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Immigration Litigation Bulletin

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AFTER 63 YEARS IN THE DEPARTMENT OF JUSTICE, INS CEASES TO EXIST - ITS FUNCTIONS TRANSFER TO NEW DEPARTMENT OF HOMELAND SECURITY

On Saturday, March 1, 2003, after 63 years as an agency within the U.S. States Department of Justice, the Immigration and Naturalization Service (INS) ceased to exist, as its functions were officially transferred to the new Department of Homeland Security (DHS).

President Bush, speaking to employees of the new Department said that March 1st marks a "historic day for our government and for our country. Around 170,000 people from more than 20 federal agencies will officially join the new Department of Homeland Security, creating a more effective, organized and united defense of our homeland."

Highlighting the challenges ahead, Secretary of Homeland Security, Tom Ridge told a Congressional committee, "We are a Department that must now set about the business of melding this collection of capable but diverse organizations into a cohesive, effective and efficient team. And we must do it without losing focus, for even an instant, on the critical mission that is ours."

Organizationally, the immigration functions previously performed by the INS have been split into three principal components: the Bureau of Customs and Border Protection (BCBP); the Bureau of Immigration and Customs Enforcement (BICE); and the Bureau of Citizenship and Immigration Services (BCIS). Additionally, the Homeland Security Act creates an Ombudsman for Citizenship and Immigration Service (Ombudsman).

> ***"We are a Department that must now set about the business of melding this collection of capable but diverse organizations into a cohesive, effective and efficient team."***

Immigration Enforcement

The immigration enforcement functions of the former INS have been transferred to BCBP and BICE. These two bureaus are within the Directorate of Border and Transportation Security (BTS), under the leadership of Undersecretary William Asa Hutchinson. The BTS also incorporates the United States Customs

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NINTH CIRCUIT EN BANC FINDS DUE PROCESS VIOLATION IN BOARD'S REFUSAL TO CONSIDER EVIDENCE

In ***Ramirez-Alejandre v. Ashcroft***, __F.3d__, 2003 WL 402614 (9th Cir. Feb. 14, 2003) (Schroeder, Tashima, *Thomas*, W. Fletcher, Paez, Berzon, for the majority; Trott, O'Scannlain, Gould, Tallman, Rawlinson, dissenting), the Ninth Circuit, sitting *en banc*, held that the BIA violated the alien's right to due process when it declined to consider new material he submitted to bolster his suspension application while his case was pending before the BIA.

The petitioner, a Mexican citizen, first entered the United States illegally on May 5, 1979. He subsequently made four brief visits to Mexico, each time reentering the United States unlawfully. When placed in proceedings in 1990, petitioner, who now had a U.S. citizen child, unsuccessfully applied for suspension. While his appeal was pending

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RECORD TURNOUT EXPECTED AT SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

More than 180 government attorneys have already registered to attend the Seventh Annual Immigration Litigation conference to be held in St. Louis, Missouri on April 21-24, 2003. The theme of this year's Conference, "Immigration and Homeland Security - Litigation and Reorganization," reflects the historic changes made by the Homeland Security Act of 2002 and its impact on immigration litigation.

The conference will commence on the evening of Monday, April 21st with an opening reception and will continue

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DHS ABSORBS IMMIGRATION FUNCTIONS

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Service, the Animal Plant Inspection Service, the Transportation Security Administration (TSA), the Federal Protective Service, and the Federal Law Enforcement Training Center.

BCBP

Immigration laws at the borders will be principally enforced by the BCBP, which absorbed the United States Border Patrol and the former INS inspections program. The President has nominated Robert C. Bonner, the former Commissioner of Customs, as the new Commissioner of BCBP. Concurrent with the transfer of functions, on midnight March 1, 2003, Secretary Ridge delegated the appropriate authority to the Commissioner of BCBP, including the authority to administer and enforce the immigration laws with respect to matters within the jurisdiction of BCBP. The delegation is subject to the authority, direction, and control of the Undersecretary for BTS.

On February 28, 2003, Undersecretary Hutchinson and Commissioner Bonner announced the appointment of twenty Interim Directors for Field Operations, including some former INS District Directors. The managers will work out of the current locations of the twenty Customs Management Centers. Additionally, DHS named Interim Port Directors for the 307 ports of entry. "This is the first, and most important step in a long process," said Under Secretary Hutchinson. "As we implement our plans, we will fully integrate the work of the agencies that now make up BCBP, and in doing so create a single face of government at the border." One of the most visible and immediate changes in immigration enforcement occurred on March 1, when inspections at the border were unified under one command structure under DHS.

BICE

Immigration enforcement in the interior will be the primary responsibility of BICE, which inherits the former INS enforcement programs other than inspection and Border Patrol. These include the investigation functions, detention and removal, and intelligence. BICE also absorbs similar enforcement functions from Customs and the entire operation of the Federal Protective Service, bringing a total of 14,000 employees.

> The delegations of authority to BCPS and BICE overlap considerably, reflecting the fact that both bureaus will be enforcing similar provisions of the immigration laws.

The President has nominated Michael Garcia, the former Acting Commissioner of the INS, as the Assistant Secretary to head this bureau. Concurrent with the transfer of functions to DHS, on March 1, Secretary Ridge delegated the appropriate authority to the Assistant Secretary for BICE, including the authority to administer and enforce the immigration laws with respect to matters within the jurisdiction of BICE. The delegations of authority to BCPS and BICE overlap considerably reflecting the fact that both bureaus will be enforcing similar provisions of the immigration laws.

Concurrent with the transfer of INS functions and the delegation of authorities to BICE, Undersecretary Hutchinson and Assistant Secretary Garcia (designee), announced the appointment of three Interim BICE Regional Directors and 33 Interim BICE District Directors for Interior Enforcement. These 33 managers will work out of the current locations formerly occupied by INS District Directors and INS Regional Commissioners. The interim district directors have been delegated "the authority and responsibility for the field operations of the BICE with respect to the immigration laws within their respective geographical areas (including detention and removal)."

For additional and developing information about BICE, visit their web site at: http://www.bice.immigration.gov

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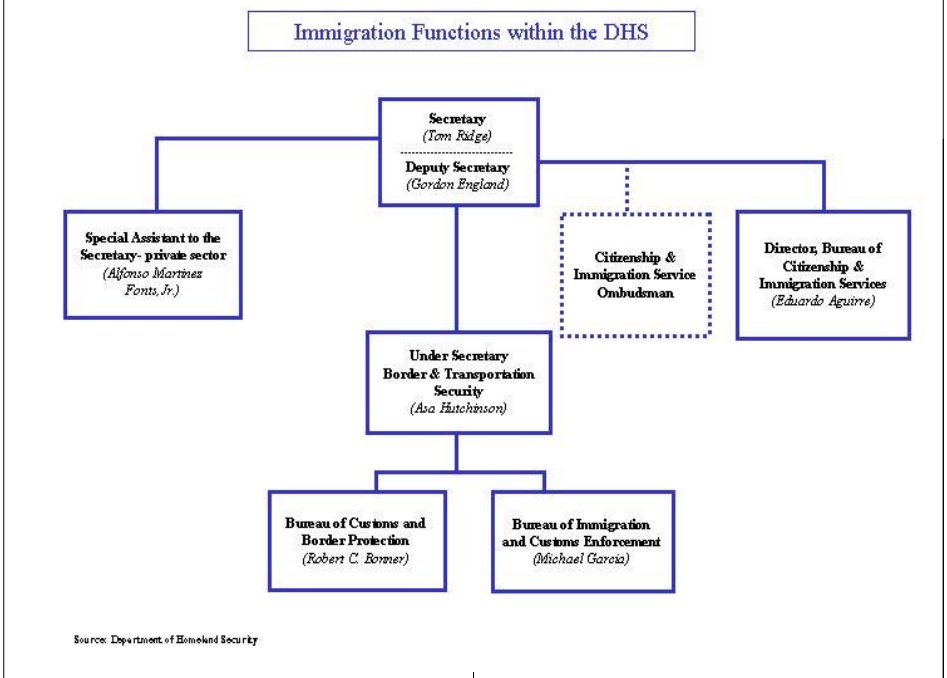

NEW DEPARTMENT ABSORBS IMMIGRATION FUNCTIONS

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Immigration Services

Bureau of Citizenship and Immigration Services (BCIS)

The INS's "service" functions have been transferred to BCIS. The Bureau is headed by a Director who reports directly to the Deputy Secretary of DHS. The President has nominated Eduardo Aguirre to be the Director of BCIS. Under the HSA, the following INS adjudications, including personnel, infrastructure, and funding, have been transferred to the BCIS: immigrant visa petitions, naturalization petitions, asylum and refugee applications, applications performed at service centers, and all other adjudications performed by the INS immediately before the date when the functions are transferred to DHS. For developing information on BCIS visit the new immigration web site at: http://www.immigration.gov

In addition to the three bureaus, HSA § 475 creates within the Office of the Deputy Secretary, a Director of Shared Services who will be responsible for the coordination of resources for the Bureau of Border Security, now split into two bureaus, and the Bureau of Citizenship and Immigration Services, including -- (1) information resources management, including computer databases and information technology; (2) records and file management; and (3) forms management.

For continuing information about developments at Homeland Security visit DHS's web site at http://www.dhs.gov/dhspublic.

By Francesco Isgro, OIL
☎ 203-616-4877

Contributions To The ILB Are Welcomed!

IMMIGRATION LITIGATION CONFERENCE SET FOR ST. LOUIS APRIL 21-24, 2003

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with three full days of substantive presentations. Attendees are responsible for their own hotel, travel, and *per diem* costs. Registration and training materials are provided at no cost.

The agenda for the conference, a copy of which is enclosed with this issue of the Immigration Litigation Bulletin, reflects the significant restructuring of immigration responsibilities and the role of immigration in homeland security issues. In addition to topics relating to the defense of the new Department of Homeland Security, the Conference will present various panels to address a number of topics of current interest, including the detention and removal of criminal aliens, asylum and withholding of removal, and relief under the Convention Against Torture.

The agenda for the conference reflects the significant restructuring of immigration responsibilities and the role of immigration in homeland security issues.

Speakers will include: Robert McCallum, Jr., Assistant Attorney General for the Civil Division, Peter D. Keisler, Acting Associate Attorney General, Kevin Rooney, Director of the Executive Office for Immigration Review, Kris Kobach, Counsel to the Attorney General, Laura L. Flippin, Deputy Assistant Attorney General, Marc D. Wallace, General Counsel for BICE and BCIS, Lori Scialabba, Chairman of the Board of Immigration Appeals, Chief Immigration Judge Michael Creppy, Charles Adkins-Blanch, General Counsel of EOIR, Dr. Nguyen Van Hanh, Director of the Office of Refugee Resettlement, HHS, Honorable Richard C. Tallman, U.S. Circuit Judge U.S. Court of Appeals for the Ninth Circuit, and Raymond W. Gruender, III, U.S. Attorney. We also expect a number of officials from the Department of Homeland Security to make presentations.

The preliminary agenda with the list of speakers is available on the OIL web site and is updated regularly.

The Conference is designed for government attorneys, including Assistant and Special Assistant United States Attorneys, attorneys in Homeland Security who are involved in immigration matters, and attorneys from EOIR who litigate or assist in the litigation of civil immigration cases. The Conference will also be useful to Federal prosecutors who are involved with task forces established to locate, apprehend, and to prosecute or remove aliens subject to final orders of removal.

Registration is a two-step process. First, government attorneys who wish to attend should register for the Conference by calling Francesco Isgro at 202-616-4877, before March 21, 2003. It is very important that attendees advise Mr. Isgro at registration or anytime prior to the conference if they plan to be present for only part of the conference. This information is required to control the cost of the conference.

Second, attendees must make their own hotel reservations before **March 21, 2003**, by calling the Ritz-Carlton St. Louis at 314-863-6300. The hotel was selected through competitive bidding and the government per diem rate has been made available only until March 21. Please request the group rate for DOJ/Immigration Litigation.

Questions regarding hotel accommodations and requests for any special need should be directed to Julia Doig, at 202-616-4893.

LOOKING BACK IN HISTORY— THE BIRTH OF INS

It was a modest beginning. His whole force consisted of the chief clerk, the confidential clerk, the keeper of the correspondence and the bookkeeper. Those were all the positions that Section 7 of the Immigration Act of March 3, 1891 had authorized. With these four employees, on June 15, 1891, William D. Owen took office as the first Superintendent of Immigration, giving birth to the INS 112 years ago.

The Act of March 3, 1891, also it ended the dual State-Federal administration of immigration matters and vested it in the Federal Government which since then has continued to exert complete control over immigration matters

Prior to the Act of March 3, 1891, the administrative machinery to enforce the various immigration laws then in force was decentralized. The individual States were regulating their own immigration laws, and federal legislation was mostly aimed at improving the conditions of steerage passengers enroute to the United States. An attempt was made by Congress in 1864 to centralize the control of immigration by creating the office of the Commissioner of Immigration under the Department of State. However, the office was shortlived and the act creating it repealed four years later. Subsequently, Congress passed a series of general immigration laws, including among others the Act of October 19, 1888, which authorized deportation of alien contract laborers within one year after entry, and the adoption of the controversial first Chinese exclusion law in 1882.

In 1889, a joint Senate and House committee on immigration was established. It was authorized to investigate the laws on immigration. The Chairman of the Committee was William D. Owen, and the bill that the Committee reported out, was eventually enacted into law on March 3, 1891.

The Act of 1891, was the most comprehensive immigration law that Congress had enacted. It extended and strengthened exclusions, and made more complete provisions for the inspection of immigrants.

In his annual report to the Secretary of Treasury, Superintendent Owen understood the 1891 law to have been framed "to sift the incomers -- to draw a dividing line between the desirable and the undesirable immigrants." However, he added, "I take it that it is not the serious intention of the Government to prohibit immigration, but from time to time to prohibit the people whom experience has demonstrated fail in some important direction in entering beneficially into American citizenship."

The Superintendent of Immigration understood the 1891 law to have been framed "to sift the incomers -- to draw a dividing line between the desirable and the undesirable immigrants."

According to official statistics, in 1891, 440,000 immigrants were admitted into the United States. The $.50 head tax imposed by law to each immigrant, yielded a revenue of $220,000. The expenses of running the immigration system in 1891, was well over $300,000 according to Superintendent Owen.

On January 29, 1892, the Senate and the House adopted a joint resolution establishing a Select Committee on Immigration and Naturalization which was authorized to investigate, among other matters, "the workings of the various laws of the United States relative to immigration from foreign countries." The 796 page report and hearings of the Committee generated much public attention. In its report the Committee noted:

> The committee cannot be unmindful of the tone of public opinion, voiced by the press of our country, as to the turning loose in the midst of our honest laborers and intelligent and religious people the hordes of vicious, depraved, criminal, and pauper elements of humanity now permitted to invade our land. We cannot shut our eyes to the growth of crime, pauperism, and insanity that is traceable from foreign countries to our prisons, almshouses, hospitals, and insane asylums.

A year later, in 1893, Representative Herman Stump, replaced W.D. Owen as Superintendent of Immigration. Under his tenure, the duties of the office were gradually expanded and immigration laws became more restrictive. In the Act of August 18, 1894 (28 Stat. 390), the office of Superintendent of Immigration became known as the "Bureau of Immigration." The same act provided that "the Secretary of the Treasury shall report to the next regular session of Congress a plan for the organization of the service in connection with immigration and make detailed estimates of the employees necessary for such service, and their compensation and all other expenses."

The result of the Secretary's study led to the enactment of the Act of March 2, 1895, which officially created the Bureau of Immigration. The title of Superintendent of Immigration was changed to Commissioner General of Immigration, and he was given five additional employees. However, he was also charged with the administration of the contract labor laws which had been previously within the purview of the individual States.

For more than 100 years the immigration service continued to grow and consolidate until its dissolution on March 1, 2003.

By Francesco Isgro, OIL
☎ 203-616-4877

ACTIONS BY AN IMMIGRATION JUDGE THAT MAY VIOLATE AN ALIEN'S PROCEDURAL DUE PROCESS RIGHTS

In light of the extensive restrictions on judicial review of removal orders in cases involving discretionary determinations in cancellation of removal, suspension of deportation, adjustment of status applications, and the bar to judicial review of orders of removal against criminal aliens, OIL has seen an increase in claims in which aliens seek to get around these bars by invoking federal court jurisdiction by asserting procedural "due process violations" in their removal hearings. These claims are also more readily asserted in light of the BIA's streamlining procedures which have resulted in a dramatic increase in the number Immigration Judge ("IJ") decisions that are subject to direct review by the federal courts. The purpose of this article is to review the factors the courts of appeals have considered when reviewing claims that an alien's procedural due process rights were violated by an IJ's evidentiary rulings, and by judges who take an active role in conducting the examination of witnesses and the development of the evidence, and by IJs who display irritability, impatience and who, aliens allege, harbor a hostile temperament in the course of removal hearings.

In order to get a foot in the door of judicial review, an alien need only plead a "colorable" claim of a violation of due process. Claims of procedural due process are reviewed de novo. *Antonio-Curz v. INS,* 147 F.3d 1129 (9th Cir. 1998); *Roman v. INS*, 233 F.3d 1027 (7th Cir. 2000); *Mikhailvitch v. INS*, 146 F.3d 384 (6th Cir. 1998). It is not uncommon for aliens to characterize their wish-list of benefits and procedural preferences as "due process" entitlements. Although courts "retain jurisdiction to review due process challenges, a petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb." *Torres-Aguilar v. INS*, 246 F.3d 1267 (9th Cir. 2001). The first step in analyzing the substance of a procedural due process claim is to determine how much process is actually due. Courts have held that while the Fifth Amendment of the Constitution requires aliens facing deportation to receive a "fair" and "full" hearing, the question of how much process is actually due to meet this requirement is found in the immigration statutes and regulations. *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. 1989); *U.S. v. Lopez-Vasquez*, 227 F.3d 476 (5th Cir. 2000). The procedural framework for removal hearings is articulated in INA § 240(b)(1), which provides that the IJ "shall . . . receive evidence, interrogate, examine, and cross-examine the alien and any witnesses" and 8 C.F.R. § 240.1(c) which provides the IJ "shall receive and consider relevant and material evidence, rule on objections, and otherwise regulate the course of the hearing." However, this authority is exercised within the context of the alien's right to have a "reasonable opportunity to examine the evidence" against him and "present evidence on the alien's own behalf." INA § 240(b)(4)(A).

A due process challenge must also make a prima facie showing of prejudice, which requires making a showing that the violation of procedural protection actually had potential for affecting the outcome of the proceedings.

To establish a colorable procedural due process violation, it is not enough simply to allege that a particular procedural right was denied. A due process challenge must also make a prima facie showing of prejudice, which requires a showing that the violation of procedural protection actually had potential for affecting the outcome of the proceedings. *Shahandeh-Pey v. INS*, 831 F.2d 1384 (7th Cir. 1987); *Gutierrez-Chavez v. INS*, 289 F.3d 824 (9th Cir. 2002). Additionally, in order to invoke jurisdiction over a procedural due process claim, an alien must have exhausted administrative remedies for review of the claim. INA § 242(b)(4)(A). *Drobny v. INS*, 947 F.2d 241 (7th Cir. 1991); *Sanchez-Cruz v. INS*, 255 F.3d 775 (9th Cir. 2001). The mere fact that a claim is labeled a constitutional "due process" violation does not deprive the BIA of jurisdiction to consider the issue. *U.S. v. Gonzalez-Roque*, 301 F.3d 39 (2d Cir. 2002). The Board has jurisdiction over procedural errors that are correctable by a remanded hearing, even if labeled a "due process violation." *Castaneda-Suarez v. INS*, 993 F.2d 142 (7th Cir. 1993). While exhaustion applies to litigating a due process violation in the immigration proceeding, even if such claims are not raised in the initial removal case, due process claims can be raised in a collateral attack on an underlying deportation order in a subsequent criminal prosecution for illegal re-entry after deportation. *U.S. v. Mendoza-Lopez*, 479 U.S. 981 (1986). Because a due process claim may have a life for many years after the hearing is completed, the Government has a considerable interest in foreclosing such claims at the time of the initial hearing and defending against them whenever they may be raised.

Procedural due process violation challenges generally take one of three forms. Aliens complain they did not receive a "full" and "fair" hearing because the IJ: (1) did not permit witnesses to testify and excluded other evidence; (2) took an overly active role in examining witnesses and controlling the focus of the hearing; and (3) was abusive in temperament and intimidated witnesses. The Courts of Appeals are generally most concerned with claims that involve the first theory of a due process violation, the exclusion of testimony and other evidence. As in many other issues, courts are particularly sensitive to these claims when raised by pro se aliens. Examples of cases that have been found to rise to the level of a

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DUE PROCESS CHALLENGES

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constitutional violation include prohibiting an asylum applicant from testifying about prison conditions during his detention in his home country and excluding the testimony of relatives who sought to corroborate facts which the alien had no documents to support. *Podio v. INS*, 153 F.3d 506 (7th Cir. 1998); *see also, Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000) (IJ denied the alien a fair and full hearing because the IJ did not fulfill *his* duty to fully and fairly develop the record of a pro se asylum seeker, where he failed to fully elicit testimony from the alien as to why she feared members of the Guatemalan military would persecute her). The court reasoned that "should the immigration judge fail to fully develop the record, information crucial to the alien's future remains undisclosed.").

The Ninth Circuit issued a similar decision critical of an IJ's ruling to disallow an alien's testimony about certain issues related to his asylum application. *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000). The IJ precluded the testimony because he found it was based on circumstantial evidence. *See also*, *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000) (IJ's refusal to allow 77 year-old alien's wife to provide the primary testimony of their persecution amounted to a due process violation where alien claimed he had difficulty testifying due to his age and confusion with use of interpreter). An alien's due process violation claim was upheld in a case in which the IJ did not inquire about the possible "hardship" implications for the unborn child that was being carried by an alien's pregnant girlfriend who appeared to testify at the alien's 212(c) hearing. *Drobny v. INS*, 947 F.2d 241 (7th Cir. 1991). In another decision, the Court found a colorable due process violation because the IJ excluded evidence that contradicted his findings (regarding the alien's means of support and employment history in the context of a suspension of deportation application). *Sanchez-Cruz v. INS*, 255 F.3d 775 (9th Cir. 2001). In that case the court found it had jurisdiction to hear whether the alien had a colorable due process violation even though the court lacked jurisdiction over the IJ's discretionary determination of extreme hardship. Interestingly, even though the court issued a scathing decision against the IJ for violating the alien's due process right to a fair and full hearing, the court found it lacked jurisdiction over the case because the alien had failed to exhaust her administrative remedies. Thus, even if a court lacks jurisdiction over a due process claim, it still may choose to berate an IJ for his (or her) handling of a case.

Courts try to draw the ever-elusive fine line between rulings that exclude relevant evidence from rulings that exclude irrelevant evidence.

Courts try to draw the ever-elusive fine line between rulings that exclude relevant evidence from rulings that exclude irrelevant evidence. For example, there is no due process violation where an IJ excludes the testimony of non-qualifying relatives (cousins) in a hardship claim in a suspension of deportation proceeding. *Kuciemba v. INS*, 92 F.3d 496 (7th Cir. 1996). In another case upholding the exclusion of testimony the court found that it was not a due process violation to exclude testimony of an asylum applicant's grandfather who alleged persecution by his exile to Siberia in the former Soviet Union because it was too attenuated to the alien's claim of persecution. *Mikhailevitch v. INS*, 146 F.3d 384 (6th Cir. 1998). The court reasoned that the IJ's decision to exclude irrelevant evidence falls within their authority to maintain the focus and scope of the hearing and that the IJ "is afforded broad discretion to control the manner of interrogation in order to ascertain the truth." *Id*. at 391 (citations omitted).

When due process violation claims slip along the continuum of aliens' preferred procedures wish-list, they frequently complain that an IJ improperly took control of the examination of witnesses.

Courts are generally reluctant to find that such action rises to the level of a due process violation. In these scenarios, courts look to the IJ's duty to fully develop the record found in their authority to interrogate, examine and cross-examine witnesses articulated in INA § 240(b)(1) and authority to control the course of the hearing embedded in 8 C.F.R. § 240.1(c). *See Flores-Leon v. INS*, 272 F.3d 433 (7th Cir. 2001) (IJ is permitted to ask questions in order to clarify the issues) (citations omitted); *Roman v. INS*, 233 F.3d 1027 (7th Cir. 2000) (IJ interruptions and follow-up questions were intended to focus testimony on specific allegations of persecution and therefore no due process violation found); *Aguilar-Solis v. INS*, 168 F.3d 565 (1st Cir. 1999) (IJ efforts to move things along by preventing repetitive testimony, efforts to facilitate reconciling conflicting answers to issues that go to elements of claim, not a due process violation); *Morales v. INS*, 208 F.3d 323 (1st Cir. 2000) (permissible for IJ with limited time to accept offer of proof rather than hear direct testimony from the witness because this procedure did not result in the exclusion of evidence); *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001) (upholding IJ's rulings sustaining objections to leading questions on direct examination which resulted in alien not presenting testimony as to the nexus between her rape and one of the statutory protected grounds for asylum); *Li v. Ashcroft*, 312 F.3d 1094 (9th Cir. 2002) (IJ did not violate alien's due process rights when he failed to limit cross-examination of witness to matters addressed during his direct examination).

However, when the IJ limited the hearing to *his own* examination and denied the alien's asylum claim based on his finding that proffered docu-

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SUMMARIES OF RECENT BIA DECISIONS

LPR Who Obtained Status Through Fraud Not Eligible For Cancellation

In its first decision of 2003, ***Matter of Koloamatangi***, 23 I&N Dec. 548 (BIA 2003), a Board panel held that an alien who obtained lawful permanent resident status through fraud was not an alien lawfully admitted for permanent residence and was therefore ineligible for cancellation of removal under section 240A(a). Mr. Koloamatangi obtained his residence through marriage to a United States citizen, although he knew that that marriage was bigamous since he was already married. In reaching its conclusion, the Board considered the statutory and regulatory definitions of the term, its own case law, and circuit court precedent in the Fifth and Ninth Circuits. The Board concluded that an alien is deemed, ab initio, never to have obtained lawful permanent resident status once his original ineligibility therefor is determined in proceedings. 23 I&N Dec. at 551. The case was remanded to the immigration court because of the alien's apparent eligibility to apply for other forms of relief.

Board Declines To Overturn Matter Of Lozada

In ***Matter of Assaad***, 23 I&N Dec. 553 (BIA 2003), the *en banc* Board considered an appeal from the denial of Assaad's motion to reopen based upon ineffective assistance of counsel. Assaad's claim was that his former counsel was ineffective because he failed to file a timely appeal from an adverse immigration judge decision. The INS argued that the Board should overturn *Matter of Lozada* based on Supreme Court precedent that there can be no claim based on ineffective assistance of counsel in a criminal case where there is no constitutional right to counsel at government expense. *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). The Board declined to reverse *Lozada*, finding that the Supreme Court cases were limited to the criminal context and noting that the circuit court cases had not extended the Supreme Court's criminal law interpretation to immigration cases. With regard to Assaad's claim, the Board found that he had complied with the requirements of *Lozada*, but noted that such compliance also requires a showing that he suffered prejudice as a result of the ineffective assistance of counsel and he had made no such showing. A concurring opinion was filed by Board Member Filppu, joined by Chairman Scialabba and Board Member Pauley.

Contact: Julia K. Doig, OIL
☎ 202-616-4893

DUE PROCESS VIOLATIONS DURING IJ PROCEEDINGS

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ments lacked credibility without the alien presenting his asylum claim, the court found this violated due process. *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003).

Frequently due process challenges to IJ rulings that exclude evidence and claims that the IJ overreached by conducting examination of witnesses also include complaints that an IJ's excessive impatience, irritability, intimidating tone and hostile temperament crossed the line of a "fair" hearing as required by the Fifth Amendment. Courts rarely find cantankerous temperament alone is enough to amount to a due process violation. *See Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999) (modicum of impatience not the stuff from which a due process violation can be fashioned; an alien is entitled to a fair hearing, not an idyllic one); *Ivezaj v. INS*, 84 F.3d 215, 220 (6th Cir. 1996) (alien's rights do not include the right not to have his feelings hurt by a no nonsense judge); *Antonio-Cruz v. INS*, 147 F.3d 1129 (9th Cir. 1998) (no due process violation where IJ conducted cross-examination in harsh manner and tone). Indeed, the Supreme Court held in a non-immigration related case that, "Expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display, even after having been confirmed as federal judges, do not establish bias or partiality." *Liteky v. U.S.*, 510 U.S. 540, 554 (U.S. 1994). *But see Sanchez-Cruz v. INS*, 255 F.3d 775 (9th Cir. 2001) (rebuking IJ for calling alien a "liar"); *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000) (dissent, characterizing IJ performance as "deplorable"). When an IJ's short temper trumps an alien's right to present relevant evidence, the courts are likely to find a due process violation.

While irritability alone may not support a due process violation, the Seventh Circuit has admonished that "we all have the right to expect fair, even-handed treatment by whoever exercises judicial authority of any kind. It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect. . . In a country built on the dreams and accomplishments of an immigrant population, a particularly severe wound is inflicted on that principle when an immigration matter is not conducted in accord with the best of our tradition of courtesy and fairness. *Iliev v. INS*, 127 F.3d 638, 643 (7th Cir. 1997).

By Patricia L. Buchanan, OIL
☎ 202-616-4850

Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit Reverses BIA's Denial Of Asylum To Ethnic Albanian From The Kosovo Region Of Serbia

In ***Hoxha v. Ashcroft***, __F3d__, 2003 WL __ (9th Cir. Feb. 18, 2003) (*Canby*, Gould, Berzon), the Ninth Circuit reversed the BIA and found that petitioner, an ethnic Albanian male from what used to be the Kosovo region of Serbia, had established a well-founded fear of persecution. The petitioner testified that he had suffered a lifetime of insults and a one-time beating on account of his ethnicity. An immigration judge found petitioner credible but denied asylum and withholding. The BIA affirmed, finding that petitioner's evidence had failed to demonstrate a pattern or practice of persecution.

The level of persecution that an ethnic Albanian must show "is inversely related to the degree of persecution directed toward ethnic Albanians generally."

The Ninth Circuit agreed with the BIA that petitioner had failed to show past persecution, finding that the one incident of physical violence against the petitioner was not connected with any particular threat and there was no evidence that the incident was officially sponsored. However, the court found that there was evidence compelling a finding of a well-founded fear of future persecution. The court found that there was evidence in the record of general mistreatment of ethnic Albanians. Although petitioner had to show that his fear had to be based on an individualized risk of persecution, the court explained that "the level of individualized targeting that he must show is inversely related to the degree of persecution directed toward ethnic Albanians generally." Here, there was evidence of numerous atrocities documented by the petitioner and by the 1997 State Department report on country conditions. Thus, reasoned the court, because the amount of persecution directed toward Albanians was extensive, the level of individualized risk that petitioner had to show was comparatively low. After finding that petitioner met this lower burden, the court remanded the case to the BIA to exercise its discretion in light of *INS v. Ventura*.

Contact: Michele Y.F. Sarko, OIL
☎ 202-616-4887

■Tenth Circuit Finds That It Lacks Jurisdiction To Review A Denial Of Asylum Based On An Untimely Filing And Affirms Denial Of Withholding

In ***Tsevegmid v. Ashcroft***, __F.3d__, 2003 WL 295544 (10th Cir. Feb. 11, 2003) (Kelly, *McKay*, Murphy), the Tenth Circuit found that it lacked jurisdiction under INA § 208(a)(3), to review the BIA's determination that petitioner had not filed his asylum application within a year of entry. The court noted that the other circuits have reached the same conclusion. *Fahim v. U.S. Attorney General*, 278 F.3d 1216 (11th Cir. 2002); *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001); *Ismailov v. Reno*, 263 F.3d 851 (8th Cir. 2001).

The court then considered petitioner's claim to withholding of removal which was not time-barred by the statute. The petitioner, a native of Mongolia, claimed that in Mongolia he had been attacked by a group of young people because he belonged to a human rights group. The immigration judge found that petitioner had failed to link the attack on his person to political motives. The Tenth Circuit found that, on this evidence, a reasonable adjudicator would not be compelled to reject these findings of facts.

Contact: Blair O'Connor, OIL
☎ 202-616-4890

■Third Circuit Finds That Ukrainian Should Be Granted Asylum Based On Whistleblowing

In ***Derevianko v. Reno***, 2003 WL 214464 (3d Cir. Jan. 31, 2003) (Scirica, Barry, Smith), the Third Circuit in an unpublished decision vacated the BIA's denial of asylum and withholding of removal and remanded for further proceedings. The petitioner, a Ukrainian involved in exposing governmental corruption, left the Ukraine and voluntarily returned after the issuance of an allegedly fabricated local arrest warrant and attempts on his life. He was taken into custody by INS following the issuance of an allegedly fabricated INTERPOL warrant. The court held that a reasonable factfinder would have to conclude that the requisite well-founded fear of future persecution existed because petitioner testified credibly, the BIA erroneously stated that the issue of the INTERPOL warrant was not raised below, and because the IJ failed to recognize the difference between petitioner's returning to the Ukraine voluntarily and being placed into the custody of corrupt Ukrainian authorities pursuant to the false INTERPOL warrant.

Contact: Aviva L. Poczter, OIL
☎ 202-305-9780

■First Circuit Denies Asylum To Guatemalans Applicants, But Holds That It Has Jurisdiction To Reinstate Voluntary Departure

In ***Velasquez v. Ashcroft***, 316 F.3d 31 (1st Cir. 2002) (*Torruella*, Lipez, McAuliffe (by designation)), the First Circuit affirmed the BIA's denial of asylum, but held that it had jurisdiction under the immigration statute to reinstate the BIA's grant of voluntary departure, reversing and vacating its earlier decision in *Velasquez. v. Ashcroft*, 305 F.3d 62 (1st Cir. 2002). The petitioners, a father with two daughters, claimed

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that they had witnessed various acts of guerrilla violence in Guatemala in the early 1980s. The father claimed that he had received death threats because his family was wealthier than average Guatemalans. He testified that in 1981 his store and home was burned down. In 1989 petitioners came to the United States and when apprehended by the INS they applied for asylum. The IJ and later they BIA held that petitioners had not met their burden of showing past persecution or a well-founded fear of persecution. However, the BIA reinstated the grant of voluntary departure.

The First Circuit held that petitioners suffered no more than thousands of other Guatemalans during that period of civil unrest and that the evidence did not compel a BIA's reversal. The court also found that there was no compelling evidence to find a well-founded fear of persecution.

The court then reinstated voluntary departure rejecting the government's contention that it lacked jurisdiction to do so.

Contact: Kurt Larson, OIL
☎ 202-616-9321

TORTURE CONVENTION

■Second Circuit Holds That District Court Had Habeas Jurisdiction To Review Denial of CAT Claim But Finds That Withholding Was Properly Denied

In ***Wang v. Ashcroft***, __F.3d__, 2003 WL 255958 (2d Cir. Feb. 6, 2003) (Feinberg, *Cabranes*, Magill (8th Cir.)), the Second Circuit held that the district court properly exercised jurisdiction over a § 2241 habeas petition challenging, *inter alia*, the denial of withholding under the Convention Against Torture (CAT). Petitioner's proceedings both at the administrative level and in the courts had a tortuous history. This last action arose when the BIA denied withholding under CAT on the basis that petitioner had not shown that the threats of death that he received as a result f deserting from the a Chinese military base, were more than the threat of a lawfully imposed sanction under Chinese law. The BIA also found no evidence that China tortures deserters from its military.

> The Second Circuit rejected the government's assertion that the district court lacked habeas jurisdiction to consider a claim under the Convention Against Torture

Petitioner, who was in INS custody, then filed a habeas petition under 28 U.S.C. § 2241, challenging the CAT denial, and contending that his continued detention without a bond hearing violated his Fifth Amendment right to due process of law. The district court rejected the INS's assertion that it lacked jurisdiction over the CAT claim, but found that the BIA had not erred in its decision. The court also found that petitioner's continued detention did not violate his due process rights under the analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

On appeal, the Second Circuit agreed with the lower court that § 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1988 (FARRA), had not stripped the federal courts of jurisdiction to review CAT claims. FARRA expressly provides that "[n]otwithstanding any other provision of law . . . nothing in this section shall . . . be construed as providing any court jurisdiction to consider or review claims under the Convention or this section . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act." The Second Circuit followed the Supreme Court's reasoning in *St. Cyr*, that "a statute must, at a minimum, explicitly mention either 'habeas corpus' or '28 U.S.C. § 2241' in order to limit or restrict § 2241 jurisdiction." The court also rejected the INS's contention that scope of review was limited to purely legal questions of statutory interpretation.

On the merits, the court preliminarily held that it did not have to decide what standard of review to apply for reviewing a BIA's application of law to fact pursuant to a § 2241 petition, because even if the review was *de novo*, it would find no error in the BIA's analysis of the CAT claim. The court noted that petitioner had the burden to show that as a result of his military desertion, he was more likely than not to be tortured if removed to China. The court agreed with the BIA's finding that there was no evidence showing that China tortures military deserters. Petitioner's testimony alone, said the court, was insufficient to meet his burden.

The court also rejected petitioner's contention that his continued detention violated his substantive due process rights. The lower court had already found no procedural due process violation. The Second Circuit held that under *Zadvydas v. Davis*, 533 U.S. 678 (2001), petitioner's due process rights were not being jeopardized by his continued detention as long as his removal remained reasonably foreseeable. The court found that in this case removal was not only foreseeable but imminent. Accordingly, it affirmed the judgment of the district court.

Contact: Deborah R. Douglas, AUSA
☎ 202-821-3700

DETENTION

■Eleventh Circuit Holds INS Detention Of Haitians Is Bona Fide

In ***Moise v. Bulger***, __F.3d__, 2003 WL 360107 (Wilson, Fay, Limbaugh, D.J.) (11th Cir. February 20, 2003) (*per curiam*), the Eleventh Circuit in a brief opinion, affirmed the dis-

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trict court's "well-reasoned order" dismissing the complaint/class action habeas petition filed by a group of undocumented Haitians who had been rescued off the coast of Florida and placed in the custody of the INS as arriving aliens. *Jeanty v. Bulger*, 204 F. Supp.2d 366 (S.D. Fla. 2002). They were given "credible fear" interviews and found generally to have a credible fear of persecution. Despite a pre-existing policy of parole for aliens with credible fears, the Acting Deputy Commissioner of INS adopted a new policy for Haitians because of the fear of a mass migration and resulting death to Haitians and a likelihood that Haitians would not appear for hearings. The policy did not prevent parole but required approval in the central office. Petitioners brought a challenge to detention and sought class certification and an injunction requiring individual determinations and release of class members. The district court found that the INS' Acting Deputy Commissioner had validly exercised his delegated authority over parole determinations and had provided facially legitimate and bona fide reasons when he implemented the Haitian detention policy.

Contact: Jocelyn Wright, OIL
☎ 202-616-4868

MOTIONS

■Ninth Circuit Holds Board Properly Construed Alien's "Motion To Remand" As A Motion To Reopen And Subject To Numerical And Time Limits

In ***Guzman v. INS***,__F.3d__, 2002 WL 1234567 (9th Cir. Jan. 29, 2003) (Canby, Gould, Berzon) (*per curiam*), the Ninth Circuit held that the BIA acted within its authority when it construed the second motion filed by the alien as a motion to reopen, even though the alien styled the pleading as a "motion to remand," and that the motion was therefore subject to numerical and time limits.

The petitioner had entered the United States illegally in 1990. When placed in removal proceedings in 1997, he applied for suspension of deportation. An immigration judge pretermitted his application because petitioner had not met the seven-years continuous presence requirement. Petitioner then sought reopening claiming that he had reported the wrong date of entry. The motion was denied and the BIA affirmed that decision on the basis that the new information had been capable of discovery prior to his hearing. While the appeal was pending, petitioner moved for remand to apply for adjustment of status. The BIA denied that motion on the basis that it was in the nature of a motion to reopen and thus was numerically barred by 8 C.F.R. 3.2(c)(2).

Because the court was uncertain on how the BIA would have exercised its discretion if it had not misapprehended the availability of the visa, the court remanded the case to give the BIA another opportunity to exercise its discretion.

The Ninth Circuit held that the BIA properly denied petitioner's first motion and that it properly determined that his second motion was in the nature of a motion to reopen. However, the court noted that it was arguable that the motion to remand was a "second motion because there was an appeal pending before the BIA and the BIA could have considered the motion as a "supplement to, or an amendment of, the first motion." The court further found that when the BIA treated the motion to remand as motion to reopen it "labored under a misapprehension of fact," because it had noted that petitioner had not shown the availability of a visa. On appeal, the INS conceded that a visa was available. Accordingly, because the court was uncertain on how the BIA would have exercised its discretion if it had not misapprehended the availability of the visa, the court remanded the case to give the BIA another opportunity to exercise its discretion.

Contact: Cindy S. Ferrier, OIL
☎ 202-353-7837

REINSTATEMENT

■Eighth Circuit Rejects Alien's Constitutional Challenge To Reinstatement Procedures And Collateral Attack On Previously Executed Order

In ***Briones-Sanchez v. Heinauer***, __F.3d__, 2003 WL 261804 (8th Cir. Feb. 10, 2003) (*Hansen*, Heaney and M. Arnold), the Eighth Circuit upheld the constitutionality of INA § 241(a)(5), the reinstatement statute.

The petitioner, a native of Mexico, came to the United States in 1980 with his mother when he was seven months old. When he grew up he married a United States citizen and had two children. In 1997, petitioner's mother filed an immediate visa petition on his behalf. The petition was approved but a visa was not immediately available because of the long waiting list for such visa. Petitioner then engaged an immigration attorney to help him with his application for adjustment but later discovered that the attorney was a lay person who had a scheme to defraud immigrants. In 1999, the INS denied petitioner's application for adjustment and placed in removal proceedings. On January 25, 2000, an immigration judge in Chicago issued an order of removal in absentia, when petitioner failed to appear. On November 13, 2000, petitioner appeared at the INS office in Omaha, Nebraska seeking to adjust his status based on his marriage to a United States citizen. Pursuant to the warrant of removal he was deported two days later to Mexico. Approximately eight months later he reentered without inspection. In December 2001, petitioner was arrested in Iowa for attempting to use a false identity to obtain a driver's license. The INS then reinstated the prior removal order and de-

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ported him for a second time on January 15, 2002.

In his appeal to the Eight Circuit petitioner contended that the reinstatement of the prior order without a hearing denied him procedural due process. The court found that to succeed on a due process claim an alien must prove that he was actually prejudiced by the lack of process afforded him. Here, the petitioner had to prove that, had there been a hearing, the INS would not have reinstated is removal order. The court found that given the limited scope of the reinstatement proceedings his collateral attacks on the original removal order would have been precluded. The court held that the reinstatement statute's bar on review of the prior removal order that is reinstated upon the alien's unlawful reentry to the United States after the prior removal does not violate due process because the alien had an adequate opportunity for administrative and judicial review of that order in the original proceedings, and because the alien failed to demonstrate prejudice. The court noted that aliens in deportation proceedings have a full range of administrative and judicial procedures available to them and that it does not offend due process "to preclude a second bite at the apple after illegal reentry." *Citing Alvarenga-Villalobos v. Ashcroft*, 271 F.3 1169, 1174 (9th Cir. 2001).

Contact: Papu Sandhu, OIL
☎ 202-616-9357

STREAMLINING

■First Circuit Rejects Challenge To "Streamlining" Under 1999 Regulations

In ***Albathani v. INS***, __ F.3d__, 2003 WL 257276 (1st Cir. Feb. 6 2003) (Lipez, *Lynch*, Farris (by designation)), the First Circuit became the first Circuit to uphold in a published decision a BIA "streamlined" order under 8 C.F.R. 3.1 (a)(7). The BIA had affirmed without opinion (AWO) a decision of an immigration judge finding petitioner ineligible for asylum, withholding, and CAT relief.

The petitioner, a Maronite Christian, arrived in the United States without valid documentation in January 1999, and was taken into custody in Miami. He sought asylum on the basis that he feared persecution by members of Hezbollah active in Lebanon. After a credible fear interview he was allowed to remain here pending a hearing on his asylum claim. Petitioner then moved to New Hampshire where his family was located. Once in the United States he was arrested twice: once for using someone's credit card, and once for selling liquor to a minor. Eventually, on September 28, 200, petitioner had his asylum hearing in Boston. The immigration judge found his story not credible and denied his applications. The BIA affirmed under the streamlining regulations.

"Congress has not given aliens any statutory right to an administrative appeal." These rights only exist in regulations promulgated by the Attorney General.

Preliminarily, the court reviewed the record and found that, under *Elias-Zacarias*, the evidence was not sufficient to compel reversal of the asylum claim. The court also rejected petitioner's claim that his due process rights had been violated by the conduct of the IJ. The court found, *inter alia*, that the IJ's attempts to expedite the proceedings were "not the stuff of which due process violations can be fashioned."

The Petitioner and his *amici* (AILA *et al.*), then challenged the AWO procedures contending that it violated due process and rules of administrative law. The court pointed out that the context of the claim was important. "An alien has no constitutional right to an administrative appeal at all," said the court and "Congress has not given aliens any statutory right to an administrative appeal." These rights only exist in regulations promulgated by the Attorney General. The court then cited approvingly from the Supreme Court's opinion in *Vt. Yankee Nuclear Power Corp*. for the proposition that "administrative agencies should be free to fashion their own rules of procedures and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 435 U.S. 519, 543 (1978). The court rejected petitioner's contention that the BIA had to provide a reasoned opinion, noting that the BIA can adopt without opinion the IJ's opinion. The court acknowledged that there may be some problems because the AWO procedures permit affirmance even where the BIA disagrees with the IJ's reasoning. However, these problems, said the court "do not render the scheme a violation of due process or render judicial review impossible. Nor does the scheme violate any statute." The court will continue to have the IJ decision and the record upon which it is based available for review. If the BIA does not independently state a correct ground for affirmance where the reasoning of the IJ is faulty, the BIA risks reversal on appeal. "Ordinarily, the case will be remanded to the agency, and the agency will not, in the end, have saved any or effort," observed the court.

The court found as a "more serious argument," the possibility that BIA members "are not in fact engaged in the review required by regulations and courts will not be able to tell." The court noted that the Board member who denied petitioner's appeal had apparently decided 50 case on October 31, 2002, a rate of one every ten minutes over the course of nine-hours. The court, by contrast, had taken more than one day to review the case. The court noted, that even when the IJ decides the alien is not credible, "there must be

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review of the record before the IJ by the BIA." The court warned that "[w]ere there evidence of systemic violation by the BIA of its regulations, this would be a different case. We would then have to face, *inter alia*, the INS's claim that the decision to streamline an immigration appeal is not reviewable by the courts because these matters are committed to agency discretion." However, in the absence of any evidence, the court refused to infer that the required review was not taking place.

Contact: John C. Cunningham, OIL
☎ 202-307-0601

■Eleventh Circuit Finds That AWO Procedure Does Not Violate Due Process

In ***Gonzalez-Oropea v. U.S. Attorney General***, __F.3d__, 2003 WL 356044 (11th Cir. Feb. 18, 2003) (Dubina Carnes, Wilson) (*per curiam*), the Eleventh Circuit held that it lacked jurisdiction to review a decision of the BIA where it affirmed without opinion (AWO) pursuant to 8 C.F.R. § 3.1(a)(7), a denial of cancellation of removal. The petitioner, with his wife and son, had applied for cancellation under INA § 240A(b). An immigration judge had denied their application on the basis that he had failed to establish exceptional and extremely unusual hardships.

The petitioners argued that the BIA violated their due process right by issuing the AWO, because their case was not appropriate for streamling. They also claimed that the BIA failed to perform an individualized analysis of the facts and equities presented. Preliminarily the court noted that petitioner's case fell under IIRIRA's permanent rules. Consequently, the jurisdictional bar of INA § 242(a)(2)(B) applied to the case. In particular, the court held that since the exceptional and extremely unusual hardship determination was a discretionary decision, it was not subject to judicial review. The court further found, following *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001), that it had jurisdiction to review substantial constitutional challenges to the BIA. Here, the court held that under the regulations petitioner had no entitlement to a full BIA opinion. The court also found that the decision was in full compliance with the regulation "as the issues in this case are not complex, and are governed by existing agency and federal court precedent." Accordingly, the court found the due process claim lacked merit and petitioners had not raised a substantial constitutional question.

Contact: Anthony Nicastro, OIL
☎ 202-616-9358

STAYS

WAIVER – 212(c)

■Second Circuit Holds That 212(c) Relief Not Available Where Aliens Were Convicted After Trial

In ***Rankine v. Reno***, __F.3d__, 2003 WL 179792 (2d Cir. Jan. 28, 2003) (*Oakes*, Cabranes, Preska (S.D. N.Y.)), the Second Circuit held that IIRIRA's repeal of section 212(c) relief was not impermissibly retroactive when applied to an alien convicted after trial of an aggravated felony.

This decision, consisting of three separate cases addressed by the court in tandem, involved three resident aliens who had been convicted after trial of aggravated felonies while section 212 (c) was still in effect. The BIA had denied their applications on the basis that they were ineligible for that relief. All three petitioners then filed unsuccessfully habeas corpus petitions.

The petitioner argued that the holding in *INS v. St. Cyr*, 533 U.S. 289 (2001), should apply to them, too. In *St. Cyr*, the Court found that the elimination of section 212(c) relief for aliens who had entered plea agreements "with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past.'" However, here the Second Circuit found that the three aliens had not detrimentally changed their positions in reliance on continued eligibility for section 212(c) relief, nor did they take any actions to preserve their eligibility for that relief. "It was that reliance, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA ," said the court.

"It was that reliance, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA ."

The Second Circuit noted that its ruling was consistent with that of other circuits. *See Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.2d 116 (9th Cir. 2002); *Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001)

Contact: Kathy Marks, AUSA
☎ 212-637-2706

VISA WAIVER PROGRAM

■Tenth Circuit Holds That VWP Alien Is Statutorily Ineligible For Suspension of Deportation

In ***Itaeva v. INS***, 314 F.3d 1238 (10th Cir. 2003) (Kelly, Baldock, and Lucero), the Tenth Circuit held that an alien who entered the United States under the Visa Waiver Pilot Program (VWPP), see INA § 217, 8 U.S.C. § 1187, was statutorily barred from applying for suspension of deportation.

The petitioner, a native of Russia and a Swedish citizen, first entered the United States in April 1986. She then reentered in September 1989 under the

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VWPP. When her term of admission expired she failed to depart. In August 1992, she filed an application for asylum. In January 1993, she again reentered under the VWPP. In 1996, the INS instituted removal proceedings against the petitioner and her children on the basis that they had remained in the United States beyond the time authorized by the terms of the 1989 entry. Petitioner's application for suspension of deportation was denied by the IJ and affirmed by the BIA on the basis that she was statutorily barred for that relief under the terms of her admission under the VWPP. The BIA also held that she did not qualify for asylum.

Before the Tenth Circuit, petitioner argued that since she had been placed in deportation proceedings, she remained eligible to apply for suspension of deportation. Petitioner did not challenge the denial of asylum. The court held, deferring to the BIA's interpretation of the statute, that the petitioner was not entitled to "the full panoply of remedies to deportation" simply because she had filed an application for asylum and was placed in deportation proceedings. The court then agreed with the BIA that she was statutorily ineligible to apply for suspension of deportation.

Contact: Anthony P. Nicastro, OIL
☎ 202-616-9358

■Seventh Circuit Finds That It Lacks Jurisdiction Over Petition filed by VWPP Alien Who Contested Her Removal

In ***Wigglesworth v. INS***, __F.3d__, 2003 WL 329046 (7th Cir. 2003), the Seventh Circuit held that it lacked jurisdiction to consider a challenge to an order or deportation filed by an alien who had been admitted under the Visa Waiver Pilot Program. The program, now a permanent one is referred to as "VWP" The petitioner, a citizen of Sweden, had been last admitted under the VWP in 1990. After the INS denied her application for adjustment, she was placed in deportation proceedings where she applied for suspension of deportation. Subsequently, the INS realized petitioner's status and moved to terminate the proceedings as improvidently commenced. The IJ terminated the hearing but opined that petitioner might not have knowingly waiver her rights to a deportation hearing. Petitioner's appeal was affirmed by the BIA.

The Seventh Circuit petitioner had waived her right to contest her deportation when she signed the VWP Form I-790, which explicitly contained a waiver of rights provision in the Swedish language. The court also rejected petitioner's constitutional challenge to the VWP program, based on her contention that she had not knowingly waived her rights to remain in the United States. The court considered the constitutional question to determine whether it was in the best interest of justice to transfer the case the district court to consider the issue in the first instance under the habeas statute. Moreover, the court also held that her claim had to be dismissed under INA § 242(g) because petitioner practically was seeking and order that the INS recommence deportation proceedings for purpose of adjudicating a discretionary application for relief.

In a footnote, the court distanced itself from the ruling in *Itaeva v. INS*, 314 F.3d 1238 (10th Cir. 2003), insofar as that decision can be read to allow VWP deportees to seek review in the courts of appeals.

Contact: Carl McIntyre, OIL
☎ 202-616-4882

NINTH CIRCUIT SPLITS OVER DUE PROCESS

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before the BIA, petitioner filed numerous documents to prove his eligibility for suspension.

In refusing to address the new material, the BIA cited *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), holding that it "is an appellate body whose function is to review, not to create, a record."

"Over the years we have established a body of law in this Circuit that is at odds with what Congress has asked us to do."

The 6-judge majority of the Court held that the BIA was obliged to consider current relevant evidence in suspension cases. It determined that the BIA "falsely claimed" that it did not accept new evidence on appeal because it had done so in other cases. The court also found that the BIA had no established motion-to-remand procedure in place between 1992 and 2000, whereby aliens could advise the BIA of changed circumstances. Consequently, the court held that petitioner's right to due process was violated because he was unable to reasonably present his case to the BIA.

The 5-judge dissent noted that the alien chose to "just send" his new material to the BIA without benefit of an accompanying motion, and elected not to file an available motion to remand under *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992), or a motion to reopen under the regulations. The dissent characterized the majority's opinion as an "excursion beyond our warrant" and "particularly troubling because of the connection between immigration law, foreign affairs, and national defense. Nevertheless, once again we aspire to be all things to all people. Over the years we have established a body of law in this Circuit that is at odds with what Congress has asked us to do."

Contact: David Kline, OIL
☎ 202-616-4856

CASES SUMMARIZED IN THIS ISSUE

NOTED WITH INTEREST

A former California gubernatorial candidate is seeking political asylum in Canada because he says he'll be prosecuted for marijuana possession if he returns to the United States. Canadian federal prosecutors, however, are challenging his claim and say he's just trying to avoid jail in California on a peyote conviction.

OIG ISSUES REPORT CRITICAL OF INS'S REMOVAL EFFORTS

The Office of the Inspector General of the U.S. Department of Justice released in February a report critical of the INS's efforts in removing nondetained aliens with final orders of deportation or removal. The report found that "INS continues to be largely unsuccessful at removing aliens who are not detained, removing only 13 percent of nondetained aliens with final removal orders."

Among other subgroups of nondetained aliens, the report found that the INS removed only 3% of nondetained asylum seekers with final removal orders." The Inspector General noted that "the low removal rates for asylum seekers is a concern because this group may include potential terrorists who threaten our national security. We found that several individuals convicted of terrorist acts in the United States requested asylum as part of their efforts to stay in the country."

The report criticizes the INS for having failed to improve its removal process after agreeing to take corrective actions in light of an earlier 1986 OIG report on the same subject.

INSIDE OIL

To date five OIL attorneys have been recalled to active duty with the United States Marine Corps and the United States Army. Our prayers go to **Andrew MacLachlan**, **John Hogan**, **Stephen Flynn**, **Ted Durant**, **Larry Cote**, and to their families.

INSIDE EOIR

Congratulations to Immigration Judge **Samuel Der-Yeghiayan**. The President has nominated him to be United Stated District Judge for the Northern District of Illinois. Judge Der-Yeghiayan has been invited to participate at OIL's Seventh Annual Immigration Litigation conference to be held in St. Louis on April 21-24.

Congratulations to **Mary Maguire Dunne**, Vice-Chairman of the Board of Immigration Appeals who recently retired after being a Member of the Board for more than 25 years.

Contributions To The ILB Are Welcomed!

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. The deadline for submission of materials is the 20th of each month. 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"

If you are not on our mailing list, please contact Marian Bryant at marian.bryant@usdoj.gov

Robert D. McCallum, Jr.
Assistant Attorney General
United States Department of Justice
Civil Division

Laura L. Flippin
Deputy Assistant Attorney General

Thomas W. Hussey
Director
David J. Kline
Principal Deputy Director
Office of Immigration Litigation

Francesco Isgro
Senior Litigation Counsel
Editor

francesco.isgro@usdoj.gov
✉ P.O. Box 878
Washington DC 20044