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Immigration Litigation Bulletin

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OIL ANNOUNCES ITS 2005 CONFERENCE

OIL Director Thom Hussey is pleased to announce that the 2005 OIL Conference, "Immigration Reform and Security: Litigating Service and Enforcement," will be held during the week of March 28, 2005, at the Wyndham San Diego at Emerald Plaza in San Diego, California. The hotel is located in downtown San Diego, adjacent to Little Italy, and within walking distance of Seaport Village and the Embarcadero. OIL's annual litigation conference brings together a broad spectrum of Government attorneys who are responsible for immigration policy and litigation, including Assistant and Special Assistant United States Attorneys, DHS attorneys, attorneys from the Executive Office for Immigration Review, and officials from the Department of State.

Immigration Reform and Security: Litigating Service and Enforcement

The plenary sessions will take place from Tuesday, March 29th through Thursday, March 31st and will run from 8:30 am until 5:00 pm each day. Attendees are asked to plan their travel schedules accordingly, with a suggested check-in on Monday and check-out on Friday. Expected topics include: Border Enforcement, Defending Immigration Cases in District Courts, Immigration Crimes, Emerging Issues in Asylum Law, and many more. Speakers are expected to include DOJ, DHS (ICE, CIS, and CBP), and DOS officials. We are fortunate to be joined this year by Ninth Circuit Judge Diarmuid F. O'Scannlain and United States District Judge Barry Ted Moskowitz of the S.D. Cal. We also expect to offer a presentation by officials from the Canadian and Mexican governments. The program will include an opportunity to tour the United States-Mexican border with members of the Border Patrol. This is a great opportunity to see the unique challenges faced by law enforcement officials on the border.

Registration is a two-step process. First, government attorneys should register for the Conference by emailing Julia Doig Wilcox at Julia.wilcox@usdoj.gov. It is very important that attendees advise Mrs. Wilcox at registration, or anytime prior to the conference, if they will be present for only part of the conference. Second, attendees must make their own hotel reservations. Reservations can be made by calling the hotel at 619-239-4500 or the Wyndham nationwide reservations line at 800–996-3426. Please specify that you are with the DOJ/ Immigration Litigation conference in order to receive the government rate. Reservations should be made no later than March 14, 2005.

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OCIJ Overview

The Office of the Chief Immigration Judge (OCIJ), a component of the Executive Office for Immigration Review, is headed by Chief Immigration Judge Michael J. Creppy. Judge Creppy was appointed as the Chief Immigration Judge on May 1, 1994. He received his B.A. from Fisk University in 1975, his J.D. from Howard University School of Law in 1978, and his LL.M. from Georgetown Law Center in 1979. Prior to his appointment as Chief Immigration Judge, Judge Creppy worked for 13 years in numerous positions with the former INS. He has lectured extensively and authored many articles in the immigration field. Moreover, he has been the recipient of numerous awards, such as the Younger Federal Bar Award where he was honored as one of the top five litigators in government.

The Chief Immigration Judge establishes operating policies for the Immigration Courts and oversees policy implementation in each of those courts with the help of Deputy Chief Immigration Judges Brian O'Leary and Thomas Pullen, and eight Assistant Chief Immigration Judges. Biographies of the Deputy and Assistant Chief Immigration Judges are available at http://www.usdoj.gov/eoir/fs/ocijbio.htm. OCIJ supervises and directs the activities of the Immigration Courts, which handle more than 250,000 immigration

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Highlights Inside

OCIJ Overview

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matters annually. Statistics for Fiscal Year 2003 are available at http://www.usdoj.gov/eoir/statspub/fy03syb.pdf.http://www.usdoj.gov/eoir/statspub.htm. Specific statistics on OCIJ's caseload for Fiscal Year 2004 have not yet been published.

OCIJ provides overall program direction, articulates policies and procedures, and establishes priorities for more than 200 Immigration Judges located in 53 Immigration Courts throughout the nation. A list of courts and judges is available at http://www.usdoj.gov/eoir/sibpages/ICadr.htm. Many removal proceedings are conducted in prisons and jails as part of the Institutional Hearing Program. In coordination with DHS and correctional authorities in all 50 states, Puerto Rico, the District of Columbia, selected municipalities, and Federal Bureau of Prison facilities, Immigration Judges conduct on-site hearings to adjudicate the immigration status of aliens while they are serving sentences for criminal convictions.

Like any court, OCIJ's workload depends on the number of matters filed before it. The Department of Homeland Security determines OCIJ's initial caseload by filing charging documents alleging aliens' illegal presence in the United States. If the DHS alleges a violation of immigration laws, it has the prosecutorial discretion to serve the alien with a charging document, ordering the individual to appear before an Immigration Judge. The charging document, generally a Notice to Appear, is also filed with the Immigration Court having jurisdiction over the alien. In proceedings initiated prior to April 1, 1997, the charging document is called an Order to Show Cause (OSC) for deportation proceedings and an I-122 for exclusion proceedings.

Immigration Judges are responsible for conducting formal court proceedings and act independently in deciding the matters before them. Immigration Judges are not bound by the Federal Rules of Evidence. Although those rules are instructive, an Immigration Judge has authority to receive most kinds of evidence in deciding a case. Immigration Judge decisions are administratively final unless appealed or certified to the Board of Immigration Appeals, or if the period by which to file an appeal lapses where no appeal is filed. Immigration Judges conduct removal proceedings, which account for approximately 80 percent of their caseload. Immigration Judges also conduct the various proceedings noted below. In Fiscal Year 2003, the Immigration Courts completed more that 295,000 matters.

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Removal Proceedings: In a typical removal proceeding, the Immigration Judge may decide whether an alien is deportable or inadmissible under the law, then may consider whether that alien may avoid forced removal by accepting voluntary departure or by qualifying for various forms of relief. In fiscal year 2003, the Immigration Judges completed over 238,000 removal hearings, over 8,900 deportation hearings, and over 1,200 rescission hearings.

Bond Redetermination Hearings: Immigration Judges conduct bond redetermination hearings for aliens in DHS detention. For proceedings commenced on or after April 1, 1997, the Immigration Judge must set a minimum bond of $1500. *See* INA § 236(a)(2)(A). These hearings are separate from the removal proceedings and are generally not recorded. Either the alien or the DHS can appeal the Immigration Judge's decision. In fiscal year 2003, the Immigration Courts conducted over 33,000 bond redetermination hearings.

Rescission Hearings: Immigration Judges conduct rescission hearings to determine whether an LPR should have his or her residency status rescinded because he or she was not entitled to it when it was granted. In fiscal year 2003, the Immigration Judges completed 47 rescission proceedings.

Asylum-Only Hearings: An asylum-only hearing applies to an individual who is not entitled to a removal hearing under the law. Such individuals include crewmen, stowaways, Visa Waiver Program beneficiaries, and those ordered removed from the United States on security grounds. An asylum-only hearing is held to determine whether certain aliens, who claim a well-founded fear of persecution in their home country, are eligible to apply for asylum. In fiscal year 2003, the Immigration Judges completed over 2,200 asylum-only hearings.

Withholding-Only Hearings: Immigration Judges conduct withholding-only hearings to determine whether an alien who has been ordered removed is eligible for withholding of removal under the Immigration and Nationality Act (INA) or the Convention Against Torture (CAT).

Credible Fear Reviews: If an alien seeks to enter the U.S. without proper documents or with fraudulent documents, and expresses a fear of persecution or an intention to apply for asylum, a DHS asylum officer will conduct a credible fear interview. An alien will demonstrate a credible fear of persecution if he or she shows a significant possibility that he or she could establish an asylum claim, or a claim based on withholding of removal under the INA or the CAT. If

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Border Security 101

The oldest tool in the border security arsenal is the sharpest and most efficient. The Supreme Court endorsed it in 1950 when it existed only in a regulation. Congress in 1952 mandated that it be considered in arriving alien cases. It requires that conventional removal proceedings halt when an alien appears inadmissible on security or foreign policy grounds, and permits that alien's expeditious removal without a hearing, predicated on confidential national security information, with no exposure of that information. Judicial review, if any, is extraordinarily limited. Today, this tool and the congressional mandate have no less vitality, in INA section 235(c).

Section 235(c) permits both the removal of an alien who is inadmissible on national security or foreign policy grounds on the basis of undisclosed "confidential" information and the issuance of an exclusion order which makes no reference to that information. The dispositive information need not be classified, but only confidential. It requires that any immigration officer or judge who "suspects" that an arriving alien "may be inadmissible" under the espionage, terrorism, or foreign policy provisions: (1) order the alien removed, (2) report the matter to the Attorney General, and (3) halt further inquiry unless and until directed by the Attorney General to proceed.

Like the statute, the attendant regulation has yet to be revised in DHS terms, and delegates this decisional authority to INS Regional Directors. 8 C.F.R. § 235.8. The initial order of removal issued by an immigration officer or judge on INS Form I-147, by its terms, is "temporary." Referral to the Regional Director is mandatory. In the interim, the alien is afforded "the right to submit a written statement and other information for consideration" by the Regional Director. If the Regional Director "is satisfied" on the basis of confidential information that the alien is inadmissible under section 212(a)(3)(A) ("other than clause (ii)"), (B), or (C), he "may order the alien removed without further inquiry or hearing by an immigration judge." INA § 235(c)(2)(B), 8 U.S.C. § 1225(c)(2)(B). The Regional Director is required to issue a written decision, but the alien receives only "a separate written order showing the disposition of the case, . . . with the classified information deleted." 8 C.F.R. § 235.8(b)(3); INS Form I-148. There is no administrative appeal.

It is little known that the Supreme Court's oft-quoted decision on the rights of excludable aliens, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), upheld a summary exclusion regulation that, in its essentials, had existed since 1917 and which Congress later enacted in INA section 235(c). The regulation provided for exclusion without hearings based on confidential information, "the disclosure of which would be prejudicial to the public interest." 8 C.F.R. § 175.57(b) (1945 Supp.). 338 U.S. at 543. The Court upheld the regulation notwithstanding the absence of specific statutory authorization. The Court concluded with the holding for which its *Knauff* decision is most noted, echoing its holding fifty-eight years before: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892), and *Ludecke v. Watkins*, 335 U.S. 160 (1948)).

> ***"Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."***

Three years later, the Court again examined the Attorney General's summary exclusion regulation. *See Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *United States ex rel. Mezei v. Shaughnessy*, 345 U.S. 206 (1953). In *Chew*, the Court held that the regulation's "authorization of the denial of hearings raises no constitutional conflict if limited to 'excludable' aliens who are not within the protection of the Fifth Amendment," but found the regulation inapplicable to a resident alien returning from a five-month excursion abroad as a merchant mariner. *Chew*, 344 U.S. at 600.

Five weeks later in *Mezei*, the Court reaffirmed the summary exclusion regulation's validity, but this time found it fully applicable to another resident alien who had been abroad nineteen months behind the Iron Curtain. The Court again reprised its precedent: "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Mezei*, 345 U.S. at 210 (citations omitted). It then elaborated:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' And because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; 'it is not within the province of any court, unless expressly authorized by law, to

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> review the determination of the political branch of the Government.' In a case such as this, courts cannot retry the determination of the Attorney General.

Id. at 212 (citations omitted). The Court also concluded that because Mezei was the subject of a national security-based exclusion order, he was ineligible for release on bond. "An exclusion proceeding grounded on danger to the national security . . . presents different considerations; neither the rationale nor the statutory authority for such release exists." Id. at 216.

Section 235(c) process has been upheld in a number of lower court decisions. *See Azzouka v. Meese*, 820 F.2d 585, 587 (2d Cir. 1987); *Azzouka v. Sava*, 777 F.2d 68, 72 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986) (applying *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), to hold that the Government acted on a facially legitimate and *bona fide* reason, ending the judicial inquiry); *Avila v. Rivkind*, 724 F. Supp. 945, 948, 950 (S.D. Fla. 1989) ("The role of a court in reviewing an order of summary exclusion is limited to ascertaining that the subject of the order is an alien and that the alien has been summarily excluded under the procedures authorized by Congress."); *El-Werfalli v. Smith*, 547 F. Supp. 152, 153 (S.D.N.Y. 1982) ("Th[e] governing standard permits the Court to inquire as to the Government's reasons, but proscribes its probing into their wisdom or basis. If the Court finds that the Government acted on a facially legitimate and bona fide reason, its inquiry is complete.") (citing *Kleindienst*, 408 U.S. at 770, and *NGO Committee on Disarmament v. Haig*, 82 Civ. 3636 (S.D.N.Y.), aff'd mem, 697 F.2d 294 (2d Cir. 1982)); *see also Rafeedie v. INS*, 880 F.2d 506, 520 (D.C. Cir. 1989) (finding 235(c) procedural minimum inapplicable to returning resident alien on facts but recognizing that "an initial entrant has no liberty (or other) interest in entering the United States, and thus has no constitutional right to any process in that context; whatever process Congress by statute provides is obviously sufficient, so far as the Constitution goes").

Appeals from section 235(c) determinations were historically by habeas corpus petitions in district court, although without apparent jurisdictional authorization in the INA. In the wake of the 1996 jurisdictional amendments, the INA still contains no provision for judicial review of these decisions. AEDPA section 401(b) temporarily amended the INA to vest appellate venue and jurisdiction in the U.S. Court of Appeals for the D.C. Circuit. IIRIRA repealed that provision, however, as well as former INA section 106, which provided for the habeas corpus review of exclusion decisions generally, leaving just the general provision for the review of final removal orders. *See* INA § 242. Section 242 contemplates judicial review only of conventional immigration judge-conducted proceedings and summary exclusion proceedings for criminal aliens under section 235(b)(1). INA §§ 101(a)(47) (defining "final orders of deportation" as Board-approved orders or order subject to Board review), 242(a)(1), (b)(2), 8 U.S.C. §§ 1101(a)(47), 1252(a)(1), (b)(2). Unlike section 242(e), which provides for review of section 235(b) summary removal orders, the INA contains no provision for the review of section 235(c) summary removal orders. Moreover, section 242(a)(2)(B)(ii) bars judicial review of discretionary determinations by the Attorney General, other than political asylum decisions. Section 235(c) orders are discretionary in nature. ("If the Attorney General is satisfied . . . [he] may order the alien removed . . . .") (emphasis added). We presented this jurisdictional analysis in the Khobar Towers case, *El Sayegh v. INS*, Civ. No. 1:98-CV-316-GET (N.D. Ga.). The district court ultimately dismissed El Sayegh's habeas corpus petition on other jurisdictional grounds. El Sayegh's appeal in the Eleventh Circuit from that decision was mooted by El Sayegh's deportation to the Saudi Arabia.

The INA contains no provision for the review of section 235(c) summary removal orders.

Although its terms apply to arriving aliens without limitation, section 235(c) has only limited application to returning lawful permanent resident aliens. While section 235(a)(1) deems all aliens arriving in the United States "applicants for admission," section 101(a)(13)(C) specifies that returning resident aliens "shall not be regarded as seeking an admission into the United States" unless they have (a) abandoned residency status, (b) been abroad in excess of 180 days, (c) engaged in illegal activity abroad, (d) left during the pendency of removal proceedings, (e) committed a section 212(a)(2) crime (*e.g.*, morally turpitudinous or controlled substance crimes, multiple convictions sentenced in the aggregate to five or more years, money laundering) or (f) reentered or attempted to reenter the United States without inspection. *See also* INA § 235(a)(3), 8 U.S.C. § 1225(a)(3) ("All aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or to transit through the United States shall be inspected by immigration officers.") (emphasis added), § 221(h), 8 U.S.C. § 1201(h) ("Nothing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States, if upon arrival at port . . . he is found to be inadmissible . . . ."); 8 C.F.R. §§ 1.1(q), 235.1(d), 235.8(e).

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Thus, a returning resident alien found within one of the section 101(a)(13)(C) exceptions can be placed in a removal proceeding under section 235(c) to determine his admissibility. Judicial decisions prior to the 1996 INA amendments indicated that a returning resident placed in 235(c) proceedings might be entitled to a measure of process in excess of section 235(c)'s procedural minimum. A few weeks prior to its decision in *Mezei*, the Supreme Court held in *Chew* that some returning resident aliens are entitled to the procedural protections that they would have enjoyed if they had never left. 344 U.S. at 600-601. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court recalled both cases, expressly reaffirmed that returning resident aliens could be placed in exclusion proceedings in some circumstances, and implicitly reaffirmed that 235(c) proceedings will be appropriate for some of them. *Id.* at 30-34. The Court continues to cite *Mezei* with approval. *E.g., Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (declining to entertain aliens' claim that subsequent developments have undermined its authority).

The courts have never made clear the constitutional dividing line for distinguishing between those returning resident aliens who retain deportation procedural rights and those who can be accorded the section 235(c) procedural minimum. Extended absence abroad is one criterion that has been used. Mezei's nineteen month trip was sufficient to "assimilate" him to the procedural position of an initial entrant seeking admission. *Mezei*, 345 U.S. at 214. Chew's five month trip was insufficient. *Chew*, 344 U.S. at 601. Section 101(a)(13)(C)(ii) now fixes the temporal limit at 180 days. In *Landon*, however, the Court cited its decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), and held that a returning resident could be properly placed in an exclusion proceeding if she made other than an "innocent, casual, and brief" excursion abroad. 459 U.S. at 29. In *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989), the D.C. Circuit took a more limited view with respect to a resident alien PFLP member who left the United States for three weeks to attend a terrorist organization meeting in Syria after seeking a reentry permit from INS ostensibly to visit his sick mother in another country. The government relied on *Landon* and *Fleuti*, and argued that the alien's terrorist purpose in going abroad, irrespective of the trip's duration, should suffice. The D.C. Circuit disagreed, holding that the procedural line must be drawn solely by reference to the duration of the alien's trip abroad rather than the nefariousness of his purpose in going. *Rafeedie*, 880 F.2d at 524. On remand, the district court concluded that the D.C. Circuit would permit the short-excursion resident alien to be placed in 235(c) proceedings so long as he is given some semblance of deportation procedural rights: "[I]t is now well-settled that Section 235(c) applies to permanent resident aliens." *Rafeedie v. INS*, 795 F. Supp. 13, 21 n.11 (D.D.C. 1992); *see also Rafeedie*, 880 F.2d at 524. As noted above, INA section 101(a)(13)(C)(iii) now provides that the returning resident alien will be deemed an applicant for admission if he engaged in illegal activity abroad, and should therefore be amenable to removal in section 235(c) proceedings.

Section 235(c) provides an expeditious tool for securing our borders against national security threats. It is well-tested authority which must be considered in every security case involving an arriving alien inadmissible under section 212(a)(3)(B) or (C). More importantly, the statute mandates it.

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The Basics OIL website, including sample briefs, can now be found at http://intranet/civil/MiniOLIV/home.html or http://10.173.2.12/civil/MiniOLIV/home.html. This site can only be accessed from a DOJ computer.

Summaries Of Recent Federal Court Decisions

Abandonment of LPR Status

In ***Katebi v. Ashcroft***, 396 F.3d 463 (1st Cir. Feb. 3, 2005) (Selya, Lipez, *Howard*), the First Circuit denied petitioner's petition for review of the Board's decision finding he had abandoned his permanent resident status by traveling to Iran and Canada. In 1995, Petitioner, a native and citizen of Iran, was sponsored for permanent resident status. Petitioner also applied for and was granted Canadian citizenship, and moved to Canada for over two years. Petitioner maintained a Canadian bank account and purchased and registered a car. In 1997, petitioner visited to Iran for two months while his father was ill, and returned to the United States. In 1998, petitioner returned to Iran to attend his father's funeral. Upon his return to the United States, petitioner was interviewed by INS agents who determined that he had abandoned his permanent resident status, and placed him in exclusion proceedings. The IJ found petitioner removable on that basis and the Board summarily affirmed.

The court denied the petition, finding petitioner's ties to the United States between 1995 and 1998 to be minimal, whereas he had significant ties to Canada. The court held that the evidence supported the view that petitioner's stay in Canada was more consistent with resuming his prior residency than with making a "temporary visit."

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Adjustment of Status

In ***Ngongo v. Ashcroft***, — F.3d — , 2005 WL 334942 (9th Cir. Feb. 14, 2005) (O'Scannlain, *Siler*, Hawkins), the Ninth Circuit denied a petition for review of the Board's decision ordering petitioner's removal as an alien who procured her visa by marital fraud. Petitioner, a native of the Congo, married a U.S. citizen who filed an I-130 in 1995, which he later withdrew, claiming that the marriage was fraudulent. In 1996, he filed a second I-130. Despite petitioner's request, the petitions were never consolidated, so there were had two actions simultaneously proceeding with INS. During the hearing concerning the first petition, the IJ had petitioner testify prior to her husband because the credibility of both the spouses was at issue. The IJ denied the first petition because he found the marriage fraudulent, and the District Director likewise denied the second petition. The Board affirmed without opinion the denial of the first petition and later remanded the District Director's denial of the second petition. On appeal, petitioner argued that the Board deprived her of the opportunity to pursue adjustment of status when it affirmed the IJ's decision on the first petition before the District Director adjudicated the second petition.

Approval of an "I-130 petition does not automatically entitle the alien to adjustment of status as an immediate relative of a United States citizen."

The court held that the Board did not err by affirming the IJ's decision on the first petition before the second I-130 was fully adjudicated. Furthermore, the court reasoned that, even if the District Director approved the I-130 upon remand, petitioner would not have been automatically entitled to adjustment of status. Approval of the "I-130 petition does not automatically entitle the alien to adjustment of status as an immediate relative of a United States citizen." The court also found that no due process violation resulted from requiring petitioner to testify first because the IJ needed to compare petitioner's testimony with her husband's and petitioner could not show that the order unduly prejudiced her. Accordingly, the court denied the petition for review.

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Asylum/Withholding/CAT

In ***Aden v. Ashcroft***, 396 F.3d 966 (8th Cir. Feb. 3, 2005) (*Loken*, Heaney, Melloy), the Eighth Circuit denied a petition for review of the Board's decision denying asylum, withholding of removal, and CAT protection. Petitioner, a native of Somalia and member of the Tunni clan testified that she was slapped and raped by members of the Hawiye clan and that her brother was killed by these men. Petitioner and her family fled to Kenya where she lived for several years. The IJ found petitioner's testimony to be incredible because it was vague, uncorroborated, and inconsistent with her asylum application. The IJ also found that petitioner had failed to prove either past persecution or a well-founded fear of future persecution, and that she was ineligible for CAT protection. Furthermore, the IJ found that petitioner failed to prove that she applied for asylum within one year of entering the United States. The Board affirmed without opinion.

The court held that the finding that petitioner had failed to meet the one-year filing requirement was not subject to judicial review, and therefore it could not overturn the denial of petitioner's application for asylum. The court further found that petitioner had failed to demonstrate a well-founded fear of future persecution on account of a protected ground or to prove torture, and therefore failed to establish eligibility for withholding of removal and CAT protection.

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The Eighth Circuit, in ***Ahmed v. Ashcroft***, 396 F.3d 1011 (8th Cir. Jan. 26, 2005) (Riley, *Gibson*, Gruender),

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denied a petition for review of the Board's denial of asylum and withholding of removal. Petitioners, natives of Pakistan, argued that economic discrimination against their ethnic group, the Mohajirs, amounted to persecution, and specifically that jobs were allocated according to region. The IJ disagreed, finding they had not suffered past persecution and had not shown a well-founded fear of future persecution. The Board affirmed. Petitioners appealed, arguing that they showed a reasonable fear of economic sanctions and that the Board abused its discretion in failing to address all of their arguments.

Pakistan's policy of allocating government jobs according to geographic areas was not innate persecution.

The court held that Pakistan's policy of allocating government jobs according to geographic areas was not innate persecution of any particular ethnic group living within those geographic areas, and would not support an asylum claim by aliens who, because they were living in a geographic area where other members of their same ethnic group were clustered, were allegedly eligible for only 3-4% of available government jobs. Accordingly, the court dismissed the petition for review.

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In ***Berte v. Ashcroft***, 396 F.3d 993 (8th Cir. Feb. 4, 2005) (*Wollman*, Lay, Colloton), petitioner, a native of Ivory Coast, testified that it is difficult for people from the northern part of the country to obtain documents such as passports, and that he would be unable to renew his documentation and thus be denied the rights of citizenship, such as the right to vote and apply for work. The IJ denied petitioner's applications for asylum and withholding of removal, finding that, while petitioner may have suffered discriminated, he was not persecuted. Petitioner appealed, seeking to supplement the record with evidence of changed country conditions, however the Board denied that request and adopted and affirmed the IJ's decision.

The court agreed, finding that petitioner's testimony reflected discrimination, but did not rise to the level of persecution. The court found it significant that petitioner had never been arrested, detained, or interrogated by authorities and did not expect such treatment upon his return. Furthermore, the court held that the Board did not err in denying petitioner's request to supplement the record as the evidence concerned general unrest in Ivory Coast and was not specific to petitioner. Accordingly, the court denied the petition for review.

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In ***Chaib v. Ashcroft***, — F.3d —, 2005 WL 350338 (10th Cir. Feb. 14, 2005) (Seymour, *McKay*, Murphy), the Tenth Circuit reversed the Board's decision affirming the IJ's denial of asylum, withholding of removal, and CAT protection. Petitioner, a native of Algeria, claimed that he feared persecution because while working at the Public Treasury, he discovered a co-worker was funneling money to the Armed Islamic Group ("AIG"). Petitioner testified that when he confronted the co-worker at his home, petitioner was pressured into joining the Islamic Salvation Front ("FIS") in transferring funds to the AIG. Petitioner alleged that he was threatened with death if he notified the authorities. Petitioner testified that when he arrived in the United States, he learned that he had been implicated in the scheme and government agents had been to his home and beaten his brother.

The IJ denied petitioner all relief and protection, finding that petitioner had not been subject to past persecution and that petitioner's claim of future persecution was unfounded because he lacked credibility. The Board summarily affirmed. On appeal, petitioner challenged the constitutionality of the Board's summary affirmance procedures as well as the IJ's adverse credibility finding.

The court held that the decision to affirm without opinion was beyond its jurisdiction to review, and that in any case, the Board's summary affirmance procedures do provide meaningful review and thus are not unconstitutional. The court held that the IJ's credibility ruling was not supported by record evidence, and the State Department Country Report was in direct contradiction to the IJ's finding regarding the Algerian government's ability to control the group petitioner feared. Accordingly, the court reversed the Board's decision and remanded to provide the agency an opportunity to further explain or supplement the record.

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In ***Diab v. Ashcroft***, — F.3d —, 2005 WL 288988 (1st Cir. Feb. 8, 2005) (Torruella, Selya, *Stahl*), petitioner, an Egyptian national and Coptic Christian, sought asylum on the ground that he had been persecuted by Muslims due to his religious beliefs. Petitioner claimed that he was often confronted by Muslims who attempted to convert him to Islam, and that he was beaten because he refused to convert. He also testified that, after moving to Greece, a Muslim extremist stabbed him thirty-three times. Petitioner claimed that he returned to Egypt on three occasions, twice to secure travel documents and once to visit his mother. The IJ found petitioner's testimony to be incredible and denied all relief. The Board summarily affirmed.

On appeal, the court held that petitioner failed to establish past persecu-

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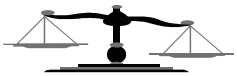

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tion or a well founded fear of future persecution due to his religious beliefs. The court found that there was insufficient evidence that the alleged attacks were undertaken due to religion. The court held that, while the IJ gave only a cursory review of petitioner's evidence of country conditions, it need not consider the error because petitioner's incredible testimony and ability to return to Egypt without incident negated his claim of a subjective fear of future persecution. Accordingly, the court denied the petition for review.

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In ***Dorosh v. Ashcroft***, — F.3d —, 2004 WL 3187917 (6th Cir. Dec. 20, 2004) (*Suhrheinrich*, Batchelder, McKeague), the Sixth Circuit affirmed the Board's denial of asylum and withholding of removal. Petitioner, a native of Ukraine, said she would be persecuted and tortured if returned because she was a Jew. Petitioner alleged that her father was killed by his co-workers for marrying a Jewish woman and that she herself was arrested, detained for a week, and brutalized because her mother had participated in a Jewish-rights' demonstration. The IJ denied relief and protection, finding petitioner's testimony to be incredible. The Board reversed the adverse credibility finding, but agreed that petitioner had not met her burden of proof because she did not provide sufficient corroboration.

The Board's corroboration requirement did not place unreasonable demands on petitioner and her explanation for why she was unable to corroborate her claims was inadequate.

The Sixth Circuit agreed, finding the Board's corroboration requirement did not place unreasonable demands on petitioner and that her explanation for why she was unable to corroborate her claims was inadequate. The court held that petitioner's claim that her mother could not safely obtain affidavits was refuted by her ability to obtain a previous letter from her mother in which she documented her own mistreatment. The court further noted that the Ukranian government had condemned anti-Semitism and there had been a resurgence of Jewish religious and cultural institutions. Finding that petitioner had failed to prove past persecution or a well-founded fear of future persecution, the court affirmed the Board's denial of asylum and withholding of removal.

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In ***Esaka v. Ashcroft***, — F.3d —, 2005 WL 356497 (8th Cir. Feb. 16, 2005) (*Smith*, Beam, Benton), the Eighth Circuit considered the case of an English-speaking native of Cameroon who was placed in removal proceedings for violating the terms of her student visa by seeking employment without permission. Petitioner sought asylum, withholding of removal, and CAT protection on the ground that, as an Anglophone, she had suffered past persecution. Petitioner alleged that while protesting the government's treatment of Anglophones, she was arrested, detained, and beaten. She alleged that she was able to escape and then walked fifty miles back to her home. Petitioner produced death certificates, which were later proved to be fake, of two cousins who she alleged had been murdered by government officials.

The IJ found petitioner's testimony to be incredible and denied her applications. Specifically, the IJ found the discrepancies between petitioner's testimony and her asylum application concerning her detention and her explanation that, despite being educated in English, any discrepancies were due to faulty translation to be "shaky." Moreover, the IJ found petitioner's submission of fake death certificates seriously damaged her claim. The Board affirmed on appeal.

The court held that petitioner's testimony was inconsistent and not credibly explained. The court noted that she made no mention of being beaten in her asylum application, and this discrepancy clearly related to the heart of her asylum claim. Accordingly, the court found specific and cogent reasons for the adverse credibility determination and denied asylum and withholding of removal. Finding that petitioner had failed to demonstrate that she would more likely than not be subject to torture, the court found petitioner ineligible for CAT protection.

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In ***Ismail v. Ashcroft***, 396 F.3d 970 (8th Cir. Feb. 4, 2005) (Murphy, Hansen, *Melloy*), the court denied a petition for review of the Board's denial of asylum, withholding of removal, and CAT protection. Petitioner, a native of Somalia, testified that his home was raided, he was beaten, and his wife was raped on several occasions by Hawiye militia members because petitioner was a member of the Midgan clan. The IJ denied all forms of relief or protection, finding petitioner's testimony to be incredible. The Board affirmed, finding petitioner's testimony concerning the method in which his father was killed, whether his wife was stabbed, and whether he was captured by the Hawiye to be inconsistent.

The court agreed, finding petitioner's claim of mistakes in interpretation and misunderstanding of the proceedings did not explain his inconsistent testimony. Further, the court held that petitioner failed to show that the IJ's decisions concerning the exclusion of witnesses and introduction of the asylum officer's illegible notes resulted in prejudice.

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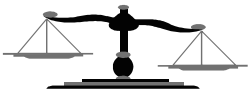

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In ***Lie v. Ashcroft***, 396 F.3d 530 (3rd Cir. Feb. 7, 2005) (Nygaard, Rosenn, *Becker*), the Third Circuit considered the claim of a Chinese Christian living in Indonesia who alleged that several Indonesian Muslims entered her husband's store, threatened him with a knife, called him a "Chinese pig," and robbed him. Petitioner testified that one year later, two people called her a "Chinese pig," threatened to burn down her house, and stole some of her money and jewelry. Following the second incident, petitioner continued to live in the same house without incident for twenty-one months. The IJ granted asylum. On the government's appeal, the Board overturned the grant of asylum, finding no evidence that the single incident was motivated by petitioner's religion, and that the ethnic slur was insufficient evidence of ethnic motivation. Furthermore, the Board reasoned that the incident was did not constitute persecution and that petitioner's continued residence in Indonesia without incident undermined her fear of future persecution.

The court found that petitioner failed to establish that she faced an individualized risk of persecution or that there is a pattern or practice of persecution of Chinese Christians in Indonesia.

The court agreed, finding that petitioner had not established that the alleged incident was motivated by her ethnicity or religion, and even if that was the motivation, the incident was not severe enough to constitute persecution. Furthermore, the court found that petitioner failed to establish that she faced an individualized risk of persecution or that there is a pattern or practice of persecution of Chinese Christians in Indonesia. While the 1999 Country Report did provide evidence that there was widespread animus against ethnic Chinese, the court held the Board was nevertheless entitled to rely on the evidence that, in petitioner's particular case, the robberies were motivated by money. Accordingly, the court denied the petition for review.

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In ***Mohamed v. Ashcroft***, 395 F.3d 835 (8th Cir. Feb. 2, 2005) (Murphy, Heaney, *Magill*), petitioner, a native of Somalia, testified that after he fled to Kenya, he learned that his mother had been killed and his father abducted. Petitioner alleged that the Hawiye clan attacked his family because they were members of that Hatimi clan. The IJ found petitioner's testimony to be incredible because petitioner had never before mentioned that his father had been abducted twice and mother murdered. The Board affirmed without opinion.

The court agreed, finding the IJ's adverse credibility determination to be supported by substantial evidence. The court noted that petitioner appeared to have changed his story radically to make it conform with the requirements for asylum. Accordingly, the court denied the petition for review.

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In ***Mohamed v. Ashcroft***, 396 F.3d 999 (8th Cir. Feb. 10, 2005) (Loken, *Magill*, Benton), the Eighth Circuit denied a petition for review of the Board's denial of asylum and withholding of removal. Petitioner, a native of Somalia, claimed that she was persecuted on account of her membership in the Benadir clan and because her husband was a speech-writer for ousted President Barre. Petitioner testified that, during a period of civil unrest in the Somali capitol of Mogadishu, her home was looted and she was attacked by members of the United Somali Congress who she claimed were looking for her husband. She further testified that the same men later murdered her oldest son. Petitioner fled to a refugee camp in Kenya and then moved to the United States. The IJ found that petitioner's house was attacked as part of the generalized looting that swept Mogadishu, not on account of her clan membership. The IJ found petitioner's testimony concerning her husband's relationship with President Barre to be incredible and did not believe that the alleged persecution was on account of her husband's employment. The Board affirmed without opinion.

The court held that the record provided substantial evidence that petitioner was not persecuted on account of her Benadir clan membership, but rather that the alleged persecution was part of the general strife which engulfed Somalia. Furthermore, the court found insufficient evidence that petitioner had been persecuted because of her husband's association with Somali President Barre. Additionally, the court held that petitioner's evidence that she could not relocate within Somalia was self-serving and unreliable in comparison to the State Department's country report.

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In ***Rodriguez-Ramirez v. Ashcroft***, — F.3d —, 2005 WL 375133 (1st Cir. Feb. 17, 2005) (Boudin, Torruella, *Selya*), the First Circuit denied the petition for review. Petitioner, a Guatemalan national, illegally entered the United States and applied for asylum and withholding of removal on the ground that he would be persecuted by the guerrillas. Petitioner alleged that one night two masked guerrillas sought to recruit his father and threatened that they would come back for him in two days. The guerrillas never returned. Petitioner then alleged that six years later, the army killed a number of innocent people in the region in which he lived, suspecting they supported the guerrillas. The IJ found that petitioner

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failed to demonstrate his eligibility for asylum or withholding, and the Board summarily affirmed.

On appeal, the court held the Board did not err in upholding the IJ's denial of petitioner's application for asylum. The court found that neither of the incidents petitioner alleged rose to the level of persecution. The court found petitioner did not have an objective well-founded fear of future persecution based on his father's political views, noting that if the holder of a political opinion is not a target of ongoing persecution, it strains credulity that one to whom that opinion might be imputed should be regarded as objectively at risk. Furthermore, the court found that the peace accords signed by the guerrillas and petitioner's family's continued residence in Guatemala without incident undercut his asylum claim.

If the holder of a political opinion is not a target of ongoing persecution, it strains credulity that one to whom that opinion might be imputed should be regarded as objectively at risk.

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In ***Singh v. Ashcroft***, — F.3d —, 2005 WL 291515 (6th Cir. Feb. 8, 2005) (Martin, *Moore*, Bell), the Sixth Circuit denied the petition for review of the Board's denial of asylum and withholding of removal, and remanded with regard to the CAT claim. Petitioner, a native Indian Sikh, sought asylum, withholding of removal, and CAT protection on the ground that he was persecuted due to his imputed association with the Khalistan Liberation Front ("KLF"), a radical Sikh separatist group. Petitioner alleged that on several occasions he was arrested, interrogated, and beaten by the police because they believed he was associated with the KLF. He also testified that the police forced him to become an informant against the KLF, and that the KLF threatened to kill him if he did not stop providing the police with information. The IJ found petitioner's testimony to be incredible, noting inconsistencies regarding petitioner's involvement with the death of a KLF leader and with petitioner's involvement with a plot to bomb the Senior Police Detective. The Board affirmed.

While the court noted it was a close case, it found that a reasonable adjudicator would not be compelled to find that the IJ's decision that petitioner lacked credibility was unreasonable. Accordingly, the court affirmed the Board's denial of asylum and withholding of removal. The court found that neither the IJ nor the Board addressed the CAT claim directly, rather they simply made a generalized adverse credibility finding. Thus the court remanded to the Board for further consideration of the CAT claim.

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In ***Unuakhaulu v. Ashcroft***, — F.3d —, 2005 WL 334842 (9th Cir. Feb. 14, 2005) (Tashima, *Fisher*, Tallman), the Ninth Circuit denied a petition for review of his applications for withholding of removal and CAT protection. Petitioner, a native of Nigeria, was convicted of credit card fraud in violation of 18 U.S.C. § 371. The IJ found that the conviction was an aggravated felony. Petitioner sought withholding of removal and CAT protection on the ground that the Nigerian government engaged in tribal genocide of the Ogoni people. However, petitioner provided no evidence that he was a member of the Ogoni tribe, and testified that there was no way the Nigerian government could identify him as Ogoni. The IJ denied petitioner's applications and the Board dismissed his appeal without opinion.

The court held that it had jurisdiction because petitioner had received only eighteen months' imprisonment for his conviction and the IJ did not rely upon the conviction as the basis for denying his application for withholding of removal. However, on the merits, the court found substantial evidence supporting the IJ's denial of petitioner's application for withholding. The court noted that petitioner did not claim that he was ever subject to past persecution and that he testified that he could not be recognized as Ogoni. As petitioner failed to meet his burden of proving past or a clear probability of future persecution, the court denied the petition for review.

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In ***Zheng v. Ashcroft***, — F.3d —, 2005 WL 351217 (9th Cir. Feb. 15, 2005) (Nelson, Tashima, *Fisher)*, the Ninth Circuit considered the claim of a Chinese man who sought asylum, withholding of removal, and CAT protection on the grounds that his wife was forced to undergo an abortion, the couple was fined for violating China's family planning policies, and one of the couple was instructed to report for sterilization. Petitioner testified that he and his wife married before they attained the legal age for marriage. When petitioner's wife was five months pregnant, she was forced to undergo an abortion. He said that they were fined 20,000 RMB, more than three times their annual combined income. Petitioner further testified that his wife later gave birth to a daughter, and when the government officials found out about the birth, the couple was assessed a second fine of 20,000 RMB and ordered to report for sterilization. The IJ found petitioner's testimony to be incredible because it was inconsistent with the State Department's Country Reports and found it unlikely that the couple would be subject to sterilization. The IJ denied all relief and protection, and the Board affirmed without opinion.

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On appeal, the court noted that the IJ incorrectly interpreted the Country Reports as he focused on the repercussions legally married couples faced, whereas petitioner's marriage was not legal and thus different punishments applied. Furthermore, the court held the fine was similar to the amount stated in the Report. The court noted that the inconsistencies regarding time and the lack of detail concerning the wife's abortion were minor and insufficient to support an adverse credibility finding. Accordingly, the court granted the petition for review and remanded so the Board could determine petitioner's eligibility for relief.

The IJ incorrectly interpreted the Country Reports as he focused on the repercussions legally married couples faced, whereas petitioner's marriage was not legal and thus different punishments applied.

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Cancellation of Removal

In ***Romero v. INS***, — F.3d —, 2005 WL 299698 (2d Cir. Feb. 9, 2005) (Cardamore, *Jacobs*, Cabranes), the Second Circuit affirmed the Board's decision denying cancellation of removal. Petitioner, a native of Mexico, entered the United States without inspection and was placed in removal proceedings. Petitioner conceded removability, and requested cancellation under NACARA. Petitioner further claimed that while he was not eligible for relief under NACARA, the act violates the equal protection rights of similarly situated aliens from non-NACARA nations. The IJ found petitioner ineligible for cancellation, noting that it lacked jurisdiction to hear the constitutional challenge to NACARA, and the Board affirmed.

The Second Circuit held that NACARA's preferential treatment of Cubans and Nicaraguans over Mexicans is supported by facially legitimate and bona fide reasons. Furthermore, the court held that petitioner was not prejudiced by his counsel's failure to invoke petitioner's marriage, which had previously been deemed insufficient to alter petitioner's status.

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Crimes

In ***Alvarez-Hernandez v. Acosta***, — F.3d —, 2005 WL 375683 (5th Cir. Feb. 17, 2005) (*Higgenbotham*, Smith, Benavides), the Fifth Circuit reversed the district court's decision finding petitioner ineligible for § 212(c) relief for not having established seven consecutive years of lawful domicile. Petitioner, a native of El Salvador, entered the U.S. in 1988 and pled guilty to aggravated delivery of a controlled substance in 1994. A final judgment of conviction was not entered until 1997. INS commenced removal proceedings on the basis of an aggravated felony controlled substance conviction. Petitioner conceded removability and sought a waiver of deportation under § 212(c). The judge denied relief on the ground that § 212(c) had been repealed by IIRIRA. While petitioner's appeal to the Board was pending, the Supreme Court decided *INS v. St. Cyr*, which held that the repeal of § 212(c) could not be applied retroactively to aliens whose convictions were obtained by plea agreements and who would have been eligible for relief at the time of their plea. The Board held that petitioner had not been formally convicted until 1997, after the passage of IIRIRA, and affirmed the IJ's decision. Petitioner filed a habeas petition. The district court held that while the date of the acceptance of the plea determines the applicability of IIRIRA, petitioner was ineligible for relief under § 212(c) because he lacked the requisite seven years of lawful domicile and denied his petition.

The circuit court disagreed, holding that petitioner was not required to have accumulated seven years of unrelinquished domicile at the time of his plea, but rather when removal proceedings were initiated against him. Furthermore, the court held that the date of a plea of guilty, and not the date that judgment of conviction is ultimately entered, is determinative of whether the retroactive application of the IIRIRA bar to an alien's claim for § 212(c) relief is impermissible under *St. Cyr*. Accordingly, petitioner was not barred from relief, and the court reversed the order of the district court

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In ***Argaw v. Ashcroft***, 395 F.3d 521 (4th Cir. Jan. 31, 2005) (*Michael,* Duncan, Titus), the Fourth Circuit reversed the Board's finding that petitioner's conviction for possession of khat constituted a controlled substance offense. Petitioner, returned from Ethiopia in possession of khat, a plant whose leaves are chewed as a stimulant. He was ordered removed as an alien convicted of a controlled substance violation under the Controlled Substances Act, and the Board affirmed. The court disagreed, holding that since khat is not listed as a controlled substance and it has not been established that khat might contained a controlled substance, petitioner's conduct did not amount to a criminal offense. Accordingly, the court reversed the Board's order of removal.

Contact: Jonathan F. Cohn, OIL

In ***Becerra-Garcia v. Ashcroft***, — F.3d —, 2005 WL 237647 (9th Cir. Feb. 2, 2005) (Meskill, Trott, *McKeown*), the Ninth Circuit affirmed the district court's denial of petitioner's motion to suppress evidence. Petitioner was stopped by Tribal Rangers while crossing the Tohono O'odham Indian

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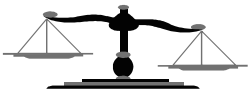

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Reservation in southern Arizona with more than twenty undocumented aliens in his van. Petitioner was charged with conspiring to transport illegal aliens and transporting illegal aliens under 8 U.S.C. § 1324(a)(1)(A)(ii). He sought to suppress the evidence of the illegal aliens arguing the Tribal Rangers had no authority to stop his vehicle, thus the search and seizure violated his Fourth Amendment rights. The district court denied the motion and petitioner entered a conditional plea of guilty.

The court, finding that the legality of the seizure did not depend on the Rangers' authority under tribal law, held that the stop was reasonable.

The court, finding that the legality of the seizure did not depend on the Rangers' authority under tribal law, held that the stop was reasonable. The court noted that the Rangers' intrusion was minimal; they merely turned their jeep around, followed petitioner's van, and turned on their emergency lights. Accordingly, the court affirmed the district court's decision.

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In ***Caesar v. Ashcroft***, — F.Supp.2d —, 2005 WL 14686 (S.D.N.Y. Jan. 3, 2005) (Sand), the Southern District of New York dismissed petitioner's pro se habeas petition. Petitioner, a native and citizen of Guyana, was convicted of several crimes, including criminal possession of stolen property in the third degree under New York Penal Law § 165.50 §§ 110 and attempted petty larceny under §§ 110 and 155.25. Petitioner was found removable for having been convicted of two or more crimes involving moral turpitude. The IJ denied relief, finding that petitioner's criminal record showed insufficient rehabilitation to warrant § 212(c) relief. The Board adopted and affirmed the IJ's decision and petitioner sought habeas review.

The court held that it lacked jurisdiction with regard to petitioner's request for 212(c) relief as it was a discretionary denial. The court lacked subject matter jurisdiction over petitioner's claims that his crimes were not crimes of moral turpitude because he did not raise the issue before the IJ or Board, and further, his claims were without merit as criminal possession of stolen property and attempted petty larceny would both be considered crimes of moral turpitude.

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In ***Cruz-Garza v. Ashcroft***, 396 F.3d 1125 (10th Cir. Feb. 2 2005) (Lucero, *McKay*, Porfilio), the Tenth Circuit reversed the Board's decision upholding the IJ's order that petitioner be removed for having been convicted of an "aggravated felony." Petitioner, a native of Mexico, pled guilty to attempted theft by deception, a third-degree felony in the state of Utah. INS initiated removal proceedings and petitioner filed a motion in state court to vacate his conviction. The state court amended petitioner's conviction to attempted theft by deception, a Class B Misdemeanor under Utah Code Ann. § 76-3-402. Petitioner argued that his amended conviction was no longer an "aggravated felony."

The court, following the Board's decision in *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999), held the government had the burden of proving petitioner's vacated conviction was the result of petitioner's completion of rehabilitative procedures, as opposed to the merits of the case. The court held that the government failed to prove by clear, unequivocal, and convincing evidence that petitioner had been convicted of an "aggravated felony" due to the vagaries in the record as well as the state statute authorizing reduction of petitioner's conviction. Accordingly, the court granted the petition for review and reversed the Board's decision.

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In ***Liao v. Rabbett***, — F.3d —, 2005 WL 275702 (6th Cir. Feb. 7, 2005) (*Guy*, Cole, Tarnow), the Sixth Circuit affirmed the district court's decision granting petitioner's habeas petition on the ground that petitioner's conviction of heroin possession was not an aggravated felony and therefore petitioner was eligible for cancellation of removal. Petitioner, a native of China, was convicted of possession of heroin, a "fifth-degree felony" under Ohio Rev.Code § 2925.11 and punishable by a maximum of twelve months imprisonment, as well as theft and receiving stolen property under Ohio Rev.Code § 2913.02 and § 2913.51. He was charged in removal proceedings as having been convicted of a controlled substance violation and two or more crimes involving moral turpitude. Petitioner conceded removability and sought cancellation of removal. The IJ found that petitioner's drug conviction was an aggravated felony which rendered him ineligible for cancellation, and the Board affirmed. Petitioner filed a habeas petition, and the district court held that since petitioner's drug conviction was not punishable by more than one year in prison, it was not an "aggravated felony," and granted the habeas petition.

On appeal, the Sixth Circuit agreed. The court held that a state drug conviction is not a felony under state law, even if it is labeled as such, if it is not punishable under state law by more than one year imprisonment. The court reasoned that defining a state felony with respect to the authorized punishment under state law more accurately reflects the state's judgment concerning the seriousness of an offense than the nomenclature used to label an offense a felony or misdemeanor. Accordingly, the court affirmed the district court's

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decision granting habeas relief and declaring petitioner eligible to apply for cancellation of removal.

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Denaturalization

In ***U.S. v. Lekarczy***, — F.Supp.2d —, 2005 WL 246686 (W.D.Wis. Jan. 31, 2005) (Crabb), the district court granted the government's motion for summary judgment and revoked defendant's citizenship. Defendant, a native of Poland, applied for citizenship in 1995 and was naturalized in 1996. In 1994, defendant was charged with felonious forgery-uttering under Wis. Stats. §§ 943.38(2) and 939.05. When he failed to appear at his hearing, he was charged with bail jumping under Wis. Stat. § 946.49(1)(b). Defendant was convicted on both counts in 2003. Defendant also pled guilty to bank fraud and admitted that he committed various acts between 1992 and 1997. The government sought to rescind respondent's citizenship on the ground that he failed to demonstrate good moral character by committing unlawful acts.

The court agreed, finding it inconsequential that defendant was not convicted of his unlawful acts until after he had naturalized. Furthermore, the court held that while defendant's crimes were not listed specifically as exceptions to good moral character, the government may consider any unlawful act as undermining and applicant's good moral character. The court found that there was no question that bank fraud, bail jumping, and forgery-uttering were "unlawful acts" and accordingly granted the government's motion for summary judgment and revoked defendant's citizenship.

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The court agreed, finding it inconsequential that defendant was not convicted of his unlawful acts until after he naturalized.

In ***U.S. v. Zajanckuskas***, — F.Supp.2d —, 2005 WL 225613 (D.Mass. Jan. 26, 2005) (Gorton), the district court ordered the revocation of defendant's citizenship. Defendant, a native of Lithuania, was granted citizenship in 1956. Prior to coming to the U.S., defendant served in the Lithuanian Army, was captured by the Germans during World War II, and was recruited to serve in the German Army. In 1943, defendant's unit was deployed to Warsaw to take part in the liquidation of the city's Jewish Ghetto. In his 1950 visa application, defendant claimed that he was in Lithuania from 1929 to 1944 and made no mention of his military service. An issue in the case was whether defendant actually went to Warsaw as part of that deployment and therefore illegally procured his citizenship.

The court found substantial evidence supporting the government's position that defendant was in fact deployed to Warsaw. Defendant's name was on a roster of soldiers deployed to Warsaw, and the court found defendant's testimony to the contrary to be incredible. Having found the government presented clear, unequivocal and convincing evidence that defendant was deployed to Warsaw, the court held that defendant willfully made a material misrepresentation for the purpose of gaining admission to the United States and therefore was rendered ineligible for a visa by the Displaced Persons Act. Because defendant was ineligible for a visa, his admission into the U.S. was unlawful and his subsequent naturalization was unlawful. Thus, the court ordered the revocation of defendant's citizenship.

Ineffective Assistance of Counsel

The Eleventh Circuit in a *per curiam* decision in ***Dakane v. U.S. Attorney General***, — F.3d —, 2005 WL 289462 (11th Cir. Feb. 8, 2005) (Barkett, Kravitch, Forrester) affirmed the Board's decision denying petitioner's motion to reopen due to ineffective assistance of counsel. Petitioner entered the United States with a Kenyan passport, but alleged he was a Somali citizen, and sought asylum on the basis of being a member of a minority clan in Somalia. The IJ held that even if petitioner was originally from Somalia, he had firmly resettled in Kenya as evidenced by his Kenyan passport, and found petitioner ineligible for asylum. Petitioner appealed to the Board and was granted two extensions to file a brief, but never did. Petitioner obtained new counsel and requested leave to file his brief out of time, claiming ineffective assistance of prior counsel. Petitioner attached a copy of a complaint against his previous attorney. The Board denied the request and affirmed the results of the IJ's decision. The Board denied petitioner's motion to reopen, finding that while he properly asserted most of the requirements of *Matter of Lozada*, he failed to demonstrate prejudice.

The court held that under *Lozada*, a petitioner claiming ineffective assistance of counsel must show prejudice. While counsel's failure to submit a brief could be prejudicial, the court held that in this case, the basis for the IJ's decision to deny petitioner asylum was based on an adverse credibility finding concerning petitioner's nationality. The court could not say that the Board erred in determining that petitioner failed to show that an appellate brief could have changed the outcome of the case. Accordingly, the court affirmed the Board's denial of petitioner's motion to reopen.

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Habeas Corpus

In a *per curiam* decision in ***Nguyen v. Ashcroft***, — F.3d —, 2005 WL 299702 (5th Cir. Feb. 9, 2005) (Barksdale, Garza, DeMoss), the Fifth Circuit affirmed the Magistrate Judge's decision denying petitioner's habeas petition. Petitioner, a native of Vietnam, pled guilty to two counts of sexual assault on a child and was found removable. Petitioner appealed, arguing that he was a U.S. citizen because his out-of-wedlock father was a citizen. The appeal reached the Supreme Court which held that the statute preventing citizenship unless the father legitimizes the child before the age of 18 was constitutional. Petitioner filed a motion to reopen which was denied and a subsequent habeas petition arguing the denial of the motion to reopen deprived petitioner of due process. The Magistrate Judge denied petitioner's claim.

On appeal, the Fifth Circuit found that petitioner's removal proceedings were not fundamentally unfair, and the denial of the possibility of discretionary relief from removal did not threaten petitioner's constitutional right to due process. The court held that while the government's jurisdictional challenge was not raised below, subject matter jurisdiction may be raised at any stage in litigation, including for the first time on appeal. However, the court found that it need not reach the jurisdictional issue because petitioner had not stated a cognizable constitutional claim. Accordingly the court affirmed the Magistrate Judge's dismissal of petitioner's habeas claim.

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The court noted that granting jurisdiction to hear a motion to reopen when the original claim is barred would create an improper backdoor method for challenging a removal order.

Motions to Reopen

The Second Circuit, in ***Durant v. INS***, 393 F.3d 113 (2d Cir. Feb. 1, 2005) (Cardamone, Cabranes, *Sotomayer*), dismissed petitioner's petitions for review of an order of removal and the denial of a motion to reopen. Petitioner, a native of Barbados, was convicted in 1991 and 1994 for criminal possession of a controlled substance. INS initiated removal proceedings and petitioner applied for asylum and withholding because he claimed that he would not be able to receive medical care on account of his HIV-positive status. The IJ granted withholding of removal; on appeal, the Board reversed. The Board subsequently denied petitioner's motion to reopen.

The court held that it lacked jurisdiction to review petitioner's final order of removal since petitioner's 1991 and 1995 convictions for cocaine possession constituted controlled substance violations. For the same reason, the court found it lacked jurisdiction to review the denial of the motion to reopen, noting that granting jurisdiction to hear a motion to reopen when the original claim is barred would create an improper backdoor method for challenging a removal order.

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In ***Jupiter v. Ashcroft***, 396 F.3d 487 (1st Cir. Feb. 8, 2005)(Boudin, Torruella, *Selya*), the First Circuit denied petitioner's petition for review of the Board's decision denying his second motion to reopen. Petitioner, a native of Haiti, initially sought asylum before requesting voluntary departure. After his request was granted, petitioner filed a motion to reopen, claiming that his lawyer failed to advise him about his rights. The IJ denied the motion. Petitioner did not depart within the allotted period; instead he married a U.S. citizen and sought to adjust his status. Petitioner filed a second motion to reopen, claiming that exceptional circumstances prevented him from complying with the voluntary departure deadline. The IJ denied the second motion to reopen, finding it numerically barred and that reopening would be futile because petitioner was barred for having overstayed his voluntary departure date. The Board affirmed without opinion.

On appeal, the court held initially that petitioner's second motion was numerically barred as aliens may only file one motion to reopen. Secondly, the court found that petitioner's failure to comply with his voluntary departure date rendered him ineligible for relief. The court rejected petitioner's argument that exceptional circumstances prevented his voluntary departure, holding that even if petitioner believed his motion to reopen had never been adjudicated, the fact that an unadjudicated motion is pending is not an excuse for failing to comply with a voluntary departure deadline. Furthermore, the court rejected petitioner's due process claim finding it to be nothing more than a reformulated attack on the IJ's discretionary refusal to extend the voluntary departure deadline. Thus, the court denied the petition for review.

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In ***Guerra-Soto v. Ashcroft***, — F.3d —, 2005 WL 310036 (8th Cir. Feb. 10, 2005) (*Bye*, Lay, Gruender), the Eighth Circuit denied a petition for review of the Board's order denying her motion to reopen. Petitioner, a native of Mexico, conceded removability and requested an opportunity to apply for cancellation of removal. Petitioner failed to file an application for cancellation by the deadline. The IJ held that the failure to apply constituted a waiver of the right to request cancellation and ordered petitioner removed. Petitioner appealed and the Board affirmed, grant

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ing petitioner voluntary departure. Petitioner failed to depart and filed a motion to reopen claiming ineffective assistance of counsel. The Board denied the motion on the basis petitioner failed to comply with the voluntary departure order and therefore was ineligible for cancellation of removal.

On appeal, the Eighth Circuit was not persuaded by petitioner's argument that her compliance with the voluntary departure order would have made it pointless to seek cancellation of removal because she would no longer satisfy the continuous presence requirement. The court held if petitioner had not satisfied the continuous presence requirement by the time of her Notice to Appear, she could not subsequently satisfy it in any event as the continuous presence period ends with service of the Notice to Appear. Additionally, the court found that the Board did not abuse its discretion in denying the motion to reopen because the ineffectiveness claim did not result in a violation of due process rights because an alien has no constitutionally protected interest in seeking discretionary relief. Accordingly, the court denied the petition for review.

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In ***Polanco v. U.S. Department of Justice***, — F.3d —, 2005 WL 317558 (2d Cir. Feb. 10, 2005) (Meskill, *Calabresi*, Wesley), the Second Circuit denied the petition for review and affirmed the Board's decision denying a motion to reopen. Petitioner, a native of El Salvador, failed to appear for her asylum hearing and was ordered deported *in absentia*. The order became final when she did not appeal. Petitioner received Temporary Protected Status and joined the class in *American Baptist Churches v. Thornburgh*. Pursuant to the ABC settlement, petitioner was allowed to reapply for asylum. NACARA's stop-time rule prevented her from seeking suspension, but § 203 waived this for ABC class members who filed their applications within a specific period of time. While petitioner filed an application, it was more than one year late, and the IJ denied the motion as untimely. While petitioner's appeal with the Board was pending, Congress passed the LIFE Act Amendments. LIFE § 1505 extended NACARA § 203 relief eligibility to certain previously ineligible aliens and allowed these newly eligible aliens to apply for reopening of their deportation proceedings within a fixed time period. Petitioner argued that she should be allowed to reopen under these amendments. The Board found her NACARA application untimely, and that she was ineligible for LIFE. Petitioner appealed, arguing that the LIFE Act's distinction between those eligible to file a motion to reopen and those who are not violated the Equal Protection component of the Fifth Amendment.

The court reasoned that preventing aliens from being afforded duplicative opportunities to seek relief was surely within the province of Congress' broad authority to determine the shape of the immigration laws.

The Second Circuit found petitioner's claim to be without merit. The court held that only aliens who were not already afforded the opportunity to move to reopen in order to apply for NACARA § 203 relief are permitted to move to reopen under the LIFE Act. The court reasoned that preventing aliens from being afforded duplicative opportunities to seek relief was surely within the province of Congress' broad authority to determine the shape of the immigration laws. Thus, the court denied the petition for review and affirmed the Board's decision.

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Reinstatement

In ***Faiz-Mohammad v. Ashcroft***, 395 F.3d 799 (7th Cir. Jan. 26, 2005) (Posner, *Ripple*, Evans), the Seventh Circuit reversed and remanded an INS decision reinstating a removal order. Petitioner, a native of Pakistan, was ordered removed in May 1988. He reentered in June 1989. On February 25, 1997, after Congress enacted IIRIRA, but before its April 1, 1997 effective date, petitioner applied for adjustment of status and sought a waiver of inadmissability. The INS District Director denied the petition and reinstated petitioner's previous removal order.

On appeal, petitioner argued that IIRIRA's reinstatement provision may not be retroactively applied to aliens who reentered and applied for relief prior to IIRIRA's effective date. The court agreed, finding that, since petitioner reentered and applied for relief prior to IIRIRA's effective date, he had the right to have his adjustment application adjudicated. Because IIRIRA operated to impair rights petitioner possessed when he acted, the statute cannot be applied retroactively. Accordingly, the court reversed and remanded for further proceedings.

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CASES SUMMARIZED

OCIJ Overview continued

an asylum officer decides that an alien does not possess a credible fear of removal under the INA or the CAT, an Immigration Judge may review that determination. If the Immigration Judge finds that the alien has a credible fear of persecution, the alien may apply for asylum or withholding of removal under the INA or the CAT. In fiscal year 2003, the Immigration Judges conducted 43 credible fear reviews.

Reasonable Fear Reviews: If an alien who is ordered removed during an expedited removal hearing expresses a fear of returning to his or her country, he or she must be given a reasonable fear interview by a DHS asylum officer. Similar to the credible fear assessment discussed above, the asylum officer will determine whether the alien has a reasonable fear of persecution or torture in the country of removal. If the interviewing officer determines that the alien has a reasonable fear of persecution or torture, the alien will be referred for a hearing before an Immigration Judge. The Immigration Judge will then conduct a withholding-only hearing. In fiscal year 2003, the Immigration Courts conducted 101 reasonable fear reviews.

Claimed Status Reviews: If an alien in expedited removal proceedings claims under oath to be a U.S. citizen, to be a lawful permanent resident (LPR), to have been admitted as a refugee, or to have been granted asylum, he or she can obtain review of that claim by an Immigration Judge if the DHS determines that the alien has no such claim. In fiscal year 2003, the Immigration Courts held 88 claimed status review hearings.

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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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