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Immigration Litigation Bulletin

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ATTORNEY GENERAL ORDERS REVIEW OF IMMIGRATION COURTS AND BIA

On January 9, 2006, Attorney General Alberto Gonzales, sent a memorandum to all immigration judges stating that he has "watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work I expect from employees of the Department of Justice." The Attorney General expressed his belief that some of the judges' "conduct can be aptly described as intemperate or even abusive."

> "To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect."

The Attorney General indicated that he has asked the Deputy Attorney General and the Associate Attorney General "to develop a comprehensive review of the immigration courts . . . to include the quality of work as well as the manner in which it is performed and encompass both the Immigration Court and the Board of Immigration Appeals."

Attorney General Gonzales urged immigration judges "to bear in mind the significance of [their] cases and the lives they affect. To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department in which you serve."

A number of courts have raised concerns lately about the quality of the administrative adjudication of immigration cases. The Seventh Circuit Court of Appeals has been particularly vocal on this issue, complaining recently that the "the adjudication of immigration cases at the administrative level has fallen below the minimum standards of legal justice." *See Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

EOIR has more than 200 immigration judges located in 53 immigration courts throughout the United States.

BULLETIN BIRTHDAY *A RETROSPECTIVE*

This year marks the beginning of the Immigration Litigation Bulletin's tenth year of publication, and our circulation is now over 1,200 copies each month. The headlines in Volume 1, Issue 1 (July 1997) read, "Attorney General Vacates N-J-B-" and "In AADC v. Reno, Ninth Circuit Rules That INA § 242(f) Trumps § 242(g)". July 1997 was an interesting midpoint for the Office of Immigration Litigation.

OIL was founded by order of Acting Attorney General Edward C. Schmults, signed December 23, 1982. The Office began operations in February 1983 in the old Todd Building, with Director Robert L. Bombaugh, Deputy Director Lauri S. Filppu, and a staff of 17 lawyers and 7 support personnel. A Memorandum

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SOLICITOR GENERAL ACQUIESCES IN CERT PETITION RAISING ISSUE OF WHETHER STATE FELONY DRUG CONVICTION IS AN AGGRAVATED FELONY

The Solicitor General has acquiesced in a petition for certiorari filed in ***Lopez v. Gonzales***, 417 F.3d 934 (8th Cir. 2005*), cert. petition filed*, __US__, 74 USLW 3289 (Oct 31, 2005)(No. 05-547). The question raised is whether the commission of a controlled substance offense that is a felony under state law but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," where the alien was sentenced under State law to more than one year of imprisonment.

The petitioner, a citizen of Mexico and an LPR since 1990, pleaded guilty in 1997 to aiding and abetting

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BULLETIN BIRTHDAY

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of Understanding between the Criminal Division (Assistant Attorney General D. Lowell Jensen), the Civil Division (Assistant Attorney General J. Paul McGrath), and the Immigration and Naturalization Service (Commissioner Alan C. Nelson) transferred immigration litigation from the Criminal Division's General Litigation Section to the Civil Division's new Office of Immigration Litigation. OIL's initial staff was drawn principally from these three DOJ components. Our surviving founders include Margaret Perry, Mary Coates, Dick Evans, Jim Hunolt, and Marshall Golding.

For all of its 23 years, OIL's mission has been to preserve and defend the Executive's authority to administer the immigration and nationality laws of the United States.

There had been much debate about the number of immigration cases that the new OIL would face. The number of pending review petitions had risen from 496 in 1977 to 605 in 1981, which, in the face of AAG McGrath's skepticism, the Criminal Division insisted was only a temporary phenomenon. In our first year, we received 1,483 new cases, including 803 review petitions. The actual catalyst for OIL's formation, however, was not review petitions but the need to defend district court immigration cases such as *Louis v. Nelson* in Miami, *Nunez v. Bolden* in Texas, and *Orantes-Hernandez v. Smith* in California. OIL was to be organized into litigation teams, which Mr. McGrath predicted would be expected to handle "about 12 significant district court trials and 60 appellate matters per year." In our early years, OIL attorneys did spend about a third of their time on district court matters.

Fourteen years brought significant change to OIL's staff and docket. In 1997, after an eight year exile in the Patrick Henry Building, OIL was ensconced its National Place quarters with a staff of 81 attorneys and 27 support personnel. That year we received 2,979 new cases, 1,939 of which were petitions for review. We were then in our tenth year of litigating a variety of class actions under the amnesty provisions of the 1986 Immigration Reform and Control Act (IRCA, Pub. L. No. 99-603), a task that persisted over two decades and only now is being brought to a close with the settlement of what today is styled *Northwest Immigrant Rights Project* (a case turning on the amnesty's "known to the government" provisions). In 1997, Congress had recently passed the Antiterrorism and Effective Death Penalty Act (AEDPA, Pub. L. No. 104-132) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, Pub. L. No. 104-208), which were expected to have significant impact on our litigation.

The Department and OIL had been involved in the development of the 1996 legislation, and concern was expressed that AEDPA and IIRIRA's restrictions on judicial review might "put OIL out of business." Even before some alien advocates took up the cry, "Fix '96", it was clear that considerable effort would be needed to assure effective and consistent implementation of the new laws. In May 1997, OIL held its first annual immigration litigation conference in Chicago, the theme of which was "Litigation under AEDPA and IIRIRA." The conference brought together 94 attorneys from OIL, INS, and various United States Attorney Offices, and OIL has held conferences every year since at various locations across the United States (complementing our annual Fall training program in Washington and the periodic immigration course offerings at the National Advocacy Center). In July 1997, OIL launched its monthly "Bulletin" providing articles, case summaries, and advice on immigration litigation.

Both the proponents and the critics proved wrong about AEDPA and IIRIRA. Far from putting OIL out of business, the 1996 reforms greatly increased OIL's docket, with new case receipts jumping 65% from 1996 to 1998. In the ten years since the 1996 reforms, our annual receipts of new district and circuit court matters have risen from 2,028 to 15,185 (including last year more than 11,000 review petitions). So great has been our litigation "prosperity" that, through the good offices of the Deputy Attorney General, we have shared our cases with many of our Department colleagues. And while our success rate before the courts has been relatively constant throughout the past decade (at about 90%), the statutory limits on judicial review have done little to reduce the frequency or the ardor with which the courts have scrutinized the agencies' immigration determinations. The 1997 catchphrase, "jurisdiction-stripping" now sounds quaint if not ironic.

For all of its 23 years, OIL's mission has been to preserve and defend the Executive's authority to administer the immigration and nationality laws of the United States. A critical part of meeting our responsibility has been the coordination and guidance that OIL provides to the government's immigration community through its training programs, websites, and this Bulletin. Such resources are the product of years of effort by Bob Bombaugh, Francesco Isgro, and the hundreds of people who have submitted articles, summarized cases, shared briefs, and attended our conferences and training. Against today's gathering cry for yet more immigration reform with its promise of new laws to implement and litigate, we look to the continued commitment and contributions of our immigration family and friends to assure another decade of growth and success.

By Thom Hussey, OIL Director

OIL'S ADVERSE DECISION PROCEDURES

The Office of Immigration Litigation ("OIL") is responsible for thousands of cases every year in both the courts of appeals and the district courts across the country. Many of these cases are handled by United States Attorneys offices or other components inside the Justice Department. While OIL's overall success rate remains high, each month there are a number of cases resulting in an adverse disposition. In order to monitor these adverse decisions, determine whether further review is warranted, and subsequently file a timely appeal or rehearing petition, OIL long ago put in place a procedure called "First Cuts." The First Cuts procedure was updated in September of 2005. This article provides an overview of these updated procedures.

Step One: Notify OIL Management

When the attorney responsible for an immigration case learns that a decision is adverse, the attorney must notify OIL management via email and attach a copy of the decision (Thom Hussey (THussey@civ.usdoj.gov), Donald Keener (DKeener@civ.usdoj.gov), Dave Kline (DKline@civ.usdoj.gov), and DaveMcConnell (DMcConne@ civ.usdoj.gov)). If the attorney learns of the adverse decision via OIL's "first cuts" email (sent out Monday-Thursday), this step is not necessary because OIL management already has a copy of the decision. In some instances, however, the attorney may discover the adverse decision in a different manner, and in such cases, the attorney should notify OIL management immediately.

Step Two: Recommendation for Further Review and Request Agency Views

The responsible attorney must review the decision and make a recommendation to OIL management and to Department of Homeland Security ("DHS") of whether or not OIL should seek further review. The attorney must also request DHS's views on further review. The attorney should email a recommendation to OIL management and to the appropriate DHS contact within five days of the adverse decision date. The attorney does not need to wait for DHS's views before emailing a recommendation to OIL management. Any responses from DHS must be forwarded on to OIL management. The DHS contacts are as follows: Ron.Rosenberg@dhs.gov (published asylum, withholding of removal and Torture Convention decisions); Lois.Agronick@dhs.gov and Catherine.Muhletaler@dhs.gov (unpublished asylum, withholding of removal and Torture Convention decisions); Lisa.Batey@dhs.gov and Catherine.Muhletaler@dhs.gov (non-asylum enforcement decisions); and LeahL.Rogal@dhs.gov (benefits decisions, such as naturalization, visa petitions, and citizenship).

Every Monday through Thursday, OIL management reviews the adverse decisions and the recommendations from DHS and the responsible attorneys regarding further review. At these daily meetings, OIL management determines whether or not OIL will seek further review in the adverse cases by way of making a "first cut." This "first cut" indicates whether OIL will seek the appropriate appeal (e.g. district court appeal, rehearing, or certiorari) or "no further review." After a decision is made, the responsible attorney will receive a second email with the "first cut" for the case and additional instructions on how to proceed.

OIL's "first cut" recommendations are made to the Civil Division's front Office (Messrs. Keisler and Cohn), and ultimately to the Solicitor General for determination.

Step Three: Draft an SG Memo

The responsible attorney must draft a Solicitor General memo ("SG memo") for the adverse case. There are four different formats for an SG memo: Bulk, Short, Standard, and Noncontroversial. The type of SG memo required is generally dictated by the nature of the adverse decision (e.g. published v. unpublished, joint v. split recommendation for further review). The "Bulk" form memo is not actually a memo, but a packet of documents that is included in a boilerplate SG memo generated by OIL. The "first cuts" email instructs the attorney as to which type of SG memo the attorney should draft and includes samples. The attorney should send the draft SG memo along with a copy of the court's decision, Board of Immi-

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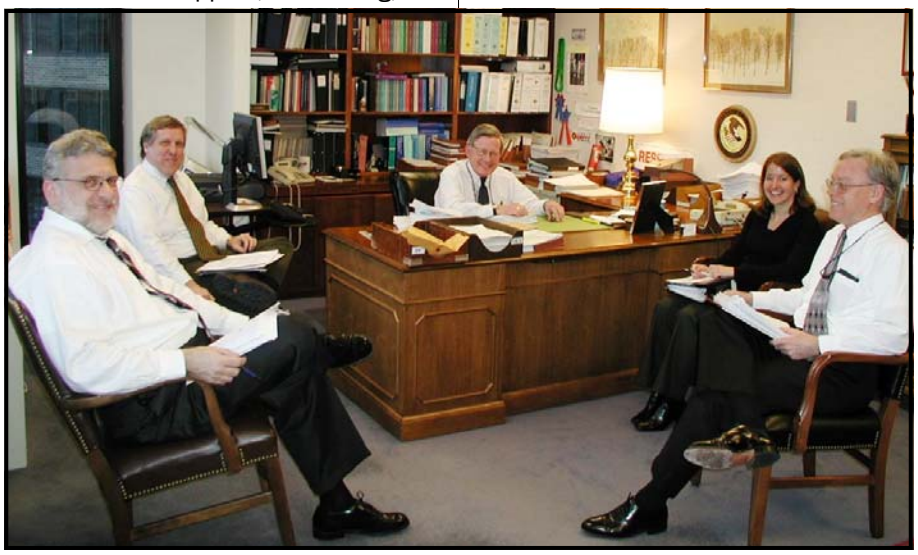

The first cut ritual— From L to R: David Kline, David McConnell, Thom Hussey, Jennifer Paisner, Donald Keener

"FIRST CUT"

(Continued from page 3)

gration Appeals' ("BIA") decision, immigration judge's decision, and any email correspondence from DHS to Donald Keener. Generally, the SG memo and accompanying materials should be forwarded to Donald Keener within fourteen to twenty-one days of the adverse decision date. The attorney should also calendar the relevant due dates for the type of appeal. A table with the relevant due dates is attached to the "first cuts" email.

Step Four: Write a Litigation Report

The "first cuts" email also includes the type of Litigation Report required for OIL's weekly Litigation Report to DHS. There are two designations: Separate Summary and Short List. A Separate Summary designation indicates that the responsible attorney must draft a short summary of the adverse decision to send to the Litigation Report editor (currently Elizabeth "Betty" Stevens). A Short List designation indicates that the attorney need not draft a summary of the decision, and that the Litigation Report editor will include the case in the table of adverse decisions at the end of the Litigation Report.

OIL created a document outlining in more detail the adverse decision procedures described above. This document is included as an attachment to every "first cuts" email, as are samples of recommendation emails, the different types of SG memos documents, and a Litigation Report. For a copy of these procedures and samples, please contact Donald Keener. The adverse decision procedures are also available on OIL's website at https://oil.aspensys.com (click on Adverse Decision Procedures). For access to the OIL website, please contact Andy MacLachlan or Francesco Isgro.

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AQUIESCENCE FILED IN EIGHTH CIRCUIT AGGRAVATED FELONY FELONY CASE

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the possession of a controlled substance (cocaine). He was sentenced to five years of imprisonment, of which he served 15 months. Subsequently, he was charged with being subject to removal based on his conviction of a controlled substance violation and his conviction of an aggravated felony under 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i). The IJ sustained both charges of removability. In particular, the IJ ruled that petitioner's state felony controlled substance offense constituted an aggravated felony because it was a drug trafficking crime under 18 U.S.C. 924(c). As a result of this finding petitioner was statutorily disqualified him from obtaining the discretionary relief of cancellation of removal. The BIA affirmed without opinion.

The Eighth Circuit held that the "plain language" of INA § 1101(a)(43) and the criminal law provisions it incorporates establish that "any felony punishable under the Controlled Substances Act . . . under either state or federal law," is an aggravated felony. Because petitioner's conviction was for a felony offense and was for conduct that was independently punishable under the Controlled Substances Act, the court also held that it qualified as an "aggravated felony."

The Solicitor General, while arguing that the decision below was correct, noted that the courts of appeals are divided on whether a state-law felony drug offense qualifies as an "aggravated felony" if it would be punishable only as a misdemeanor under federal law. The Fifth Circuit, like the Eighth, has held that a state-law felony conviction constitutes an "aggravated felony" as long as the offense conduct would be punishable-either as a felony or a misdemeanor-under the statutorily designated federal controlled substances laws. *See United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001); *see also Salazar-Regino v. Trominski*, 415 F.3d 436, 448 (5th Cir. 2005). The Second, Third, and Ninth Circuits, by contrast, have held in immigration cases that a state-law offense qualifies as an "aggravated felony" only if the offense would also be punishable as a felony under federal law. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910-18 (9th Cir. 2004); *Gerbier v. Holmes*, 280 F.3d 297, 307-316 (3d Cir. 2002); *Aguirre v. INS*, 79 F.3d 315, 317-318 (2d Cir. 1996).

The Solicitor General stated in his brief that the question of when state felony drug offenses constitute aggravated felonies under the INA is a frequently recurring issue of significant importance. He noted that in FY 2005, more than 77,000 aliens with criminal records were ordered removed from the United States, and that approximately 9.5% of those aliens had arrests for drug possession offenses. The Solicitor General pointed out that "the large number of removals that arise annually involving aliens convicted of controlled substance offenses confirms what the case law and the federal government's experience in administering the immigration laws indicate: the characterization of a state controlled substance felony as an aggravated felony is a frequently recurring issue, and continued confusion about the proper interpretation of that term consumes significant governmental and private resources and complicates and delays the proper enforcement of the immigration law."

By Francesco Isgro, OIL

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Topical Index To Federal Courts Decisions Under The REAL ID Act

Conversion of Habeas Appeals to Petitions for Review

Tostado v. Carlson, __ F.3d __, 2006 WL 250257, *1 (8th Cir. Feb 3, 2006); *Rosales v. Bureau of Immigration & Customs Enforcement*, 436 F.3d 733, 736 (5th Cir. 2005) (per curiam); *Gittens v. Menifee*, 428 F.3d 382 (2d Cir. 2005); *Bonhometre v. Gonzales*, 414 F.3d 442 (3d Cir. 2005); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005); *see also Ishak v. Gonzales*, 422 F.3d 22 (1st Cir. 2005) (treating habeas appeal as "still 'pending' in the district court within the meaning of the Real ID Act," and transferring petition to court of appeals to be treated as a petition for review).

Scope of Review of Removal Orders in Courts of Appeals Under REAL ID

Meraz-Reyes v. Gonzales, __ F.3d __, 2006 WL 229910, at *1 (8th Cir. Feb. 1, 2006); *De La Vega v. Gonzales*, __ F.3d __, 2006 WL 201497, *4 (2d Cir. Jan. 27, 2006); *Jean v. Gonzales*, F.3d ___, 2006 WL 205041 (4th Cir. Jan. 27, 2006); *Sukwanputra v. Gonzales*, __ F.3d __, 2006 WL 133548, *6 (3d Cir. Jan. 19, 2006); *Joaquin-Porras v. Gonzales*, __ F.3d __, 2006 WL 120331, *7 (2d Cir. Jan. 18, 2006); *Chen v. U.S. Dept. of Justice*, F.3d __, 2006 WL 27427, *5 (2d Cir. 2006); *Higuit v. Gonzales*, __ F.3d __, 2006 WL 9606, *3 (4th Cir. Jan. 3, 2006); *Mehilli v. Gonzales*, __ F.3d __, 2005 WL 3491017 (1st Cir. December 22, 2005); *Elia v. Gonzales*, 431 F.3d 268 (6th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005); *Chacon-Botero v. U.S. Atty. Gen.*, 427 F.3d 954, 957 (11th Cir. 2005); *Schroeck v. Gonzales*, 429 F.3d 947, 951 (10th Cir. 2005); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 319 (5th Cir. 2005); *Balogun v. U.S. Atty. Gen.*, 425 F.3d 1356, 1359-1360 (11th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 929-30 (9th Cir. 2005); *Kamara v. US Attorney General*, 420 F.3d 202, 210-11 (3d Cir. 2005); *Grass v. Gonzales*, 418 F.3d 876, 878 (8th Cir. 2005); *Vasile v. Gonzales,* 417 F.3d 766, 768-69 (7th Cir. 2005); *Hamid v. Gonzales,* 417 F.3d 642, 647 (7th Cir. 2005); *see also Bakhtriger v. Elwood*, 360 F.3d 414, 425 (3d Cir. 2004) (pre-REAL ID case which has helpful language distinguishing between legal and factual claims).

REAL ID's Jurisdictional Amendments Apply Retroactively

Hamdan v. Gonzales, 425 F.3d 1051, 1057 (7th Cir. 2005) ("[I]n the REAL ID Act, Congress explicitly mandated that the amendment restoring our jurisdiction be retroactive."); *Jordon v. Attorney General of U.S.*, 424 F.3d 320, 327 (3d Cir. 2005) ("We have also acknowledged that Congress left no doubt that the REAL ID Act's changes to § 1252(a)(2)(D) would be retroactive."); *Tovar-Alvarez v. U.S. Attorney General*, 427 F.3d 1350, 1352 (7th Cir. 2005) (same); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 319 (5th Cir. 2005) (same); *Fernandez-Ruiz v. Gonzales,* 410 F.3d 585, 587 (9th Cir. 2005) (same); *Ishak v. Gonzales*, 422 F.3d 22, 29-30 (1st Cir. 2005); *Kamara v. US Attorney General*, 420 F.3d 202, 210 (3d Cir. 2005) (same); *Lopez v. Gonzales*, 417 F.3d 934, 936 (8th Cir. 2005) (same).

Under REAL ID No Jurisdiction in District Court Over Removal Orders

Ramirez-Molina v. Ziglar, __ F.3d __, 2006 WL 62862, *2 (5th Cir. January 12, 2006) ("The REAL ID Act thus supplies, in this context, the 'clear statement of congressional intent to repeal habeas jurisdiction' that the *St. Cyr* Court found lacking."); *Gittens v. Menifee*, 428 F.3d 382, 383 (7th Cir. 2005) ("The REAL ID Act "eliminates habeas corpus review of orders of removal . . . ."); *Ishak v. Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005) ("The plain language of these amendments, in effect, strips the district court of habeas jurisdiction over final orders of removal, including orders issued prior to the enactment of the REAL ID Act . . . Congress now has definitely eliminated any provision for jurisdiction.").

Cases Previously Governed by the Transitional Rules for Judicial Review are Now Governed by 8 U.S.C, § 1252(a) Pursuant to REAL ID § 106(d)

Masnauskas v. Gonzales, 432 F.3d 1067, 1069 (9th Cir. 2005); *Tovar-Alvarez v. U.S. Attorney General*, 427 F.3d 1350, 1351 (7th Cir. October 13, 2005) ("The Act made the permanent rules applicable to all petitions for review. . ."); *Paripovic v. Gonzales*, 418 F.3d 240, 241 (3d Cir. 2005); *Elia v. Gonzales*, 431 F.3d 268, 272-73 (6th Cir. 2005).

Cases Improperly Transferred Under REAL ID Act § 106(c)

Chen v. Gonzales, __ F.3d __, 2006 WL 217944, *1 (7th Cir. January 30, 2006) (improperly transferred because habeas petition filed after REAL ID Act's enactment).

REAL ID Act §§ 101(e) and 101(g) Apply to Pending Cases

Rodriguez-Galicia v. Gonzales, 422 F.3d 529, 536 n.6 (7th Cir. 2005) (REAL ID Act § 101(e)'s modification of the standards by which this Court reviews the agency's determination concerning the availability of corroborating evidence applies to pending cases); *Chen v. Gonz*ales, __ F.3d __, 2005 WL 3545055, *3 (3d Cir. December 29, 2005) (Section 101(e) applies to pending cases); *Lin v. U.S. Dept. of Justice*, 416 F.3d 184, 188 (2d Cir. 2005) ("We note that the 1,000 person-per-year cap has been lifted by § 101(g) of the recently enacted REAL ID Act.").

By Papu Sandhu, OIL
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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Hardship Determination Not Subject To Review

In ***Benscome v. Gonzales***, 433 F.3d 163 (1st Cir. 2005) (Torruella, Selya, Lipez) (*per curiam*), the First Circuit held that it lacked jurisdiction over the petitioner's claim that her removal would result in "exceptional and extremely unusual hardship" to her United States citizen children. The court also declined to review petitioner's due process claim asserting improper judicial conduct by the IJ because petitioner failed to exhaust her administrative remedies.

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SECOND CIRCUIT

■Although Motion To Rescind Was Untimely, BIA Erred In Not Addressing Motion To Reopen To Apply For Previously Unavailable Relief

In ***Wu v. INS,*** __F.3d__, 2006 WL 164769 (2d Cir. January 24, 2006) (*Cardamone*, Jacobs, Cabranes), the Second Circuit granted a petition for review and remanded the case to the BIA. The court found that the BIA did not abuse its discretion in denying an appeal of an IJ's decision to deny a motion to rescind an *in absentia* order that was filed two-and-a-half years after the alien was ordered deported. However, it also held that the BIA should have addressed the petitioner's alternative "change-in-law" argument regarding asylum eligibility, notwithstanding that BIA precedent makes clear that the time and numerical limitations apply to motions to reopen for new relief.

The petitioner, a Chinese national, had been ordered deported in absentia in 1995. In 1998, he filed a motion to reopen claiming persecution by family planning officials in China. The IJ denied that motion because it had not been filed within the required 180 days of the in absentia order. In August 1999, the BIA dismissed the appeal, and subsequently also denied petitioner's motion to reconsider. The court, while finding no error in the denial of the motion to rescind the in absentia order, determined that the BIA should have addressed the intervening change in the law, namely that in 1996 Congress amended the refugee definition to provide that persecution on account of political opinion encompassed forced abortion or sterilization and resistance to coercive family planning policies.

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■Diversity Visa Complaints Dismissed As Moot In Light Of Congressionally-Mandated Deadline

In ***Mohamed v. Gonzales***, __F.3d__, 2006 WL 164773) (2d Cir. January 24, 2006) (Cabranes, Sack, Amon) (*per curiam*), the Second Circuit affirmed the judgments of two district court decisions dismissing plaintiffs' claims challenging the denial of their applications for benefits under the Diversity Visa Program. Plaintiffs alleged, inter alia, that they had been denied a meaningful opportunity to appeal the denial of their diversity visas without as the result of sheer bureaucratic ineptitude or intransigence." The court concluded that, "despite the harshness" of the result, it was compelled to apply the unambiguous statutory language that eligibility for diversity visas under this annual program expire at the end of each fiscal year. Accordingly, the court affirmed the decisions below finding that plaintiffs' complaints became moot after the expiration of the relevant fiscal years.

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■Second Circuit Denies Claim For Relief Under The U.N. Convention On The Rights Of The Child

In ***Oliva v. U.S. Dep't of Justice***, 433 F.3d 229 (2d Cir. 2005) (Calabresi, *Raggi*, Cote), the Second Circuit affirmed the BIA's denial of petitioner's request for suspension of deportation under NACARA. The petitioner claimed that the United Nations Convention On the Rights of the Child (CRC) had attained the status of customary law in the United States, and thus required the government to look solely at the "best interests" of the aliens U.S.C. child, despite his ineligibility on other grounds for either suspension of deportation or cancellation of removal.

The court determined that, even if the CRC attained the status of customary law (which it did not decide), "the CRC is irrelevant to petitioner's request for relief from removal based on hardship to his American-born child because such relief is clearly controlled by 8 U.S.C. § 1229b(b)(1)."

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■Adverse Credibility Finding Upheld Against Russian Asylum Applicant

In ***Borovikova v. INS***, __F.3d__, 2006 WL 120148 (2d Cir. January 18, 2006) (Oakes, *Cabranes*, Goldberg (Ct. Int'l Trade, by designation)), the Second Circuit upheld the denial of asylum and withholding of removal. The court held that substantial evidence supported the IJ's determination that petitioner's failed to provide credible evidence in support of her asylum claim, because any one of the three bases (birth certificate that was likely fraudulent, asylum application inconsistent with later affidavit, and inconsistent testimony) could support the adverse credibility finding. "Even if no single ground had been persuasive enough on it own, the combination of them all surely was," sufficient

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Summaries Of Recent Federal Court Decisions

to support the adverse credibility determination, said the court.

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■Second Circuit Determines That Asylum Is Not Available To Avoid Relocation To Sanctuary In One's Own Country

In ***Singh v. Ashcroft***, __F.3d__2006 WL 147500 (2d Cir. January 20, 2006)(Oakes, Jacobs, Straub), the Second Circuit affirmed the BIA's denial of asylum and withholding of removal to an applicant from India. The court held that it did not have jurisdiction to review the untimely filed asylum application, except where a petitioner raises "constitutional claims or questions of law" under the REAL ID Act. On the merits of petitioner's claim for withholding, the court held that petitioner was unlikely to face persecution in India on account of his Sikh beliefs and his membership in the Akali Dal Mann. The court also agreed with the IJ's finding that petitioner could avoid a future threat to his life or freedom by relocation to another part of the country, stating that "[a]sylum in the United States is not available to obviate re-location to sanctuary in one's own country."

"Asylum in the United States is not available to obviate re-location to sanctuary in one's own country."

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■Second Circuit Concludes That Agency Did Not Provide Sufficient Consideration Of Alien's Claim For Withholding Of Removal

In ***Ivanishvilli v. U.S. Dept. of Justice***, 433 F.3d 332 (2d Cir. 2006) (*Cardamone*, Katzmann, Kravitz (D. Conn., by designation)), the Second Circuit remanded the petition for review finding that the IJ's denial of withholding of removal was "based on reasoning that, in light of the record is insufficient for us to permit meaningful review of the decision." The petitioner, an citizen of Georgia who had overstayed her visitor's visa, claimed persecution on account of her religion and her ethnicity. The IJ had determined that petitioner's testimony was "relatively general," and that the harassment she had been subject to in Georgia for being Ossetian did not constitute persecution. The IJ also questioned petitioner's credibility because her application had failed to mention the most severe incidents of ethnic persecution. The BIA summarily affirmed the IJ's decision.

The Second Circuit determined that the IJ had failed "to distinguish adequately between 'harassment' and 'persecution,'" because she had not mentioned petitioner's testimony regarding the religious persecution nor had she found petitioner's testimony incredible. The court, however, held that it lacked jurisdiction to consider petitioner's untimely filed asylum claim and to consider her claim for CAT protection because she has failed to exhaust that issue by raising it first to the BIA.

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■Second Circuit Holds That Lack Of Evidence Of Reasonable Diligence Bars Motion To Reopen Based On Ineffective Assistance Of Counsel

In ***Cekic v. INS,*** __F.3d__, 2006 WL 120329 (2d Cir. January 18, 2006) (Cardamone, *McLaughlin*, Pooler), the Second Circuit affirmed the BIA's denial of petitioner's motion to reopen based on ineffective assistance of counsel. Based on counsel's advice, the petitioners failed to attend a hearing in 1996 and were ordered removed *in absentia*. The petitioners learned of the order in 1998 and unsuccessfully tried to obtain new counsel, but the record contained no evidence of any efforts they made from 2000-2002 to resolve their immigration problems.

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■Second Circuit Clarifies Extent Of Review Of BIA Decisions And Upholds IJ's Adverse Credibility Determination

In ***Chen v. BIA***, __F.3d__, 2006 WL 62023 (2d Cir. January 12, 2006) (*Newman*, Wesley, Hall), the Second Circuit affirmed the IJ's denial of asylum, withholding of removal and CAT protection. The court found that, since the BIA adopted and affirmed the IJ's decision in its entirety, the court could review that decision without confining its review to the BIA's alternative bases for denying relief. The petitioner, a Chinese nationals claimed that she had been arrested for interfering with the local cadres who were seeking her aunt for violating the population control policies. The court upheld the IJ's adverse credibility determination, concluding that it was "entirely reasonable for the [IJ] to have considered these claims implausible without further explanation and to have relied on them, along with her demeanor and inconsistencies in her testimony, in making the ultimate finding that she was not a credible witness."

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■Second Circuit Holds That Immigration Judge Erred In Failing To Consider Entire Record

In ***Jorge-Tzoc v. Gonzales***, __F.3__, 2006 WL 120147 (2d Cir. January 18, 2006) (Straub, Pooler, Sotomayor) (*per curiam*), the Second

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Circuit found that the BIA and the IJ erred by failing to consider the entire record in determining that the petitioner had failed to establish past persecution. The court found that petitioner's combination of circumstances - his young age at the time his family members were killed in 1982, the family's loss of land and animals and being forced to relocate - could constitute persecution to a child totally dependent on his family and community.

Petitioner had provided "assistance in persecution" because of his active and direct role in transporting captive women to undergo forced abortions.

Additionally, the court found that substantial record evidence did not support the IJ's determination that harm was caused by guerrillas, and not the Guatemalan military, who were targeting Mayan Indians because of their perceived support of the guerrillas. On remand, the IJ was instructed to determine whether the 1982 massacre in petitioner's town "viewed from the perspective of a child of seven, constituted past persecution."

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■Second Circuit Upholds Denial Of Asylum On Grounds That Alien Assisted In Persecution

In ***Xie v. INS***, __F.3d__, 2006 WL 23413(2d Cir. January 5, 2006) (Walker, *Sack*, Raggi), the Second Circuit affirmed the BIA's denial of asylum and withholding of removal. The petitioner was a government driver whose duty occasionally was to transport pregnant women to hospitals where forced abortions were performed on them in furtherance of China's family planning policies. The IJ determined that petitioner did not meet the refugee definition because he had assisted in the persecution of others. The BIA summarily affirmed that decision. The court held that under *Federenko* and its progeny, petitioner had provided "assistance in persecution" because of his active and direct role in transporting captive women to undergo forced abortions.

Petitioner also argued that his redemptive acts in setting a woman free should have been considered in the asylum determination. The court stated that it could "find nothing in the governing statutes or case law that allows [a single instance of mercy], however praiseworthy, to serve as a basis for us to conclude that [the alien] was thereby relieved under the INA of the consequences of his having previously assisted in persecution."

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THIRD CIRCUIT

■Third Circuit Remands For Reconsideration Of Alien's Claim Of Religious Discrimination In Compulsory Military Service

In ***Ilchuk v. Gonzales,*** __F.3d__, 2006 WL 901254 (3d Cir. January 17, 2006) (Alito, Ambro, *Restani* (Court of Int'l Trade)), the Third Circuit upheld the BIA's determination that petitioner was removable as a criminal alien because his conviction for theft of services (false calls for ambulances) constituted an aggravated felony, but it reversed the BIA's denial of withholding of removal. Petitioner, who objects on religious grounds to military service, contended that members of other religions were given exemptions from conscription, while members of his faith were not. The court held that if petitioner established that he would be imprisoned because of his Pentecostal beliefs, while adherents of other religions would not, such discrimination would constitute religious persecution.

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■Third Circuit Determines That Corroboration May Be Required To Meet Burden Of Proof For Asylum Despite Invalid Credibility Determination

In ***Chen v. Gonzales,*** 434 F.3d 212 (3d Cir. 2005) (Scirica, Roth, *Irenas*), the Third Circuit affirmed the IJ's denial of asylum, withholding of removal, and protection under CAT. The court concluded that the IJ's failure to make a valid credibility determination did not affect petitioner's burden to provide corroboration of her claims, where the Country Report provided evidence contrary to the alien's claim and the alien did not provide a reasonable explanation for her failure to corroborate.

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■Simple Assault Under Pennsylvania Law, With A *Mens Rea* Of Specific Intent, Is A Crime Of Violence

In ***Singh v. Gonzales***, 432 F.3d 533 (3d Cir. 2006) (Rendell, Fisher, *Van Antwerpen*), the Third Circuit held that petitioner's conviction for simple assault under Pennsylvania law constituted a crime of violence and therefore an aggravated felony because the subsection required a *mens rea* of specific intent. However, it also held that a separate conviction for recklessly endangering another person was not a crime of violence because the required *mens rea* was only recklessness. The court upheld the BIA's denial of the petitioner's application for withholding of removal, and also determined that his due process claims were without merit.

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■Attacks During Civil Unrest In Ivory Coast Were Motivated By Imputed Political Opinion

In *Konan v. Attorney General*, 432 F.3d 497 (3d Cir. 2005) (Smith, *Becker*, Nygaard), the Third Circuit reversed a denial of asylum and remanded the case to the BIA to address petitioner's claim of persecution on account of his membership in the particular social group of immediate family members of a gendarme in the Cote D'Ivoire (Ivory Coast). The court determined that although the attacks on the alien's family occurred in the context of civil unrest, they were motivated in part by a desire to kill presumed government loyalists.

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FOURTH CIRCUIT

■Fourth Circuit Affirms Finding That Filipino Alien Was A Persecutor

In *Higuit v. Gonzales*, __F.3d__, 2006 WL 9606 (4th Cir. January 3, 2006) (Widener, *Wilkinson*, Traxler), the Fourth Circuit sustained the BIA's finding that petitioner's ten-year career of surreptitious intelligence-gathering and infiltration led to the torture, imprisonment, and death of leftist guerillas, political opponents of the Marcos regime activities disqualified him for asylum or withholding of removal. The court also dismissed petitioner's challenge to the decision denying his request for adjustment of status as "an equitable determination based on factual findings" which the court did not have jurisdiction to review.

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FIFTH CIRCUIT

■Notice To Appear Signed On Behalf Of An Authorized Official Is Valid

In *Ali v. Gonzales*, __F.3d__, 2006 WL 20535 (Barksdale, *Clement*, Stewart) (5th Cir. January 4, 2006), the Fifth Circuit affirmed an IJ's denial of petitioner's request to terminate removal proceedings. The petitioner claimed that the notice to appear initiating his removal proceedings had been defective because it was not signed by a Department of Homeland Security official authorized to issue the notice. The court held that providing for a special agent to initially sign the notice to appear so long as he or she later obtains approval from an authorized official, comports with the language of the controlling regulation.

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■Fifth Circuit Holds Denial Of Continuance Proper In Absence Of Approved Labor Certification

In *Ramchandani v. Gonzales*, 434 F.3d 337 (5th Cir. 2005) (Higginbotham, *Benavides*, Dennis), the Fifth Circuit upheld the BIA's affirmance of the IJ's denial of a continuance, stating that the petitioner had produced no evidence that he had filed an application for labor certification before the sunset date, and thus he could not establish good cause for a continuance. The court also stated that the BIA had not abused its discretion in denying the petitioner's motion to reopen to apply for adjustment of status because he had not complied with the applicable regulations to submit supporting documents.

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■Fifth Circuit Concludes That Denial Of Motion to Reopen Does Not Implicate Fifth Amendment Due Process

In *Altimarano-Lopez v. Gonzales*, __F.3d__, 2006 WL 23478 (5th Cir. January 5, 2006) (Smith, Garza, Prado) (*per curiam*), the Fifth Circuit affirmed a decision of the BIA denial of a motion to reopen. The court rejected petitioner's claim that the due process requirements found in 8 U.S.C. § 1229a(b)(4) apply to motion to reopen proceedings. According to the court, "because there is no liberty interest at stake in a motion to reopen, Altamirano cannot establish a due process violation under the Fifth Amendment."

> "Because there is no liberty interest at stake in a motion to reopen, [petitioner] cannot establish a due process violation under the Fifth Amendment."

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■Fifth Circuit Determines That Aggravated Felon Alien Not Entitled To Retroactive § 212(c) Waiver After Conviction By Jury

In *Hernandez-Castillo v. Moore*, __F.3d__, 2006 WL 73748 (5th Cir. January 13, 2006) (Smith, Garza, Prado), the Fifth Circuit vacated the district court's finding of habeas jurisdiction and denied the petition for review. A removed alien had claimed the IJ erred in denying him a 212(c) waiver for the alien's aggravated felony conviction which resulted from a jury trial. The court found jurisdiction over the petition for review because the case presented a question of law. The court determined that the repeal of § 212(c) did not create an impermissible retroactive effect to the alien due to his conviction after a jury trial.

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SIXTH CIRCUIT

■Denial Of Visa Petition Due To Prior Fraudulent Marriage Does Not Violate Due Process

In *Bangura v. Hansen*, 434 F.3d 487 (6th Cir. 2006) (*Clay*, Gibbons, Steeh), the Sixth Circuit affirmed the

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district court's dismissal of plaintiffs's claims that their substantive and procedural due process rights were violated by the denial of an immediate relative visa petition. The visa petition was based on the wife's third marriage; an earlier visa petition filed by her second spouse had been denied as fraudulent. Preliminarily, the court held that since no statute or administrative rule required plaintiffs to exhaust their administrative remedies, exhaustion was a matter of sound judicial discretion. Here, said the court, exhaustion did not serve the interests of judicial economy because "the federal courts must nonetheless hear other claims that are integrally related to the dismissed claims." Accordingly, the court held that the district court abused its discretion in dismissing the procedural due process claim for failure to exhaust administrative remedies.

On the merits, the court held that the plaintiffs failed to state a claim for violation of either substantive or procedural due process. Plaintiffs challenged 8 U.S.C. § 1154(c), which denies aliens immediate relative visas when they marry American citizens for the purpose of obtaining U.S. residence. The court readily dismissed the substantive challenge, even assuming that plaintiffs had established a that the statute interfered with their fundamental right to marry because the statute was related to legitimate federal interest, i.e. to prevent immigration fraud. The court also rejected the procedural due process challenge noting that it had rejected a similar challenge in *Almario v. Attorney General*, 872 F.2d 147 (6th Cir. 1989), where the statute required an alien to have lived outside the U.S. for two years if the marriage to a U.S.C. had occurred while in deportation proceedings.

The court also found that the plaintiffs had standing to sue under the APA; the denial of the petition from the second marriage was reasonable; and the denial of the petition from the third marriage could not be challenged under the APA in the instant lawsuit because a pending appeal rendered the denial non-final.

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SEVENTH CIRCUIT

■Seventh Circuit Criticizes Adverse Credibility Determination

In ***Giday v. Gonzales***, 434 F.3d 543 (7th Cir. 2006) (Posner, Manion, and *Rovner*), the Seventh Circuit remanded the case to the BIA to rectify errors in the credibility determination, and to consider whether petitioner's threatened deportation from her home country constituted past persecution. The court criticized how the IJ questioned the petitioner, stating that when "questioning becomes so aggressive that it frazzles applicants and nit-picks inconsistencies, any benefit that the barrage of questions contributes to the development of the record may be lost in the distortion it creates." The court said that the case presented a close call, but noted that "the volume of case law addressing the issue of the intemperate, impatient, and abrasive immigration judges should sound a warning bell to the Department of Homeland Security that something is amiss." Accordingly, the court held that the IJ's four adverse credibility findings were not supported by substantial evidence.

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■Seventh Circuit Remands For Consideration Of Eligibility For 212(c) Relief

In ***Medellin-Reyes v. Gonzales***,__F.3d__, 2006 WL 162997 (7th Cir. January 24, 2006) (Easterbrook, Rovner, Williams) (*per curiam*), the Seventh Circuit granted the government's motion to remand for the BIA to consider a 212(c) waiver application. The court held that the REAL ID Act's plain language requires all collateral proceedings pending in district court on the date of enactment of the REAL ID Act to be treated as timely petitions for review. "Nothing in the REAL ID Act or § 242 authorizes courts of appeals to review immigration judges' decisions," said the court.

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■Adverse Credibility Finding Against Asylum Applicant From Albania Not Supported By Substantial Evidence

In ***Shtaro v. Gonzales,*** __F.3d__, 2006 WL 162994(7th Cir. January 24, 2006) (*Kanne*, Wood, Sykes), the Seventh Circuit reversed the denial of asylum based on adverse credibility findings, holding that the IJ had improperly based his conclusions on speculation and assumptions that were not supported by the record. The petitioner, a citizen of Albania, entered the United States using a Slovenian passport issued under someone else's name. She claimed that she had worked as the secretary for the Democratic Party Chairman in Albania. She also served as a polling commissioner for the October 2000 elections when the Socialist Party prevailed. She testified that because she had refused to certify the election results three armed men with police IDs took her to a police station and later took her into the Soda Forest where they took turn raping her. The IJ did not believe petitioner's testimony regarding the rape incident, and also found that the supporting documents were inconsistent and unreliable. The BIA summarily affirmed.

The Seventh Circuit found that petitioner's story was not "so inherently plausible," and that the minor discrepancies could be easily explained. The court found that petitioner's failure to authenticate her documents under 8 C.F.R 287.6 did not amount to presumptive proof of falsity. The court remanded for further

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proceedings without addressing the merits of petitioner's claim.

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EIGHTH CIRCUIT

■IJ May Reasonably Rely On State Department Report As It Relates To Likelihood Of Future Persecution

In ***Abrha v. Gonzales***, 433 F.3d 1072 (8th Cir. 2006) (*Murphy*, Bowman and Gruender), the court affirmed the denial of petitioner's applications for asylum, withholding of removal, and CAT protection. The petitioner, a native of Ethiopia, entered the U.S. as a visitor in 1991 and never departed. She feared persecution based on her mixed ethnic marriage and her husband's past association with the Mengistu regime. A State Department Profile of Asylum Claims from Ethiopia indicated that those "who had fled Mengistu's rule should now be able to return without reprisals." The IJ denied asylum principally based upon the Profile.

The court determined that an IJ may reasonably rely on the State Department's informed assessment of current country conditions as they relate to likelihood of future persecution, and agreed that the record did not establish a likelihood of persecution given changed country conditions.

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■Eighth Circuit Upholds Denial Of Asylum To Somali National Due To Lack Of Credibility

In ***Ibrahim v. Gonzales,*** __F.3d__, 2006 WL 155250 (Murphy, Bowman, *Gruender*) (8th Cir. January 23, 2006), the Eighth Circuit upheld the IJ's denial of asylum, withholding of removal, and protection under the CAT. The court found that petitioner's inconsistent accounts of his identity, his family, and his clan membership provided substantial evidence to support an adverse credibility determination, as well as a denial of asylum in the exercise of discretion. The record reflected that petitioner had applied twice for asylum in Canada, and that the second time he was prosecuted for providing false testimony and had served three months in prison. The court also determined that the IJ's denial of a continuance was not a fundamental procedural error and even if error it had not prejudiced petitioner.

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An alien's conviction in California of unlawful driving or taking a vehicle is not categorically a "theft offense," and hence not an aggravated felony.

NINTH CIRCUIT

■Ninth Circuit Denies Government's Petition For Rehearing *En Banc*, Holds That California Vehicle Theft Is Not Categorically A "Theft Offense"

In ***Penuliar v. Gonzales***, __F.3d__, 2006 WL 156849 (9th Cir. January 23, 2006) (Browning, *Pregerson*, Berzon), the Ninth Circuit denied the government's petition for rehearing *en banc* and amended its prior decision. The amended opinion holds that an alien's conviction in California of unlawful driving or taking a vehicle is not categorically a "theft offense," and hence not an aggravated felony, because the California statute's inclusion of aiding and abetting encompasses conduct that is outside of the generic definition of theft.

The government's petition for rehearing argued that California, as well as every other state within the Ninth Circuit, and federal law, has abolished the common law distinction between principals and accessories for purposes of criminal liability.

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■Rehearing *En Banc* Granted In Case Involving The Date Of Adjustment Of Status Under The Special Agricultural Worker Program

In ***Perez-Enriquez v. Gonzales***, 411 F.3d 1079 (9th Cir. 2005), *reh'g granted*, 2006 WL 229928 __F.3d__ (January 30, 2006) (*Callahan*, Hall, Bertelsman), the Ninth Circuit granted rehearing en banc in a case involving an applicant from Mexico who had his status adjusted to permanent resident status in 1990, under the Special Agricultural Workers ("SAW"), INA § 210. The panel originally held that petitioner adjusted his status in December 1, 1990, rather than on November 10, 1998, when he was granted temporary resident status. This meant that he was inadmissible at the time of adjustment of status by virtue of a February 27, 1989, controlled substance conviction.

On June 14, 2005, the court withdrew its original opinion, denied a "motion for reconsideration and rehearing en banc," and filed a superceding opinion which reached the same conclusion with additional construction of the two-step process for adjustment under the SAW statute. Petitioner again petitioned for rehearing en banc which presented a new argument that he was eligible for a waiver of inadmissibility under 8 U.S.C. § 1182. The government had opposed the rehearing en banc.

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■Ninth Circuit Reverses Adverse Credibility Finding Despite Applicant's Admitted Submission Of False Documents

In ***Kumar v. Gonzales***, __F.3d__, 2006 WL 156705 (9th Cir. January 23, 2006) (*Reinhardt*, Berzon, Kozinski (dissenting in part)), the Ninth Circuit reversed a denial of asylum based on adverse credibility grounds where the IJ had found that the petitioner had submitted false documents to bolster his asylum claim. The petitioner claimed that he and his brother (Rajiinder) had been falsely accused by the police of being involved in terrorist activities. Petitioner claimed that he and Rajinder had been interrogated and severely beaten when asked to reveal information about Muslim terrorists. Petitioner submitted photographs to show the extent of the injuries he had suffered. He also claimed that these terrorists had killed his brother Ram, and submitted Ram's death certificate. Finally, petitioner claimed that he and Rajindeer fled India because the terrorists had threatened to kill them, too.

The IJ did not believe petitioner's story, partly based on the fact that the photographs he submitted were of his brother Rajinder and that Ram's death certificate was likely a forgery because it appeared that the dates on the certificate had been written by the same individual who had also dated Rajinder's asylum application. The IJ also determined that petitioner failed to establish a nexus between the harm suffered and a protected ground, and that the threat of future persecution were was speculative.

The majority of the panel held that the IJ's credibility findings were not based upon substantial evidence. In particular, the court held that finding as to the death certificate was based on "speculation and conjecture." As to the photographs, the court held that this was probably a "clerical error" on the part of whoever prepared the asylum application. "Discrepancies such as the one presented here that are capable of being attributed to clerical errors may not form the basis of an adverse credibility finding 'unless the IJ or the BIA specifically explains the significance of the discrepancy or points to the petitioner's obvious evasiveness when asked about it.'" the court also held that petitioner had been subject to persecution on account of imputed political opinion and that his fear of future persecution was well-founded. The court noted that evidence that petitioner's parents were living in India unharmed was not sufficient to rebut the presumption of a well-founded fear of future persecution.

The dissenter criticized the Ninth Circuit's case law on credibility noting that "the net effect is that an asylum applicant who is a skillful enough liar – and many who aren't – must be believed no matter how implausible or farfetched their story."

The panel's reversal of the adverse credibility finding drew a sharp dissent from Judge Kozinski who pointed to the majority's opinion as being "yet another tiresome 'example of nitpicking we engage in as part of a systematic effort to dismantle the reasons immigration judges give for their decision.'" The dissenter criticized the Ninth Circuit 's case law on credibility noting that "the net effect is that an asylum applicant who is a skillful enough liar – and many who aren't – must be believed no matter how implausible or farfetched their story." He also criticized the majority for concluding that the IJ's failure for providing an opportunity for petitioner to explain the discrepancies in his application amounted to a denial of due process. "Pretty soon," predicted Judge Kozinski "every denial of asylum will amount to a denial of due process."

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■Ninth Circuit Holds Due Process Requires Equitable Tolling Time And Numerical Bars On A Motion To Reopen Based On Ineffective Assistance Of Counsel

In ***Ray v. Gonzales,*** __F.3d__, 2006 WL 147634 (9th Cir. January 20, 2006) (*B. Fletcher*, Berzon, Gibson (8th Cir. by designation)), the Ninth Circuit remanded the case for the BIA to consider whether petitioner's failure to file a brief was due to ineffective assistance of counsel. The court held that the BIA violated the alien's due process rights by improperly denying the alien's first and second motions to reopen as time and number barred when the motions were untimely due to serial ineffective assistance of counsel. In particular, the court stated that an alien in immigration proceedings has a due process right to obtain counsel of his choice and that the Ninth Circuit "has long recognized that an alien's due process right to obtain counsel in immigration matters also includes a right to *competent representation* from a retained attorney."

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■Ninth Circuit Reverses Conviction For Knowingly Procuring Naturalization Contrary To Law

In ***United States v. Alferahin***, __F.3d__, 2006 WL 51181 (9th Cir. January 11, 2006)(*B. Fletcher*, Gibson (8th Cir.); Berzon concurring), the Ninth Circuit reversed a conviction in the district court for knowingly procuring naturalization contrary to law. The defendant, a Jordanian citizen, obtained permanent resident status by virtue of his marriage to an American citizen, but failed to disclose a previ-

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ous marriage on his naturalization application. The alien's attorney objected to a request for a jury instruction on materiality, and one was not given. On appeal, the alien argued that the materiality instruction should have been given, and that his trial attorney was ineffective for not requesting one. The court held that in such prosecutions, the "crime charged . . . includes not only a requirement of materiality, but the more substantial requirement that the government produce evidence sufficient to raise a fair inference that [the alien] was statutorily ineligible for permanent residence," and that a new trial was warranted because of defense counsel's ineffectiveness in rejecting the materiality instruction. Judge Berzon concurred because she would have reversed on the ineffective assistance of counsel ground only, noting that the jury instruction plain error analysis is more thorny than the majority suggests.

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■Ninth Circuit Reverses IJ's Adverse Credibility Finding As Based On Questionable Corroborating Documents

In ***Lin v. Gonzales,*** __F.3d__, 2006 WL 62313 (9th Cir. January 12, 2006) (Hawkins, *McKeown*, Clifton), the Ninth Circuit reversed the IJ's adverse credibility finding, in which the IJ observed that three documents submitted in support of the petitioner's asylum clam were suspicious, missing details, and inconsistent with similar documents submitted in other cases. The found that the IJ's speculation, conjecture, and musings as to the appearance of official Chinese documents were not backed by "objective evidence."

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ELEVENTH CIRCUIT

■Relocation Within Colombia Unreasonable Because FARC Operates Country-Wide

In ***Arboleda v. Gonzalez***, __F.3d__, 2006 WL 9556 (11th Cir. January 3, 2006) (Tioflat, Dubina, Barkett) (*per curiam*), the Eleventh Circuit reversed the BIA's finding that the Revolutionary Armed Forces of Columbia (FARC), did not function countrywide and held that the record compelled the conclusion that "the FARC operates country-wide in Colombia, and that relocation was therefore not a viable option for the petitioners to escape persecution." The petitioner, with his wife and children, claimed persecution by the guerrillas in Colombia on account of his work with the Conservative Party.

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■Grand Theft Under Florida Law Is Not An Aggravated Felony

In ***Jaggernauth v. Gonzales***, 432 F.3d 1346 (11th Cir. 2005)(Barkett, Marcus, George) *(per curiam)*, the Eleventh Circuit reversed the BIA and held that grand theft pursuant to Florida law is not categorically a theft offense because the Florida statute encompasses "some offenses that constitute deportable aggravated felonies and some that do not." The court found jurisdiction to consider the BIA's order notwithstanding that the BIA had subsequently granted a motion to reconsider and the alien had not petitioned from the ensuing BIA decision. The court found that there is nothing in the INA that would require petitioner to seek judicial review of the BIA's reconsideration order.

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NOTED

During his confirmation hearings, Justice Alito was asked a number of questions regarding his record in deciding immigration cases. Apparently, according to the Washington Post, he sided with asylum seekers only in one out of eight cases analyzed. In his response he stated the following:

"In the area of immigration, Congress has spoken clearly . . . My role is not to substitute my judgment for that of the immigration judge. My job is to say, 'Could a reasonable person have reached the conclusion that the immigration judge did?' And if I find that a reasonable person could have reached that conclusion, then it's my job to deny the petition for review. And that's what I do in those instances."

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TENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

Planning is underway for the Tenth Annual Immigration Litigation Conference. Although the date and location of the conference have not been finalized, OIL is seeking your suggestions as to which topics should be addressed at the conference. Please send your suggestions to:

francesco.isgro@usdoj.gov

OILERS RECEIVE AWARDS

Congratulations to **David Kline**, Principal Deputy Director of OIL, who was recently awarded the Civil Division "Dedicated Service Award." The Award recognizes employees with more than 15 years of service in the Civil Division who have demonstrated – by a record of outstanding actions and accomplishments – the highest standards of excellence and dedication throughout their careers.

Congratulations also to the following OIL attorneys and staffers who were recognized with special awards at the Civil Division Awards Ceremony: Assistant Director **Linda Wendtland** and Senior Litigation Counsel **John Andre**, who received the "Special Commendation Award" and the OIL Paralegal Team of **Katrina Brown, Valarie Dickson, Emily Earthman, Judy Forrest**, and **Anthony Messuri**, who received the "Award for Excellence in Paralegal Support."

David Kline (center) accepting Award from Deputy Attorney General Paul McNulty (Right), and Assistant Attorney General Peter Keisler (Left)

The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

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

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