner conceded removability, and applied for asylum, withholding of removal, and protection under CAT, claiming political persecution. Petitioner claimed that she was involved in the Union Civica Radical (UCR) which opposed Argentina's military-run government and wanted a return to democracy. Petitioner claimed that following the 1983 elections, she became well-known as a union organizer. Following the 1989 elections, petitioner alleged that she was blacklisted and could not find suitable work due to her association with the UCR. She testified that in 1990, three men came to her home, punched her, called her a "crazy nationalist" and threatened to kill her and her daughter if she continued her political activities. She claimed the men were part of a paramilitary group that took orders from the leaders of the ruling political party. One month later, peti-

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tioner traveled to Acapulco, Mexico. Petitioner testified that while in Mexico, she learned from her father that two men had come looking for her. She then decided to flee to the United States. Petitioner testified that she feared she would be persecuted if returned to Argentina because she would continue to speak out against the government.

The IJ denied relief on the ground that petitioner's application was untimely, finding that her claim that she had no need to apply for asylum because she thought she would be allowed to remain in the U.S. through spousal petitions did not establish "extraordinary circumstances." In the alternative, the IJ held that Petitioner failed to demonstrate a genuine fear of persecution, finding that her failure to timely apply for asylum indicated a lack of urgency. Furthermore, the IJ found that petitioner's account of the men breaking into her home, even if true, did not rise to the level of persecution. The Board affirmed without opinion.

On appeal, the court vacated the Board's decision, holding that when there are two grounds for denying relief, one reviewable (asylum eligibility) and the other nonreviewable (one year bar to asylum) and the Board streamlines, there is no way to tell on which basis the Board affirmed. The court affirmed the Board's denial of the withholding of removal and CAT claims.

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In *Mamedov v. Ashcroft*, 387 F.3d 918 (7th Cir. Nov. 1, 2004) (*Posner*, Kanne, Wood), the Seventh Circuit set aside the Board's affirmance denying asylum, and remanded the case for further proceedings. Petitioners, Jewish nationals of Turkmenistan, sought asylum on religious grounds. The IJ, in an oral decision, found petitioners' testimony regarding their inability to find employment and police abuse incredible. The IJ further held, but did not explain, that even if believed, petitioners' testimony did not amount to persecution. The IJ later edited the written transcript of his decision.

**The Court noted that it is a "bad practice" for judges to continue working on their opinions after the case has entered the appellate process.**

On appeal, the Seventh Circuit held that the IJ erred in finding petitioners' testimony incredible and incorrectly rejected evidence establishing petitioners' religion. The court held that being excluded from all employment (as opposed to discriminatory exclusion from some jobs), and being beaten by police could amount to persecution, and accordingly remanded for further proceedings. While the court held that the changes the IJ made to his opinion were harmless, it noted that it is a "bad practice" for judges to continue working on their opinions after the case has entered the appellate process.

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In *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. Dec. 6, 2004) (Pregerson, *Beezer*, Tallman), the Court dismissed in part and denied in part Mansour's petition for review. Mansour and his wife Edawa, natives and citizens of Egypt, overstayed and applied for asylum. They conceded removability and renewed their requests for asylum and withholding of removal and sought voluntary departure. Mansour testified that he feared persecution because he is a Coptic Christian. He claimed that he was treated differently as a child and was physically struck by his teachers. He also claimed that if he returned to Egypt he would be persecuted because he spent time in a Western Country. Edawa, also a Coptic Christian, claimed teachers were unwilling to provide her assistance with her studies, and that she was often struck for no reason and neighborhood children threw rocks at her. She further testified that she did not want her United States born children to have to suffer as she did. Petitioners testified that Edawa's cousin had been killed, allegedly because he was an outspoken Coptic Christian.

The IJ determined that Mansour, and therefore Edawa as a derivative applicant, had not established eligibility for asylum or withholding of removal and denied voluntary departure. The Board summarily affirmed. The court agreed, finding substantial evidence supported the IJ's conclusion that Mansour had not suffered past persecution. While the evidence showed that Coptic Christians are subject to discrimination in Egypt on the basis of their religion, the discrimination did not rise to the level of persecution. The court did not address the issue of voluntary departure, finding that it lacked jurisdiction over voluntary departure.

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The Eighth Circuit, in *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. Dec. 2, 2004) (Arnold, Bowman, *Riley)*, affirmed the Board's decision denying asylum and withholding of removal. Petitioner, a native of Botswana, entered the United States in 1997 as a nonimmigrant visitor, overstayed, and was placed in removal proceedings in 1999. He claimed persecution due to his homosexuality. Petitioner claimed that the police searched his apartment without a warrant to harass him because of his sexual orientation. He testified that two friends had suffered disparate treatment based on their sexual orientation--one was beaten by his cousins, the other was allegedly jailed and beaten

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for engaging in homosexual activity. Petitioner testified that he held various teaching jobs prior to leaving for the United States, and although others suspected that he was a homosexual, he never experienced problems at work. Petitioner believed that his son lost friends because parents did not want their children playing with his son. Petitioner claimed he would be beaten to death to save Botswana from the AIDS epidemic.

Petitioner did not apply for asylum within the first year after his arrival because he did not want to accept his sexual orientation and did not know that homosexuals could apply for asylum. The IJ rejected this explanation and found that petitioner failed to present extraordinary circumstances to excuse the one-year filing requirement. Alternatively, the IJ determined petitioner did not suffer past persecution or have a well-founded fear of future persecution. Petitioner appealed, arguing that changed circumstances should have permitted his application to go forward. The Board affirmed without opinion.

The court affirmed, holding that as the application was untimely, the court did not have jurisdiction to review the Board's determination that petitioner did not demonstrate changed circumstances. Furthermore, the court held that petitioner did not prove it was more likely than not that he would be subject to persecution in Botswana, therefore he did not establish his eligibility for withholding of removal.

Contact: Carl McIntyre, OIL
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In *Mukamusoni v. Ashcroft*, 390 F.3d 110 (1st Cir. Dec. 1, 2004) (*Lynch*, Campbell, Stahl), the court vacated the Board's denial of asylum, withholding of removal, and CAT protection. Petitioner, a native of Uganda and a citizen of both Uganda and Rwanda, entered the United States as a nonimmigrant visitor with authorization to remain until November 4, 1998. Petitioner overstayed and was placed in removal proceedings. Petitioner alleged that, during the Rwandan civil war, her mother and siblings were slaughtered by a Hutu death squad because they were Tutsi. While in college, petitioner was banned from publishing letters in the school newspaper and questioned by soldiers after receiving letters from her father, a Hutu rebel. Petitioner testified she was arrested and imprisoned for four months. She alleged that she was beaten every morning, interrogated twice per week, was tortured by various kinds of forced activity and was raped. Petitioner claimed that during her second year of college, she was again arrested, imprisoned for two months beaten, forced to do manual labor, and raped. Petitioner testified that she escaped to Uganda where she was able to obtain a Ugandan passport, a tourist visa to the United States, and a plane ticket. Petitioner, at the request of her counsel, sought psychological counseling and was diagnosed with Post Traumatic Stress Disorder (PTSD).

**The fact that the Petitioner suffered from PTSD excused the untimely filing of her asylum application.**

The IJ excused petitioner's late filing of her asylum application because the IJ found that the fact that she suffered from PTSD constituted "extraordinary circumstances." However, the IJ denied petitioner's applications, finding that she had not established the truthfulness of her testimony, and that a similarly situated person would not have a reasonable fear of persecution. Petitioner appealed, arguing that the IJ misapplied the "reasonable person" test set out in *Matter of Mogharrabi* and abused his discretion in failing to fully consider her case. The Board denied her appeal, holding that while petitioner was credible, she failed to meet her burden of proof in establishing past persecution or a well-founded fear of future persecution.

The court disagreed, finding that substantial evidence did not support the Board's conclusion that petitioner failed to establish past persecution on account of her mixed Hutu/Tutsi heritage and/or the political activities of he father. The fact that petitioner returned to Rwanda to continue her education, the only place where she could obtain a "free" education, was insufficient to show that her fears of persecution in Rwanda were not genuine.

Contact: Jamie Dowd, OIL
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The Sixth Circuit, in *Pilica v. Ashcroft*, 388 F.3d 941 (6th Cir. Nov. 15, 2004) (Moore, Cole, *Marbley*), affirmed the Board's denial of petitioner's asylum and withholding of removal claims and remanded to the Board to provide an explaination for its denial of petitioner's motion to remand. Pilica, a native and citizen of Yugoslavia, entered the United States without inspection on August 22, 1991. At his removal hearing, petitioner testified that he was an ethnic Albanian who had been politically active with the Albanian Democratic Party in Montenegro. He testified that he was arrested twice as a result of his participation in ADP demonstrations, and that during a third demonstration he was beaten by a policeman, resulting in head injuries and hospitalization for a week. Petitioner provided a hospital report confirming he had suffered a head injury and several documents relating to country conditions.

The IJ denied petitioner's claims for relief or protection, finding his testimony to be incredible. The IJ cited inconsistencies between petitioner's testimony and his asylum application,

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and his failure to corroborate his testimony. The IJ found that Petitioner's political involvement was "sparse," consisting only of attending a few demonstrations at which he "held up a sign, clapped, and yelled." Petitioner appealed, and while the appeal was pending, filed a motion to remand. The Board affirmed the decision of the IJ without opinion, and in the same decision denied petitioner's motion to remand.

On appeal, the court found that since the Board failed to provide any explanation regarding its decision on petitioner's motion to remand, it unquestionably failed to supply a "rational explanation" in conformance with *Balani v. INS,* and accordingly remanded for further proceedings. The court affirmed the Board's decision denying petitioner relief or protection, holding that petitioner's testimony could plausibly be viewed as incredible and certainly could be viewed as inconsistent or incoherent, therefore a fact finder could reasonably find that petitioner's testimony was insufficient to meet his burden of proof.

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In *Rashiah v. Ashcroft*, 388 F.3d 1126 (7th Cir. Nov. 16, 2004) (*Flaum*, Ripple, Williams), the Seventh Circuit affirmed the Board's decision denying petitioners' applications for asylum, withholding, and CAT protection. At their removal proceedings, petitioners conceded removability and sought asylum. Lead petitioner is of Tamil ethnicity. Petitioner claimed that on two or three occasions he was taken to a police station and "abused with words," and on one occasion slapped by an officer. Petitioner married a Sinhalese woman, and alleged the couple were verbally abused by members of the army for being an ethnically mixed couple, although neither was ever physically harmed. Petitioner claimed that in 1998 he witnessed his shop being looted but did not report the incident to the police.

The IJ denied petitioner's claims, finding the application was time-barred because he had failed to file it within one year of his arrival in the United States. Furthermore, the IJ held that petitioner had failed to present evidence establishing past persecution or a well-founded fear of future persecution. The Board adopted and affirmed the IJ's decision. Petitioner challenged only the denial of CAT protection before the Seventh Circuit.

The court affirmed the Board's denial of CAT protection. The court held that a fair reading of the Board's order did not suggest that it failed to consider petitioner's brief or that it applied the wrong legal standard in denying petitioner's CAT application. Furthermore, the court held that while the Country Report acknowledged that torture occurs in Sri Lanka, petitioner did not prove that he was more likely than not to be tortured if returned.

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In a *per curiam* decision in *Elian Sanchez v. Ashcroft*, — F.3d —, 2004 WL 2755203 (11th Cir. Oct. 27, 2004) (Tjoflat, *Birch*, Pryor), the court denied Sanchez's petition for review of the Board's decision. Sanchez alleged that she was a volunteer for Corp. J. Siloe, which helped rehabilitate young gang members and delinquents. In August, 1999, while working with her brother, she was stopped and her wallet taken by five men who were members of the Revolutionary Armed Forces of Columbia (FARC). Sanchez was detained for twenty minutes and then released. One month later, Sanchez received a phone call from FARC asking that she meet with a commander. She did not cooperate, and several days later, FARC again called and demanded twenty million pesos from her and her brother. Fearing death, she fled to the United States. Sanchez's brother moved in with an uncle and allegedly received phone calls and someone he did not know came looking for him. He then moved in with cousins and people on motorcycles allegedly began asking for him. One night he allegedly received a death threat over the phone. He subsequently came to the United States.

The IJ denied Sanchez's application for asylum on the ground that it was untimely and her application for withholding because she had failed to establish that FARC's interest in her was related to a statutorily protected ground. The IJ denied CAT protection because Sanchez failed to show government knowledge or involvement in her encounters with FARC. The Board affirmed. On appeal, Sanchez contended that the IJ erred in determining she was ineligible for asylum, that she satisfied her burden of proof for withholding, and that she established a case for CAT protection.

The court held that it did not have jurisdiction concerning Sanchez's claim that she was eligible for asylum because a finding of failure to comply with the one-year time limit is not reviewable. The court affirmed the Board's decision to deny withholding, finding that Sanchez provided no evidence that there was any nexus between her political opinion and FARC's alleged persecution, rather it appeared the harassment was a result of her failure to cooperate with them. The court dismissed Sanchez's CAT claim as frivolous as she presented no evidence of torture at the hands of the government.

Contact: Beau Grimes, OIL
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In *Sylla v. INS*, 388 F.3d 924 (6th Cir. Nov. 12, 2004) (Moore, *Merritt*, Gilman), the Sixth Circuit vacated an adverse credibility finding. Sylla is a native of Guinea. Petitioner testified that he was active in the youth wing of the Rally for the Guinean People political party, which opposed the government. He alleged that he was arrested during a protest, beaten and chained, thrown in the back of a truck, and transported to Camp Alpha Yaya where he was imprisoned for twenty

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months without being charged. He testified that he was beaten with belts and the butts of guns, kicked, and tortured, and was only allowed to leave after he became ill. The IJ found petitioner incredible and denied all forms of relief and protection. The Board adopted the IJ's adverse credibility finding and dismissed petitioner's appeal.

On appeal, the court disagreed, holding that a lack of detail, minor inconsistencies regarding how much Petitioner paid to join the organization, and when Petitioner ended his studies were irrelevant to his asylum claim and could not be the basis for an adverse credibility finding.

Contact: Hugh Mullane, OIL
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**CANCELLATION**

In *Gonzalez-Gonzales v. Ashcroft*, 390 F.3d 649 (9th Cir. Nov. 29, 2004) (Nelson, *Thomas*, Ezra), the court denied a petition for review of the Board's denial of cancellation of removal. Gonzalez, illegally entered the United States in 1983. Sometime later, he married a United States citizen, and in 1998 his spouse petitioned for an immediate relative visa on his behalf. The matter was not pursued and Gonzalez never adjusted. In 1993, Gonzalez was divorced and he assumed sole custody of his three citizen children. On May 2, 2000, Gonzalez was convicted of assault in the fourth degree stemming from an assault of a family member. He was incarcerated for 150 days, and shortly after his release was served with a Notice to Appear. Gonzalez conceded removability, but sought cancellation of removal. The IJ found Gonzalez ineligible for cancellation based on 8 U.S.C. § 1229b(1)(C) which renders ineligible an alien convicted of an offense under section 1182(a)(2) 1227 (a)(2) or 1227 (a)(3). Section 1182 is titled "Inadmissible Aliens" and domestic violence is not mentioned. Section 1227 is titled "Deportable Aliens" and "Domestic Violence" is listed as an offense under section 1227(a)(2).

Gonzalez appealed to the Board, arguing that he could only be found ineligible for offenses under section 1182 as he is inadmissible, not deportable. The Board affirmed the IJ's decision, finding the language of section 1229b to mean "convicted of an offense described under" any of the three statutes, therefore Gonzalez's domestic violence conviction barred cancellation. The court agreed, finding that the plain language of section 1229b indicated it should be read to cross-reference a list of offenses in three statutes, rather than the statues as whole. Under Gonzalez's theory, aliens who entered the United States illegally would have greater rights than those who entered lawfully. Finding that this result was clearly not Congress's intent, the court denied the petition for review.

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**CRIMES**

In *Ferreira v. Ashcroft*, — F.3d —, 2004 WL 2725161 (9th Cir. Dec. 1, 2004) (*Trott,* McKeown, Shadur), the court affirmed the District Court's denial of a habeas petition. Petitioner, a native and citizen of Venezuela, was admitted to the United States in 1980 as an LPR. Between 1997 and 2000, petitioner was convicted of one petty theft violation and two drug related charges. She also pled guilty to welfare fraud in 1998. As part of her plea agreement on the welfare fraud offense, petitioner was require to pay $22,305 in restitution to California. INS issued a Notice to Appear, charging petitioner with removability based on her CIMT and drug convictions. INS subsequently lodged additional charges of removability for the conviction of an aggravated felony (an offense involving fraud or deceit with a loss in excess of $10,000). An IJ found petitioner removable because of her controlled substance conviction and found her ineligible for cancellation of removal because her welfare fraud constituted an aggravated felony. The Board affirmed without opinion.

Petitioner filed a habeas petition in the District of Arizona, arguing that her conviction for welfare fraud did not constitute an aggravated felony because the offense did not involve fraud or deceit and the government had not proven that the amount of loss exceeded $10,000. Petitioner also argued that the Board's streamlining procedures violated her due process rights. The District Court denied petitioner's habeas petition. The Ninth Circuit affirmed, holding that welfare fraud required a false statement or false representation, which constituted fraud or deceit for aggravated felony purposes. Furthermore, the court held that the loss to California exceeded $10,000, as evidenced by the requirement that petitioner repay $22,305 in restitution. Lastly, the court held that under *Falcon-Carriche*, the Board did not violate petitioner's due process rights by streamlining her appeal.

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In *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. Nov. 19, 2004**)** (Wallace, Kozinski, *Graber*), the Ninth Circuit granted Li's petition for review and reversed the Board's decision. Li, a citizen of Taiwan, was admitted to the U.S. as an LPR in 1987. In 1995, he was convicted of 8 fraud-related offenses and was sentenced to 24 months in prison. He was charged in removal proceedings as an alien convicted of an aggravated felony. The NTA alleged that Li's conviction met 3 different aggravated felony provisions: a theft offense (8 U.S.C. § 1101 (a)(43)(G),) a fraud offense (§ 1101 (a)(43)(M)(i),) and an attempt or conspiracy to commit one of those two offenses, (§ 1101 (a)(43)(U)).

The IJ found Li removable under subsections (M) and (U), but did not rule under subsection (G). Relying on the superseding information and the judgment of conviction, the IJ found that petitioner had been convicted of fraud offenses resulting in a loss of more than $10,000 and or-

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dered his removal. The Board affirmed, finding that if petitioner was found guilty of counts 1-8 of the superseding information, and that counts 3, 6, and 8 referred to falsely claimed amounts of more than $10,000, petitioner must have been convicted of an offense resulting in a loss of more than $10,000.

On appeal, the court disagreed finding the superseding information and the judgment in the record did not demonstrate unequivocally that the jury found the amount of loss arising from petitioner's fraud to be greater than $10,000. The court held that because amount of loss was not an underlying element to the crime, and there was no documentary evidence suggesting the jury was called upon to decide the issue of amount of loss, it could not be established that petitioner had been convicted of each element of the generic crime.

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In *U.S. v. Johnson*, — F.3d —, 2004 WL 2749844 (2d Cir. Dec. 2, 2004) (Newman, *Miner*, Katzman), the court affirmed the District Court's judgment of conviction and sentence. Johnson, a native and citizen of Jamaica, entered the United States as a lawful permanent resident on January 23, 1987. On February 11, 1993, cefendant was convicted of attempted sale of a controlled substance in the third degree, and was sentenced to one month in prison and five years probation. While on probation, cefendant was convicted of aggravated unlicensed operation of a motor vehicle in the first degree and was sentenced to five years probation.

Upon his arrival in the United States in 2000 following a trip to Jamaica, cefendant was apprehended at the airport and charged with being removable as an alien convicted of an aggravated felony. Defendant sought cancellation of removal and a Section 212(c) waiver. The IJ denied relief, finding cefendant's drug conviction fit within the definition of an "aggravated felony," therefore Defendant was not eligible for cancellation of removal. As to cefendant's waiver claim, the IJ denied relief, holding the form of relief requested had been repealed by IIRIRA.

The IJ convened a hearing at which he asked cefendant's counsel, telephonically, if cefendant wished to appeal. Defendant's counsel replied that he would have to discuss the matter with defendant, unless defendant stated himself that he did not wish to appeal. The IJ then explained to defendant that he believed the law was against him. Defendant chose to waive appeal and was deported. Defendant subseqeuntly returned to the United States without authorization, was arrested, and charged with illegal entry following removal. Defendant filed a motion to dismiss the indictment, arguing that he was illegally deported after a fundamentally unfair proceeding that violated his due process rights, and that he met the statutory requirements for collateral attack on his deportation order. The District Court found that defendant had waived appeal, therefore barring him from presenting a collateral attack. Defendant was found guilty of illegal reentry after deportation and sentenced to 27 months in prison.

On appeal, the court rejected defendant's claims that Congress exceeded its authority in imposing an exhaustion requirement, and that his failure to exhaust was excused by the erroneous view of the IJ. The court held that defendant cited no authority to support his contention that Congress exceeded its authority. Furthermore, the court found that the IJ advised defendant of his right to appeal on more than one occasion, defendant was represented by counsel, and that defendant's waiver was "considered and intelligent." The court distinguished this case from *Copeland,* noting that the defendant was represented, and that the IJ noted the unsettled state of the law and suggested that the appeal issue was one defendant should discuss with counsel.

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**FOIA**

In *National Council of La Raza v. Department of Justice*, 339 F.Supp.2d 572 (S.D.N.Y. Oct. 14, 2004) (*Kaplan*), the court granted in part and denied in part the government's motion for summary judgment regarding the production of documents under a FOIA request. La Raza brought an action under FOIA to compel the Department to produce certain records relating to its position on the authority of state and local police to enforce immigration laws. DOJ moved for summary judgment.

The major issues were whether Office of Legal Counsel memoranda were protected by the deliberative process privilege; whether, if protected, the Department waived the privilege with respect to one of the memoranda; whether certain e-mail messages qualified for the deliberative process privilege; and whether the Department had released all segregable non-exempt material.

The court held that memoranda (which consisted of legal advice and analysis) were pre-decisional and deliberative. E-mail messages regarding whether or not memorandum would be made public were not pre-decisional or deliberative on their face, but e-mail messages requesting legal advice and responding to legal questions were pre-decisional and deliberative. However, the court found that the Department waived the deliberative process privilege as to memoranda created by OLC. The court reasoned that when an agency adopts a pre-decisional document or incorporates it by reference into a final decision, the rationale for the deliberative process privilege--namely, protecting the quality of agency decision-making by facilitating the candid exchange of ideas--evaporates. Moreover, once a document has become part of an agency's decision, the public has a much greater interest in the disclosure of that document. Therefore, the court compelled the Department to produce the documents.

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**HABEAS CORPUS**

In *Al Odah v. United States*, — F.Supp.2d —, 2004 WL 2358254 (D.D.C. Oct. 20, 2004) (Kollar-Kotelly), the court found that detainees at Guantanamo Bay are entitled to be represented by counsel under the federal habeas corpus statute. Petitioners, three Kuwaiti nationals who had been detained since shortly after the September 11th attacks and counsel, filed petitions for writs of habeas corpus and ancillary claims. The government argued that petitioners were not guaranteed the right to counsel by the Constitution or any treaties or statutes, therefore the government could regulate or prohibit counsel's access to petitioners.

The District Court found that the Supreme Court held in *Rasul v. Bush,* 542 U.S. ----, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), that it had jurisdiction to consider petitioners' claims, and that those claims could not be properly presented without the aid of counsel. Furthermore, the court denied the government's motion to allow it to monitor any interaction between petitioners and their counsel and review any notes. To allay the government's national security concerns, the court proposed a framework under which petitioners' counsel would be allowed unmonitored access to their clients and unreviewed written notes and legal mail so long as they agree to treat all information obtained in the course of petitioners' representation as classified.

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The Eastern District of New York, in *Boyd v. ICE*, -- F.Supp.2d --, 2004 WL 2598277 (E.D.N.Y. Nov. 10, 2004) (Gershon), dismissed petitioner's habeas petitions for lack of jurisdiction. Petitioner was born in Panama and entered the United States as a nonimmigrant visitor in 1982. He overstayed, and was later granted voluntary departure. Petitioner later reentered the United States illegally. In 1993, he was convicted of first degree rape and sentenced to 3.5 to 10.5 years. In 2003, petitioner was convicted of illegally reentering the United States and sentenced to three months in prison. In January 2004, DHS reinstated the order of deportation, and petitioner has been detained in the custody of ICE ever since. He filed two habeas petitions, asserting that he was a U.S. citizen under INA Section 303, which confers citizen status on the children of certain U.S.. citizens residing in Panama.

The District Court dismissed the petitions for lack of jurisdiction, holding that petitioner had failed to exhaust his administrative remedies because he never raised his citizenship claim of citizenship in his deportation proceedings, did not raise the issue on appeal to the Board, and never submitted an application for a certificate of citizenship to CIS.

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In *Dragenice v. Ridge*, 389 F.3d 92 (4th Cir. Nov. 5, 2004) (*Niemeyer*, Traxler, Shedd), the Fourth Circuit reversed the district court's ruling that it lacked jurisdiction over a habeas petition by a detained alien. A native of Haiti, petitioner entered the United States as an LPR. Four years later, he was convicted of armed robbery and subsequently charged as an aggravated felon in removal proceedings.

Noting that petitioner listed "Haitian" as his nationality and citizenship on his application for withholding and conceded as much at the hearing, the IJ found him removable. Petitioner appealed, arguing that he was in fact a U.S. national because he voluntarily enlisted in the U.S. Army Reserve and swore an oath of allegiance to the U.S. Before the Board ruled, petitioner filed this suit in habeas alleging his detention was unlawful because he was a U.S. national. The government moved to dismiss contending that petitioner had not exhausted his administrative remedies and the District Court lacked jurisdiction to determine the nationality issue. The district court agreed and transferred the case to the Fourth Circuit. Petitioner appealed the district court's decision that it did not have habeas jurisdiction.

The Fourth Circuit held that although the transferring statute confers habeas jurisdiction on "the Supreme Court" and "the district courts," it does not similarly confer jurisdiction on "courts of appeals." Rather it confers jurisdiction on "any *circuit judge* within their respective jurisdictions." 28 U.S.C. § 2241(a) (emphasis added). The court found that this statutory language has uniformly been construed to mean that, while a *single circuit judge* may entertain a habeas petition, *courts of appeals* may not. Accordingly, the requirement of § 1631 that a case be transferred to a *court* in which it could have been brought is not satisfied in this case, and the court had no jurisdiction over petitioner's habeas petition for any other purpose, including petitioner's request that it convert his habeas petition to a petition for review.

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The Sixth Circuit, in *Moussa v. Jenifer*, 389 F.3d 550 (6th Cir. Nov. 8, 2004) (*Keith*, Moore, Gilman), affirmed the District Court's dismissal of petitioner's habeas case for lack of jurisdiction. Petitioner, a native of Syria, entered the United States in 1993 for surgery. The INS extended his visa during his recovery. Prior to the expiration of his visa, petitioner married a United States citizen who filed an I-130 on his behalf, which was later granted.

Upon his divorce and his ex-wife's withdrawal of her visa petition, petitioner was placed in proceedings. An IJ found petitioner deportable. Petitioner was granted voluntary departure, and the departure period was extended through 1997 for continued medical care. Petitioner

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challenged the denial of his application for a further stay in habeas, claiming that his life would be at risk if returned to Syria because he would be without necessary medical care. The District Court dismissed for lack of jurisdiction.

On appeal, the Sixth Circuit affirmed. The court held that petitioner's habeas petition ultimately requested that the court review a determination to execute an order of removal. As there was no statutory or constitutional basis for an objection, such a determination fell strictly to the unreviewable discretion of the Attorney General. Because the decision was neither lawless nor arbitrary it was unreviewable by this court, regardless of whether the court agreed with the INS decision to deport petitioner.

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In *Rivera-Martinez v. Ashcroft*, 389 F.3d 207 (1st Cir. Nov. 4, 2004) (Torruella, Rosenn, Howard), the First Circuit, in a *per curiam* decision, affirmed the District Court's denial of habeas relief. Petitioner, a native of the Dominican Republic, was admitted as a n LPR in 1981. Sixteen years later, he was convicted of raping a child. The INS initiated removal proceedings on the ground that the conviction was an aggravated felony. At his hearing, petitioner argued he was not subject to removal because he was a United States citizen based on his father's naturalization in 1981. The IJ rejected this claim and ordered petitioner removed. The Board affirmed and petitioner did not appeal. Eight months later, petitioner filed a habeas petition which the District Court dismissed.

On appeal, the First Circuit affirmed the District Court's decision. Petitioner set forth no argument as to why the District Court's ruling was erroneous, and the court did not find any error. The court held that this was a straightforward case of petitioner attempting to use habeas to resurrect a claim that should have been presented on direct review.

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In *Soberanes v. Comfort*, 388 F.3d 1305 (10th Cir. Nov. 3, 2004) (Tacha, Murphy, *Cauthron*) the Tenth Circuit affirmed the District Court's decision denying habeas relief. Petitioner, a native of Peru, illegally entered the United States in 1990 and applied for asylum in 1994. His application was denied and petitioner did not appeal. Petitioner failed to comply with a voluntary departure order and in 2002 was taken into custody for execution of the extant deportation order. He filed a habeas petition, seeking release from custody which was denied by the District Court.

On appeal, the Tenth Circuit affirmed the District Court's decision. The court held that the ineffective assistance/due process issues could have been pursued in a petition for review, and therefore the court did not have jurisdiction. The court held that when petitioner was taken into custody in 2002, a preciously executed order was not reinstated, rather a pending order was enforced. In response to Petitioner's indefinite detention claim, the court held that petitioner's detention was neither indefinite nor potentially permanent, rather it was directly associated with a judicial review process that has a definite termination point and thus is more akin to detention during the administrative review process.

## MOTIONS TO REOPEN

In *Amin v. Ashcroft*, 388 F.3d 648 (8th Cir. Nov. 12, 2004) (Arnold, McMillian, *Melloy*), the Eighth Circuit affirmed the Board's denial of a motion to reopen. Petitioner is a native and citizen of Bangladesh. In 1993, he applied for asylum on the ground he was discriminated against because he was a Bihari, an ethnic minority. Petitioner testified that he lived his life in a refugee camp and was kidnaped and assaulted in retaliation for his father potentially revealing a scheme to embezzle refugee camp assets. In 1998, petitioner was placed in removal proceedings and renewed his application for asylum. The IJ found his testimony to be incredible and denied the asylum application. The Board affirmed without opinion.

On appeal, the court affirmed the Board's decision, finding that petitioner had failed to prove he had been persecuted on account of his ethnicity. Furthermore, the court held that despite petitioner's contention that his ethnicity rendered him stateless and not a citizen of Bangladesh, his Bangladeshi passport indicated that he was a citizen. Moreover, even if he was stateless, it would not have affected his claim of past persecution, as he was granted voluntary departure and would not have to return to Bangladesh.

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In *Joshi v. Ashcroft*, 389 F.3d 732 (7th Cir. Nov. 19, 2004) (*Posner*, Kanne, Wood), the Seventh Circuit vacated the Board's order denying petitioner's motion to reopen and remanded for further proceedings. Petitioner entered the United States on a visitor's visa, overstayed, and applied for asylum. On March 3, 1998, the INS mailed to her correct home address a Notice to Appear with a hearing date of April 29th. On March 21st and again on April 16th, she wrote to the INS to inquire about the status of her asylum application. She sent the letters certified mail and received the receipts, but got no response from INS, probably because the letters had been sent to the wrong address. Petitioner failed to appear at the IJ hearing and was ordered removed *in absentia*. She received the order the next day and claimed it was the first notice of the hearing she had received. She filed a motion to reopen, alleging no notice. The motion was denied by the IJ and affirmed by the Board. The Board denied three subsequent motions to reopen, the last finding that her absence from the hearing was inexcusable.

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The court held that the notice issue presented a question of fact which was not adequately resolved by the Board. The court noted that the fact that before the hearing Joshi sent two certified letters to INS inquiring about the status of her case is some "objective" evidence and some corroboration that she had not received notice of the hearing. While the Board could hold that the intended recipient's affidavit of nonreceipt is not by itself sufficient proof of nonreceipt to warrant a new removal hearing, it did not adopt this approach and the court remanded for further proceedings.

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In *Ven v. Ashcroft*, 386 F.3d 357 (1st Cir. Oct. 22, 2004) (Tourrella, Seyla, *Lynch*), the First Circuit affirmed the Board's denial of petitioners' motion to reconsider the denial of a motion to reopen. Petitioners conceded removability and sought asylum on account of their association with the FUNCINPEC political party. Petitioners testified that, as a widow and daughter of a FUNCINPEC member, they had a well-founded fear of persecution in Cambodia. The IJ denied their applications for asylum, withholding of removal, and CAT protection, but granted voluntary departure. Petitioners appealed and the Board affirmed. The Board subsequently denied petitioners' motions to reopen and to reconsider. Petitioners sought review of these motions on appeal. The court held that the Board did not abuse its discretion in denying petitioners' motion to reconsider because it was not made without a rational explanation and did not depart from established policies or rest on an impermissible basis.

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**REINSTATEMENT**

In *Lopez-Flores v. DHS*, 387 F.3d 773 (Oct. 28, 2004) (Wollman, Fagg, *Hansen*), the Eighth Circuit granted the petition for review and vacated the reinstatement order. Lopez illegally entered the U.S. without inspection in August 1992. In December, Lopez was apprehended and granted voluntary departure. He did not depart, and an order of deportation was entered. Lopez then left the country. He illegally reentered on April 3, 1995, and in December of 1995, his employer filed an application for work authorization. In the 5 years it took for his employment visa application to be approved, Congress enacted INA Section 241(a)(5) permitting the reinstatement of prior deportation orders. In 2002, Lopez sought to adjust his status, but was deemed ineligible because he had been illegally present for over one year, and had subsequently reentered the U.S. illegally. Lopez appealed to the INS AAU, but was served with a reinstatement order while the appeal was pending and was deported.

Relying on the court's decision in *Alvarez-Portillo v. Ashcroft,* 280 F.3d 858 (8th Cir.2002), Lopez appealed, arguing that section 241(a)(5) has an impermissible retroactive effect when applied to disallow aliens who reentered prior to the effective date of the statute from seeking discretionary adjustment of status as a defense to the reinstatement. The Eighth Circuit recognized that discretionary waivers may have allowed Lopez to escape his apparent statutory ineligibility, and since an agency should have the first opportunity to interpret and apply its own regulations, especially one involving such a degree of discretion, the court concluded that the most appropriate resolution was to allow Lopez to raise the defense in a new deportation proceeding.

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The First Circuit, in *Ponta-Garca v. Ashcroft*, 386 F.3d 341 (1st Cir. Oct. 20, 2004) (Torruella, Campbell, *Selya*), denied Ponta-Garca's petition for review of a reinstatement order. Petitioner, a Portuguese national, was ordered deported in 1987 after overstaying his authorized period of visitation. It does not appear from the record that the 1987 order was ever executed. However, petitioner subsequently departed and reentered. On May 24, 2004, petitioner was apprehended by DHS agents and served with a reinstatement order. On June 28, 2004, he filed a request for reconsideration of this decision, and, at the time of the court's decision, that request remained pending. On July 19, 2004, fifty-five days after the decision finding him removable, petitioner filed the instant petition for review.

Petitioner argued that the thirty-day appeal period for reinstated orders does not begin to run until the reconsideration determination had been made; therefore, his petition was not tardy, if anything, it was premature. The court dismissed the petition for lack of jurisdiction as it was not filed within the statutorily prescribed thirty-day window. The court held that the decision accomplished whatever reconsideration was warranted, therefore petitioner's June 28, 2004 letter did not toll the thirty-day period for seeking judicial review.

The court noted: "We add a coda. If the representations made by the petitioner's counsel are accurate, he would appear to have a strong case on the merits." 386 F.3d at 343. The court encouraged DHS to re-examine this case in light of the due process issues raised.

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**REMOVAL**

In *Ymeri v. Ashcroft*, 387 F.3d 12 (1st Cir. Oct. 20, 2004) (Torruella, *Gibson,* Lynch), the First Circuit affirmed the finding of removal as well as the denial of petitioners' applications for asylum, withholding of removal, and CAT protection. Petitioners, natives of Albania, arrived by air under the transit without visa program, using falsified passports. The immigration inspector at the airport detected the counterfeit passports, and petitioners admitted their falsity. They were found removable for having willfully misrepre-

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sented a material fact to procure admission or another immigration benefit. Petitioners sought asylum on the basis of political opinion. The IJ found the petitioners' testimony incredible and denied relief or protection. Petitioners appealed the denial of asylum as well as the finding of removability.

The court held that the record as a whole supported a finding that petitioners presented fraudulent passports to immigration officials to obtain admission into the United States or other benefit under the law. A person who knowingly presents a false passport as if it were genuine has engaged in a willful misrepresentation. The court distinguished cases in which aliens who possessed fraudulent passports were not rendered inadmissible by section 1182 (a)(6)(C)(i) because they did not present the passports to United States officials to gain admission, but admitted the falseness of the documents immediately and voluntarily. Petitioners did not confess the falseness of their documents until the inspector had caught them, supporting the IJ's determination that they sought to procure admission or other immigration benefit by a willful misrepresentation. Petitioners further claimed they merely wanted to continue on to Canada. However, even accepting petitioners' story that they wanted to continue to Canada and therefore did not attempt to enter this country, they still attempted to gain another benefit under the immigration laws--the privilege of traveling as transit without visa participants. The court found that substantial evidence supported the adverse credibility finding and denial of asylum.

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**STREAMLINING**

In *Smriko v. Ashcroft*, 387 F.3d 279 (3rd Cir. Oct. 26, 2004) (Rendell, *Stapleton*, Lay), the Third Circuit granted Smriko's petition for review. Smriko, a native of Bosnia-Herrzgovina, was admitted to the United States as a refugee and later adjusted to lawful permanent resident status. Within five years, he was convicted of theft of retail property on three occasions. Smriko was placed in removal proceedings and charged with having been convicted of crimes involving moral turpitude.

The IJ rejected Smriko's argument that his crimes were not CIMTs, as well as his argument that he did not lose his status as a refugee when he adjusted to LPR status and therefore could not be removed. The Board affirmed without opinion, and Smriko appealed the Board's streamlining procedures.

The court, finding that it had the authority to review the streamlining procedures, concluded that the Board member charged with examining Smriko's case clearly acted arbitrarily and capriciously by issuing an affirmance without opinion, in violation of the BIA's regulations, with respect to a case presenting novel and substantial legal issues without precedent. The court vacated the Board's decision and remanded so the Board could establish precedent.

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The Tenth Circuit, in *Tsegay v. Ashcroft*, 386 F.3d 1347 (October 26, 2004) (Ebel, *Tymkovich*, Heaton), dismissed Tsegay's petition for review of the Board's decision to affirm without opinion. Tsegay, an Ethiopian Jehovah's Witness, entered the United States in 1996 on a temporary visa which expired in 1997. She lived without proper documentation for two years and then applied for asylum in 1999.

Tsegay testified that Jehovah's Witnesses refused to participate in Eritrea's war for independence, and this aroused widespread resentment against them by the government and among the general population. The government subsequently outlawed the practice of the Jehovah's Witness faith, stripped them of their citizenship rights, and imprisoned some for refusing to participate in military service. Tsegay testified she continued to practice her faith, and as a result was held in jail for three months during which she was verbally harassed. She testified that she did not file a claim for asylum right away because she planned on returning to Eritrea, and filed her application after hostilities renewed.

The IJ denied Tsegay's application for asylum for failure to file within the one-year statutory window and failure to show "changed circumstances" sufficient to extend the deadline. Tsegay, however, was granted withholding of removal on the grounds she would likely be persecuted if returned to Eritrea. The Board affirmed without opinion. While Tsegay conceded the court did not have jurisdiction to review the merits of the IJ's decision, she raised the question of whether the court could nonetheless review the Board's decision to affirm without opinion.

The court dismissed Tsegay's petition, holding it could not review the Board's decision to apply the AWO regulation to Tsegay's agency appeal without either engaging in an impermissible review of the merits of her appeal or interfering with the BIA's inherent discretion to manage its cases.

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# INSIDE ICE

On December 2nd, Homeland Security Secretary Tom Ridge hosted the first DHS awards. The annual awards recognize the highest levels of professional performance and commitment. This year's awardees included Victor X. Cerda, Acting Director, Office of Detention and Removal Operations and former Acting Principal Legal Advisor for ICE, and Detroit Chief Counsel Marsha K. Nettles who was recognized for litigating the removal case of Rabih Haddad.

## CASES SUMMARIZED



# INSIDE OIL

OIL welcomes the following new staff members who joined the office recently. Gjon Juncaj joins OIL after serving in EOIR's Office of the General Counsel as an Attorney Advisor. He previously worked as a Judicial Law Clerk with the Immigration Courts in Detroit and Buffalo. Gjon is a graduate of Wayne State University Law School and Michigan State University.

Three law clerks, all of whom are students at American University Washington College of Law who will graduate in May 2005, started recently. Stephanie Blazewicz works as a law clerk on David Bernal's team. She earned a B.S. from Boston College in Finance/Economics and worked as a Financial Analyst for the Federal Reserve Bank of Boston before returning to school. Brian Fiorino works as a law clerk on Mark Walters' team. After graduating from George Washington University and before law school, Brian worked at the Language Services Division of the International Monetary Fund. Jeff Leist is a law clerk on Linda Wendtland's team. Brian received a B.A. in International Studies from Illinois Wesleyan University.

OIL has also added three paralegals for the new Ninth Circuit Counselor team. Katrina Brown earned her B.A. in International Studies from Boston College where she concentrated in Economics and Latin America. She grew up in Peloski, Michigan. Emily Earthman received her B.A. in the Program of Liberal Studies with a minor in Classical Civilization from Notre Dame. She is originally from Houston, Texas. Anthony Messuri completed his B.A. in Criminal Justice with a Legal Specialization from St. John's University.

Clynetta Nealy re-joins OIL as a member of the staff after working here as a contractor for Labat-Anderson. She originally worked at OIL beginning in 1999 under the former Stay-In-School program. She recently completed her B.A. in Political Science from St. Mary's College of Maryland. Clynetta works with Mark Walters' team.

***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 Julia Doig Wilcox at 202-616-4893 or julia.wilcox@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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